



Title IX K-12 Training

Level 2: Report Writing for Investigators and Decision-Makers




Disclaimers



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

- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- We will send a copy of the slides after this presentation to all who registered their email address when signing in
- Feel free to submit questions - we will answer them at the end as time permits

Posting These Training Materials?



- Yes!
- Your Title IX Coordinator is required by 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 district electronically to post


Additional information available at:

Title IX Resource Center
at www.bricker.com/titleix

Find us on **Twitter** at
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Agenda



- Report process/timelines
- Writing the facts
- Jurisdiction
- Bias and conflicts of interest
- Relevancy
- Resolving credibility disputes
- The written decision
- Appeals

What is your role as investigator?



As you write a report keep in mind that you are **NOT** the decision-maker

Report Process and Timelines



- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
 - **Include the evidence you don't intend to rely on**
 - **Include inculpatory or exculpatory evidence whether obtained from a party or other source**
 - Purpose: allow each party to meaningfully respond to the evidence prior to conclusion of the investigation.

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Report Process and Timelines



- **Prior to completion of the investigative report**, you must send the evidence subject to inspection and review **to each party and the party's advisor**
- You must give the parties at least **10 days to submit a written response**
- **You must consider the responses prior to completion of the investigative report**

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Report Process and Timelines



- You must make all of the evidence subject to the parties' inspection and review available at any hearing

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Report Process and Timelines



- Create an investigative report that fairly summarizes relevant evidence
- Send it to each party and the party’s advisor for review and a written response **at least 10 days prior to a hearing** (if there is one) **or other time of determination regarding responsibility**

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Report Process and Timelines



- Before reaching a determination regarding responsibility, the decision-maker(s) **must afford each party:**
 - The opportunity to submit written, relevant questions that a party wants asked of any party or witness
 - The answers to those questions
 - Additional, limited follow-up questions

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Goals **Bricker Graydon**

- Write your interview summaries in narrative form so you can drop them into your report
- Be consistent in terminology
- Be clear as to the source of information – compare:
 - “Bob stated that this happened”
 - “This happened”

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Structure of an Interview Summary **Bricker Graydon**

- Who, when, where, via what medium?
- Did they have an advisor?
- Did you discuss your role? Their role?
- Did you discuss the prohibition on retaliation?

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Structure of an Interview Summary **Bricker Graydon**

- Background
 - How does this person connect with the parties and witnesses?
 - Age, year in school
 - Length of employment, position

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Structure of an Interview Summary



- Background
 - Monologue
 - Follow-up questions you ask, including responses
 - Evidence requested, evidence provided
 - Witnesses suggested

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Structure of an Interview Summary



- Know your policy and procedures
 - Interview summary is often more complete than what is included in report
 - May include information irrelevant to investigative decision, such as discussions about supportive measures

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Complete



- Include screenshots and other reference material directly in summary when possible
- Don't paraphrase a document when you can use direct quotes

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Unambiguous



- Could my mother pick up the report and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

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Relevant



- Is there extraneous information that is unnecessary to resolve the charges or credibility disputes?
- Is the extraneous information nevertheless appropriate to include?
- Does your report contain any information you are prohibited from including?
- Will the parties read this, and if so, will they focus on the wrong things?

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Sensitive



- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?

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Empathetic



- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
 - Clearly/obviously
 - Innocent/guilty
 - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

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Specific



- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like

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Editing Exercises



1. Respondent engaged in sexual intercourse with Complainant from behind.
2. Complainant couldn't explain why she was sitting on the couch by herself.
3. Respondent visibly winced when Complainant said "no."
4. John stated that Alice told him to "knock it off."
5. On a scale of 1 to 10, the witness described the Respondent as being a "level 4 kind of drunk."

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Editing Exercises



- 6. There was no evidence to support Complainant’s assertion that the activity was without consent.
- 7. During the mediation, Respondent admitted to the misconduct and promised not to do it again.
- 8. Professor Clark indicated that he had never known Respondent to commit sexual misconduct at 2:00 in the morning in the back of a bar before.

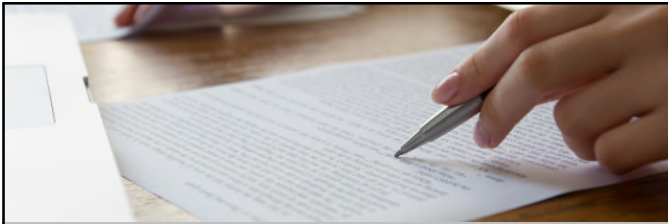
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Editing Exercises



- 9. Respondent stated that Complainant was diagnosed with bipolar disorder and that the complaint was “all in his head.”
- 10. When Respondent asked if Complainant wanted oral sex and Complainant said, “That’s OK,” that was indication of the Complainant’s consent.
- 11. Jane insinuated that Respondent changed her grade based on her report.

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Just the Facts: Synthesizing Evidence Into an Investigative Report

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Disclaimer



“This document is intended to be a summary of evidence and a description of what was learned through an investigation. Please refer to the full record, including [information shared in the hearing, and]* the contents of the [hearing packet] [exhibit packet].”*

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Basic Information



- Complainant
- Respondent
- Investigator
- When was the complaint made?

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Basic Information



- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses Interviewed
- Witnesses Not Interviewed (and why)
- Any procedural anomalies that need explained?

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Does Your Policy Require Witness Sign-Off?



- “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?

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Basic Information



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

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Applicable Policy Provisions



- Definition of prohibited conduct alleged
- Related definitions as appropriate (e.g. consent, substantial incapacitation)
- Include verbatim, in entirety

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Summary of Information



- Ways to arrange:
 - Chronologically
 - By witness summary
 - By allegation/topic

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Summary of Information



- Explain your structure
 - Example: "The information in this report is a summary of the facts. 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."

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Summary of Information



- Tell the story chronologically
 - How did the relationship start?
- Citations to the record – always
 - Be helpful for your fact-finders!
- Hearing packet or exhibits – helpful to number the pages sequentially for easy citation

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Summary of Information **Bricker Graydon**

- Give an overview of evidence collected
- Attach as appendices any statements and important evidence

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Summary of Information **Bricker Graydon**

- If you can, synthesize the information from multiple parties and witnesses
- Where the stories diverge:
 - "Information from [Complainant]"
 - "Information from [Respondent]"

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Summary of Information **Bricker Graydon**

- 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

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Summary of Information



- 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 decision-maker 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]."

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Summary of Information



- Undisputed Facts
 - Series of numbered sentences
- Disputed Facts
 - Series of numbered sentences
- Make sure you have facts for each element of each charge

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Make No Assumptions: Being Impartial, Avoiding Conflicts of Interest, and Bias

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Avoiding Pre-Judgment of Facts at Issue



- A good way to avoid bias and ensure impartiality: avoiding prejudgment of facts
- Each case is unique and different

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Considerations: Potential Responses to Trauma



- Delayed reporting
- Difficulty remembering specifics (could also be due to drugs/alcohol)
- Reluctant reporting
- Remaining in a relationship or living arrangement with the respondent
- Being calm and composed after an assault
- Failing to identify the accused

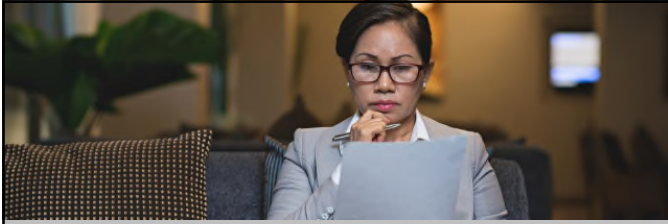
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Disclaimer



- Do **not** assume that because there are signs of trauma that the respondent caused the trauma and violated the policy
- Do **not** assume that because there are **no** signs of trauma nothing bad happened

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**More on Issues of Relevancy:
Not Rules of Evidence**

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Issues of Relevancy



- Relevant unless expressly touched upon in Regulations (p. 980):
 - Information protected by a legally recognized privilege
 - Evidence about complainant’s prior sexual history
 - Party’s medical, psychological, and similar records unless voluntary written consent
 - Party or witness statements that have not been subjected to cross-examination at a live hearing*

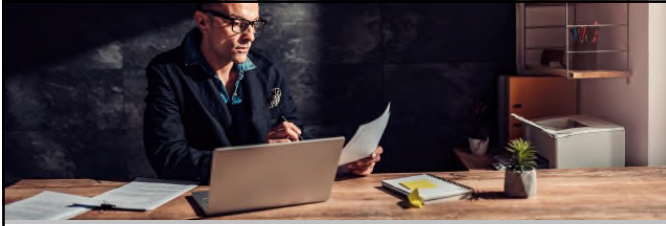
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Relevancy: Legally Privileged Information



- Preamble identifies medical and treatment records.
- Other typical privileges recognized across jurisdictions but with variations (will want to involve your legal counsel for definitions in your jurisdiction):
 - Attorney-client communications
 - Implicating oneself in a crime
 - Confessions to a clergy member or other religious figures
 - Spousal testimony in criminal matters
 - Some confidentiality/trade secrets

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Objectively Evaluating Evidence and Resolving Credibility Disputes

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Objectively Evaluating Relevant Evidence



- Preamble indicates that the decision-maker should be looking at consistency, accuracy, memory, credibility (p. 1060), implausibility, inconsistency, unreliability, ulterior motives, lack of credibility (p. 1111)
- Again, not making relevancy determinations beyond those expressly included in regulations
- Standard of proof and using it to guide decision

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Standard of Proof



- Standard of Evidence: Preponderance of the Evidence or Clear & Convincing
- Must use same standard for formal Title IX complaints against both students and employees (including teachers) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievances procedures, teacher conduct)
- Must begin with a presumption of no violation by Respondent

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**Recommended Considerations
for Resolving Conflicts**



- Statements by any witnesses to the alleged incident
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person’s account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

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**Recommended Considerations
for Resolving Conflicts**



- Evidence of the complainant’s reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

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**Recommended Considerations
for Resolving Conflicts**



- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

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Recommended Considerations for Resolving Conflicts



- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?

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The Written Decision

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Written Determination in 106.45(b)(7)(ii)



- Written determination **must** include:
 - Identification of the allegations potentially constituting sexual harassment
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held

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Written Determination in 106.45(b)(7)(ii)



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, **any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant**

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Written Determination in 106.45(b)(7)(ii)



- Institution's procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

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Final Checklist for the Decision Maker

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Final Checklist

1. Are there any additional procedural anomalies to be explained?



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Final Checklist

2. Is every element of every charge accounted for?



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Final Checklist

3. Is every relevant disputed fact resolved in the analysis?



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Final Checklist

- 4. Is there a clear connection between the **charges**, the **investigation**, the **evidence**, and the **conclusions**?



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Final Checklist

- 5. Would an unfamiliar reader be able to connect the dots?



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Bases for Appeal



- 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
- The 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
- A recipient may offer an appeal equally to both parties on additional bases

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Appeals **Bricker Graydon**

- As to all appeals, the recipient must:
 - Issue a written decision describing the result of the appeal and the rationale for the result
 - Provide the written decision simultaneously to both parties.

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Bricker's Title IX Toolkit
Available for download: k12tixtoolkit.bricker.com



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Bricker Graydon's Title IX K-12 Training Series



Level 1

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- Investigator
- Report Writing for investigators and decision-makers
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- Informal Resolution Facilitator

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Thank you for attending!

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