Advanced Title IX Investigator Training and Certification

Welcome & Faculty Introductions

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RESOURCES

Welcome to Zoom and its features:

A. Mics (keep muted please)
B. Camera (option to keep on or off)
C. Chat Box
   • Use to ask questions or respond
   • Send Rabia a private message for anonymous questions
   • To find downloadable files during the presentation
   • To send private messages to each other or host
D. Recording (for quality purposes only – not for distribution)
E. Participant List with Emoji’s
   • Change name option (hover over your name, select “more” then “rename” to change your name)
Overview of this Virtual Training

After participating, you will be able to effectively investigate complex sexual harassment and sex discrimination cases.
Disclaimer

The information provided in this training does not, and is not intended to, constitute legal advice. Instead, all information, content, and materials available during this training are for training and general informational purposes only.
AGENDA

March 25, 2021

1. Understanding Witness Testimony Challenges
2. Confronting Interviewing Challenges
3. Small Group Activity: Mock Interviews
4. Stages 3&4: Compile and Assess for Relevance
5. Stage 5: Drafting the Investigation Report
6. Testifying at the Hearing
7. Final Q&A and Conference Wrap up

Welcome AI Members!

Agnes Scott College  North Carolina State University
Alamo Colleges District  North Hennepin Community College
Baylor University  Northwest College
Case Western Reserve University  Norwich University
Clarke University  Saint Leo University
Colorado State University – Pueblo  Sam Houston State University
Eastern Kentucky University  San Jose State University
El Camino Community College  State Technical College of Missouri
District  The Alamo Colleges
Fayetteville State University  Tri County Technical College
Flagler College  Troy University
Grand Valley State University  Truckee Meadows Community College
Humboldt State University  University of California, Santa Barbara
Kentucky State University  UH Maui College
Iowa Wesleyan University  University of Denver
Lee College  University of Nevada, Las Vegas
Loyola University Chicago  University of Nevada, Reno
Macalester College  University of Phoenix
Marquette University  Western Carolina University
Mills College  Wichita State University
Morgan State University  Yavapai College
Meet Your Expert Faculty

Cara Hardin, J.D.
Title IX Deputy Coordinator
Marquette University
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christine.taylor@wichita.edu

#1
The New Era of Title IX Investigations
Investigative Process: 30,000-foot overview

Grievance Process (generally)

• The filing of a formal complaint of sexual harassment triggers the grievance process set forth in §106.45.

• The § 106.45 grievance process includes:
  - Investigation conducted by a neutral, objective investigator(s)
  - Live-hearing providing for cross-examination by the advisor for both parties
  - Appeal

Investigative Process – 1 to 3

1. Formal complaint filed.

2. Title IX Coordinator assigns a trained neutral/unbiased investigator to investigate the allegations.

3. Notice of Allegations sent to Parties. §106.45(b)(2)
Investigative Process – 4, 5, and 6

4. Investigator requests and conducts interviews with the complainant and respondent.
   - Interviews may be conducted virtually!

5. Investigator requests and obtains physical evidence.

6. The parties have equal opportunity to present witnesses and evidence.
   - The investigator may independently identify and interview witnesses and obtain evidence other than offered by the parties.

Investigative Process – 7 and 8

7. When the investigator finishes gathering the available evidence, the investigator compiles all the information “directly related to” the allegations raised in the formal complaint into the “Investigative File.” §106.45(b)(5)(vi)

8. The investigator sends the parties and their advisor the “Investigative File” for review and response.
   - Party written responses are attached to the Investigative File and shared with other party and their advisor.
   - If responses offer new evidence, investigator may want to give the other party a brief period of time to respond—but only to the new evidence.
Investigative Process – 9 and 10

9. Investigator drafts an “Investigative Report” that fairly summarizes the relevant evidence and sends it to the parties and their advisors for review and response.

➤ Parties may submit a written response to the Investigative Report, which will be shared with the other party and their advisor and attached to the Investigative Report. §106.45(b)(5)(vii).

10. Down the road... Investigator likely testifies at the hearing. May be called as a witness by either party or decision-maker(s).

Investigative Process – Drop the Mic!
Rights of the Parties within the Investigative Process 
(see handout)
As an investigator, what gaps in the law have you identified, experienced, or foresee?

Do you have ongoing concerns about how to conduct investigations under the Final Regulations?
#2

Introduction of the Five Stages of the Investigation and Scenario

What does it mean to “investigate?”
Investigative Process: Evidence

To investigate a formal complaint is to gather the information (evidence) pertaining to the allegations in the formal complaint, including:

- Inculpatory information that tends to show the allegations are true, and
- Exculpatory information that tends to show the allegations are not true.

Examples of Evidence

Example of inculpatory evidence:

After the alleged sexual misconduct occurred, the respondent sent a text message to the complainant stating, “I’m sorry, I should have listened when you said no.”

Example of exculpatory evidence:

The respondent is tall with short hair. The video from the scene of the alleged misconduct shows that the perpetrator is short with long hair.
Investigative Process: Five Stages

1. Prepare
2. Gather
3. Compile
4. Assess for relevance
5. Summarize relevant evidence

Scenario

On October 31, 2020, Hall Director Mary Martin contacted the Title IX Coordinator to report an incident potentially falling under the University’s Sexual Harassment and Discrimination Policy (the “Policy”). Mary explained that Foster-Harper resident, Alex Arata, approached her about an altercation she observed involving another Foster-Harper resident, Bailey Benson. Alex shared the following information with Mary.

On October 31, 2020, around 6:15 p.m., Alex walked from his residence hall room to the bathroom on the 5th floor of Foster-Harper. As Alex passed the 5th floor study room, Alex saw a physical altercation between Bailey and another student. Specifically, Alex saw Bailey on the ground, with the other student on top of Bailey. Alex made eye contact with the student. This caused the student to jump off Bailey. Alex said that Bailey was crying. Alex kept walking, unsure of what to think, went to the bathroom, and a couple of hours later contacted Mary. Alex does not know the name of the student who was on top of Bailey but thinks it might have been Bailey’s romantic partner.

The Title IX Coordinator contacted Bailey, who said that the altercation involved Bailey’s ex-romantic partner, Quinn Quinnby. Bailey told the Title IX Coordinator Quinn physically assaulted Bailey in the study room. During their meeting with the Title IX Coordinator, Bailey shared additional concerns about Quinn’s behavior that occurred after they broke up.

The Title IX Coordinator discussed Bailey’s rights under the Sexual Harassment and Discrimination Policy (the “Policy”), including Bailey’s right to file a sexual harassment formal complaint and supportive measures designed to preserve or restore equal access to university education programs or activities.

On November 2, 2020, Bailey filed a formal complaint against Quinn Quinnby, alleging that Quinn engaged in dating violence and hostile environment sexual harassment against them. Specifically,

- Bailey alleges that on October 31, 2020, Quinn placed Bailey in a chokehold, forced Bailey to the ground,
QUESTIONS?

#3
Stage 1: Prepare
Stage 1: Prepare (Steps 1-3)

I. Thoroughly review Notice of Allegations

II. Who is involved? (Students, faculty, staff?)

III. What Title IX/policy offense(s) are you investigating?

- Quid Pro Quo Sexual Harassment
- Hostile Environment Sexual Harassment
- Sexual Assault - Rape, sodomy, fondling, incest, statutory rape
- Dating violence
- Domestic violence
- Stalking
- Sex Discrimination
Stage 1: Prepare (Step 4)

IV. What are the “elements” of the offense(s) at issue?

Example: Rape

1. The penetration of any sort
2. Of the penis and the vagina (attempt to do the same)
3. Without complainant’s consent

Under legal age of consent or incapacitation (see policy for definition of incapacitation)

4. Including instances where the complainant is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Fact Pattern

What offense(s) are implicated within the fact pattern?

Let’s break down the elements of those offense(s).
Stage 1: Prepare (Step 5)

V. Evidence available pre-interviews

• Email reporting misconduct (i.e., from Hall Director, RA, Campus Safety)

• Campus video footage

• Campus access-card record

• Police reports

Fact Pattern

What evidence may be available pre-interviews?
Stage 1: Prepare (Steps 6-7)

VI. Interview list
- Complainant
- Respondent
- Witnesses

VII. What information are you seeking from each person?

VII. Order of interviews

Fact Pattern
- Preliminary interview list (will be updated as you progress)
- What information are you seeking from each person?
- Order of the interviews?
Stage 1: Prepare (Step 8)

VIII. Create Investigator Log

<table>
<thead>
<tr>
<th>Date</th>
<th>Recorded By</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>3/13/21</td>
<td>CBH</td>
<td>Received and reviewed Notice of Allegations.</td>
</tr>
<tr>
<td>3/19/21</td>
<td>CBH</td>
<td>Emailed parties notices of interview and calendar appointments for Microsoft Teams video meeting.</td>
</tr>
<tr>
<td>3/21/21</td>
<td>CBH</td>
<td>Received email from Complainant with the selection of and contact information for their advisor. Sent advisor (request Complainant) information about the advisor role within the Investigative Process.</td>
</tr>
<tr>
<td>3/30/21</td>
<td>CBH</td>
<td>Emailed interview transcript to Complainant and their advisor for review, edit, and approval.</td>
</tr>
<tr>
<td>4/07/21</td>
<td>CBH</td>
<td>Interview with Respondent. No advisor present. Reviewed investigative process, including right for an advisor. Conducted questioning and requested/obtained physical evidence.</td>
</tr>
<tr>
<td>4/08/21</td>
<td>CBH</td>
<td>Emailed interview transcript to Respondent for review, edit, and approval.</td>
</tr>
<tr>
<td>3/29/21</td>
<td>CBH</td>
<td>Respondent emailed redacted additions and clarifications within interview transcript.</td>
</tr>
</tbody>
</table>

Stage 1: Prepare (Step 9)

IX. Outline party/witness interviews

Complainant’s interview outline
- Build rapport
- How know the respondent?
- What happened?
  - Where?
  - When?
  - How? Penetration of genitalia?
  - Consent? (Actions/words? Incapacitation? Force?)
  - Response to conduct?
- Witnesses (Eyewitnesses? Who saw before and right after? Who talk to before and right after?)
Stage 1: Prepare (Step 10)

X. What additional information would the decision-maker need to assist in deciding Responsibility during the deliberation process?

➢ If it exists, do your best to obtain it.
Based on what you’ve learned thus far, how will you refine your preparation strategy?

QUESTIONS?
Stage 2: Gather - Evidence

- Testimonial Evidence
  - Party/witness interviews
    - Expert witnesses
  - Party/witness statements within electronic or other type of communications

- Non-testimonial evidence
  - Documents
  - Photographs
  - Video
  - Screenshots of electronic or other communications
  - Police reports
  - SANE reports (need signed release to obtain and rely on)

Stage 2: Gather – Party/Witness Interviews

Party/witness interviews

1. Build rapport
2. Effective questioning
3. Identifying and obtaining physical evidence
Stage 2: Gather – Building Rapport

1. Build rapport

   • Identify mutual interests or commonalities between the investigator and the interviewee
   • Attentive
   • Transparent about the investigation process and the investigator’s role within it
   • Provide control
   • Answer questions

ACTIVITY

Rapport Building Demos

1. What went well?
2. What could be improved?
Stage 2: Gather – Effective Questioning

2. Effective questioning
   - The funnel method

Closed v. Open-Ended Questions

<table>
<thead>
<tr>
<th>Closed Questions</th>
<th>Open-Ended Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td>You went to the party with the Complainant and your roommate</td>
<td>Who went with you to the party?</td>
</tr>
<tr>
<td>You said “no” when the Respondent kissed you.</td>
<td>How did you respond when the Respondent kissed you?</td>
</tr>
<tr>
<td>After you said “no,” you shoved the Respondent to the ground</td>
<td>What happened next?</td>
</tr>
</tbody>
</table>
Stage 2: Gather – The Funnel

**THE FUNNEL QUESTIONING TECHNIQUE**

- **Open**
  - ..... open-ended questions to solicit information
- **Clariﬁng**
  - ..... to clarify and narrow focus
- **Probing**
  - ..... to solicit additional detail
- **Exhaust**
  - ..... anything else?
- **Closed**
  - ..... to clarify or commit

- **Listen**
  - ..... you’re understood

Stage 2: Gather – Pitfalls to Avoid

2. Effective questioning

**Interviewing pitfalls**

- Careful not to ask an open-ended question in a leading/closed manner.

  “Did you go to the police right after you left Respondent’s apartment?”

  “Were you scared when your partner’s hands were around your neck?”
Stage 2: Gather – Avoid compound questions

2. Effective questioning

Interviewing pitfalls

- Avoid compound questions

“Describe what you saw, what you heard, and what you did?”

One question at a time: “What did you see?”

“What did you hear?”

“What did you do?”

Stage 2: Gather – Interview Pitfalls

2. Effective questioning

Interviewing pitfalls

- Failing to clarify complex answers.

  “Tell me if I understand you correctly, you said...”

  “I am not sure that I understand, what does that mean?”

- Assuming you know what the witness means.

  “I talked to Jane last night.”

- Assumptions about what happened, generally.
Example:

Inaccurate Assumption

"If it's brown it's down."
"Redneck Plunger"
Stage 2: Gather – Pitfalls, cont.

2. Effective questioning

Interviewing pitfalls

• Failing to use understandable (“normal”) language.

  “Are you and Jane intimate with one another?”

  “Did your fingers penetrate Jane’s labia majora?”

Stage 2: Gather – Pitfalls, cont.

2. Effective questioning

Interviewing pitfalls

• Interrupting the witness.

• Harmful spoken or body language in response to answers to questions.
Stage 2: Gather – Example #1

Possible Investigator Reactions to an Interviewee Response

Actual Thought  vs.  Professional Speak

That makes no sense.  

What you just explained is a bit confusing to me. Let's go over it again...

Stage 2: Gather – Example #2

Possible Investigator Reactions to an Interviewee Response

Actual Thought  vs.  Professional Speak

You're such a liar!  

Help me understand why 3 other people recall things differently
Stage 2: Gather – Example #3

Possible Investigator Reactions to an Interviewee Response

<table>
<thead>
<tr>
<th>Actual Thought</th>
<th>vs.</th>
<th>Professional Speak</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do you think I’m an idiot! Really!!!</td>
<td>In my experience, I generally find ...</td>
<td></td>
</tr>
</tbody>
</table>

Stage 2: Gather – Example #4

Possible Investigator Reactions to an Interviewee Response

<table>
<thead>
<tr>
<th>Actual Thought</th>
<th>vs.</th>
<th>Professional Speak</th>
</tr>
</thead>
<tbody>
<tr>
<td>Are you kidding me?! What part of “I don’t want to have sex” didn’t you understand?</td>
<td>Tell me about your thought process when ...</td>
<td></td>
</tr>
</tbody>
</table>

Co-investigators
Stage 2: Gather – Obtaining Narratives/Evidence

2. Effective questioning

a. Obtain a narrative (facts may not be relayed chronologically)
   - Can allow the interviewee to choose where to begin

b. Start with most critical or damning evidence
   - A photograph
   - Video

Stage 2: Gather – Advanced Questioning

2. Effective questioning

• Clarifying and additional exploratory questioning that follows the trail of information...

• Probing for additional or omitted details.

• Refreshing the memory of a party/witness.

• Addressing interviewing challenges (stay tuned...)

• The “catch-all”
ACTIVITY

Effective Questioning Demos

1. What went well?
2. What could be improved?

Stage 2: Gather – Trauma (Part 1)

2. Effective questioning
   • Identifying potential trauma in response to alleged misconduct and what to do with it.
   • Trauma-informed interviewing techniques.
Stage 2: Gather – Trauma (Part 2)

“Trauma is defined as an event that combines fear, horror, or terror with actual or perceived lack of control.”

- Trauma is subjective. What may be traumatic to one person may not be to another.

Source: Understanding the Neurobiology of Trauma and Implications for Interviewing Victims, Wilson, Lonsway, Archambault, Hopper, November 2016

Stage 2: Gather – Trauma (Part 3)

The neurobiology of trauma

What does trauma look like during the event (Defense Circuitry)?

- Fight
- Flight
- Freeze
- Dissociation
- Tonic immobility

“When the defense circuitry takes over, the part of the brain that makes logical choices is impaired.”

Source: Understanding the Neurobiology of Trauma and Implications for Interviewing Victims, Wilson, Lonsway, Archambault, Hopper, November 2016
Stage 2: Gather – Trauma (Part 4)

The neurobiology of trauma

What does trauma look like during post-event?

- Memory loss
- Intense emotional reaction (or not)
- Trouble focusing
- Lack of linear memory
- Confused

Stage 2: Gather – Trauma Informed Interviewing (con’t)

- What is the relevant evidentiary value of a possible trauma response? Impact corroboration, maybe? What about credibility? **CAUTION**

- The presence of trauma (fight, flight, freeze, disassociation, etc.) does not prove that the misconduct occurred nor does the lack of trauma provide a reason to disbelieve.

- However, we know that if there is evidence of trauma in response to alleged misconduct, it could explain a gap in memory or the interviewee's odd response to the misconduct or a period of hyper-focus.
Stage 2: Gather – Trauma Informed Interviewing (con't)

W2: Asked if Complainant was okay
Complainant: “Yeah, I think so, I have to use the bathroom.”
W2: “Did he [Respondent] touch you?”
Complainant: “I don’t think so, because I don’t feel sad.” See Exhibits 4 & 14.
W2: “Are you sure nothing happened and you are ok?”
Complainant: “I don’t know.”
W2: “Why, what do you think happened?”
Complainant: “He violated me.”
W2: “Did he hurt you?”
Complainant: “I think so.”

When the Complainant said she was violated she became “upset” and began to cry.

Stage 2: Gather – Trauma Informed Interviewing (Part 1)

What are trauma-informed interviewing techniques?

- Building rapport is the first step in interviewing victims in a trauma-informed way.
  - Acknowledge the difficult situation
  - Explain process and investigator’s role
- Set forth expectations for interview:
  - Investigator will ask detailed questions (may be personal)
  - May ask clarifying questions
  - No judgments will be made
  - There is no wrong answer
Stage 2: Gather – Trauma Informed Interviewing (Part 2)

- Provide some control to victim (water, breaks, etc.)
- Use a conversational approach rather than a rapid series of questions
  - “Where would you like to start?”
  - “What happened?”
  - “Tell me about . . .”

What are trauma-informed interviewing techniques?

- Be cognizant of “sensory” responses: sight, sound, smell, feelings
- Be aware of sensitive questioning to avoid victim blaming and rape myth beliefs.
  - Both of these practices can function to re-victimize the survivor.
  - Explain your reasoning behind difficult questions.
Stage 2: Gather – Trauma Informed Interviewing (part 2)

2. Effective questioning

• Trauma-informed interviewing techniques are helpful with any party or witness, not just complainants.

• Result is to obtain better information and to have the interviewee leave the interview feeling respected rather than victimized by the interview experience.

Stage 2: Gather – The Expert Witness

2. Effective questioning

• The expert witness

   An expert witness is a person who has specialized or scientific knowledge, skill, experience, or proficiency in a particular field that is relevant to the case.

   - Expert witnesses are supposed to provide independent, impartial, and an unbiased opinion about evidence in the case.
Stage 2: Gather – Expert Witness Intro

I. INTRODUCTION

• Name and profession

• Qualifications - What makes this person an “expert?”
  - Education
  - Special Training
  - Experience
  - License/Certification
  - Publications
  - Teaching or speaking experience
  - Experience as an expert witness
    ▪ Ever testified as an expert witness?
    ▪ Ever been disqualified as an expert witness?

Stage 2: Gather – Expert Witness Assignment

II. EXPERT’S ASSIGNMENT

• What have you been asked to do/examine/compare in the case?

• Are you receiving compensation for your opinion and testimony? If so, how much and by whom?

• Did you reach an opinion?

• What information did you receive and rely on to make an opinion?

• What techniques, methodology, or process did you use on the information received?

• Is this the type of information relied on by experts in their field?
Stage 2: Gather – Expert’s Opinion

III. EXPERT’S OPINION

- What is your opinion?
- How did you arrive at your opinion?
- Did you make any assumptions based on the information? If you change your assumption, does your opinion change?
- Why are you sure of your opinion?
- Are there alternative techniques or methods that could result in a different opinion?

Stage 2: Gather – Physical Evidence

3. Identifying and obtaining physical evidence

Examples of how physical evidence can be critical to your case:

- The text message that the Respondent allegedly sent to the Complainant’s roommate admitting to the misconduct.
- The medical report noting the injury that the Complainant claims to have sustained during the alleged misconduct.
- Campus building access report that shows the Complainant was not in the library on the date and time of the alleged misconduct.
Stage 2: Gather – Examples

Party/witness interviews

3. Identifying and obtaining physical evidence

• Ask parties/witnesses if physical evidence available and, if so, can you have it.

• Investigators should have access to campus access card records and video surveillance camera footage.

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Stage 2: Gather

Party/witness interviews

3. Identifying and obtaining physical evidence

• Documents from third-party sources

• Boots on the ground!
QUESTIONS?

#5
Autonomy, Neutrality, and Objectivity
Stage 5: Autonomy, Neutrality, and Objectivity

34 C.F.R. 106.45(b)(1)(iii)

Requires that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate the informal resolution process may not have a conflict of interest or bias either for or against complainant, respondent, or individual parties.

Stage 5: Regulations and Investigators

As the Final Regulations apply to Investigators:

Investigators are neutral, objective, and impartial. An impartial investigation performed by a bias and conflict-free investigator is the substantive foundation of the entire grievance process.

Note: The Regulations establish a low floor without defining what the terms "impartial investigation, bias and conflict free".
Stage 5: Bias defined

Defined as: *An inclination toward (or away from) one way of thinking, many times, based on how you were raised.*

- Examples:
  - Assuming that Complainants or Respondents are generally more likely to tell the truth
  - Assuming the Complainant “had it coming” based on what they were wearing, how much they had to drink, or because they were at a fraternity party
Stage 5: Bias (con't)

As an investigator:

- Not on anyone's side
- Presumption of non-responsibility
- You are helping the decision-maker(s) decide responsibility/non-responsibility based on reliable and relevant evidence
- You are an advocate for the process – not either party
- Credibility is determined by specific factors, not a party's status as a complainant or respondent.

Stage 5: Autonomy

Defined as: *Independence or Freedom*

- Are you able to conduct the investigation without internal or external interference or influence?
  - High profile cases
  - Media influence
How does your institution allow you to demonstrate your autonomy?

Stage 5: Neutrality

Defined as: **Not aligned with or supporting a side or position.**

- Understand and respect the rights of both parties
- Facts are presented as gathered – allow parties and witnesses to review and revise their statements
- Questioning conducted using non-judgmental language:
  - "Do you remember how much you drank before you went to the house party?"
  - Not: "Were you thinking about how much you were drinking before you left your residence hall room?"
Stage 5: Appearance of Neutrality

- Meeting with one party more than the other without explanation
  - Does your policy address this?
- Number of witnesses on either side does not determine outcome
- Perception of neutrality throughout the university

Stage 5: Objectivity

Defined as: Not being influenced by personal feelings, interpretations, or prejudice.

- How do you act or respond to a party or witness you find obnoxious, conceited, or generally unlikable?
- How do you act or respond to a party or witness you find likable?
Stage 5: Conflicts of Interest

- Exist when the investigator has a personal or professional interest in the matter, and prevent the investigator from discharging their duties in a fair, neutral, and impartial manner.

- Arise depending upon the investigator's relationship to a party, or witness.

Stage 5: Strategies

- We all have biases
  - Evaluate/Recognize when you are having a biased or stereotypical thought
  - Identify the reasons behind the thought
  - Replace the biased/stereotypical thought with a non-stereotypical response
Stage 5: Strategies (con't)

• Improve Decision Making
  ➢ Slow down

  ➢ Ask: What assumptions have I made about the gender identity, religious beliefs, athletic status?

  ➢ What evidence supports the conclusions I draw and how have I challenged the "unsupported" assumptions

• Practice - and be present.

QUESTIONS?
NETWORKING RECEPTION
We invite you to turn on your cameras and mics to ask any remaining questions and to network with each other.