Braving The Elements: Identifying, Investigating, And Analyzing Claims Under Title IX

OSPA Summer Retreat
July 28-29, 2024

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Reminders!

- To post or not to post?
- This is a training on Federal Law
- This is not legal advice
- Keep it hypothetical
- Ask questions
- Have fun!

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Required Investigator Training (2024 Rule)

In this training:

- Required grievance procedures related to investigations
- The meaning of the term "relevant" in relation to questions and evidence
- The types of evidence that are impermissible regardless of relevance
- How to serve impartially

***All other required training covered in the first two sessions*

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Some Things Stay the Same (2020 & 2024 Rule)

- The investigation process is **separate from the decisionmaking process**
- Grievance procedures (including investigation procedures) must be in writing
- Grievance procedures must:
  - Incorporate the requirements of the Title IX Rule
  - Focus on **relevant** evidence
  - Provide for **an adequate, reliable, and impartial investigation of all complaints**
  - Include **basic and essential requirements for fairness and reliability for all parties**

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Relevance in Investigations

- The 2020 Rule does not define "relevant"
- The 2024 Rule defines "relevant" as "related to the allegations of sex discrimination under investigation as part of the grievance procedures. Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred. Evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

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Some Things Stay the Same (2020 & 2024 Rules)

- Conflict-of-interest and bias-free investigators (§106.45(b)(2))*
- Presumption that the respondent is not responsible until a determination is made (§106.45(b)(3))*
- Parties must be treated equitably throughout the entire Title IX process (§106.45(b)(1))*
- Burden on the recipient to gather evidence (§106.45(f)(1))*
- Prohibitions on use of evidence that is privileged, medical treatment records, or subject to the "rape shield" (with its limited exceptions) (§106.45(b)(7))*
- Reasonably prompt timeframes for all major stages, including the investigation (§106.45(b)(4))*
- Requirement to update the Notice of Allegations if any new allegations come up during the investigation (§106.45(c)(2))*
- Equal application of any additional provisions to the parties. (§106.45(j))*

citations to 2024 Rule

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Some Things Change

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Scenario

- You are the Title IX Coordinator or their designee for a new complaint recently made by a complainant student
- You want to get a jump start on your interviews before an upcoming long weekend trip, but you have not yet seen the Notice of investigation and you don't have time to send written notice of the interview

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When can you conduct a party interview under the 2024 Rule?

Any time after the NOA is delivered, with or without prior notice to the party — 0%

Any time after the NOA is delivered and the party has had sufficient time to prepare — 0%

Any time after the NOA is delivered and the party has been given notice and an opportunity to prepare for the interview — 0%

Any time after the NOA is delivered and the party has been given written notice and an opportunity to prepare for the interview — 0%

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Scenario

During your investigation, one party and one witness refuse to participate. You want to consider your options to require or encourage participation.

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Who can you require to participate?

Neither a party or a witness	0%
Any employee party or witness	0%
Any employee witness ✓	0%
Both a party or a witness	0%

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Party and Witness Participation

- Unlike the 2020 Rule, the 2024 Rule clearly allows educational institutions to compel witnesses who are employees or others who the educational institution has authorized to provide aid, benefit, or service under its education program or activity to participate in the Title IX process, saying that such a requirement is not retaliation
- No party can be compelled to participate in the process

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Impact of Refusal to Participate on Credibility

- The 2024 Rule does not dictate how K-12 schools should treat a party's or non-employee witness's refusal to participate with respect to assessing the weight of the party's statement
- Although not specifically in the rule, it is best practice not to draw an inference about whether sex discrimination occurred **solely** because a party or witness refused to participate

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Scenario

You are concerned about this case inciting gossip within the school community and want to consider how you can keep the parties from sharing information about the underlying issue

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Under the 2024 rules, OCR has swapped its "no gag order" rule from 2020 for

A requirement to stop parties from talking about the case at all — 0%

A requirement that the school take reasonable steps to protect privacy and prevent unauthorized disclosures — 0%

A requirement to allow the parties to talk about the case only if doing so does not impact the investigation — 0%

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Reasonable Steps to Protect Privacy and Disclosures (§106.45(b)(5), (f)(4))

The educational institution must take reasonable steps to protect privacy of parties and witnesses during the grievance procedures (§ 106.45(b)(5))

The educational institution must take reasonable steps to prevent and address unauthorized disclosures (§ 106.45(f)(4))

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Authorized Disclosures

Parties should not be prohibited from:

- Taking reasonable steps to obtain and present evidence, including by speaking to witnesses, subject to prohibitions on retaliation
- Consulting with their family members, confidential resources, or advisors
- Otherwise, preparing for or participating in the grievance procedures
- Disclosing information or evidence for purposes of administrative proceedings or litigation related to a complaint of sex-based harassment

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Examples of Steps to Protect Privacy

- Use private spaces for meetings
- Share information on a need-to-know basis with parties and witnesses
- Use pseudonyms or initials for parties and witnesses in notes and other documents (share full names with parties)
- Use secure sharing communication methods and sharing platforms
- Consider nondisclosure agreements
- Train employees on confidentiality protocols
- Warn parties and witnesses of risk of retaliation

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Steps to Address Unauthorized Disclosures

- Investigate allegations of unauthorized disclosures
- Provide support for affected parties
- Use school policies to address unauthorized disclosures

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Scenario

The respondent asks you to speak with an expert witness who the respondent believes can provide exculpatory evidence

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Under the 2024 Rule, parties no longer have the right to present

Inculpatory Evidence 0%

Exculpatory Evidence 0%

Expert Witnesses 0%

Fact Witnesses 0%

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The Right to Present Evidence (§106.45(f)(2))

- The investigator must provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence that are **relevant** and **not otherwise impermissible**
- Compare to the 2020 rules, which required that the investigator allow the parties an equal opportunity to present witnesses and evidence, including expert witnesses
- Nothing prevents a school from allowing expert witnesses, but it is important to do so equally between the parties in each particular case and across similarly-situated cases

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Scenario

- During the investigation, the respondent (a minor) asks to have an attorney join in all interviews
- The respondent's parents also want to join

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Regarding advisors and support parties, the 2024 Title IX Rule

Leaves the decision up to the school with no limitations — 0%

Leaves the decision up to the school as long as it is applied equally between the parties — 0%

Requires that parents of minor parties and other legal guardians be allowed to attend but school can decide on advisors as long as applied equally — 0%

Requires that parents of minor parties and other legal guardians and advisors be allowed in all cases — 0%

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Parents/Guardians & Advisors

- Like the 2020 Rule, parents of minor parties and legal guardians of other parties have the same rights as the parties themselves in the process, including rights to information and to attend meetings
- Unlike the 2020 Rule, the 2024 Rule does not require advisors or other support persons to be allowed

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Parents/Guardians & Advisors

- Schools can allow parties to have advisors and support persons but should do so equally between parties to a case and equally between similarly situated cases across the institution
- Schools can still put limits on parents/guardians, advisors, and support persons

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Scenario

During the investigation, the respondent's advisor—a lawyer—keeps rescheduling the respondent's interview because of court deadlines and appearances in other cases

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Are you required to grant the requests for extensions

Yes, you must grant any requested extensions under the 2024 Rule — 0%

Yes, but only if you determine that the requests are for good cause — 0%

No, you are not required to grant extensions under the 2024 Rule een for good cause — 0%

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Scenario

- During the investigation, the respondent wants to submit information about the complainant's prior sexual history or predisposition

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The 2020 "excluded" certain evidence, even if relevant; under the 2024 Rule certain evidence is

Unauthorized	0%
Inadmissible	0%
Impermissible ✓	0%
Irrelevant	0%

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Privileged Evidence

2020 Rule: Excluded Evidence #1

Cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

2024 Rule: Impermissible Evidence #1

- Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:
- Evidence that is protected under a privilege as recognized by Federal or State law, unless the person holding such privilege has waived the privilege voluntarily in a manner permitted in the educational institution's jurisdiction;

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Medical Treatment Records

2020 Rule: Excluded Evidence #2

Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, without the party's (or their parent's) written consent.

2024 Rule: Impermissible Evidence #2

Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:

(Health records) - A party's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party, unless the educational institution obtains that party's voluntary, written consent for use in the educational institution's grievance procedures; and

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"Rape Shield" Protection

2020 Rule: Excluded Evidence #3

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

2024 Rule: Impermissible Evidence #3

Exclude the following types of evidence, and questions seeking that evidence, as impermissible (i.e., must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:

(Sexual interests or conduct) - Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is offered to prove consent with evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent. The fact of prior consensual sexual conduct between the complainant and respondent does not demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred.

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Scenario

During the investigation, you learn that law enforcement is beginning an investigation into the same matter

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Should you delay to allow law enforcement to take charge?

Yes, you must delay if law enforcement is involved — 0%

Yes, you must delay, but only if law enforcement asks you to do so — 0%

Yes, you can delay if law enforcement asks you to do so, but only until law enforcement completes its initial evidence gathering — 0%

Yes, you can delay if law enforcement asks you to do so until law enforcement concludes its case — 0%

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Scenario

During the investigation, a minor party's parent/guardian disagrees with the student on an important decision-point

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Whose decision wins? The parent/guardian or the minor student?

The parent/guardian 0%

The student 0%

The investigator decides 0%

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Scenario

- You have completed your interviews of parties and witnesses and document collection

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What must be shared at the end of the evidence collection?

Access to copies of all directly related evidence 0%

Access to copies of all relevant and permissible evidence or an accurate description of the evidence with the option for any party to request the actual evidence 0%

Access to copies of all relevant and permissible evidence or an investigation report accurately summarizing that evidence 0%

Access to copies of all relevant and permissible evidence and an investigation report accurately summarizing that evidence 0%

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Relevant and Permissible Evidence (§106.45(b)(3)

- At the end of the evidence collection, the investigator must review all evidence gathered through the investigation
- The investigator must determine what evidence is relevant and what evidence is impermissible regardless of being relevant
- The rules do not require a specific way to document that decision other than by sharing the evidence or accurate description of the evidence at the next step

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Access to Evidence (§106.45(f)(4)(i)-(ii))

- The investigator must provide each party equal opportunity to access the relevant and not otherwise impermissible evidence or an accurate description of that evidence (and if they provide access to a description, they must provide access to the underlying evidence upon the request of any party)
- The rules require an investigative report accurately summarizing the relevant and permissible evidence in the higher education context, so we know that is not required here
- The parties must be given an opportunity to respond to the evidence or accurate description in writing before the investigation ends

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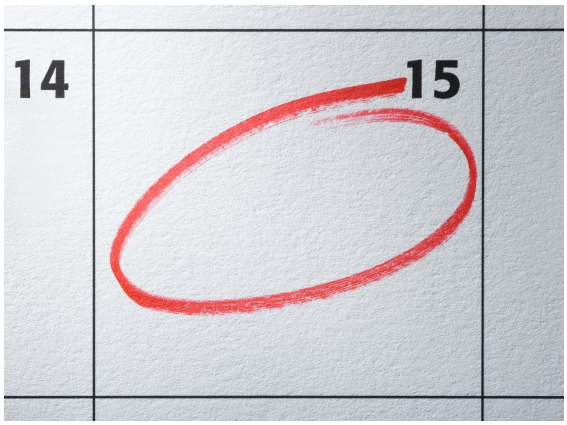
Scenario

You are ready to provide access to the evidence to the parties and want to include the deadline for response in the cover communication



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How much time must the investigator give the parties to respond to the evidence or accurate description

10 calendar days 0%

10 business days 0%

The educaitonal institution decides 0%

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How much time must the investigator give the parties to respond to the evidence or accurate description

10 calendar days 0%

10 business days 0%

The educaitonal institution decides 0%

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Response to Evidence (§106.45(f)(4)(ii))

- The educational institution must provide a reasonable opportunity to respond to the evidence or to the accurate description of the evidence
- Remember, the educational institution must take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance procedures
- Disclosures of such information and evidence for purposes of administrative proceedings or litigation related to the complaint of sex discrimination are authorized

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Serving Impartially

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Bias, Conflicts of Interest, and Prejudgment

- Both the 2020 and 2024 Rules require Title IX team members to be impartial
- Let's look at some examples Title IX Investigators might face

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Impartiality Concerns in Title IX Investigations

- Tendency to seek, interpret, and remember information that confirms existing beliefs or hypotheses (confirmation bias)
- Preconceived notions or attitudes about individuals or situations based on personal beliefs or experiences
- Unconscious attitudes or stereotypes that affect understanding, actions, and decisions
- Situations where personal interests might influence professional judgment (e.g., based on a relationship with a party or a witness)

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Avoiding Impartiality Concerns in Title IX Investigations

- Regularly participate in bias awareness and mitigation training.
- Follow standardized investigation procedures and checklists
- Engage in peer review of findings and decisions
- Regularly reflect on personal attitudes and behaviors, seeking feedback from colleagues
- Maintain transparency in the investigative process, documenting all decisions and actions taken (SHOW YOUR WORK)

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Don't Forget Your Records & Trainings

- Under both the 2020 and 2024 Rules, educational institutions must maintain records related to Title IX cases for no less than 7 years
- The 2020 Rule requires posting of all trainings for Title IX Team members (including these!) on your educational institution's website
- The 2024 Rule would only require that the training materials be maintained and made available if requested (you can still post online but are not required)

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Questions?

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