
TITLE IX INVESTIGATION REPORT

- The Investigator will prepare an investigation report summarizing all evidence relevant to the claims and factual findings, and provide the final Investigation Report to the Title IX Coordinator and a separate Decision Maker to reach the determination regarding responsibility.
- Prior to the conclusion of the investigation, copies of all evidence directly related to the allegations made against the responding individual(s) and a copy of the Investigation Report will be sent by the College to the parties and to the parties' advisors, if any.
- The parties will have ten (10) days to submit a written response, which the investigator will consider prior to completion of the investigative report.

DRAFTING AN INVESTIGATION REPORT

What to include in the Investigation Report:

- Specific Policy Provisions at issue.
- Individuals interviewed and evidence reviewed.
- Relevant facts gathered during the interview process.
- Explanation as to why some facts are more probative than others.
- Proofread, sign, and date each Investigation Report.

TITLE IX INVESTIGATION REPORT

WHAT TO INCLUDE

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1. Allegations
 2. Documents Reviewed
 3. Procedural History
 4. Standard of Evidence
 5. Applicable Policy Provisions
 6. Interview Results
 - a. Interview(s) with Complainant(s)
 - b. Interview(s) with Respondents(s)
 - c. Interview(s) with Witness(es)
 7. Undisputed Relevant Facts
 8. Disputed Relevant Facts
 9. Analysis
 10. Conclusions

KEEP IN MIND

**IMPARTIALITY,
CONFLICTS OF
INTEREST & BIAS**

IMPARTIALITY

Impartiality is key to the Title IX formal grievance process

- ❑ Serving impartially includes avoiding the following:
 - ❑ Prejudgment of the facts at issue
 - ❑ Conflicts of interest
 - ❑ Bias

IMPARTIALITY TIPS

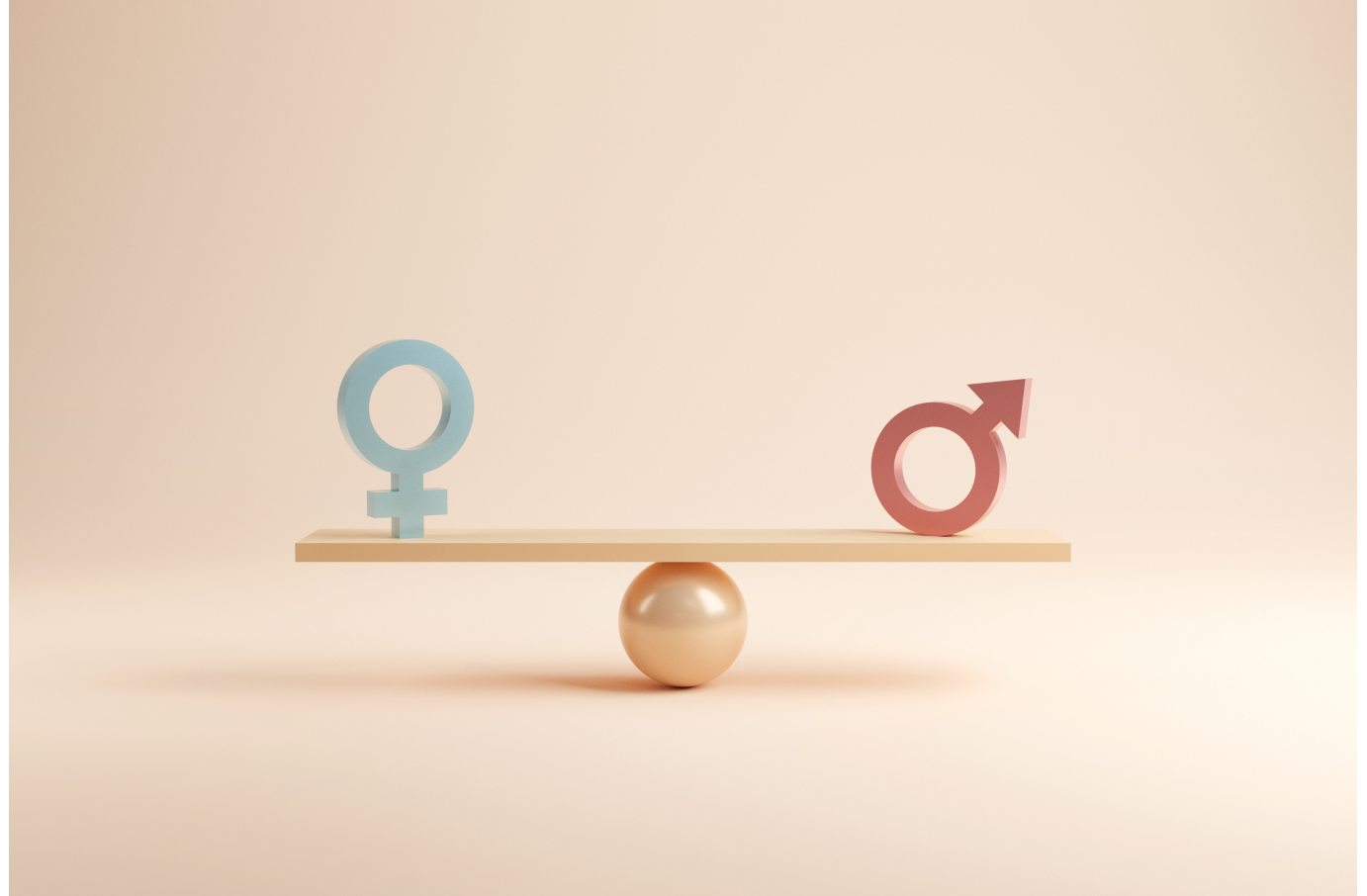


Be sure to view and evaluate all evidence in an impartial manner.

- ☐ Maintain objectivity
- ☐ Do not consider interactions with the Respondent or Complainant that are not relevant to the investigation at hand.
- ☐ Do not seek information about the Respondent or Complainant from anyone not involved in the investigation.
- ☐ Do not let any preconceived notions about complainants and respondents generally affect how you conduct the investigation.
- ☐ Accept evidence at face value unless called into question by other evidence.
- ☐ Keep in mind that evaluating factual evidence may entail assessing the credibility of witnesses.

PREJUDGEMENT OF FACTS

- Sex Stereotypes Examples:
 - Men do not know how to express emotions
 - Women are more nurturing than men
 - Men are better at science and math than women
 - Women do not like sports



PREJUDGEMENT OF FACTS

Avoid prejudgment of the facts by doing the following:

- ❑ Keep an open mind
- ❑ Do not jump to conclusions - explore all of the facts prior to making any conclusions
- ❑ Be particularly cautious about checking your assumptions in situations involving sexual assault, drugs, or alcohol use



CONFLICTS OF INTEREST

- A conflict of interest occurs when personal or private interests may compromise one's judgment, decisions, or actions
- *Example of Potential Conflict:* The Decision Maker for a particular case was the Complainant's professor the previous semester.
- *Example of Potential Conflict:* The investigator is a professor in the department where the Respondent Professor is the Chair.



CONFLICTS OF INTEREST

How do you determine whether a conflict of interest disqualifies you from serving in the grievance process?

- First determine what kind of conflict it is
 - *Is it an actual conflict of interest?*
 - A direct conflict between one's official duties and responsibilities, and a competing personal interest or obligation
 - *A perceived conflict of interest?*
 - A situation where it could reasonably be perceived that a competing interest could improperly influence the performance of one's official duties and responsibilities
 - *A potential conflict of interest?*
 - Arises where a personal interest or obligation could conflict with one's official duties and responsibilities in the future



BIAS

- ❑ You may or may not be aware of your own biases. Biases can be (and are often) **implicit**, meaning that certain attitudes and stereotypes can affect understanding, actions, and decisions in an unconscious manner.
- ❑ **Ways to Combat Bias:**
 - ❑ Pay attention to your language
 - ❑ Avoid generalizations
 - ❑ Question your thinking and challenge your assumptions
 - ❑ Listen carefully and openly

DECISION MAKERS

What is your role as a Decision Maker?

- Evaluate evidence
- Attend and participate (as needed) at Live Hearings
- Reach conclusions about whether the Respondent is responsible for the alleged sexual harassment
- Issue a written determination regarding responsibility.

EVIDENCE



- The College carries the burden of collecting evidence
- Only **relevant** evidence may be considered by the Decision Maker
- Privileged evidence is not admissible without consent
- Medical Records and Mental Health Records are not admissible without consent
- There are no other restrictions on evidence (legal rules of evidence don't apply)
- Parties have the right to inspect the evidence
- Decision Maker evaluates credibility during the Live Hearing

EVIDENCE

- **Privileged Evidence is Inadmissible pursuant to Section 106.45(b)(1)(x) of the regulations**
- The college may not 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 in writing.
- *Examples of Privilege:* patient-doctor; attorney-client; spousal privilege



EVIDENCE - RELEVANCE



Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance.



A recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.



An institution may adopt rules of order or decorum to forbid badgering a witness and may fairly deem repetition of the same question to be irrelevant.

EVIDENCE - RELEVANCE

Rape Shield Protections and Exceptions

- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are **NOT RELEVANT** unless offered to prove:
 1. "Mistaken Identity"
 - That someone other than the Respondent committed the conduct alleged by the Complainant, or
 2. Consent
 - Concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

TITLE IX HEARINGS

- Both parties have the right to submit, cross-examine, and challenge evidence at a live hearing, which will be recorded.
- Each party's respective Advisor will conduct cross examinations at the hearing.
- A Hearing Officer will preside over the hearing and will determine whether a question is relevant before the party or witness is required to answer.
- Either party can request for the live hearing to take place in separate rooms. Participants may attend the hearing virtually, provided that all participants are able to see and hear each other.
- The Decision Maker will objectively review all relevant evidence set forth at the hearing, including evidence that is inculpatory and exculpatory.

TITLE IX HEARINGS - LOGISTICS

- Live hearings may be conducted in person in the same room. An audio recording device will be provided by the Title IX Office for the Title IX Coordinator to use to record all components of the live hearing.
- At any party's request, the live hearing may be conducted in separate rooms, using Zoom technology.
 - The Title IX Coordinator will be the host of the Zoom session

HEARINGS – CROSS-EXAMINATION

- Cross-examination must be conducted by a party's Advisor **only**.
- Must be conducted directly, orally and in real time.
- If a party does not have an advisor, the College will provide an advisor who can convey the questions that a party would like to have asked.
 - No party should ever be allowed to personally question any witness or any other party.
- Before an answer is given, the Hearing Officer must first determine and indicate whether the question seeks relevant information.
- The Hearing Officer must explain any decision to exclude something as not relevant.

HEARINGS – RECENT CHANGE



August 24, 2021 OCR Letter

- *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021)
 - The court vacated the part of the regulations that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing: *“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility....”*
- “The Department will immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this portion of the provision.”

REACHING A DETERMINATION



At the conclusion of the live hearing and evidence gathering, you will make a determination of responsibility.



Your determination must be based on an objective evaluation of the evidence gathered during a procedure that conforms to the presumption of innocence.



Remember that the Standard of Proof of the College is the Preponderance of the Evidence.

REACHING A DETERMINATION



Weighing evidence:

- ❑ Determine what evidence is probative by looking at the relevant **policy definitions**.
- ❑ If you have conflicting probative evidence, then you must determine the credibility of each individual's statement by considering factors such as:
 - ❑ Eyewitness accounts of third parties
 - ❑ Other pertinent evidence (e.g., photographs, texts)

WRITTEN DETERMINATION

- At the conclusion of the investigation and hearing, the Decision Maker must issue a single final written determination.
- The written determination must be contained in one document and cannot be issued piece meal.
- The written determination must be sent to all parties simultaneously.



WRITTEN DETERMINATION

The Written Determination must include the following:

1. Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
2. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather evidence, and hearings held;
3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the College's code of conduct to the facts;
5. A statement of and rationale for each result as to each allegation including the determination of responsibility, any disciplinary sanction imposed on the Respondent and whether remedies designed to restore or preserve equal access to the College's educational program or activity will be provided to the Complainant; and
6. Procedures and permissible bases for the complainant and respondent to appeal.

TITLE IX APPEALS

The new regulations require the right of appeal be offered to both parties. Parties can appeal the outcome of a Title IX investigation on the following grounds:

- A material deviation from the procedures affected the outcome of the case;
- There is new and relevant information that was unavailable, with reasonable diligence and effort, at the time of the investigation, that could reasonably affect the findings; and/or,
- The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome of the matter.



TITLE IX INFORMAL RESOLUTION

Conditions required for implementing
Informal Resolution in a particular case:

- All parties are provided with written notice of the allegations;
- All parties are informed of the requirements of the informal resolution process and any consequences of participating; and,
- The college obtains voluntary, written consent from all parties.

Informal Resolution is not permitted in cases with allegations of an employee sexually harassing a student.

TITLE IX RESOURCES

- <https://sites.ed.gov/titleix/>
- <https://sites.ed.gov/titleix/policy/#fact-sheet>
- <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>
- <https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf>