



Not Your Ordinary Investigation: Special Rules for Title IX Investigations

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BASIC TERMS

- **Complainant** is an individual alleged to be the victim of conduct that could be sexual harassment.
- **Respondent** is an individual alleged to have engaged in conduct that could be sexual harassment against the Complainant.
- Each is referred to as a **Party**

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SEXUAL HARASSMENT*

1. Quid pro quo
2. Hostile environment
3. Sexual assault, dating violence, domestic violence, stalking

Severe, pervasive, and objectively offensive

*In a school program or activity in the United States

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WE BEGIN WITH DEADLINE ISSUES:

- If the incident could be **child abuse**, it must be reported to CPS or law enforcement (note new definition) within **24 hours**. FFG(LOCAL)
- Do we need to notify TEA/SBEC within **48 hours**?

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CONFIDENTIALITY

- Pre-2020 OCR guidance instructed schools to investigate even when the Complainant did not want the school to investigate.
- The 2020 regulations obligate schools to initiate the grievance process when a Complainant files or a Title IX Coordinator signs a formal complaint, so that the Title IX Coordinator takes into account the wishes of a complainant and only initiates a grievance process against the complainant's wishes if doing so is not clearly unreasonable in light of the known circumstances.

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CONFIDENTIALITY OF COMPLAINANT'S IDENTITY

- A Complainant can report anonymously.
- A Complainant cannot file a Formal Complaint anonymously.
- Filing a Formal Complaint means the Respondent will know the Complainant's identity.
- People outside the grievance process should not know the Complainant's identity, unless disclosure is permitted by FERPA (student), required by law, or as necessary to conduct the grievance process.

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ASSIGNS AN INVESTIGATOR

- Must be someone other than Decision-Maker or Facilitator of Voluntary Resolution
- Title IX Coordinator is not prohibited but not best choice
- Campus administrators
- Central administrators
- Outside investigator
- Train more than one
- Can assign more than one investigator/team

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WHO SHOULD INVESTIGATE ?

- No axe to grind with the Complainant or Respondent
- No bias
- Must be trained
- Not involved in any incidents that prompted the investigation
- Not someone under the supervision of the Respondent, if employee

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ASSIGN AN INVESTIGATOR

Training must cover:

- impartial investigations
- standards of evidence
- how to equitably and meaningfully include both parties in the process including inculpatory and exculpatory evidence
- how to write an investigative report
- the role of expert witnesses
- legal privileges

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REMEMBER YOUR SCOPE

- Unlike with most investigations, the Title IX Investigator will not be making the decision about whether the prohibited conduct occurred.
- That role is reserved for the Title IX Decision-Maker, which cannot be the Investigator.
- As a result, your investigative report will not contain the ultimate determination.
- So, keep that in mind during the investigation and when writing your report.
- Because the Decision-Maker will be relying on your report, make sure it expresses what it needs to.

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IMPARTIALITY

- Unbiased, disinterested
- No conflict of interest: a real or seeming incompatibility between one's private interests and one's public duties

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STANDARDS FOR RECUSAL OF JUDGES

1. Personal bias or prejudice concerning a party
2. Personal knowledge of disputed evidentiary facts
3. Material witness in the matter in controversy
4. Spouse or minor child residing in household has a financial interest in the subject matter in controversy or in a party
5. Any other interest that could substantially affect the outcome of the proceeding
6. Relative is a party

28 U.S.C. §455
(Disqualification of federal justice, judge, or magistrate).

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STANDARDS FOR RECUSAL OF JUDGES

Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

Rippo v. Baker, 137 S.Ct. 905 (2017).

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STANDARDS OF EVIDENCE

- The degree or level of proof demanded in a specific case.
- District choice by policy: preponderance of evidence, clear and convincing evidence

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PREPONDERANCE OF EVIDENCE

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

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CLEAR AND CONVINCING EVIDENCE

- Evidence indicating that the thing to be proved is highly probably or reasonably certain.
- This is a greater burden than preponderance of evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.

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EQUITABLE TREATMENT OF PARTIES

- Providing remedies to Complainants where a determination of responsibility for sexual harassment has been made
- Following a grievance process before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a Respondent for sexual harassment
- Presumption that Respondent is not responsible for the alleged conduct until the conclusion of the grievance process

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EQUITABLE TREATMENT OF PARTIES

- Not making credibility determinations based on a party's status as a Complainant, Respondent, or Witness
- Not restricting the ability of either party to discuss "the allegations under investigation" or to gather and present relevant evidence

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EQUITABLE TREATMENT OF PARTIES

- Equal opportunities for supportive measures
- Equal opportunity to review evidence
- Equal opportunity to present witnesses and other evidence
- Objective evaluation of evidence
- Considering inculpatory and exculpatory evidence

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EVIDENCE: INCULPATORY & EXCULPATORY

- **Inculpatory evidence:** showing or tending to show one's involvement in a crime or wrong
- **Exculpatory evidence:** tending to establish a person's innocence

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INVESTIGATOR: Initial Steps

- Confirm whether allegation reported to CPS/law enforcement, if appropriate
- Find out whether there is an on-going criminal/juvenile investigation

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LAW ENFORCEMENT INVESTIGATION

- The District may abate* its investigation **temporarily**, if requested by law enforcement officials.
- **Document the request.**
- **Get a timeframe.**
- **Check with law enforcement on a weekly basis to determine status of investigation.**



*May also want to temporarily abate for voluntary informal resolution process.

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INVESTIGATION TIMELINES

- The regulations do not dictate any timelines for initiating or completing investigations.
- They should be initiated and completed **promptly**.
- It will depend on the nature of the allegations and scope of the investigation.

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NOTICE TO PARTIES

The parties will have been sent a notice from the Title IX Coordinator:

- Grievance process
- Informal resolution options
- Details of allegations
- Identity of the parties
- Date/location of alleged incident(s)
- Statement that Respondent is presumed not responsible
- Right to an Advisor, who may be, but is not required to be, an attorney

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NOTICE OF INTERVIEWS

Party whose participation is invited or expected is entitled to written notice of the following for any meeting in the grievance process, including interviews, with sufficient time to prepare:

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



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NOTICE OF INTERVIEWS

- Parties may be accompanied by an advisor to interviews/any meeting in the grievance process that they are expected to participate.
- Students may have a parent and an additional advisor.

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CONFIDENTIALITY OF PROCESS - PARTIES

- Schools cannot prohibit parties from discussing the “allegations under investigation” or from gathering their own evidence.
- This does not apply to information that does not consist of “the allegations under investigation,” (e.g., the evidence provided to the parties or the investigative report).

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PARTY EVIDENCE

- Parties have the right to submit their own evidence (e.g., text messages, photographs, medical reports, psychological reports).
- Parties should be told that any evidence submitted will be shared with the other party.

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ROLE OF EXPERT WITNESSES

- Expert witnesses in Title IX K-12 investigations can provide specialized knowledge on the standard of care, federal and state laws, and investigative procedures to help school officials understand complex issues.
- They are more often used in collegiate proceedings

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LEGAL PRIVILEGES

- You are not permitted to 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.
- So, don't ask questions that will invade:
 - Attorney-client privilege
 - Physician-patient privilege
 - Spousal privilege
 - Clergy-penitent privilege
- And don't press if a Party or a Witness refuses to answer on this basis

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INTERVIEWING WITNESSES

- No one can be required to participate in an investigation.
- The regulations prohibit retaliation against any person for participating or refusing to participate in a Title IX proceeding.

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WITNESSES

Witnesses are not entitled to written notice before being interviewed or to be accompanied by a parent/advisor.

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RESEARCH BEFORE INTERVIEWING

- Review the policy and be familiar with the burden of proof and definition of sexual harassment
- Who are the parties?
- Employee? History....time with the District?
- Student disciplinary history?
- Relationship between the parties?
- Prior complaints?
- Prior claims made by others?

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But avoid prejudgment of the facts at issue

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LOOK AT DOCUMENTS YOU HAVE

- Discipline records
- Academic records
- Personnel records
- Correspondence between Complainant and Respondent

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MAKE DECISIONS ON NOTE-TAKING AND RECORDING

- Who takes the notes?
- Do we sign the notes?
- Do we want to record?
- Be consistent.
- Test your equipment.

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OPEN YOUR FILE



- **Assign a case number, if not already**
- All notes, memoranda, written statements, letters, policies, and other matters related to the investigation should be in the file.
- File should be marked as “**CONFIDENTIAL.**”
- **Access must be limited.**

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INTERVIEWING

- Generally, meet with the Complainant first.
- Provide enough time.
- Make it a neutral area.
- Do not rush. Remember this may be embarrassing.
- You want as much detail as possible. Provide time to think and opportunity to return.
- Tell them there will be no retaliation and to report any retaliation to you immediately.

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WRITTEN STATEMENT

- Determine whether age/developmentally appropriate to obtain a written statement from a student.
- Written statements:
 - Shows seriousness
 - Helps assure later testimony
 - Solidifies testimony
 - Helps determine requested outcome

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QUESTIONS FOR THE COMPLAINANT

- What happened – exactly?
- When – date and time?
- Where – specific (room, trip, outdoor)?
- Happen online?
- Why were you and this other person together?
- What happened or was said just before?

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QUESTIONS

- What exactly was said?
- What was the tone?
- Expression when said?
- Gestures or motions?
- Touch you in anyway?
- Did you touch them?

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QUESTIONS

- Can you describe the type of touching?
- What did you say in response to any touching?
- How did the words or conduct make you feel?
- Have you had conversations or interactions with this person before?
- Was the tone or atmosphere different?

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QUESTIONS

- How long have you known the person?
- Was anyone else present?
- Who?
- Have you told anyone else about this?
- Who, and when, and what did you say?
- Has anything similar happened before?
- If yes, ask the same type of questions about each prior incident.

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QUESTIONS

- Do you have any written documentation?
- Anything on social media such as Instagram, Snapchat, Facebook, X, or other evidence for me to review?
- Are there any other individuals you would like me to interview?

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REMEMBER:

- **Do not ask about prior** sexual behavior or sexual predisposition, unless to establish that another person committed the alleged conduct or that the conduct was consensual

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THOROUGHNESS

- **Do not interview only the Complainant and the Respondent.**
- Who else was there? [Corroboration]
- Who else knows about this? How? [Contemporaneous discussions]
- Is there anyone else you would like me to interview about this? [Thoroughness; other victims]
- Are there any other documents you would like me to review?
- Must thoroughly document procedures

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QUESTIONS FOR CORROBORATING WITNESSES

- Where were you at on (fill in the date and time of the incident as alleged)?
- If online – have you seen the online material?
- Who else was there at the time, or does anyone else know about this?
- Did you see the parties in that place or at that time?
- Did you see or hear any interactions/conversations between the parties?

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QUESTIONS FOR CORROBORATING WITNESSES

- Please tell me in your own words what you saw or heard.
- What exactly did you hear – the precise words?
- What exactly did you see – and from how far/angle/obscured?
- How did complainant look?
- Did the respondent make any motions or gestures?
- What response did you see or hear from the complainant?

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QUESTIONS FOR CORROBORATING WITNESSES

- What impressions do you have about what you saw or heard?
- Do you have personal knowledge of prior interactions?
- Do you know either party? How well, and in what capacity?
- How long have you known either?
- Is there any current or former relationship with either?
- Do you have opinions about trustworthiness? What led you to that opinion?

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QUESTIONS FOR CORROBORATING WITNESSES

- Do you know either of the parties?
- How well do you know them?
- How do you know?
- Is there an official relationship?
- Description of their character, personality, nature?
- Know of any similar past events?

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QUESTIONS FOR CORROBORATING WITNESSES

- Have you observed either or both interact with persons of different sex?
- What were your observations or impressions?
- Do you know if either is generally truthful or deceptive?
- Do you know anyone else that may know about any of these issues?
- Have you heard others talking about it – who?

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ISSUES FOR STUDENTS

- Do not need parental consent to interview
- Written consent is needed when recording (A/V) a student interview related to an investigation. See Tex. Educ. Code §26.009.


*Including recording a video conference that is not related to a regular classroom purpose.

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ISSUES FOR STUDENTS

- Consider interviewing in environment comfortable to them
- Classroom or library, other than office
- Who will be present?

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ISSUES FOR STUDENTS

- Involve the professionals on campus when appropriate and able.
- Do not ask leading questions: Isn't it true that you did X because of Y?
- What did you do? Why did you do it?
- Consider audio recording with consent if child cannot write statement.

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ISSUES FOR STUDENTS

- Never interview together
- Always take students one at a time - protects against duplication, false memories
- Provides a clearer picture of events
- If parents present, set the ground rules – silent observer, cannot lead, sits behind student.

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ISSUES FOR STUDENTS

- Start with small talk* – developing trust
- Learn what the student has told others about incident
- Determine how others have reacted
- Ask questions many times in different ways
- Don't have an agenda. Students often say what they think you want to hear.

*The investigator should assess the credibility of witnesses, so observe how witnesses respond to simple questions to learn the baseline of behavior of a witness.

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INTERVIEWING RESPONDENTS

- Do you know the Complainant?
- How and for how long?
- What type of relationship, conversations, interactions in the past?
- Where were you on the date and time alleged?
- Why were you there?
- Who else was there?

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INTERVIEWING RESPONDENTS

- Was the Complainant there?
- Did you do or say anything in relation to the Complainant?
- What exactly did you say or do?
- Tone of voice?
- Did you make any gestures or motions while speaking? What type? Show me.

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INTERVIEWING RESPONDENTS

- What did the Complainant say or do then?
- Did they make any gestures or motions? What? Demonstrate.
- Did they say or do anything in response to your statements or actions? What?
- Expression on his/her face?
- Did you touch them in any way? Demonstrate how.

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INTERVIEWING RESPONDENTS

- How did the words or conduct overall make you feel?
- Have you talked to anyone else about this matter?
- Who, when, where? Do you mind if I talk to them?
- Do you have anything else that you feel is important for me to know?
- Would you do the same thing if you were in front of your parent/grandparent/the principal?
- How would you feel if something similar happened to your younger sister/brother?

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THINGS TO TELL ALL WITNESSES*

We will try to keep this confidential, but we cannot guarantee.
You should not speak to others about what we have discussed.
Remind all about the anti-retaliation provisions.

*Remember that Parties (as opposed to Witnesses) cannot be prohibited from discussing the allegations raised in the Complaint.

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BODY LANGUAGE

- Read the body language and demeanor
- Rate of speaking
- Volume of speaking
- Stuttering
- Getting sidetracked
- Avoiding questions



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BODY LANGUAGE

- Not answering the question asked
- Hands – moving, still, tapping?
- Feet?
- Playing with anything?
- Arms crossed?
- Standing up? Moving around?



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BODY LANGUAGE

- Eye contact?
- Head movement when speaking?
- Changes in patterns when changes in subjects or persons?
- Off the baseline?



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DISCOMFORT SIGNALS

- People under stress give tells:
 - Rubbing neck when asked a question, pulling on collar
 - Touches hair
 - Touches mouth
 - Looks away
 - Touching neck dimple
 - Presses or strokes legs or arms, tapping
 - Chew gum, play with objects, jewelry, play with pencil
 - Yawning can be a sign of stress –dry mouth

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DISCOMFORT SIGNALS

- People under stress give tells:
 - Tightening of jaw muscles
 - Flaring of nose wings
 - Crinkle of nose
 - Squinting of eyes
 - Quivering of the mouth
 - Stiff neck, no head tilt

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DEALING WITH HOSTILE PEOPLE



- People may become hostile or confrontational when talking about uncomfortable things.
- Appreciate and respect hostility – especially in parents.
- Understand where their concern comes from.
- Also understand that such behavior is ultimately counter-productive.

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DEALING WITH HOSTILE PEOPLE

- Do not respond in kind
- Think and talk positively
- First impressions are critical
- Show you are listening by repeating
- Speak softly, and they may do the same
- Give praise where you can

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DEALING WITH HOSTILE PEOPLE

- Acknowledge frustration
- Take time-outs
- Don't allow things to get personal
- Walk away when you need to

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DEALING WITH HOSTILE PEOPLE

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NEXT STEPS

- After interviewing the witnesses, **re-interview** Complainant for clarification, if necessary.
- Gather **physical evidence**, visit incident site(s), review discipline and other relevant records of parties and witnesses.
- Review statements or reports from **expert witnesses**, if any.
- Allow parties access to **facilities** to gather evidence, if requested.

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NEXT STEPS

- Organize evidence to share with parties.
- **Prior to completion of the investigative report**, the Investigator must **send an electronic or hard copy of the relevant evidence** gathered to the parties and the parties' advisors, if any.
- Parties must be provided **at least 10 calendar days** to submit a written **response** that the investigator must consider before completing the investigative report.
- Then you will complete an **investigative report** that summarizes relevant evidence. The report may include proposed findings of fact.
- More to come from Andrea about **report writing**.

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NEXT STEPS

- Send the investigative report to Decision-Maker, who will send it to the parties and give them an opportunity to ask questions of the other parties.
- The investigative report must be sent to the parties at least 10 calendar days before the Decision-Maker determines responsibility.
- The evidence may be provided using a platform that prevents downloading and copying to protect the confidentiality of information about students or victims of sexual offenses.

THANK YOU



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