



BOWDITCH & DEWEY, LLP | OCTOBER 25, 2023

SEXUAL MISCONDUCT & TITLE IX TRAINING

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PART 3: INVESTIGATOR ROLE

INVESTIGATORS

RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT

FOLLOWING A **REPORT** OF SEXUAL HARASSMENT:

- Promptly contact complainant to discuss availability of supportive measures and explain process for filing a formal complaint
- Must document reasons why supportive measures not provided

34 C.F.R. 106.44



RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT (CONT'D)



SUPPORTIVE MEASURES

- Non-disciplinary, non-punitive individualized services provided to complainant and respondent to restore or preserve equal access
 - Examples: Counseling, extensions of deadlines, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence

34 C.F.R. 106.30

RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT

(CONT'D)

INFORMAL RESOLUTION PROCESS IS AVAILABLE

- Only available if:
 - Formal complaint has been filed
 - School provides notice disclosing allegations and informal process requirements
 - Case does not involve employee on student sexual harassment
 - School obtains voluntary, written advance consent (parties cannot be forced to participate)
- School can facilitate at any time prior to determination
- Parties can return to formal grievance process before resolution

34 C.F.R. 106.45



RESPONSE TO ALLEGATIONS OF SEXUAL HARASSMENT

FOLLOWING **FORMAL COMPLAINT** OF SEXUAL HARASSMENT:

- Immediately send notice of allegations to complaint and respondent
- Offer supportive measures
 - Must document why supportive measures not provided
 - Best practice: document offer and supportive measures that are implemented
- Initiate formal grievance process (investigation, hearing, appeal)

34 C.F.R. 106.44

INSTITUTIONAL RESPONSE TRIGGERED BY REPORT OR FORMAL COMPLAINT:

- “Formal Complaint” is a document filed by a complainant or signed by the Title IX Coordinator. C.F.R. 106.30(A)
 - REQUIREMENTS:
 - A document or electronic submission that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint;
 - Alleging that a respondent(s) has engaged in conduct prohibited under the University’s Sexual Misconduct Policy; and
 - Requesting that the University investigate the allegation
- “Report” is a complaint of sexual harassment not meeting Formal Complaint requirements.

COMPLAINT DISMISSAL

- Dismissal of Complaint Prior to Resolution
 - Mandatory
 - Conduct alleged if proved would not constitute sexual harassment as defined in the regulations (e.g., occurred outside U.S.)
 - Discretionary
 - Complainant withdraws complaint or refuses to participate
 - Respondent is no longer a student or employee
 - Institution has no authority over Respondent
- Must provide notice of dismissal and opportunity for parties to appeal
- Dismissal does not preclude action under other conduct policies

34 C.F.R. 106.45

INITIAL NOTICE REQUIREMENT

NOTICE OF ALLEGATION INCLUDES:

- Notice of grievance process
- Notice of allegations with sufficient details
- Presumption of non-responsibility
- Notice of right to advisor of choice who may be (but is not required to be) attorney
- Notice of right to review evidence
- Notice of prohibition of false statements

34 C.F.R. 106.45

INVESTIGATION

THE INVESTIGATOR WILL GATHER EVIDENCE, AND SUMMARIZE RELEVANT EVIDENCE:

- Witness statements
- Documents (social media, email)
- May include privileged evidence, if the privilege is waived
- May NOT include illegally obtained evidence (recordings)
- Generally, will not include character evidence

34 C.F.R. 106.45



FORMAL GRIEVANCE PROCESS

EQUITABLE TREATMENT OF COMPLAINANTS AND RESPONDENTS

- Presumption that respondent is not responsible
- Determination of responsibility, remedies, and sanctions can only be made at conclusion of compliant formal grievance process
- School has burden of collecting evidence and establishing responsibility
- Parties have equal opportunity to have others present during any institutional disciplinary proceeding, including right to be accompanied by advisor of their choice

34 C.F.R. 106.45



FORMAL GRIEVANCE PROCESS

(CONT'D)

OBJECTIVE EVALUATION OF ALL RELEVANT EVIDENCE

- Consider both inculpatory and exculpatory evidence
- Credibility may not be based on status as complainant, respondent, or witness

34 C.F.R. 106.45

FORMAL GRIEVANCE PROCESS (CONT'D)

NO CONFLICT OF INTEREST OR BIAS

- Conflict of interest exists when individual's knowledge of the matter or relationships with parties or witnesses (personal or professional) would preclude impartiality
- Bias is an unfair prejudice in favor or against a party
- Must report actual and potential conflicts of interest to the Title IX Coordinator

34 C.F.R. 106.45

INSTITUTION MUST ESTABLISH THE STANDARD OF REVIEW TO BE USED IN GRIEVANCE PROCESS

- Preponderance of the evidence **or** clear and convincing evidence
 - Preponderance = more likely than not
- Same standard for all formal complaints
- Same standard for employees, faculty, and students
- Standard applied by decision-makers (cannot be Title IX Coordinator or Investigators)

STANDARD OF REVIEW

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BASED ON AN IMPARTIAL REVIEW AND EVALUATION OF ALL EVIDENCE DEVELOPED

- Establish the elements of each claim
- Consider strength of evidence (incriminating and exculpatory)
 - Corroborating evidence not required. 85 FED. REG. 30384.
- Evaluate credibility of witnesses and parties
 - Credibility may not be based on status as complainant, respondent or witness
- Draw reasonable inferences

DUTIES & RESPONSIBILITIES OF A TITLE IX INVESTIGATOR

TITLE IX COORDINATOR

- The Title IX Coordinator is the designated university official with primary responsibility for coordinating the university's compliance with Title IX. This includes providing leadership for Title IX activities; providing consultation, education and training; and helping to ensure the University responds appropriately, effectively, and equitably to Title IX issues. 34 C.F.R. 106.8(A)

TITLE IX INVESTIGATOR

- Assists the Title IX Coordinator in carrying out the University's efforts to prevent and effectively respond to issues of sexual misconduct and discrimination.
- Conducts prompt and thorough student-based investigations as assigned by the Title IX Coordinator including: identifying and interviewing parties and witnesses, ensuring victim access to a variety of on and off-campus resources and interim measures where appropriate, gathering and securing relevant documentation which may include confidential information used in determining responsibility. 34 C.F.R. 106.45

REQUIREMENTS FOR INVESTIGATORS

TRAINING TOPICS MUST INCLUDE:

- Definition of sexual harassment,
- Scope of “educational program or activity,”
- Investigation and grievance process, policies,
- Impartiality,
- Rape shield protections,
- Relevance (in creating an investigative report), and
- Any technology used at a live hearing

34 C.F.R. 106.45(B)(1)(III)

REQUIREMENTS FOR INVESTIGATORS (CONT'D)

CAMPUS SAVE ACT

- Proceedings must be conducted by officials who, at a minimum, receive annual training on:
 - issues related to dating violence, domestic violence, sexual assault, and stalking
 - how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

REQUIREMENTS FOR INVESTIGATORS (CONT'D)

MA LAW (M.G.L. C. 6 SECTION 168E):

- Must give parties an equal opportunity to provide evidence
- Must have access to relevant evidence being considered
- May limit type of evidence considered
 - Character evidence
 - Prior sexual activity

REQUIREMENTS FOR INVESTIGATORS (CONT'D)

- Impartial
- Knowledge of policies and procedures
- How to conduct investigations
- Credibility determinations
- Confidentiality
- Evaluation of evidence in an impartial matter

34 C.F.R. 106.45(b)(1)(iii)

A GOOD INVESTIGATOR SHOULD BE:

- Objective
- Fair
- Impartial
- Open-minded
- Professional
- Detail Oriented
- Organized
- Appropriate in demeanor
- Active listener
- Polite and respectful to all parties

A GOOD INVESTIGATOR *DOES NOT*:

- Allow emotion to overrule reason
- Make assumptions as to how a person “should” react
- Pre-judge the facts
- Put self in the shoes of victim or the respondent
- Allow bias or prejudice to affect judgment
- Assume that a person is acting a certain way because of their role in the process

HALLMARKS OF AN EFFECTIVE INVESTIGATION

- Quality
- Timely
- Fair
- Well Documented



HALLMARKS OF AN EFFECTIVE INVESTIGATION

(CONT'D)

- Title IX: Investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence
- VAWA Section 304: The Campus Sexual Violence Act (“Campus SaVE Act”)
 - Requires a prompt, fair, and impartial process from the initial investigation to the final result



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INVESTIGATION ORGANIZATION & PLANNING

ORGANIZATION

- Organization is critical to conducting an effective and compliant investigation
 - Initial assessment of claims
 - Determine resource requirements
 - Create the investigation file
 - Coordinate with other departments
 - Open an investigation log
 - Review communication and notice requirements





DEVELOPING THE INVESTIGATIVE PLAN

- Determine the scope of the investigation – what is the subject of the complaint?
- Review relevant policies and records
- Draft a list of preliminary claims and the elements of each
- Create a preliminary chronology of events
- Prepare a preliminary timeline
- Identify known percipient witnesses and determine order of examination
- Prepare questions and inquiry topics
- Evaluate potential disability accommodations



EVIDENCE GATHERING

- Familiarization with location
- Identification of other witnesses, including fresh complaint witnesses
- Texts and Emails (check policies)
- Photos and video; pictures of condition
- Identify additional sources of evidence
 - Police or security reports
 - Surveillance video
 - Entry/Exit logs: Card swipes
 - Photos or videos from phones
 - Texts and social media messages



EVIDENCE GATHERING (CONT'D)

POLICE REPORTS

- Investigators may have access to school law enforcement reports, notes and findings as necessary, so long as it does not compromise the criminal investigation (possible exception for rape/sexual assault/DV)
- Investigators must be aware that standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual misconduct violates University policy
- Use of policy reports may reduce or eliminate the need for separate interviews of parties and witnesses



EVIDENCE GATHERING (CONT'D)

APPLICATION OF M.G.L. CHAPTER 41 SEC. 91D

- Confidentiality of police reports concerning rape, sexual assault and domestic violence
- Generally, victim must consent to release of reports except in certain situations
- Reports to campus police – consult school policy to determine whether they will be shared with TIXC



EVIDENCE GATHERING (CONT'D)

MEDICAL REPORTS

- Medical reports may provide significant relevant evidence concerning allegations of sexual misconduct. Investigators must be cautious and ensure that such reports are appropriately obtained, validated and maintained
- May require the assistance of appropriate medical professionals to assist them in understanding and evaluating the relevance (but may still be “directly related”)
- May only be obtained if privilege is waived

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CONDUCTING INTERVIEWS

INTERVIEW TECHNIQUES & COMMON ISSUES

- Controlling the interview
- Broad to narrow, open ended questioning
- Note taking / documentation
- Traps for the unwary
 - Assumption is the enemy of logic
 - Do not suggest answers for your questions.
For example:
 - Q: Did you grab her leg or just happen to bump into her?
 - Q: Did you call her a “bitch” out of anger or were you just kidding?
 - Q: Did you just get into her bed or did she motion for you to come over?
- Responding to typical witness behaviors



PREPARATION AND INITIAL MATTERS

- Identify appropriate time and location for interview
- Provide written notice for the interview
 - Address accommodation needs and rules concerning attendance and participation of advisor
- Prepare, prepare, prepare
- Assemble documents and other materials you will use (note - may need to disclose to interviewee)
- Create an outline for the interview. The outline is a guidance document (be flexible and prepared to deviate)
- Provide an introduction concerning the investigatory process and the role of the Investigator
- Advise interviewee of rights and expectations in the investigation process

ASKING THE QUESTIONS



- Provide witness sufficient context to enable a full and fair opportunity to respond
- Explain importance of honesty, institution's prohibition on retaliation, and the investigatory process
- Start with short, neutral, non-judgmental, and open-ended questions – who, what, where, when and how (sometimes “why”)
- Ask varied questions on same subject, and allow time to respond

ASKING THE QUESTIONS (CONT'D)



- Avoid editorializing, interrupting, or commenting
- Ask for clarification of unfamiliar slang words – be sure that you and the witness mean the same thing (e.g., “hook-up”)
- Avoid interrupting the flow of the narrative – encourage the witness to keep talking (the wonder of “Silence”)
- Establish the chronology, and confirm that you’ve got it right
- “Is there anything else you want me to know?”

ASKING THE QUESTIONS (CONT'D)



- Raise tough questions later in interview, to prevent witness from “shutting down”
- Don’t ask questions about complainant’s sexual encounters with persons other than respondent
- Stay focused on the policy violations – avoid turning the interview into a character assessment of any party
- Invite witness to provide relevant witnesses and documentation (e.g., medical records, diary entries, calendars, Facebook posts, emails and texts)

CLOSING THE INTERVIEW

- Review and confirm statements
- Confirm additional evidence and witnesses identified by the interviewee
- Direct witness to provide all documents and/or records referenced within a specified time period
- Notify concerning possibility of follow up meeting
- Advise about institution's prohibition on retaliation, and expectations concerning confidentiality and privacy
- Direct the interviewee to contact investigator with any additional information or concerns regarding possible retaliation.

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COMPLETING THE INVESTIGATION FORMAL GRIEVANCE PROCESS

COMPLETING THE INVESTIGATION

- Preparing the investigation file
- Review and analyze the evidence
- Review the elements of each claim to ensure that you have all of the relevant evidence that the decisionmakers will need to make a decision
 - **DO NOT** apply the standard, issue preliminary findings or recommendations
- Assess confidentiality and privilege issues
- Review outstanding issues with Title IX Coordinator
- Before completing investigation report, send all evidence under review to each party and their advisors, and give them 10 days to submit a written response
- Finalize and submit the investigation report to each party and their advisors at least 10 days before the hearing, and give them adequate time to review and provide a written response
- Revise investigation report to incorporate written response, if applicable
- Finalize and submit the investigation report
- Secure and preserve the investigation file

INVESTIGATION REPORT

- Must fairly summarize relevant evidence
- The Report must be clear, concise, correct and supported.

34 C.F.R. 106.45



INVESTIGATION REPORT

(CONT'D)

REPORT SHOULD CONTAIN:

- Identity of the Complainant (or, if filed by the School, the name of the Title IX Coordinator);
- A statement of the allegation, a description of the incident(s), and the date(s) and time(s) (if known) of the alleged incident(s);
- The date that the formal complaint was made;
- Identification of applicable policies and charged violations;



INVESTIGATION REPORT

(CONT'D)

- The date the respondent was interviewed;
- The identity, age and status of all parties and witnesses;
- The dates that any relevant evidence was obtained;
- Any dates that the School paused or resumed its investigation and why (e.g., because the complainant filed a law enforcement complaint);
- Fairly summarize the relevant evidence;
- Comply with confidentiality and privilege requirements;
- State whether supportive measures were provided, but do not identify measures provided.



INVESTIGATION REPORT

(CONT'D)

- In addition, the following information is recommended for inclusion in the report:
 - A list of all exhibits referenced in the report (each exhibit should be attached as an addendum to the report)
 - A list of all individuals interviewed with the date and time of each interview
 - A statement addressing reasons for any delays in the investigation
 - Identify advisors and/or counsel involved on behalf of each participant, if any
 - Summaries of statements



INVESTIGATION REPORT

(CONT'D)

- Equal access to inspect and review all evidence gathered during the investigation that is “directly related” to the allegations (broader than relevance) Including evidence Institution does not intend to rely on
 - Prior to completing investigation report, must send evidence to parties and provide 10 days to submit a written response
 - Send copy of final report to parties for review and response at least 10 days prior to hearing.

34 C.F.R. 106.45





DECISION

WRITTEN NOTICE OF DECISION REQUIRED

- Simultaneous notice to parties
34 C.F.R. 106.45





DECISION (CONT'D)

MUST INCLUDE:

- Identification of allegations potentially constituting sexual harassment;
- Description of procedural steps;
- Findings of fact supporting the determination;
- Conclusions regarding application of code of conduct to the facts;
- Rationale for the result as to each allegation, what disciplinary sanctions will be imposed, and any remedies provided to Complainant (with appropriate confidentiality);
- School's procedures and permissible bases for appeal.

34 C.F.R. 106.45(b)(7)(ii)

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APPEALS

INSTITUTION MUST OFFER BOTH PARTIES AN APPEAL FROM

- Determination regarding responsibility, and
- Dismissal of a formal complaint or any allegations therein on the following grounds:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
 - Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

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RECORDKEEPING

34 C.F.R. 106.45(B)(10)

QUESTIONS?



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