



# Title IX (and Beyond)

Investigator Training – Title IX, Civil Rights,  
and Special Considerations



**Bricker & Eckler**  
ATTORNEYS AT LAW

# Disclaimers

**We can't help ourselves. We're lawyers.**

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- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- Feel free to ask general questions and hypotheticals
- If you did not receive your slides by email, we will post a link in the chat box. Please download and save them!

# Presentation Rules

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- Seriously – questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

# Posting These Training Materials?

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- Yes!
- For you folks here for the Title IX focus, your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution electronically to post

# Topics Covered Today

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- Understanding the Role of Investigator
  - Neutrality
  - Gatherer and Organizer of Evidence
- Policies and how to use them correctly
- The legal reasons behind Civil Rights and Title IX policies
- Title IX relevance and special considerations
- Special considerations in investigations
  - Interviewing Employees at Public Institutions
  - Interviewing Minors
  - Interviewing Individuals with Developmental Disabilities
  - Interviewing Neurodiverse Interviewees
- Investigative Techniques
  - Witness and Evidence Lists
  - Crafting Questions
  - Note-Taking Tips
  - Questioning
  - Sensitivity to Memory Issues and Trauma
  - Interview Summaries
- The Written Product
- Writing Examples

# Aspirational Agenda

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9:00 a.m. – 9:10 a.m.	Introduction
9:10 a.m. – 10:15 a.m.	Understanding the Role of Investigator/ Policies and How to Use Them Correctly
10:15 a.m.- 10:30 a.m.	Break
10:30 a.m. – 12:00 p.m.	The Legal Reasons Behind Policies
12:00 p.m. – 12:30 p.m.	Lunch Break
12:30 p.m. – 1:45 p.m.	The Legal Reasons Behind Policies/Special Considerations in Investigations
1:45 p.m. – 2:30 p.m.	Investigative Techniques
2:30 p.m. - 2:45 p.m.	Break
2:45 p.m. – 3:30 p.m.	Investigative Techniques Continued
3:30 p.m. – 5:00 p.m.	The Written Product and Writing Examples



## Understanding the Role of Investigator



# Know the scope of your role

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- Look at the applicable policy first (theme of today)
- How proscribed is the role? Is it flexible or is it does it have legal requirements (e.g., Title IX Investigator)
- Neutral?
- Be transparent about your relationship to the Institution
- Make a recommendation?
- Make a decision?



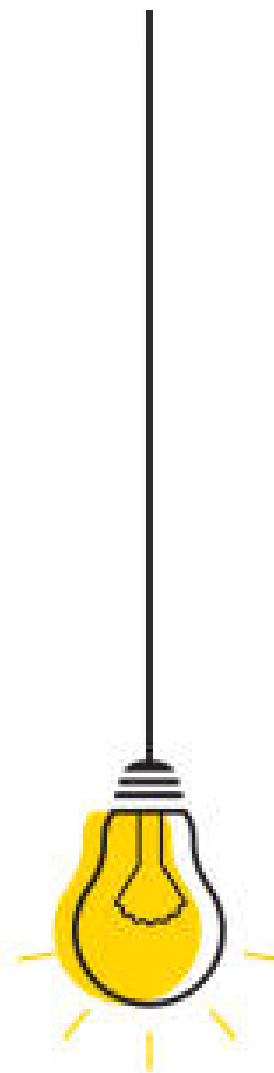
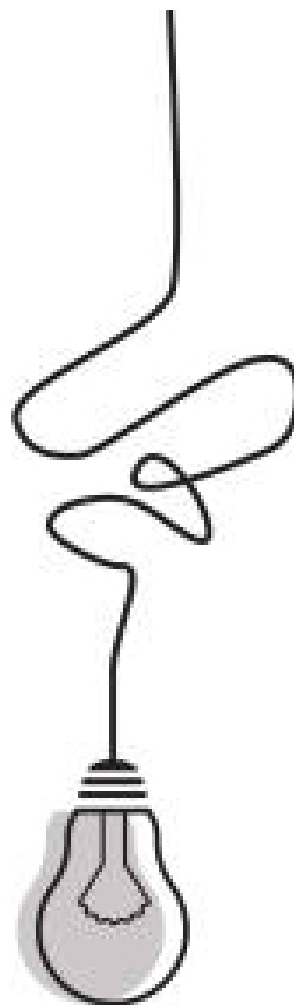
# Gatherer and Organizer of Evidence

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Regardless of the policy you are working under you have two main tasks:

- Gather all the (relevant) evidence
- Organize the evidence gathered

Transparency and ease of use of the written product for the next step in the process, parties, and administration



# Gatherer – Interviews

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As we'll discuss today, your role is get each party and witness to tell you their story and to capture that as accurately as possible in an interview summary.

- Sometimes, you will have to ask really hard questions of the party or witness.
- Sometimes, you will have to meet an interviewee where they are – and that's the best you can do.
- Sometimes, you will have to follow-up with an interviewee several times to no avail.

# Gatherer – Documentary Evidence

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You need to always follow up with interviewees to see if they have any of the following, even if it's just to help with a timeline:

- Texts or Snapchats
- Emails
- Phone logs
- Photos
- Social media posts
- Security camera footage
- Other – sometimes you may want to create a video of an area or take photographs yourself for context and explanation for the decision-maker



# Organizer – Putting it together

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We'll talk later today about report writing, but big pictures are that:

You want to make transparent any discrepancies that may exist and where they come from (in accounts by one party or witness, across several parties or witnesses, missing evidence that should exist)

You want the parties and anyone next in the process to be able to pick up your report or investigation product and find what they need and understand what you did

# Neutrality (1 of 2)

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- Be neutral – even if you have a decision-making role in the process – go into the process without prejudging the matter
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible and not trauma-informed [and it's contrary to you're a neutral role]

## **Neutrality (2 of 2)**

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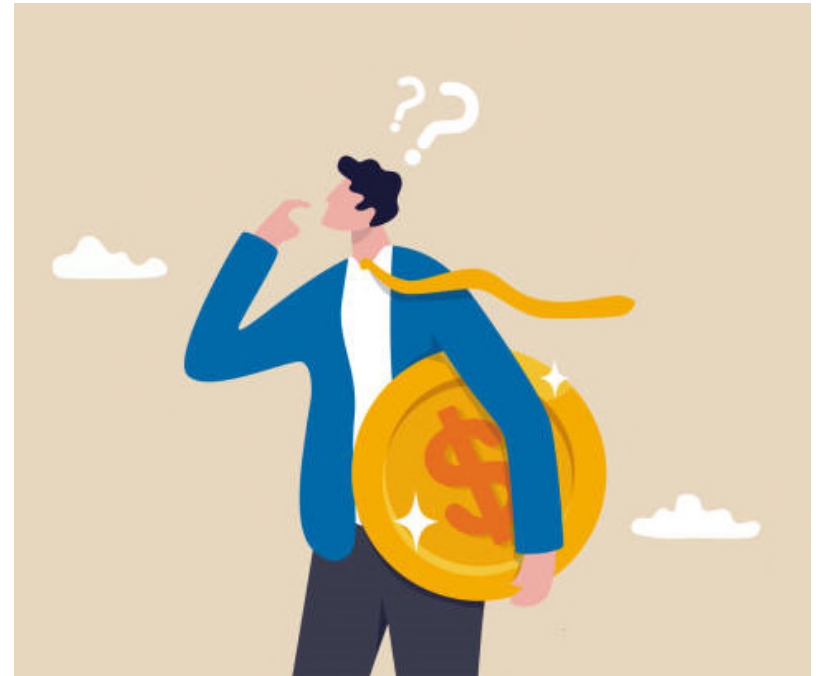
- Do not prejudge the outcome of the case
- Do not judge the parties or witnesses
- Be mindful of any bias or conflict of interests and report them immediately



# Neutrality Examples

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- Are you biased as an Investigator because you paid by the Institution?
- Should you serve as an Investigator for a case in which you know one of the parties? One of the witnesses? Does it matter how well you know them?
  - Bias?
  - Conflict of interest?



# Perceived v. Actual Bias

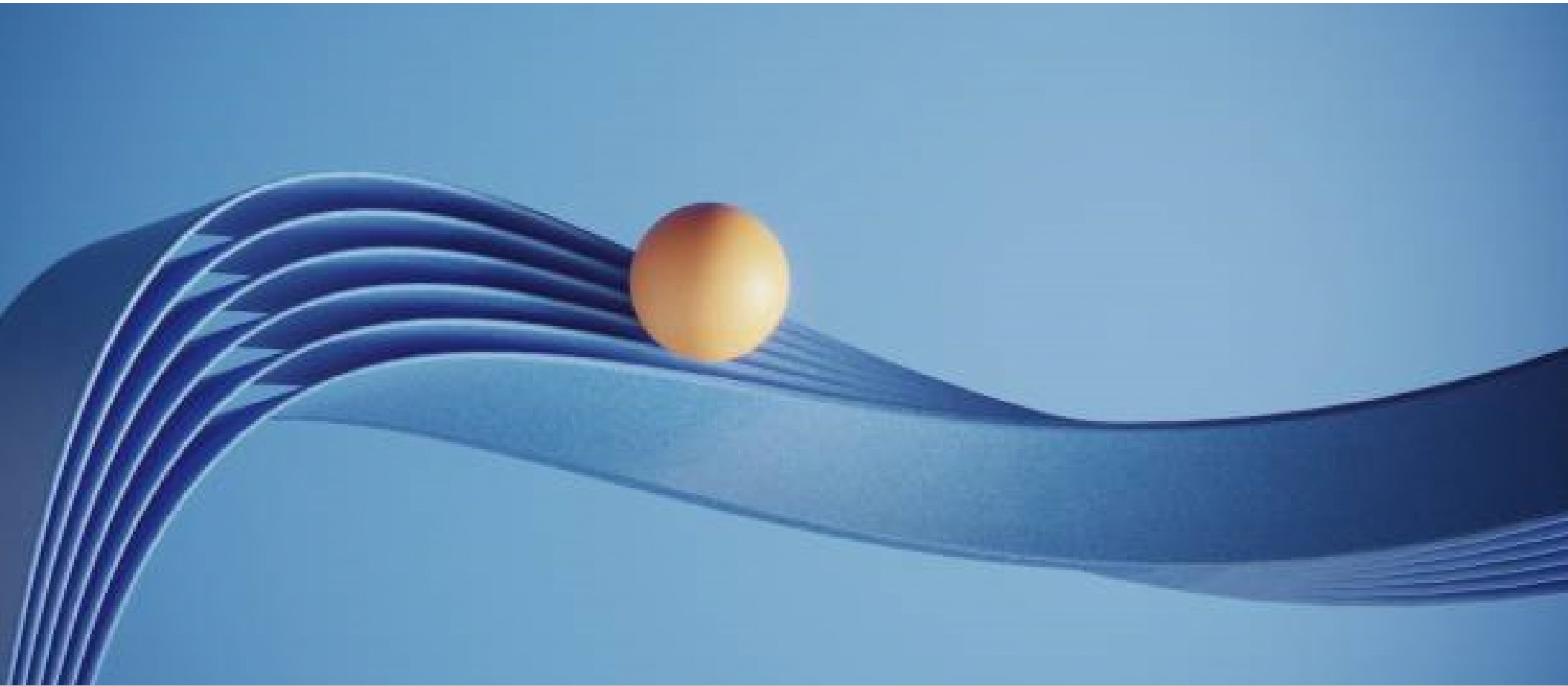
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- Both can lead to the same perception
- We all have biases – even if we are not aware of them:
  - <https://www.projectimplicit.net/resources/about-the-iat/>
  - <https://implicit.harvard.edu/implicit/takeatest.html>
- Perception can limit the quality of the participation of the party or witness and the quality of the evidence
- On appeal of decisions in Title IX, the Department requires the bias “that could affect the outcome of the matter”

# **The Bottom Line**

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Be Human & Be a Blank Slate



# Policies and How to Use them Correctly

# Know your policies/read your policies

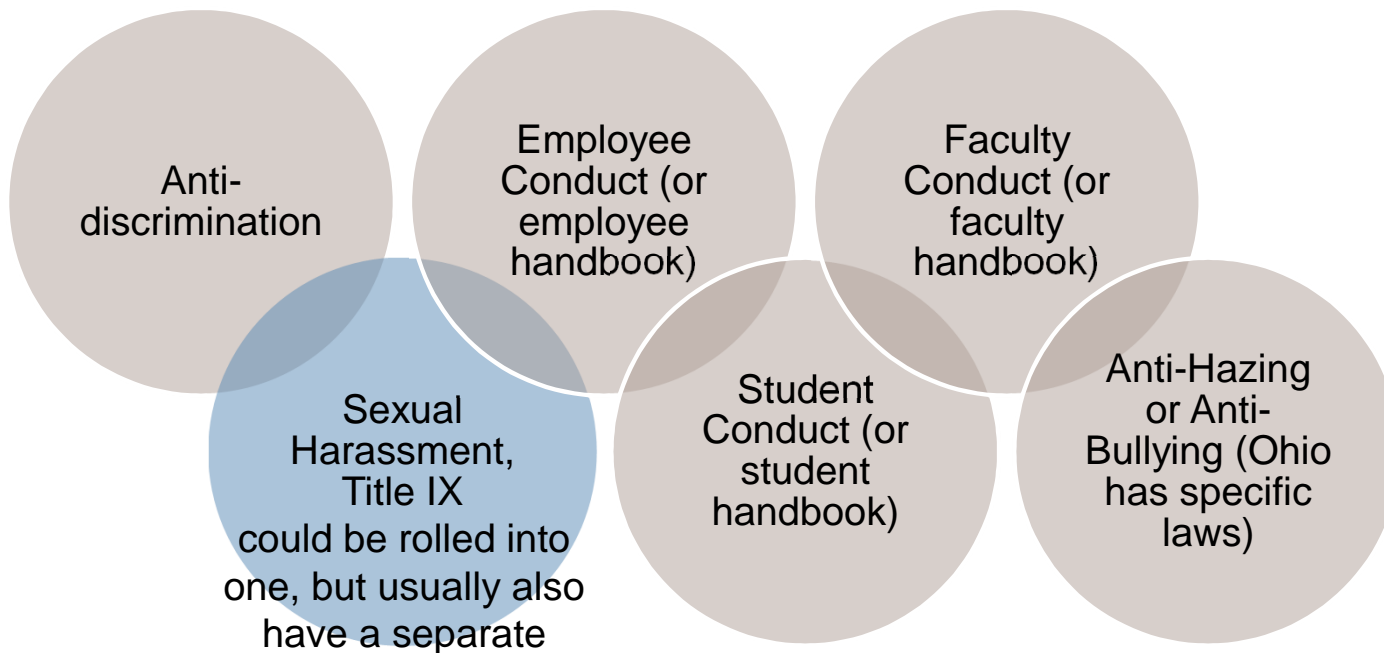
All of them, always, every time...

**Always go to the policy first**, read the policy, understand the process, ask questions if it's not clear – issues may need to be settled by legal counsel

- policy may not have been used before for an issue
- policy may lack a definition
- policy may lack a standard of review
- policy may conflict with another policy

# Types of policies

Investigators may need to track down several



- Sometimes these are not all together and there are agreements, procedures, guidelines, and/or updates you need to track down
- Don't be shy – ask the questions internally to gather everything you need

# Identify the Stakeholders for each Policy

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For example –

- Title IX mater: Title IX Coordinator, parties, possibly general counsel
- Student Conduct: Dean of Students
- Faculty Conduct: Dean, VP, HR, Union (internal EEO or compliance office?)
- Staff Conduct: HR, Union (internal EEO or compliance office?)



# Use the correct policy or policies

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Policies change overtime: make sure the definitions and non-procedural portions are correct for the time at issue

- You must use the language from the policy in effect at the time of the alleged prohibited conduct
- Sometimes, this will mean many policies apply where the conduct occurred over a period of time
- Do this for each allegations under each policy

# Type of conduct addressed in policies

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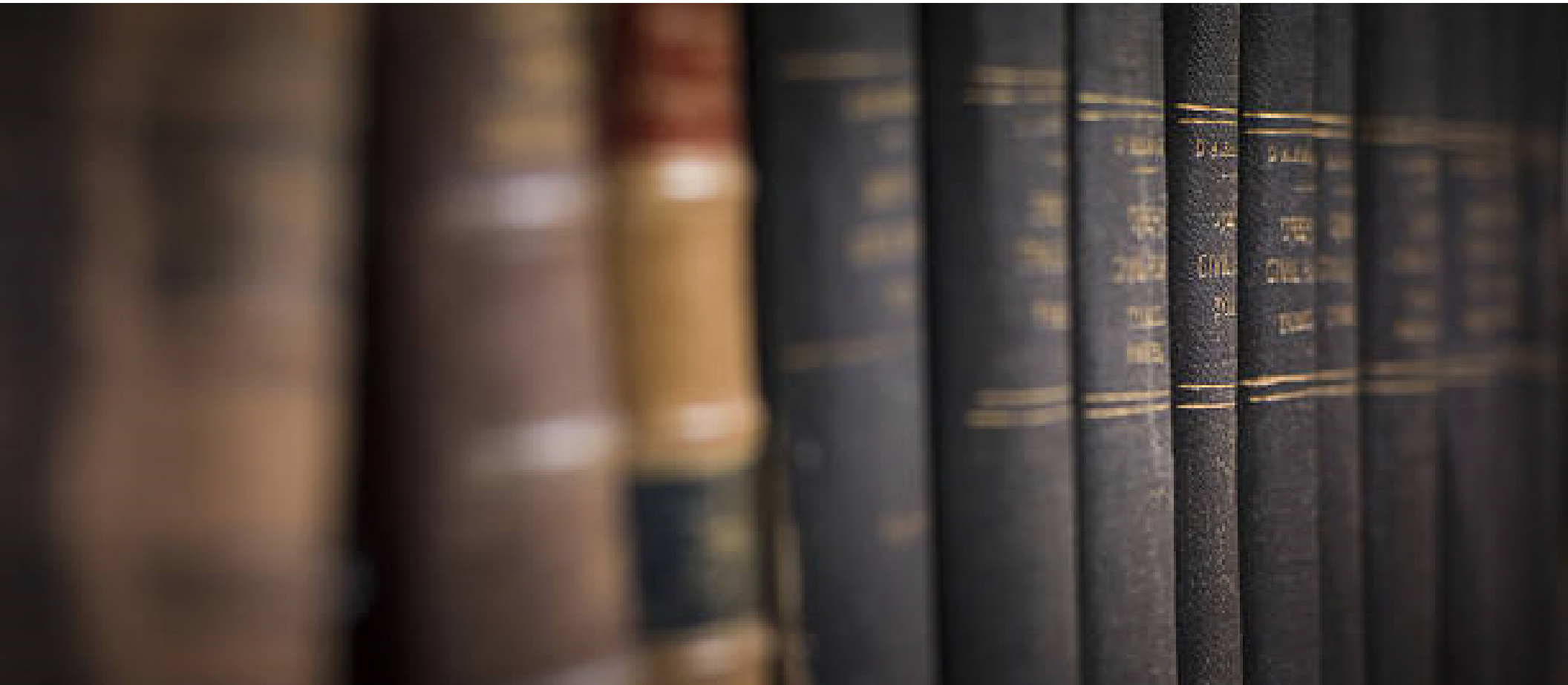
## Laws behind these policies

- for civil rights, there is usually a federal law, regulations, agency guidance, state law components, and a lot of case law
- for Title IX, there is a federal law, regulations, agency guidance
- typical ADA/disability discrimination policy will involve...
- typical ADEA/age discrimination policy will involve...
- typical race discrimination policy will involve...
- typical sex and/or gender discrimination will involve...
- typical national origin...
- typical sexual orientation...
- typical gender identity...

# Issue spot

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- You may be the one tasked with figuring out which policies apply
- Informational interview
- Big issues
- Identify potential policies implicated
- Charges? Notice?



## The Legal Reasons Behind Policies

# Civil Rights – Discrimination on the basis of Race, National Origin

## Applicable laws behind your policy

- Fourteenth Amendment
- Civil Rights Act of 1964
  - Title VII (for employees and part of the CRA) – 42 U.S.C. § 2000e et seq. – EEOC is the government agency that oversees (may have a state equivalent for state law)
  - Title VI (for students in education on the basis of race, color, national origin and part of the CRA) - 42 U.S.C. § 2000d et seq. - DOE is the government agency that oversees (may have a state equivalent for state law)
- State law – usually some state law equivalent – in Ohio, Revised Code 4112
- Case law (court-made law)

# Civil Rights – Discrimination on the basis of Sexual Orientation and Gender Identity

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- Civil Rights Act of 1964 and Title VII
- Current Administration expressly extends to Title IX (Title VII and Title IX often use the same framework in analysis before federal courts)
- *Bostock v. Clayton County, Georgia*, 590 U.S. \_\_\_\_, 140 S. Ct. 1731 (2020) – specifically on the basis of sexual orientation and transgender status

# **Civil Rights – Discrimination on the basis of Pregnancy**

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- Civil Rights Act of 1964
  - Pregnancy Discrimination Act of 1978 amended Title VII for discrimination on the basis of sex – but also treated as a disability with analysis under Americans with Disabilities Act
- State law Case law (court-made law)



# **Civil Rights – Discrimination on the basis of Pregnancy**

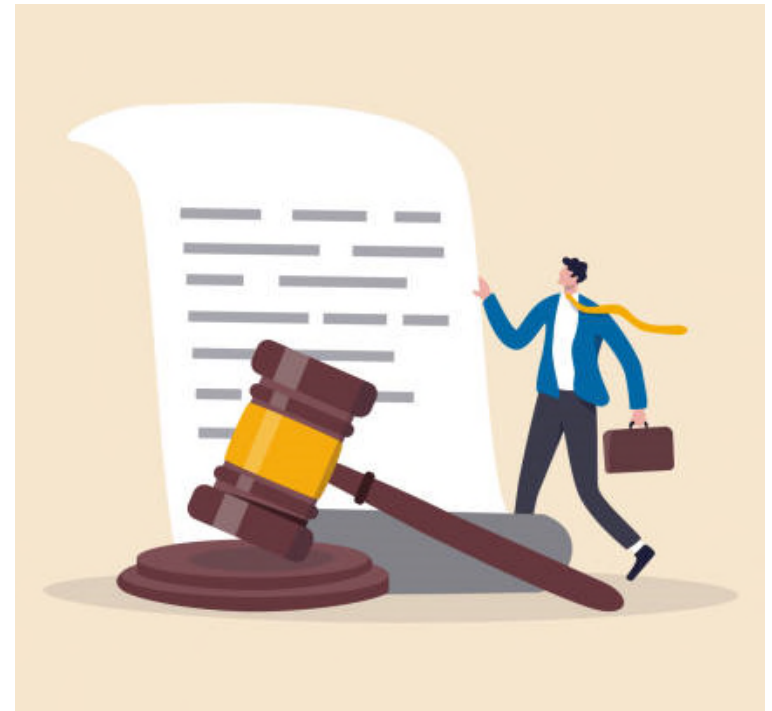
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- The Pregnancy Discrimination Act (PDA) forbids discrimination based on pregnancy when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment.
- Pregnancy can be past, current, or future.

# Civil Rights – Discrimination on the basis of Sex

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- Civil Rights Act of 1964
  - Title VII (for employees and part of the CRA) – 42 U.S.C. § 2000e et seq. – EEOC is the government agency that oversees (may have a state equivalent for state law)
- State law – usually some state law equivalent – in Ohio, Revised Code 4112
- Case law (court-made law)



# Civil Rights – Discrimination on the basis of Age

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- Age Discrimination in Employment Act (ADEA) and as amended by the Omnibus Older Workers Benefit Protection Act
- ADEA applies to individuals 40 years old and older

# Civil Rights – State Laws

Typical language is broad – employment context

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Example – Ohio Revised Code

It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

# Civil Rights – Discrimination on the basis of Disability

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Example – Ohio Revised Code

It shall be an unlawful discriminatory practice for any educational institution to discriminate against any individual on account of any disability:

- (A) In admission or assignment to any academic program, course of study, internship, or class offered by the institution;
- (B) In permitting participation in any activity that is sponsored by the institution or that takes place on property owned, operated, or controlled by the institution;
- (C) In the awarding of any form of financial aid or other benefits available to students;
- (D) In admission or assignment to housing or other facilities owned, operated, or controlled by the institution;
- (E) In awarding of grades or granting of certificates, diplomas, or degrees offered by the institution.

# Civil Rights – Court Review

## Court review of Title VII and Title IX burden-shifting framework

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Evidence of direct discrimination

Or- burden-shifting framework

- Plaintiff establishes a prima facie case (PFC) – which will vary on type of claim brought
- Institution provides a legitimate, non-discriminatory business reason for action
- Plaintiff must show that reason is pretextual

# Civil Rights – Court Review

## Court review of discrimination in employment

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Evidence of direct discrimination

Or- burden-shifting framework

- (1) employee is a member of a protected class; (2) employee was qualified for the job; (3) employee suffered an adverse employment decision; and (4) employee was replaced by a person outside the protected class or treated differently than similarly situated non-protected employees.
- In reverse race and sex discrimination cases – the standard may be different depending on your case law. For example, in Ohio (under the Sixth Circuit) – Plaintiff has to demonstrate that the employer is the unlikely employer that discriminates against the majority.

Institution proffers a legitimate, non-discriminatory business reason for action

Employee must show reason provided by Institution is pre-text for discrimination

# Civil Rights – Court Review

## Court review of hostile environment in employment

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Evidence of direct discrimination

Or- burden-shifting framework

- (1) employee was a member of a protected class; (2) employee was subjected to unwelcome harassment; (3) the harassment was based on employee's race; (4) the harassment was so severe and pervasive that it unreasonably interfered with employee's work performance by creating an intimidating, hostile, or offensive work environment; and (5) the employer is liable because it knew or should have known of the harassment and failed to take appropriate action.



# Title IX - Generally

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Prohibits discrimination on the basis of sex in education...federal financial recipients

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

# Title IX - Sexual Harassment

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- Prohibits discrimination on the basis of sex in education...federal financial recipients for sexual harassment and sexual misconduct
- *See also*, Clery Act and Violence Against Women Act (VAWA)
- History of Presidential administrations setting their own stamp on Title IX in higher education prohibiting sexual harassment
  - Years of guidance and “Dear Colleague Letters” (DCLs)
  - 2011 Dear Colleague Letter
  - August 14, 2020 Title IX Regulations
  - Repeal of other existing guidance and DCLs
  - New proposed draft Regulations

# Title IX - Sexual Harassment

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“Sexual Harassment” is an umbrella term for:

- Quid pro quo sexual harassment
- Hostile environment: unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution’s education program or activity
- Sexual assault and Clery crimes



# **Title IX - Sexual Harassment**

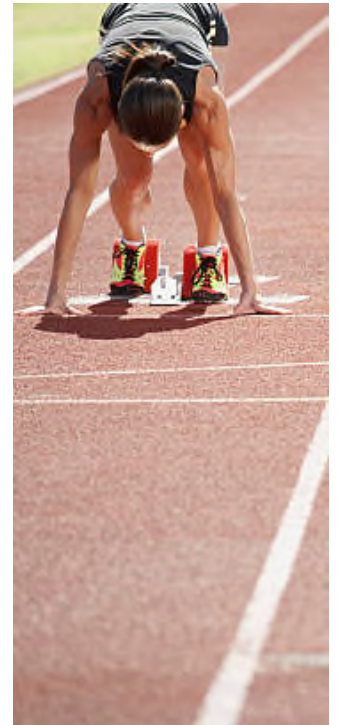
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- The biggest change from the August 14, 2020 regulations was the requirement that all institutions provide live, cross examination hearings – including for employees
- Also, the hostile environment standard is different from Title VII
- Circuit courts are currently split on whether employees of institutions can bring a Title IX claim separate from a Title VII claim in a civil suit against the institution

# Title IX – Discrimination in Athletics

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- Separate but often conflated with NCAA review of equity on the basis of sex in athletics...and upcoming NCAA sexual misconduct requirements
- Regulations promulgated pursuant to **Title IX** extend its protections to **athletics**, [34 C.F.R. § 106.41\(a\)](#); see also [45 C.F.R. § 86.41\(a\)](#), and require that recipients “shall provide equal athletic opportunity for members of both sexes,” [34 C.F.R. § 106.41\(c\)](#). The factors that determine whether equal opportunities are available include “[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.” [34 C.F.R. § 106.41\(c\)\(1\)](#).



# Title IX – Discrimination in Athletics

## Three-Part Test

- (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
- (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
- (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.



# Civil Rights – Court Review

## Court review of Title IX

Courts use the same Title VII burden shifting framework for Title IX

Claims under Title IX for sexual misconduct cases will vary on the federal district, but in Ohio (under the Sixth Circuit) – cognizable claims include – attacking an institution's disciplinary process (may also differ slightly if plaintiff is a student or employee):

Erroneous  
outcome

Selective  
enforcement

Deliberate  
indifference

Archaic  
assumptions

Hostile  
environment

# Civil Rights – Court Review

## Erroneous Outcome PFC

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Plaintiff must demonstrate:

1. Facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceed; and
2. A particularized, causal connection between the flawed outcome and gender bias

(6<sup>th</sup> Circuit)

Erroneous  
outcome

Selective  
enforcement

Deliberate  
indifference

Archaic  
assumptions

Hostile  
environment



# Civil Rights – Court Review

## Selective Enforcement PFC

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Plaintiff must demonstrate:

1. A similarly-situated
2. Member of the opposite sex
3. Was treated more favorably than the plaintiff
4. Due to gender

Erroneous  
outcome

Selective  
enforcement

Deliberate  
indifference

Archaic  
assumptions

Hostile  
environment

# Civil Rights – Court Review

## Deliberate Indifference PFC

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Plaintiff must demonstrate:

1. An official of the institution who had authority to institute corrective measures
2. Had actual notice of
3. And was deliberately indifferent to the misconduct

Erroneous  
outcome

Selective  
enforcement

Deliberate  
indifference

Archaic  
assumptions

Hostile  
environment

# Civil Rights – Court Review

## Archaic Assumption PFC

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Plaintiff must demonstrate:

1. Institution denied a student an equal opportunity to participate in an athletic program
2. Because of historical assumptions about boys' and girls' physical capabilities

Erroneous  
outcome

Selective  
enforcement

Deliberate  
indifference

Archaic  
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Hostile  
environment

# Civil Rights – Court Review

## Title IX hostile environment PFC

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Plaintiff must demonstrate:

1. Plaintiff's education experience was permeated with discriminatory intimidation, ridicule, and insult
2. That is sufficiently severe or pervasive
3. So as to alter the conditions of the victim's educational environment

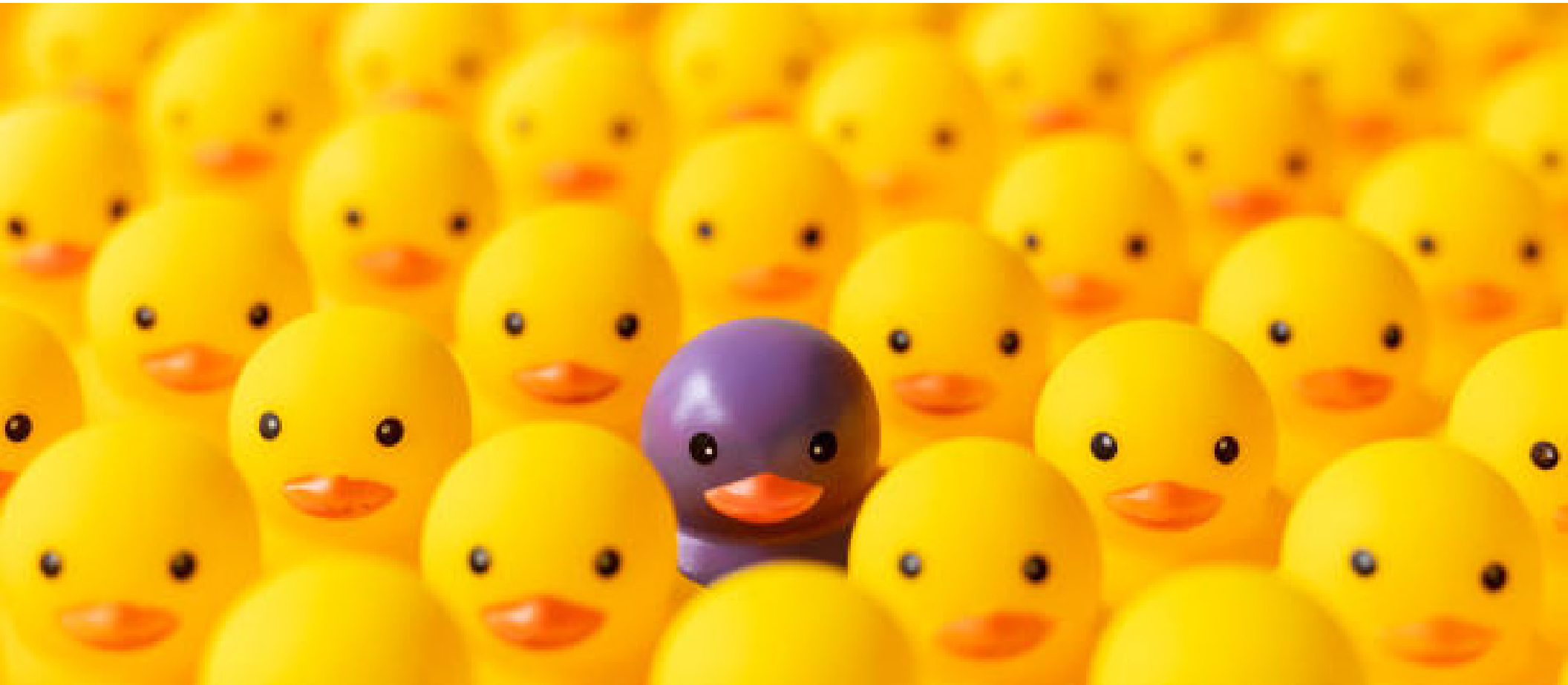
Erroneous  
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## Special Considerations in Investigations



## Interviewing Employees at a Public Institution

# Interviewing Employees at a Public Institution

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- *Garrity* Warning
- Due Process: *Loudermill* v. Title IX
- Union Representation
- First Amendment
- Public Records

# ***Garrity* Warning for Public Institutions**

## **(1 of 4)**

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A *Garrity* Warning is an advisement of rights administered by public employer investigators to public employees who may be subject to an internal investigation.

- The warning advises the employee of their criminal and administrative liability for any statements they make, but also advises them of the right to remain silent on issues that may implicate a crime without facing termination for refusing to answer.
- Further, compelled statements (e.g., threat of termination for refusing to answer without a *Garrity* warning) cannot be used in a subsequent criminal matter.
- The purpose is to preserve Constitutional Right against compelling self-implication in a crime, since the employer is the government.
- Key will be whether the statements in the investigation are compelled – if voluntary and told doesn't have to answer questions, then any statements could be used in a criminal matter.



# ***Garrity* Warning for Public Institutions**

## **(2 of 4)**

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Typical *Garrity* Warning voluntary participation:

“I am meeting with you to ask you questions related to an internal investigation. Your participation is voluntary and you do not have to answer questions that may implicate you in a crime. No disciplinary action will be taken against you solely for refusing to answer questions. However, the evidentiary value of your silence may be considered in administrative proceedings as part of the facts surrounding your case. Any statement you do choose to provide may be used as evidence in criminal and/or administrative proceedings.”

**Most common for higher education**

# ***Garrity* Warning for Public Institutions**

## **(3 of 4)**

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Typical *Garrity* Warning **compelled participation**:

“I am meeting with you to ask you questions as part of an internal investigation. I am ordering you to answer the questions I am asking you as part of this interview. Your failure to answer a question may result in disciplinary action up to and including termination. I am not questioning you for the purpose of instituting a criminal proceeding against you. During the course of this questioning, even if you do disclose information which indicates that you may be guilty of criminal conduct in this matter, neither your self-incriminating statements, nor the fruits thereof, will be used against you in any criminal proceeding.”

Less common for higher education

# ***Garrity* Warning for Public Institutions**

## **(4 of 4)**

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Typical internal investigations where this can come up:

- Title IX for sexual assault, stalking, and/or domestic violence or assault
- Staff/Employee/Faculty conduct investigation for a conduct unbecoming or moral violation clauses (usually this arises from an arrest or charges)

# Due Process

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Public employees often have a property interest in their employment and are entitled to due process before they can be subject to termination. Employees often inquire about this in the interview process of an internal investigation.

- If a Title IX matter – due process means entitled to live, cross-examination hearing before discipline
- If not a Title IX matter – due process means entitled to notice and opportunity to respond (*Loudermill*)

# Union Representation (1 of 2)

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Public employees may be members of a union that has a collective bargaining agreement with the Institution.

- Most of the time, employees who are union members are entitled to a union representative to advise them during any employment investigations.
- This can include Title IX investigations.

## **Union Representation (2 of 2)**

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- Review the collective bargaining agreement in advance of the interview, where possible.
- Allow the interviewee to confer with the union representative, including in a private location or off-camera, if they request, but note in interview summary or notes.

# Where Civil Rights and First Amendment Rights Collide

## Court review

- Employees and students have civil rights AND employees and students have First Amendment rights...
- Most policies at public institutions have some provision about First Amendment comments



# Public Records Laws

## Communications

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- Most states have their own public records laws that apply to public employees
- While the content of the investigations may be exempt due to FERPA or another exemption in your state law...
- Always be mindful of your communications within the Institution that may be subject to disclosure





## Interviewing Minors

# Who should be in the interview in addition to the minor?

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- Typically parent or legal guardian: the parent or guardian may waive their attendance in the interview, especially if it concerns questioning of sexual misconduct for portions of the interview (**huge caveat on next slide for higher education Institutions**)
- Witness- Because of the relationship between parents and legal guardians and their minor children, it can be beneficial to have a second investigator or administrator in the room to take notes



# **FERPA and minors at higher education institutions (the huge caveat)**

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## Family Educational Rights and Privacy Act (FERPA)

- Regardless of the age of the minor, a minor holds the FERPA rights over their education records in a higher education institution (different from K-12)
- The minor must sign a FERPA waiver form to allow a parent or guardian to participate in any process at a higher education institution's process – for various reasons – especially in Title IX sexual misconduct matters – a minor may not want their parent or guardian involved
- Preparation: have a specific FERPA waiver from the minor in advance of the interview (if Title IX and not specific to Title IX, get one); bring a waiver form to the interview to sign at the beginning of the minor shows up with parent or guardian and wants them to sit in

# How to set the scene

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- For minors especially, setting the minors and parents or guardians at ease is important
  - Water, allergen-free snacks (this may seem silly, but it can really help ease minors and give them something to focus on)
  - Breaks as needed
  - Transparency – build trust with parents by explaining everything you are doing and what will happen next – parents and guardians at ease helps minors be at ease



# Who will review the interview summary?

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- Parents and guardians, other party (and potentially other parents and guardians), and administrators
- Parents and guardians will have an opportunity to respond to the draft interview summary
- Be transparent about with the interview summary and investigation report will become a part of the minor's education record or how it will be maintained by the Institution

# **How to document observations v. parent or guardian report (1 of 2)**

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Sometimes, parents and guardians, like attorneys, want to answer questions for the minor.

- Policy language may prohibit anyone but party or witness (minor) from answering questions and requires other persons to be potted plants
- However, sometimes, the policy does not address the issues and that parent or guardian (or attorney) wants to answer on behalf of the minor...what to do?

# How to document observations v. parent or guardian report (2 of 2)

## The chatty parent, guardian, or attorney – what to do?

- Explain that the best information comes from the minor party or witness and that you would like to hear what the minor has to say.
- Explain that, where answers come from the parent, guardian, or attorney instead of the minor, that you will note that accordingly in the interview summary.
- If that does not work, clearly describe who answered questions in the interview summary and that you did not receive the answer from the minor. This can sometimes alert the parent, guardian, or witness, upon reviewing the interview summary that the minor should have another interview in which they parent, guardian, or attorney speaks less.



# **Interviewing Individuals with Developmental Disabilities**



# Pre-Interview Preparation

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- Check to see if the party or witness has a legal guardian separate from themselves – if so, the legal guardian stands in the place of the party or witness for purposes of agreeing to meet and approving language in interview summaries
- Check to see if there is any accommodation on record and/or discuss with the party or witness in advance to see if you can anticipate it in advance to make the party or witness more comfortable
- Check to see if there is a support person or intervention specialist who usually works with individuals on your campus with developmental disabilities to see if they should be included in the interview – again, this could help with putting the party or witness at ease.

# Who should be in the interview?

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Depending on the party or witness, a legal guardian may need to be present, but a support person is recommended at the very least



# Documenting the Interview

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- Document the interview as usual, but be aware that you may need to read and discuss the interview with the party or witness directly if they do not have a legal guardian or support person with them
- May need to work with the party or witness directly to incorporate any edits into the draft interview summary



# Interviewing Neurodiverse Individuals

# Communication and Accommodations

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Communicate in advance with the interviewee to see if there are any accommodations that would make them feel more comfortable in an interview or how they prefer to communicate (e.g., Zoom as opposed to in person, prefer to read questions and respond to them in writing)

## Be mindful of

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- Interviewees who are victims or complainants may not express or experience the same response to the prohibited conduct as another interviewee – different people experience conduct differently – and that doesn't mean it isn't as impactful (e.g., sexual harassment definition may require impact on victim)
- Conduct by a respondent interviewee may still have the same impact on others, and not okay, but may be considered for sanctioning or discipline



# Investigative Techniques

# Initial Review

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- Review notes and information collected by the police, intake person, and/or Title IX Coordinator
- Review any notices to the parties
- Review Policy/Code of Conduct
- Define Scope of Investigation
  - What elements do you think will be disputed?
  - Agreed upon?



## **If there is a criminal investigation...**

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- Contact the assigned officer or detective and receive clearance to proceed with any administrative investigation first...
- You don't want to be charged with obstruction

# Begin Witness List

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- If there is a criminal investigation, work with law enforcement to ensure permission to question witnesses
- Who should be included?
- Who should NOT be included?
- In what order should the witnesses be interviewed?
- Be flexible



# Begin Evidence List

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- If there is a criminal investigation, work with law enforcement to collect and preserve evidence
  - **Types of evidence**
    - Electronic communications
    - Security information
- Pictures, videos, audio
  - Police reports
  - Personnel files
  - Prior complaints against respondent

# Craft Questions for Each Witness

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- Refer to the policy
- Consider what information they are likely to have related to each element
- Consider what information they are likely to have that may assist the decision-maker in determining credibility
- Be flexible

# Organizing for the Interview

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- What should you have with you?
  - Intake Report
  - Written notice with allegations
  - Investigation log
  - Investigation notes cover sheet
  - Pre-prepared questions
  - Evidence you may need to reference or show witness
  - Policy or Handbook



# Note-taking Tips (1 of 4)

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- Use predictable symbols in the margin to easily skim during the interview:
  - ? ← Follow-up questions
  - \* ← Potential evidence
  - W ← Potential witness
- Try to record exact quotes when possible
- Interview notes are now required to be produced as part of the record

## **Note-taking Tips (2 of 4)**

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- Be consistent in how you take notes so that you can discuss your typical practice and whether you followed it in a specific investigation
- Consider typing notes and then completing the interview summary over them in the same version

## Note-taking Tips (3 of 4)

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- Be mindful of what you write down
  - Description of how party or witness is presenting or responding?
    - Can seem non-trauma informed – not everyone reacts how you expect them to react
    - But maybe also transparent?
    - But maybe also can make you seem biased in how describing
  - Definitely do not include comments like “seems to be lying” or “seems to be withholding information”

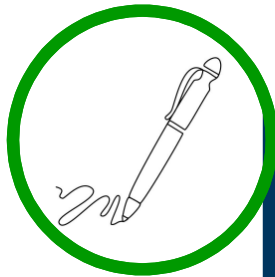


# Note-taking Tips (4 of 4)

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What to do with information that is not related to the investigation, sensitive, and/or inflammatory?

Two schools of thought:



Write it down, be transparent, possibly redact or omit it later.



Don't write it down at all.

## **Remember: The gatherer of relevant evidence for Title IX matters**

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- To ensure burden of proof and burden of gathering evidence is not on the parties (106.45(b)(5)(i))
- To provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory or exculpatory evidence (106.45(b)(5)(ii))
- Not restrict the ability of either party to discuss the allegations under investigation or to gather or present relevant evidence (106.45(b)(5)(iii))

# Setting Up the Interview 1 of 2

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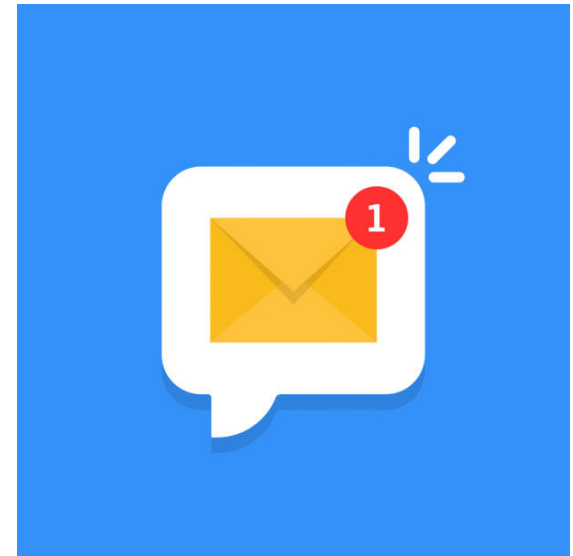
- Identify yourself, your role, and a general outline of what you're investigating
- Consider requesting the TIX Coordinator check in with those who fail to respond or refuse to participate
- Don't give up on the interview till you've tried at least 3 times, in at least 2 different methods

# Setting Up the Interview 2 of 2

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You must now provide any party whose participation you seek, with written notice (email) with “sufficient” time to prepare:

- Date
- Time
- Location
- Participants
- Purpose of interview or meeting



# Set the Stage

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- Make introductions
- Be hospitable
- Give overview of why they are being interviewed
- Explain retaliation policy
- Invite questions

# Begin Broadly

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- Elicit a monologue about the incident
  - What happened earlier that day before the incident?
  - What happened with regard to the incident?
  - What happened next?

# Ask Follow-Up Questions

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- Re-review your notes
- Re-review the elements of each charge
  - Have you elicited all of the information this witness might have about each element?
  - Do you have an understanding of how the witness obtained the information they shared?

# Freeze Frames

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- Ask the witness to “freeze” on the moment and describe details
  - What could they see? Feel? Smell? Taste? Hear?
  - Where was the other person? How were they positioned?
  - Where were you? How positioned?
  - What did you say to the other person? Them to you?
  - Describe other person’s tone, demeanor, body language



# Credibility

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- Gather facts to assist decision-maker or next step in the process (if not also your role)
- Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by witnesses

# When Memory Issues or Trauma is Suspected

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- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent

# Closing the Interview

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- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you
- Discuss supportive services if needed

# **After the Witness Leaves 1 of 2**

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- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email

## **After the Witness Leaves 2 of 2**

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- Consider whether there are additional allegations that you need to bring
  - Remember: notice of allegations must be sent out before you can ask questions of a respondent in Title IX, and a best practice in other scenarios.
- Ensure you are not leaving the burden of proof on any party or witness alone (if Title IX)

# Interview Summaries (1 of 5)

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- Try to draft as soon as possible after the interview, using your notes – no matter how good of a note taker you are, there are always things that you could forget over time
- Include at the beginning of the interview summary any information you reviewed with the interviewee:

*Aim to be consistent with this information across interviews for a case*



If remote, asked if anyone else was in the room with interviewee,

your process for taking notes and the interview summary

who will view the interview summaries,

any prohibition on retaliation,

any amnesty,

If you are recording or not

## Interview Summaries (2 of 5)

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Use names more often than in traditional writing to very clear and concise

Compare:

1. John reported that they went to the movies before they came back his apartment and before he was attacked.
2. John reported that he and Kevin went to the movies together before they both came back to John's apartment and before Kevin attacked John.

## **Interview Summaries (3 of 5)**

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Remember when we just talked about information that is not related to our case, sensitive, or inflammatory that we discussed in Note Taking?

- Time to review and decide – put in interview summary?
- Maybe put in draft and remove or redact for final version?



# Interview Summaries (4 of 5)

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Optional - Send draft to party with a firm deadline to lock them in if you don't hear back:

*Example:*

“Please find the attached draft interview summary for your review, edits, and comments. As a reminder, I include all substantive edits in footnotes for transparency. Please have any edits and comments back to me by 5:00 p.m. EST on Friday the 13<sup>th</sup>, or any request for additional time by that deadline, otherwise, I assume everything in the draft summary is correct.”

Pros: knowing as early as possible that someone may dispute their interview summary and/or allowing them to correct something that the investigator got wrong

Also – make sure to recommend they review the draft with a support person nearby for difficult topics

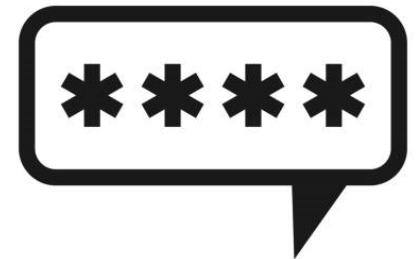
# Interview Summaries (5 of 5)

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Once you receive responses, incorporate the responses into the document for the final interview summary – footnotes help with transparency on when and how the edits and comments came in –

- Sometimes, the investigator just misheard and it's a clarification
- Sometimes, the story has changed...
- Regardless, it helps document any evolution of the interview summary from draft to final form

Optional – send final draft to interview for their records



# Physical Evidence

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- Follow up on anything identified during interviews
- Is law enforcement involved? Could they be?
- Ensure physical evidence is in a secure location and documented in the investigation log. Chain of custody is important!

# **What about advisors or support persons in interviews?**

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In Title IX, must provide parties the same opportunity to be accompanied by the advisor of their choice

- Nothing in the preamble prohibits support persons in the interview process (this is different at the hearing)
- Allowed to limit participation of advisor in process
- Whatever rules your institution selects, apply them equally to both parties (this is just a good practice generally)

# **Special Consideration: the Follow-Up Interview (1 of 3)**

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There can be many reasons you need to follow up with a party - Sometimes you will need to follow up with a party with evidence contrary or inconsistent with what they've told you – whether because of different perspectives or something else - here are some tips

- Explain to them in advance, especially if they are the Claimant in a sexual harassment matter, or reporting party in a sensitive matter, that the follow-up interview is often difficult for interviewees

## **Special Consideration: the Follow-Up Interview (2 of 3)**

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- Explain to the party what the other parties and/or witnesses have provided that may be different from what they have shared. Ask the party, “What are your thoughts about that statement?”
- Ask follow-up questions to see if anything is accurate from the different statements or if anything in the different statements changes the party’s account.

# Special Consideration: the Follow-Up Interview (3 of 3)

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- If you think the party is not being forthcoming or is untruthful on purpose, provide them an opportunity to correct the record. If they do not, explain to them that you have evidence that you will show them but provide them another opportunity to correct the record.
  - If the party still has not corrected the record, show them the evidence (e.g., security footage, text messages) and ask them to help you understand their answer.
  - “Help me understand the evidence I see here and your answer to me?”

# Special Consideration: Digging into Tough Questions

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Sometimes you have to follow up with tough questions

Examples:

- Alcohol consumption
- Sexual encounters





# Inspection and Review of Evidence (Title IX)

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## Provide ALL Evidence to both parties and advisors

- Include everything related to allegations, even if you don't expect decision-maker to rely on it
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report

(106.45(b)(5)(vi))

# Create Investigative Report (Title IX)

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- Summarize **facts**
- No determination
- Provide to parties and advisors
- Allow 10 days to review prior to hearing
- We will discuss report writing later today

# Key Takeaways 1 of 3

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- Study your policies
- Know the definition of any policy violation and the elements of that definition
- Identify when/if another policy is invoked

## **Key Takeaways 2 of 3**

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- Make sure you understand potential biases or conflicts of interest (actual or perceived)
- Prepare for your interview with questions and statements
- Trauma may affect how someone responds to an incident
- Start with open-ended questions
- Obtain any documentary evidence that you can

## **Key Takeaways 3 of 3**

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- Draft your interview summary promptly after your interview
- Follow any procedures in your policy for the next step in the process



## The Written Product

## **Look at your policy or other template**

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- ✓ First- check your policy and see if there are specific requirements for what should be included in the report
- ✓ Second – look to see if there is a template or another example internally that can assist you with how to structure your report

# Organizing the Evidence

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- After gathering all (relevant) evidence, organize all (relevant) evidence for the parties and the next step in the process.
- Here are some tools for how to best organize all the relevant evidence.



# Start with the basic information

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Identify with just factual information:

- By party
- By topic
- By allegation
  - Perhaps organize by fact v. expert witnesses or by party whom requested the witness

# Consider general organization

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Natural and neutral organization suggestions:

- Chronological order
- By topic or allegation
  - Perhaps by chronology within each topic or allegation
- By chronology of how the information came in to the investigation
- By witness summary

# Explain how organized

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Explain your structure at the beginning and for each section.

*Example:*

“The information in this report is a summary of the facts as agreed upon by the parties and the witnesses. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate.”

## **Other basic information to include**

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- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses Interviewed
- Witnesses Not Interviewed (and why) – attempts to contact that were unsuccessful
- The procedure followed, step-by-step
- Any procedural anomalies that need explained?

# Identification of witness sign-off

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If this is your practice:

“Each person interviewed was provided with a written copy of a summary of their interview, and was given an opportunity to provide feedback and approve the accuracy of the summary.”

- Did everyone do so?

# **A statement regarding (relevant) evidence**

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“All relevant information gathered during the course of the investigation has been included in this report.”

- Identify if you thought something was not relevant and why – consider still including in attachment for decision-maker
- Provide a table or list of all relevant evidence gathered and attach that evidence

# **Identify and include all alleged policy violations**

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- Definition of prohibited conduct alleged from applicable policy
- Related definitions as appropriate (e.g. consent, incapacitation) or any code of conduct included if done together
- Include verbatim, in entirety

**Give an overview of evidence collected**

---

**and**

**Attach as appendices any statements and  
important evidence**



# **Be helpful to reviewers – keep it transparent 1 of 2**

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Citations to the record – always

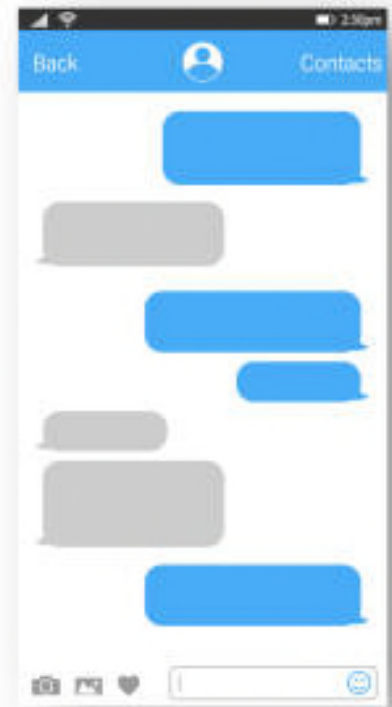
- Be helpful for your fact-finders!

Hearing packet or exhibits – helpful to number the pages sequentially for easy citation

## Be helpful to reviewers – keep it transparent 2 of 2

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- Insert into the report screenshots of text messages and pictures where relevant
- If information is attached but not referred to in a summary, may want to drop a footnote explaining why not



# **What not to include in report (but note requested and why not included) 1 of 3**

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The specific type of evidence deemed not relevant in the Regulations for Title IX, but also that you may want to redact or omit from final report:

- Information protected by a legally recognized privilege (unless a written waiver)
- Party's medical, psychological, and similar records unless voluntary written consent
- Rape Shield protection for Complainant in sexual misconduct cases

## **What not to include in report (but note requested and why not included) 2 of 3**

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If evidence is requested by a party and/or you determine it is not relevant, always explain that it was requested and why you determined it was not relevant.

## **What not to include in report (but note requested and why not included) 3 of 3**

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If you determined evidence was not relevant because of matters outside of the specific reasons identified in the regulations—i.e. because you did not think it was probative of material fact—explain and consider attaching in an Appendix

# Helpful synthesis

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If you can, synthesize the information from multiple parties and witnesses

Where the stories diverge:

- “Information from [Complainant]”
- “Information from [Respondent]”

# Summary of Information 1 of 2

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Don't forget to summarize impact on complainant if the charges require consideration as an element

- “The investigator notes that this incident and the process may have had an impact on [Respondent]. However, to determine whether sexual harassment occurred, the hearing panel will be required to review the impact of the reported behavior on [Complainant]. This is the reason that the information here focuses solely on [Complainant].”

# Summary of Information 2 of 2

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## Undisputed Facts

- Series of numbered sentences

## Disputed Facts

- Series of numbered sentences

Make sure you have facts for each element of each charge.

Do not make credibility determinations (Title IX).





**Bad vs. neutral and clear writing examples**

# Writing examples

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*Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.*

## Example 1

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Bad example: John was very believable when they said they had been attacked by Kevin.



Neutral and clear correction: John stated they were attacked by Kevin on Saturday. John provided the names of witnesses and contact information for those witnesses.

## Example 2

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Bad example: Kasey stated that she didn't think she had witnessed anything, but that I should check with her.



Neutral and clear correction: Kasey stated that Kasey did not believe that her roommate, Rebecca, had witnessed anything. Kasey asked the investigator to follow up with Rebecca to verify what, if anything, Rebecca witnessed.

## Example 3

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-  Bad example: Erin seemed nervous at the interview and wasn't consistent with the information.
-  Neutral and clear correction: Erin provided the following information at the interview: that Erin was at the party from 7-8, that Erin was not at the party at 7:30, and that Erin may not have been at the party.

## Example 4

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Bad example: Kevin requested that I follow up with his roommate, but I did not because the evidence seemed redundant.



Neutral and clear correction: Kevin requested the investigator follow up with his roommate. The investigator scheduled an interview with the roommate to follow up on any additional information the roommate may have. The roommate's account of events at the interview, provided in Exhibit C, is consistent with Kevin's statement regarding the time period between 12 and 2 on the date of the allegation. The roommate was not present outside of that time frame and had no additional information.



Questions?

# Thank you for attending!

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Remember – additional information available at:

**Title IX Resource Center** at [www.bricker.com/titleix](http://www.bricker.com/titleix)

Find us on **Twitter** at  
**@BrickerEdLaw**

**@ErinEButcher**

**Employment & Labor Law** at  
<https://www.bricker.com/industries-practices/employment-labor>