

Session 3: Investigating Title IX Complaints

Planning, Interviewing, and
Gathering Evidence Fairly and
Legally

OSPA Summer Retreat
July 28-29, 2025



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ECR SOLUTIONS
education civil rights

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About ECR Solutions

- Most educational administrators lack the time, specialized expertise, and staff to fully meet their institutions' civil rights obligations.
- ECR Solutions PLLC fills those gaps through holistic legal guidance, strategic consulting partnerships, and interim or external civil rights staffing.
- This support helps institutions manage legal risk, reduce the likelihood of public scrutiny, and uphold the rights of their communities.



WELCOME

Getting Education Civil Rights Right, The First Time

Expert services to help you understand civil rights laws and industry standards for K-12, higher ed, and beyond



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Reminders!

- This is not legal advice; contact me for specific help
- Training materials must be posted online
- Keep it hypothetical
- Ask questions
- Have fun!



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Work Alike Groups

- You should be seated with others **who serve in similar roles to you**
 - ✓ Title IX Coordinators/Deputy Coordinators (Intake & Coordination)
 - ✓ Investigators
 - ✓ Decision-Maker (Initial Decision)
 - ✓ Appeals Decision-Maker
 - ✓ Informal Resolution Facilitator
 - ✓ Other
- Each breakout group will examine the requirements covered **through the lens of their specific responsibilities**, allowing every attendee to understand how their role connects to the broader Title IX framework



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Agenda

- Investigator Training & Role in the Process
- Investigation Requirements & Best Practices
- Braving the Elements
- The Investigation Report & Relevant Evidence
- Recordkeeping & Decision-Making Role



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Training & Role in the Process



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Required Training

Investigator Required Training (covered in our Compliance Certification Training):

- ✓ What is "Sexual Harassment" under Title IX?
- ✓ What is the scope of the educational institution's "education program or activity"?
- ✓ What are the steps in the Title IX sexual harassment grievance process?
- ✓ How do you serve impartially without bias?



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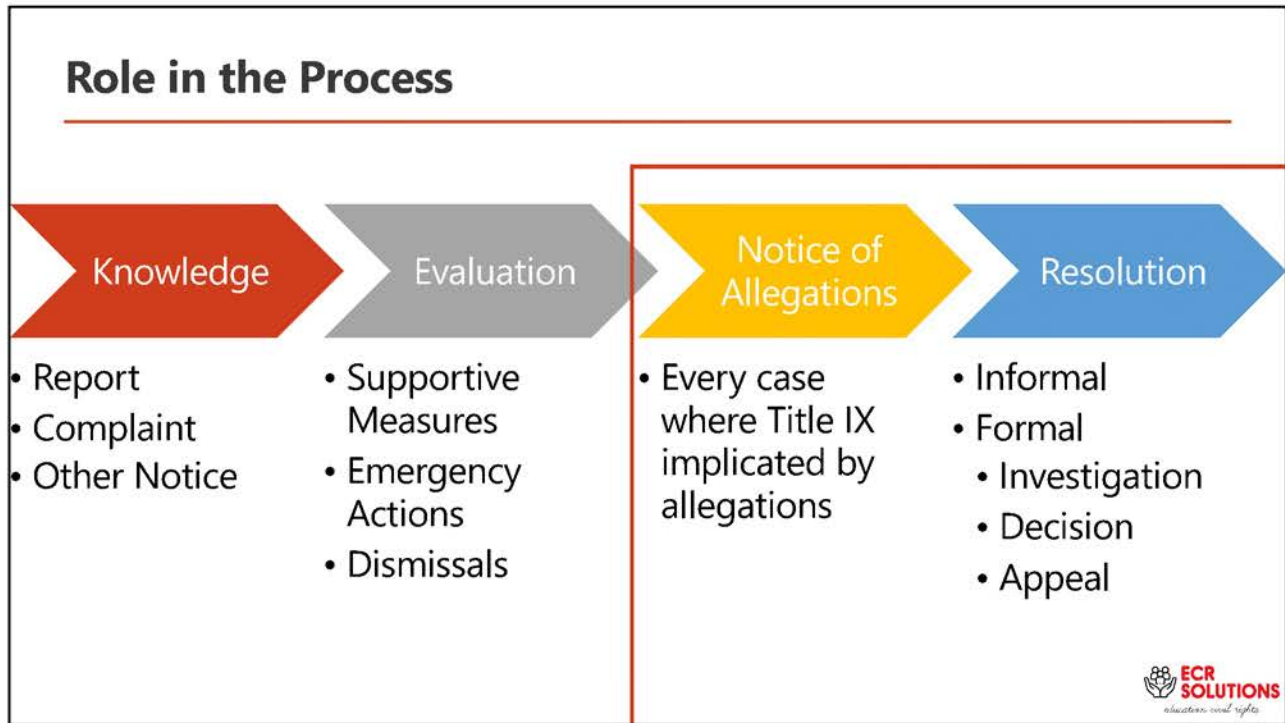
Required Training

Investigator Required Training
(covered in this training):

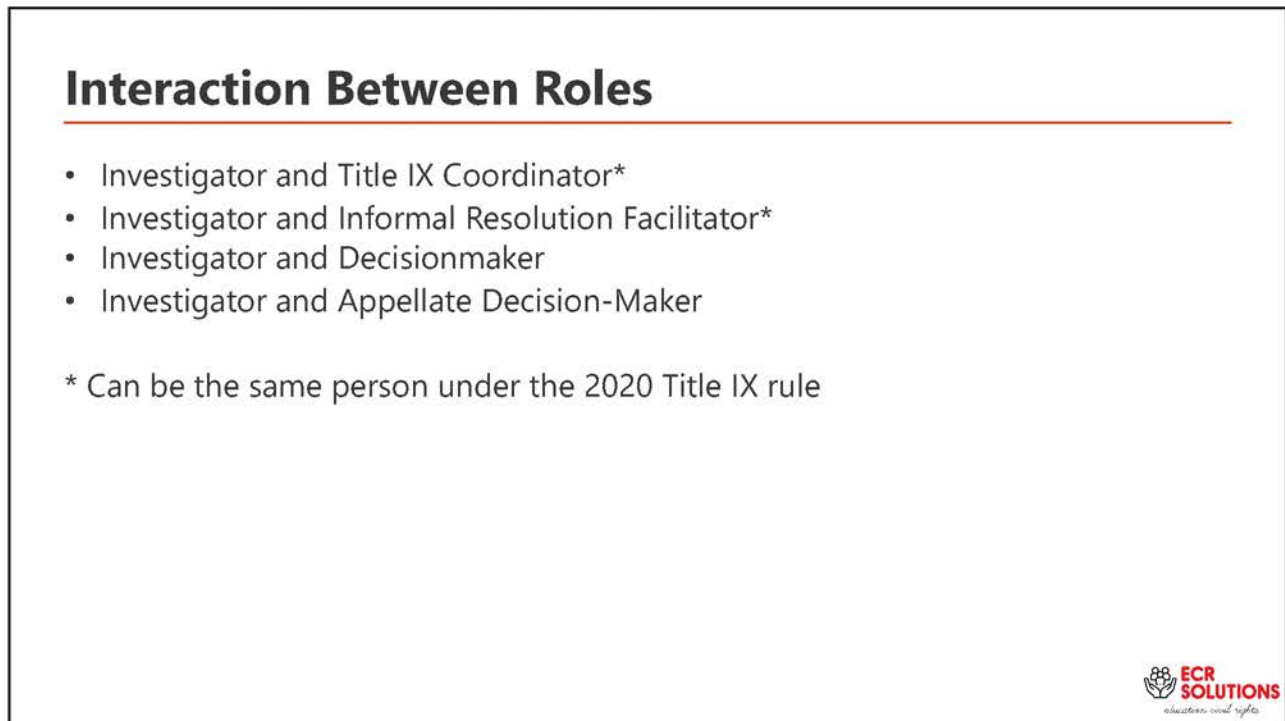
- ✓ How to conduct an investigation under Title IX
- ✓ Issues of relevance



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Work Alike: Interaction With the Investigator

How does
your role
interact with
investigators?



How should
it?



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Requirements & Best Practices



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Impartiality

Investigators should be free of any actual bias or conflict of interest that might hinder their ability to be impartial

Should also consider perceptions of bias or conflicts of interest

Investigators should not prejudge any matter before them



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Bias in Investigations

- Personal biases, whether conscious or unconscious, can influence an investigator's judgment, leading to partiality in gathering evidence, interviewing witnesses, and making determinations
- Example: An investigator might subconsciously give more weight to testimony from someone they perceive as more credible based on irrelevant characteristics such as gender, race, or socioeconomic status, and then not look for contradictory evidence as much as they otherwise might



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Conflicts of Interest in Investigations

- Investigators with a conflict of interest might have a personal or professional stake in the outcome of the investigation, which can compromise their impartiality.
- Example: An investigator who has a close relationship with one of the parties involved might inadvertently favor that party in their investigation.



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Prejudgment in Investigations

- Forming opinions about the case before all evidence is collected and reviewed can lead to a biased investigation and flawed conclusions
- Example: An investigator who assumes a respondent's guilt based on previous unrelated incidents might not thoroughly investigate exculpatory evidence



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Implied Requirements for Investigations



Use a preponderance of the evidence standard (technically allow clear and convincing, but not really)



Do not consider credibility during the investigation except as necessary to understand what evidence to probe/consider and what evidence is relevant



Oral notice is allowed many circumstances where notice is required to the parties, but ask yourself, how will I prove a communication occurred?



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INVESTIGATION

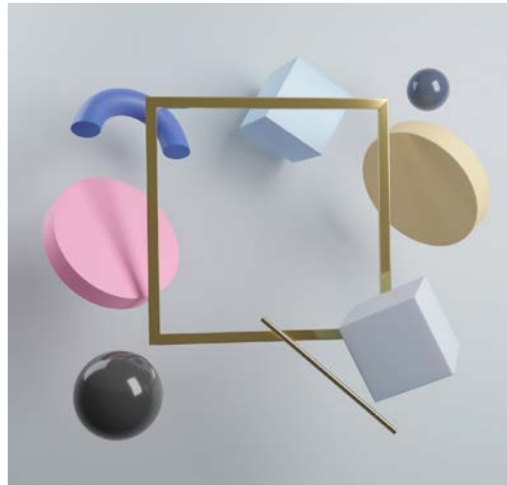
- Notice
- Planning
- Evidence Collection
- Interviews
- Sharing Evidence (Title IX)
- Report Writing (Title IX)
- Sharing Report (Title IX)
- Q&A Answers (Title IX)



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Framing the Investigation: The NOA

- Parties must receive a **notice of allegations** before a Title IX investigation begins
- Must include sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include, if known:
 - the identities of the parties involved in the incident
 - the conduct allegedly constituting sexual harassment, and
 - the date and location of the alleged incident
- The "NOA" must be supplemented if, during the investigation, the educational institution decides to investigate allegations that were not in the original NOA



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Investigation Planning

- What are the elements of the allegations?
- What are undisputed and disputed facts (this list will change over time)?
- Who will you talk to?
- What evidence is out there?
- Use your investigation plan to begin sketching out your facts as you go along



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Follow Your Policy(ies)

- Identify the conduct alleged to have occurred and determine if a policy or procedure applies to that type of conduct
- Follow steps in the process outlined in the policy or procedure as closely as possible
- You may have to follow *multiple* policies and *multiple* processes



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Big "I" and Little "i" Investigations


	Big "I" Investigation	Little "i" Investigation
Allegations	Serious, Broad, Serious Consequences	Less Serious, Narrow, Less Serious Consequences
Approach	Structured, Formal	Flexible, Informal
Speed	Slower	Faster
Manpower	More	Less
Documentation	Significant, Detailed	Minimal, Less Detailed



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Timing Tips


1 Be prompt	2 Set clear deadlines for case types	3 Follow deadlines set	4 Share timelines & expectations
5 Adjust for good cause	6 Notify of delays	7 Track actual time taken	8 Use data to adjust set deadlines



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Timeframes

Include reasonably prompt time frames for conclusion of the grievance process ... and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with **written notice** to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.



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Work Alike: Kindergarten Complaint Part 1

Review the “Kindergarten Complaint Part 1” document for Session 3

<https://tinyurl.com/OSPAT9Session1>

See specific work alike group questions in the document



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Collecting Evidence

- Burden of proof and of gathering evidence on the institution, not the parties
- Focus of investigation is on “relevant evidence” (not defined) but must share all “directly related evidence” collected during the investigation
- Three categories of evidence that is excluded from relevance



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Don't Ask, Don't Tell

- Privileged information
- Medical or psychological records or information
- Information about the Complainant's sexual predisposition or prior sexual behavior, unless
 - To prove that someone else engaged in the alleged conduct
 - Relates to interactions between the parties, to show consent



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Evidence Collection

- Preserve evidence that might be at risk of loss **early**
- Review and organize evidence available at the beginning of the investigation
- Consider preparing a chronology and case planning document
- Prepare witness outlines
- Finalize witness notes shortly after the interview
- Consider sharing finalized notes with parties and witnesses for review
- Ask parties and witnesses for potential evidence and witnesses—but remember the burden is on you to identify and collect what is reasonably available
- DON'T LEAD WITNESSES
- Be "trauma-informed" but don't be "trauma-lenient"
- Don't judge or make credibility determinations unless and until it's the time to do so



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What if the Police are Involved?

- Limited or temporary delay in timeframe is allowed, but not required
- Document, document, document



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Steps in the Investigation Process

- Notices of interviews to parties
- Notices of interviews to witnesses?
- Interview planning
- Conduct interviews
- Update investigation plan, considering factual and chronological gaps *considering the elements of the allegations and disputed/undisputed facts*



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General Investigation Rules

- Treat parties equally
- Burden of proof on the District
- No "gag orders"
- Advisors allowed
- Notice of interviews to parties

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Consider Party and Witness Warnings

- "Please be aware that while you have the right to discuss this case with others for authorized purposes, disclosing information can have significant consequences. Whether you intend it or not, widely sharing information can lead others involved in the case to feel retaliated against, which can lead to complaints. Sharing information before a party or witness's interview can also impact the credibility of parties or witnesses in the case. These actions could affect the investigation's integrity and impact the outcome of the case. We urge you to limit your disclosure of information and evidence obtained solely through the grievance process to only what is necessary to obtain and present evidence, consult with family, confidential resources, or advisors, prepare for grievance procedures, or participate in any administrative proceedings or litigation related to the complaint. If you have any questions, please contact me before sharing the information."



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Advisor Requirements

- Provide the parties the same opportunity to have others present
- Includes the opportunity to have an advisor of choice at any related meeting or proceeding
- The educational institution may establish restrictions regarding the advisor's participation if they are equally applied to the parties



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How do advisors positively and negatively impact the timing of Title IX investigations? How can you limit any negative impact?



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Impartial Investigations

- Do not discourage a party from submitting certain evidence
- Do not use terms like "victim" and "perpetrator"
- Do not use sex stereotypes
- Do not make credibility determinations (that's the decision-maker's job)



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Next Steps in the Investigation Process

- Directly Related Evidence
- Parties have 10 days to respond to the DRE
- Investigation report summarizing relevant evidence
- Parties have 10 days to respond to report



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Directly Related Evidence

Term is not defined

Think broadly—probably includes almost everything collected in the investigation

Responses to DRE are shared with the other party



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Evidence Sharing

Must send, in an electronic format or hard copy, to each party and the party's advisor, if any, **any evidence obtained as part of the investigation that is directly related** to the allegations raised in the formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source



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Party Response to Evidence

- The parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report



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Braving the Elements



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What are Elements?

- In the context of legal proceedings, including Title IX cases, the “elements” of a claim refer to the specific components or factors that must be proven to establish that a policy violation occurred
- The elements are different for different claims, e.g., hostile environment sexual harassment and stalking



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Example

"My brother stole my cookie."

Claim: Theft

Elements: (1) the unlawful taking (2) of the property of another (3) without their consent (4) and with the specific intent to permanently deprive the owner of that property.

Ownership: Is there evidence to support or refute that the cookie was mine in the first place?

Taking: Is there evidence to support or refute that my brother took the cookie?

Without Permission: Is there evidence to support that the cookie was taken without my permission?

Intent to Deprive: Is there evidence that my brother meant to deprive me of the cookie?



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Why Elements Matter

Elements serve as the building blocks of the case and provide a framework for understanding the nature and scope of the allegations from start to finish



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Evaluation

Evaluation: Could the alleged facts, if substantiated, violate a policy of the educational institution? How do you know? Look at **the elements** in the policy.

At the restaurant tonight I wasn't hungry after my meal, so I got a cookie to go. I left the cookie on the counter in the kitchen while I showered. The cookie was gone when I got out of the shower. When I asked my brother if he had seen the cookie, he said no. He had crumbs on his shirt when I asked him. I think he took and ate the cookie.



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Notice of Allegations

Notice of Allegations: The facts described in each allegation should match up with **each element** of the claim

The Complainant alleges that on July 29, 2025, the Respondent took and ate a cookie that belonged to the Complainant without the Complainant's consent.



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Notice of Allegations

Notice of Allegations: The facts described in each allegation should match up with **each element** of the claim

The Complainant alleges that on July 29, 2025, the Respondent took **[taking]** and ate **[intent to permanently deprive]** a cookie that belonged to **[property]** the Complainant without the Complainant's consent **[consent]**.



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Investigation

Notice of Allegations: The investigation should be focused on finding evidence related to any disputed element of the allegations

- The Respondent says that the cookie did not belong to the Complainant [property]
- The Respondent denies taking the cookie [taking]
- The Respondent denies eating the cookie [intent to permanently deprive]



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Investigation

Notice of Allegations: The investigation should be focused on finding evidence related to any disputed element of the allegations

- The Respondent says that the cookie did not belong to the Complainant [property]
 - What do the grandparents say about whose cookie it was?
 - What supports the parties' claims about ownership – what details can they provide?
 - Is there any documentation to show ownership



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Sexual Harassment (2020 Rule)

- Employee quid pro quo
- Sexual assault
- Domestic Violence
- Dating Violence
- Stalking
- Hostile Environment Sexual Harassment

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Employee Quid Pro Quo

- An employee of the educational institution
- Conditioning the provision of an aid, benefit, or service on
- A person's participation in unwelcome sexual conduct



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Employee Quid Pro Quo

- Is the Respondent an employee of the educational institution?
- Did the Complainant participate in conduct with the Respondent?
- Was the conduct sexual?
- Was the sexual conduct unwelcome?
- Did the Respondent condition an aid, benefit, or service on the unwelcome sexual conduct?



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Hostile Environment Sexual Harassment

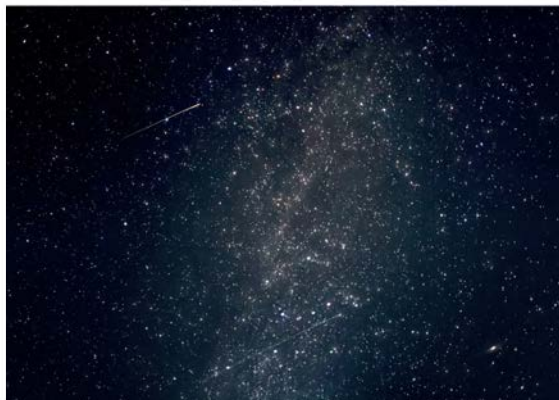
- Was there unwelcome conduct?
- Was it based on sex?
- Was it severe?
- Was it pervasive?
- Was it objectively offensive?
- Did it deny equal access to the education program or activity?



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Hostile Environment Sexual Harassment

- Impact on CP
- Type, Frequency, Duration
- Ages, Roles, Previous Interactions, Other Factors re Parties
- Location, Context, Control Over Respondent
- Other Sex-Based Harassment in the Ed Program or Activity



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Sexual Assault

Rape

- Was there sexual penetration of the Complainant?
- Was it by the Respondent?
- Was there consent?

Fondling

- Did the Respondent touch the private body parts of the Complainant?
- Was there consent?
- Was it for purposes of sexual gratification?



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Dating Violence

- Was there violence against the Complainant?
- Based on the length of the relationship, the type of relationship, and the frequency of interaction between the parties, was the violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant?



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Domestic Violence

- Was there a crime of violence against the Respondent?
- Would it be a felony or misdemeanor under state law?
- Is the Respondent a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim?
- If not, is the Respondent cohabitating, or has cohabitated, with the victim as a spouse or intimate partner
- If not, did the Respondent share a child in common with the Complainant, or
- If not, was the crime committed against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction?



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Stalking

- Was there a course of conduct?
- Was the conduct directed at a specific person?
- Would the conduct cause a reasonable person to fear for their safety or the safety of another?
- If not, would it cause a reasonable person to suffer substantial emotional distress?



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Retaliation

- Retaliation is taking an Adverse Action against a person because the person engaged in or might engage in Protected Activity.
- Evidence that may support a finding of Retaliation includes direct evidence, such as a statement from a decision-maker that expresses a retaliatory motive or express or admitted classifications explicitly distributing benefits or burdens based on engagement in Protected Activity.



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Retaliation

Absent direct evidence of retaliatory intent, OCRI examines the circumstantial evidence, typically asking the following questions:

- Did the Complainant engage in Protected Activity or did the Respondent believe the Complainant might engage in Protected Activity? If yes, ask:
- Did the Complainant subsequently experience an Adverse Action? If yes, ask:
- Is there some evidence that the Adverse Action was caused by the Protected Activity? If yes, ask:
- Do the context and circumstances support finding a legitimate, nonretaliatory reason for the Adverse Action? If no, there is sufficient evidence of Retaliation. If yes, ask:
- Is there sufficient evidence that the legitimate, nonretaliatory reason is a pretext for Retaliation? If yes, there is sufficient evidence of Retaliation



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Retaliation

- In evaluating claims of retaliation, you may also consider other circumstantial evidence to determine whether there was retaliatory intent underlying an action
- Such circumstantial evidence may include but is not limited to whether the impact of the action weighs more heavily on individuals who engaged in protected activity, whether there is a history of discriminatory conduct toward those who engage in protected activity, the administrative history behind a policy or decision, and whether policies or practices have been applied inconsistently to individuals who engaged in protected activity



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Peer Retaliation

- Was there unwelcome conduct?
- Was it based on a person's protected activity?
- Was it objectively offensive?
- Was it severe?
- If not, was it pervasive?
- Was it so severe or pervasive that it limited or denied the Complainant's ability to participate in or benefit from the recipient's education program or activity



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The Investigation Report & Relevant Evidence



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Investigative Report

Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response

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Investigation Report

- Fairly summarizes the “relevant evidence”
- Evidence is relevant if it makes a (1) **fact or issue in dispute** (2) **more or less likely to be true**



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Investigation Report

Conduct that is not relevant without written consent:

- Complainant's sexual behavior or predisposition unless used to show:
 - Someone other than RP committed the conduct
 - Past conduct between CP & RP to show consent
- Can't access, consider, disclose or use medical or psychological treatment records made/maintained re treatment
- Can't use questions or evidence that seek disclosure of legally privileged information unless waived



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Reports & Determinations

- For Title IX, the investigator only summarizes relevant evidence in a written report
- Look at your policy to understand what role the investigator plays, if any, in the investigation



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Work Alike: Report of Concern

Review the "Kindergarten Complaint Part 2" document for Session 3

<https://tinyurl.com/OSPAT9Session1>

See specific work alike group questions in the document



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Trauma Informed Investigations

- Do not use blaming, accusing, or judging language
- You can acknowledge the difficulty or both parties
- Use open-ended questions



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Trauma Informed Investigations

- Science shows trauma can have a neurological effect, particularly on memory
- Trauma can impact either party
- There is a difference between being trauma-informed and trauma-lenient – do not use apparent existence of trauma as *evidence* of alleged conduct

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Retaliation

The investigator should explain that retaliation is prohibited and will not be tolerated

Give examples of retaliation between parties

- Ostracizing someone
- Spreading rumors or gossiping



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Documentation

- Consider policy requirements for what documents must be maintained and for how long
- Even if documentation is not required, ask yourself "How would I prove that I did this later if there is a dispute?"
- Ensure that you obtain documents from external investigators



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<p>Session 3: Investigating Title IX Complaints</p> <p>Planning, Interviewing, and Gathering Evidence Fairly and Legally</p> <p>OSPA Summer Retreat July 28-29, 2025</p>	 <p>Thank You!</p> <p>Jackie Gharapour Wernz Attorney & Consultant jackie@educationcivilrights.com</p>  <p>ECR SOLUTIONS <i>education civil rights</i></p>
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Long descriptions

Figure on page 3

The image presents an agenda layout designed for a training session. It features a textured beige background with a structured format. At the top, there is a red horizontal line, indicating the title section. Below this, the agenda is divided into several colored sections, each representing different topics related to the training. The sections include a yellow box, a blue box, a green box, and a white box, each likely intended for specific content or discussion points. The agenda focuses on the roles of investigators and their responsibilities in record keeping and decision-making processes. The overall design emphasizes clarity and organization, facilitating easy navigation through the training topics.

Figure on page 4

In a bright, modern office space, two individuals are engaged in a collaborative activity at a whiteboard. One person, a man with a beard wearing a pink polo shirt, is reaching up to place a sticky note on the board. The other person, a woman with curly hair dressed in a patterned dress, stands beside him, observing the notes already on the board. The workspace features a wooden table with colorful markers and sticky notes scattered across it. Blue upholstered chairs are positioned around the table, and large windows allow natural light to fill the room, creating an inviting atmosphere for teamwork and brainstorming.

Figure on page 4

In a modern office environment, two individuals are engaged in a collaborative activity. One person, wearing a patterned dress, stands with their back to the viewer, observing as the other person, dressed in a pink shirt and blue pants, reaches up to place sticky notes on a whiteboard. The whiteboard is partially filled with colorful sticky notes, indicating a brainstorming or planning session. The room is well-lit, featuring large windows that allow natural light to flood in, and there are blue chairs around a wooden table, which has

markers and additional sticky notes scattered across its surface. This scene captures a dynamic and interactive work atmosphere.

Figure on page 6

The image features two large blue circles positioned on either side of a central arrow. The left circle contains the text, 'How does your role interact with investigators?' in white font. The right circle asks, 'How should it?' also in white font. The central arrow points from the left circle to the right circle, suggesting a transition or comparison between the current state of interaction and the desired state. The overall design emphasizes the importance of evaluating and improving the interaction between roles and investigators. The bottom right corner includes a small logo for ECR Solutions.

Figure on page 11

The image features the heading 'Follow Your Policy(ies)' prominently at the top, indicating a focus on adherence to established guidelines or principles. Below this heading, the caption 'W SOLUTIONS' suggests a discussion or presentation of various solutions related to the topic. Nearby, the words 'education civil rights' are displayed in a stylized font, reinforcing the themes of education and civil rights. This combination of text elements highlights the importance of policies in promoting and protecting civil rights within educational contexts. The layout suggests a structured approach to presenting these ideas, likely aimed at informing or guiding the audience on relevant policies and solutions.

Figure on page 18

The image features a traditional brass balance scale, prominently displayed against a smooth blue background. The scale consists of a central upright post with a horizontal beam extending from it. Two empty bowls are suspended from the beam by chains, one on each side, indicating that the scale is currently balanced. The bowls are circular and made of a dark material, contrasting with the shiny brass of the scale. The overall composition emphasizes the concept of balance and fairness, often associated with justice and legal

themes. The lighting highlights the metallic textures and creates a visually appealing effect, enhancing the focus on the scale itself.

Figure on page 25

The image features a close-up view of interlocking wooden puzzle pieces, showcasing their natural grain and texture. The pieces are arranged in a way that forms a cohesive pattern, emphasizing the interconnectedness of the elements. Overlaid on this background is the text 'Elements in Title IX Cases,' presented in bold, black font against a white banner with a red outline. This text serves as a title or heading, indicating that the content relates to the components involved in Title IX cases, which typically address issues of gender equity in education. The overall composition combines visual and textual elements to convey a thematic connection between the puzzle pieces and the complexities of Title IX.

Figure on page 36

The image depicts a group of small, wooden figures arranged in a semi-circle. Among them, one figure is red, while the others are white. This visual representation symbolizes the concept of retaliation, as discussed in the accompanying text. The text emphasizes that retaliation is prohibited and provides examples such as ostracizing someone and spreading rumors or gossiping. The red figure represents the individual who may be targeted or ostracized, while the white figures represent the group dynamics involved in such actions. This illustration serves to highlight the importance of understanding and preventing retaliation in interpersonal relationships.