

Investigator Training
 Elizabeth H. Canning, Esq.
 www.ecanninglaw.com



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Upfront Info: Today's Topic Will Cover Tough Subjects

- Terminology
- Examples and stories
- Self-care is encouraged!



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Agenda

1 Introduction Presenter, climate	4 Design & Action Questions & questioning
2 Attitude & skills Deal breakers and deal makers	5 Report Writing Information delivery
3 Setting it up Policy, process	6 Questions


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Overall learning outcomes

- 1 Developing tools to be a neutral, fair, and professional investigator
- 2 Developing and asking questions effectively
- 3 Managing interviews
- 4 Writing thorough and effective reports

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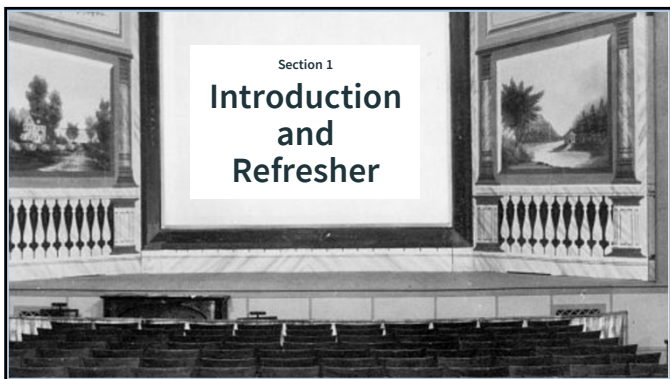
Caveats

- Each school has different policies and each school structures investigations differently. You should always follow the expectations of those responsible for Title IX on your campus.
- This training does not constitute not legal advice.

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Section 1
**Introduction
and
Refresher**

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But first:
Do you have a conflict of interest?



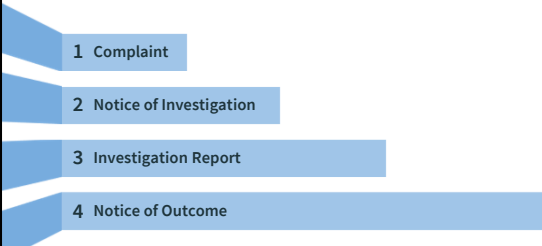
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8. MUST BE IN YOUR DETERMINATION OF RESPONSIBILITY (NOTICE OF OUTCOME) (Section 106.45)

- Identification of the allegations potentially constituting sexual harassment as defined in 106.30
- Description of the procedural steps taken from receipt of the complaint through determination, including any **notifications** to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.
- Findings of fact used to support the determination
- Conclusions regarding the application of the code of conduct to the facts
- Statement of, and rationale for:
 - the result as to each allegation, including a determination regarding responsibility,
 - any sanctions the recipient imposes on the respondent, and
 - any remedies provided by the recipient to the complainant designed to restore or preserve access to the program or activity.

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Information Gathering for Title IX Compliance




1 Complaint

2 Notice of Investigation

3 Investigation Report

4 Notice of Outcome

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Introduction: Learning Outcomes

1 Value of a thorough and well-written report

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Key Takeaways

- 1 Treat all parties fairly, neutrally, and with professionalism
- 2 Manage bias
- 3 Have the courage to act, say, and do what is ethical, professional, and appropriate
- 4 Be prepared and thorough; know the elements of the applicable definitions
- 5 Develop relevant and probative questions
- 6 Gather detail and be patient
- 7 Write a clear, detailed, neutral report that allows the parties' experiences to be heard

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Why do we need fair and thorough investigations?

- Obtain as much relevant information as possible to assist with a determination of policy violation
- Ensure that all parties are fully heard from; shows parties that their experience is being treated with respect and taken seriously
- Gives confidence to community that the institution is addressing the matter
- Essential part of compliance and due process

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There is rarely a “smoking gun,” admission, or video.

- a) recordings and first hand witnesses are infrequent
- b) people are not going to admit it
- d) difference in memory
- e) it didn't happen

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What are We Doing? Filling Information Buckets

Example: Harassment (simple version)

- 1 Conduct of a sexual nature
- 2 Unwelcome
- 3 Severe, persistent, or pervasive
- 4 Such that it denies an opportunity or benefit of the university


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Focusing on Facts

- Gives the investigation greater credibility
- Avoids bias and assumptions
- Results in greater detail and information



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Whom is the report for?



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Formal Complaint under New Title IX Regulations
document filed by a complainant or signed by the TIXC

- 1 alleging sexual harassment against a respondent,
- 2 about conduct within its educational program or activity,
- 3 requesting initiation of the school's grievance procedures, and
- 4 filed by a complainant at a time when they are participating or attempting to participate in the school's education program or activity.

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school's education program or activity


locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.



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Title IX Says...

- **“A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.”**
106.45(a)



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Objective evaluation




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Focusing In

- *“The objective nature of the inquiry simply means that evaluation is made by a reasonable person considering whether, standing in the shoes of the complainant, the conduct would be offensive.”*
- *“The reasonable person standard appropriately takes into account whether a reasonable person, in the position of the particular complainant, would find the conduct offensive.”*
Quotations from DOE commentary in unofficial version p. 514



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Relevance- Title IX

Investigators must create an investigative report that fairly summarizes relevant evidence.

Hearing officers must also focus on relevance.

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Relevant and Probative? Yes.

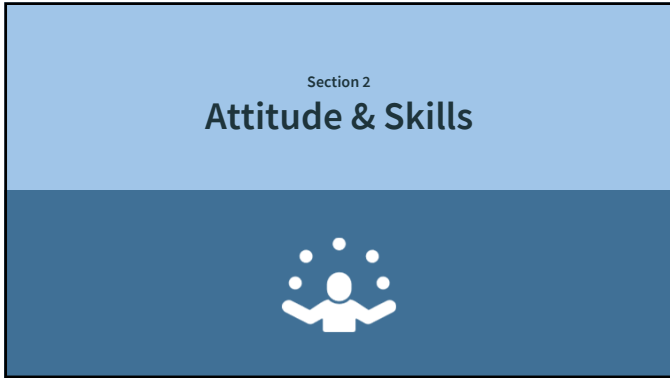
<p>Relevance</p> <p>the tendency of a given item of evidence to prove or disprove one of the elements of the case, or to have probative value to make one of the elements of the case likelier or not.</p>	<p>Probative</p> <p>“tending to prove.” Probative evidence “seeks the truth.” Tends to prove the proposition for which it is proffered.</p>
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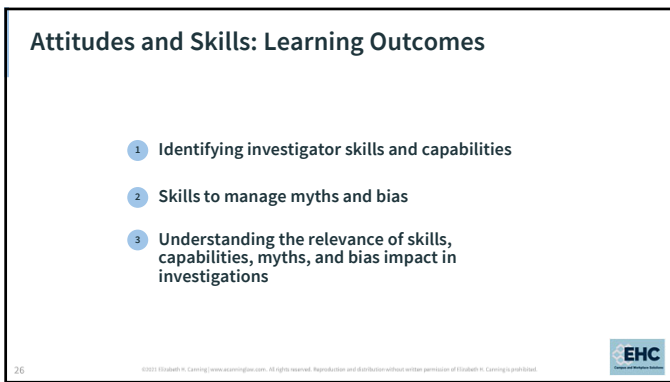
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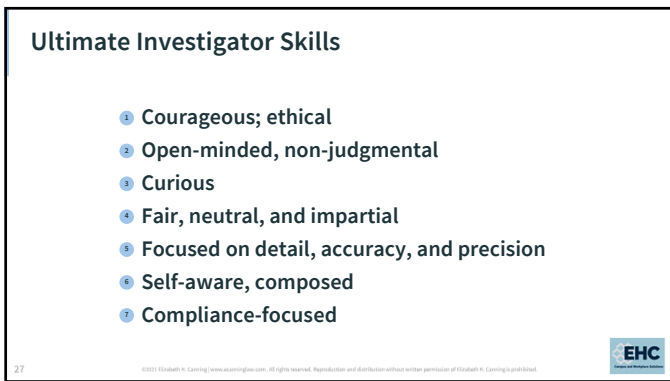
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Respect for the Parties' Experience

- **This is someone's experience and it matters.**



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**Required under the new Title IX regs:
presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process**

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No Sex Stereotyping

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Myths and Biases- Quick Revisit.

- Myths about sexual assault, dating violence, sexual harassment, discrimination, harassment....etc.
- Myths/biases about complainants and respondents
- Myths and expectations about human behavior
- Myths/biases about witnesses, advisors, lawyers, etc.
- Implicit Bias
- Affinity Bias
- Confirmation Bias
- Halo/Horns
- Myths and biases based on identity



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Tips for Managing Bias

- Check yourself
- Check the other person
- Remember your role and purpose of the interaction. Stay within it
- Be prepared for the interaction. Know your stuff
- Follow process
- Stick to consistent and neutral terminology and tone
- Check your questions for bias and slant
- Check your writing for bias and slant



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WHAT WE BRING

Confidence Dreams
Past Trauma Animosity
Disability Financial Needs
Fear Insecurity
Job Insecurity Friendship
Skill Intelligence
Housing Insecurity
Anger
Unemployment
Confusion
Hope
Leave
Goals
Embarrassment
Unethical
Intelligence
Landlordism



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Understand Potential Influences


- Personal views stay home
- People will share experiences that are deeply personal, private, and sensitive
- You may hear something you did not expect

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Demeanor

Consistent for each party and witness

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Words Matter

Innocent Survivor Assailant Allegation False Assault Accused Guilty incident Victim Respondent Complaint

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Keep in Mind How Your Report Will be Used: Preponderance of the Evidence

- More likely than not
- “50 and a feather”

That an action took place.

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What Happens Next?
Where does bias impact the process and how?

Report and hearing gather information.

Panel determines whether or not certain acts took place, (evidentiary standard).


Panel takes “found facts” and plugs them into the elements of the violation

Panel determines whether, the acts constitute ALL the elements of a policy violation.

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Exercise



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Setting it up: Learning Outcomes

- 1 Preparing for an investigation
- 2 Determining focus of investigation
- 3 Identifying people to interview
- 4 Creating questions
- 5 Understanding importance of logistics


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Before You Begin...Know Key Information

- Applicable policy
- Applicable definitions
- Steps in process
- Time frame



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Anatomy of an Investigation*

*Schools approach it differently as they are finding the approach that works best for their institution. Make sure you follow you school's process.

- 1 Read existing information, applicable definitions
- 2 Develop questions
- 3 Interview complainant
- 4 Interview respondent
- 5 Interview witnesses
- 6 Meet with complainant and share any new information gathered- allow them opportunity to respond
- 7 Meet with respondent and share any new information gathered- allow them the opportunity to respond
- 8 Write report
- 9 Parties are provided evidence and draft report for review and comment (10 days), including evidence the investigator does not intend to use in the report
- 10 Parties review and comment on the final report (10 days)

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Elements of a Violation




Part of a whole.

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Elements of a Violation




This



to this

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106.30 Definitions

Sexual Harassment

- 1 An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct
- 2 Unwelcome conduct on the basis of sex that is so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the recipient's education program or activity
- 3 Sexual assault, as defined in 20 USC 1092(f)(6)(A)(v), dating violence as defined in 34 USC 12291(a)(10), domestic violence as defined in 34 USC 12291(a)(8) or stalking as defined in 34 USC 12291(a)(3)

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Element breakdown

- Employee
- Conditioning the provision of an aid, benefit, or service of the recipient
- on an individual's participation
- in unwelcome
- sexual conduct

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Elements- sexual harassment

- Unwelcome
- Conduct on the basis of sex
- Severe, pervasive AND objectively offensive
- that it *effectively denies a person equal access* to the recipient's education program or activity

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Focusing In

- So severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.
- "The objective nature of the inquiry simply means that evaluation is made by a reasonable person considering whether, standing in the shoes of the complainant, the conduct would be offensive."
- "The reasonable person standard appropriately takes into account whether a reasonable person, in the position of the particular complainant, would find the conduct offensive."

Quotations from DOE commentary in unofficial version p. 514



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Sexual Assault

- Sexual act directed against another person, by force, threat of force, coercion, or without consent, including instances where the person is incapable of giving consent.
- Includes Rape, Sodomy, Sexual Assault with an Object, Fondling, Incest, and Statutory Rape.



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Consent

- Effective consent is defined as informed, freely and actively given mutually understandable words or actions which indicate a willingness to participate in each form of sexual activity.
- Consent is mutually understandable when a reasonable person would consider the words or actions of the parties to have demonstrated agreement between them to participate in the sexual activity.

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Consent, Cont'd

- In the absence of mutually understandable words or actions, neither party should assume that it is permissible to engage in the sexual activity.
- Consent to some form(s) of sexual activity does not necessarily mean consent to other forms of sexual activity.
- Consent to sexual activity may be withdrawn at any time at which point all sexual activity for which consent has been withdrawn must cease.

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Rape

- The carnal knowledge of a person
- without consent of the victim

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Title IX Fondling

- The touching of the private body parts
- of another person
- for the purpose of sexual gratification
- without consent of the victim

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Domestic Violence

- includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

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Dating Violence

- Violence committed by a person—(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; AND
- (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) The length of the relationship.
 - (ii) The type of relationship.
 - (iii) The frequency of interaction between the persons involved in the relationship.

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Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - (A) fear for his or her safety or the safety of others; or
 - (B) suffer substantial emotional distress

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Exercise



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Eye Out For: Other Types Prohibited Forms of Discrimination and Harassment

Check your policy and other applicable laws

- Race
- Religion
- National origin
- Age
- Disability
- Pregnancy and parenting

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Disparate Treatment vs. Disparate Impact

- Treating someone differently based on identity
- Having a policy or practice that causes members of a protected class to be treated differently
- *How do you know if someone has been treated differently than others?*

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Defenses... How do you address?

- Academic freedom
- Decision not made because of gender (made for other, non-discriminatory reason)
- Did not treat someone differently because they treat everyone that way
- First amendment
- Essential job function or technical requirement

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What Witnesses Should be Interviewed?



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Title IX Quiz: relevant or permissible?

- Questions and evidence about complainant's sexual predisposition or prior sexual behavior
- Questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege
- Expert witnesses




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Title IX Says...

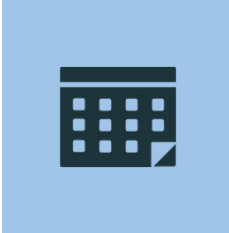
- Provide equal opportunity to present witnesses, including fact and expert witnesses, and other in/exculpatory evidence
- Do not restrict either party to discuss the allegations or gather and present RELEVANT evidence
- Provide parties same opportunity to have others present (advisor of choice) and not limit their choice or presence of the advisor in any meeting or grievance proceeding, BUT schools may establish restrictions regarding the extent to which the advisor may participate in the proceedings




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Title IX also says...



- Provide parties who are invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time to prepare to participate.



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In the Room

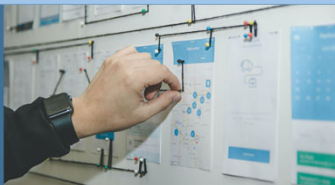
- Location of room
- Think about seating
- Phones
- Be organized
- Take and allow breaks as necessary
- Housekeeping speech up front and at end
- Professional attire and hygiene
- Communication throughout
- Notetaking



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Section 4

Design and Action



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Keep Credibility Determinations in Mind

The EEOC recommends using the following information to assess credibility:

- **Plausibility.** Is the witness's version of the facts believable? Does it make sense?
- **Demeanor.** Does the witness seem to be telling the truth?
- **Motive.** Does the person have a reason to lie?
- **Corroboration.** Are there documents or other witnesses that support the witness's version of events?
- **Past record.** Does the alleged wrongdoer have a past record of inappropriate conduct? Use appropriately.

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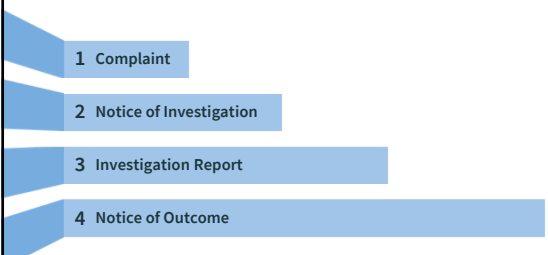
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- Statement of, and rationale for:
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Information Gathering for Title IX Compliance



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The Report Includes

- Fact cover sheet
- Material steps
- Introduction (what happened prior to report)
- Background (who are the parties and connection to the school, how the complaint meets Title IX requirements)
- Narrative
- Consistency
- Credibility

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Write Initial Questions: Who, what, when, where, why, how, how many...

- What are the buckets that I need to fill with information?
- What are questions for severe? Pervasive?
- What are questions for unwelcome or consent?


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Avoid Questions with Defined Terms

- Why?



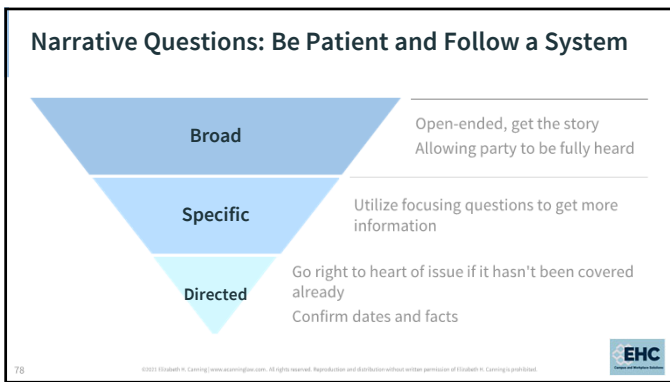
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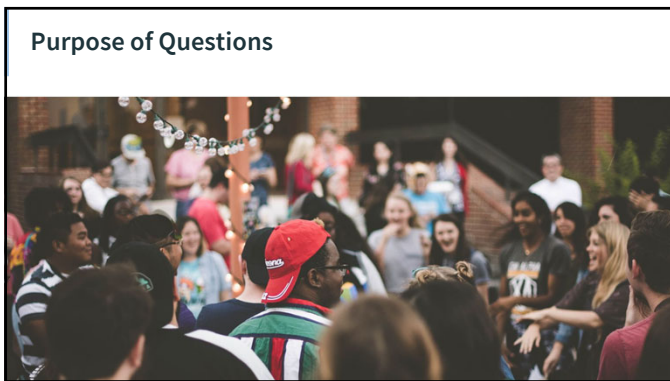
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How to navigate the Broad. To narrow. To specific. With a challenging party.

- Tell me about the meeting on October 5th.
I don't remember. Did we meet that day?
- Who was there?
Where was the meeting?
- What was the topic of discussion?
Uh, I don't remember.
- Did the team discuss members of the women's soccer team?
Oh, Yeah. We did.
- What was discussed?
I don't remember.
- Did the team discuss rating them? What was said? By whom?
- Did you make any comments?
- Did you make any comments about Maria?
- Did you make any comments about Maria's body?
- Did you say.....

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How do you ask for information without leading?

QUESTIONS

- 1- A B C D
- 2- A B C D
- 3- A B C D
- 4- A B C D
- 5- A B C D
- 6- A B C D

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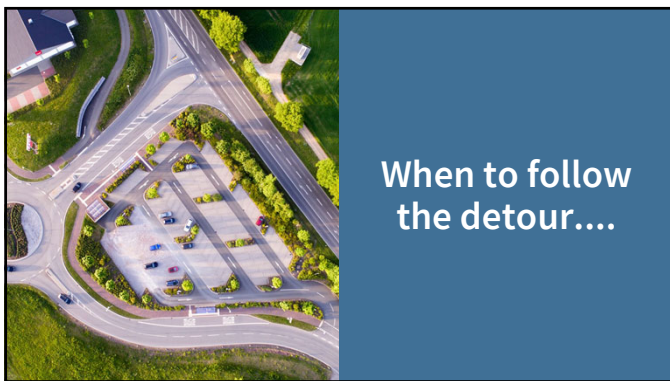
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Keep Your Eye out for Cross-Complaints or Other Important Indicia of Concerns

- Why does this matter?



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Ongoing notice requirement under new Title IX regs: if the school decides to investigate allegations not included in the original notice, it must provide notice of the additional allegations.

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Ask for and Gather All Documentation

- Texts, emails, videos from parties
- Videos from campus police
- Card swipes
- Evidence that shows someone was at their desk (alibi)
- Receipts, phone calls, attendance records
- *In-culpatory AND Ex-culpatory*

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Working with Advisors



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Steps in the Process- Title IX

<https://www.merrimack.edu/live/files/3904-merrimack-college-title-ix-sexual-harassment>

1 Interviews	4 Any next steps necessitated by review and comment
2 Information gathering	5 Finalize report
3 Sharing draft report and evidence with parties for review and comment	6 Hearing

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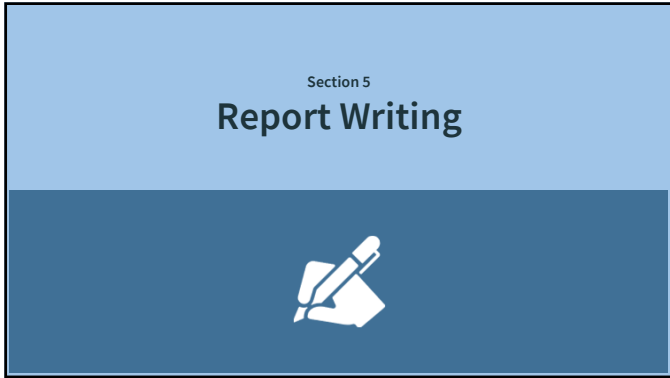
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Other Important Steps

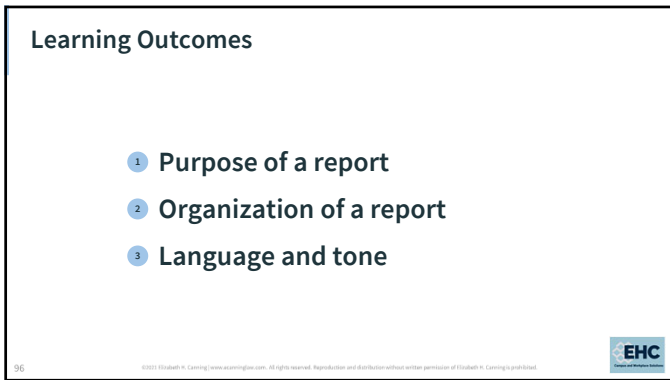
- If, at any point in this review process or the prior investigation, it becomes apparent that a party or witness will not take part and subject themselves to examination in the Determination Hearing described in Section III.C.5, below, the investigator may revise the Investigative Report to remove information provided by that individual so as not to impact the Determination Hearing.
- If this decision is made prior to the parties' review, it will be noted in a cover memo to the Investigative Report. If the decision is made following the parties' review, it will be communicated to the parties and they will be informed in writing of any information that will be removed prior to the Determination Hearing.

EHC

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Purpose of a Report

- To provide gathered facts in a neutral, clear, and digestible format
- So that the reader of the report can understand the incident in detail from all relevant perspectives with all relevant evidence- according to necessary ELEMENTS
- So that the reader of the report can easily identify relevant information necessary to make a determination of existence of ELEMENTS necessary to satisfy burden of proof



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The Report Includes

- 1 Fact cover sheet
- 2 Material steps
- 3 Introduction (what happened prior to report)
- 4 Background (who are the parties and connection to the school, how the complaint meets Title IX requirements)
- 5 Narrative
- 6 Consistency
- 7 Credibility



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Write clearly

- Short sentences.
- Well-organized paragraphs
- Consistency of language and structure
- *If you have not gathered information evenly or with detail, it will show in the report*
- Use of quotations



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Exercise



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Questions?

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DANKE!
THANK YOU!
MERCI!
GRAZIE!
GRACIAS!
DANK JE WEL!

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