



TITLE IX - Overview, Intake, Investigations, Report : The “Nuts and Bolts”

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DISCLAIMER

This presentation is intended for educational purposes only. It is not intended to convey legal or other advice pertaining to any particular situation and, with respect to legal issues, is not a substitute for legal advice. The information presented is a “nuts and bolts” presentation and is not intended to lead to any certification in satisfaction of any Title IX training requirement.

Note: This presentation utilizes resources from a number of sources, including U.S. DOE, NSBA/COSA, and other resources.

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AGENDA

- I. Introduction of Faculty
- II. A Quick Title IX Primer – Sam Kerr
 - a. Overview of current regulatory requirements
 - b. Out with the old, In with the new; Out with the new, In with the old
- III. Intake of the Complaint/Preparing for the Investigation – Brett Arenz
- IV. Interview Process/Techniques – Brett Garland
- V. Writing the Report – Sheila Woodward
 - a. Analyzing the Facts Gathered
 - b. Writing the Report

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I. Introduction of Faculty

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II. A Quick Title IX Primer



- a. Overview of current regulatory requirements
- b. Out with the old, In with the new;
Out with the new, In with the old

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Title IX: The Law



No person in the United States **on the basis of sex** shall be

- excluded from participation in,
- be denied the benefits of, or
- be subjected to discrimination under any education program or activity


which is receiving federal financial assistance.

20 U.S.C. § 1681 (sex)

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Title IX: The Law



Title IX is but one of many laws addressing civil rights; others include:


- Title VI (1964) (public accommodations-federal funding)
- Title VII (1964) (employment discrimination)
- Title IX (1972) (discrimination on the basis of sex in educational programs and activities that receive or benefit from Federal financial assistance—K-12 and higher education)

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Title IX: The Law



Discrimination under Title IX on the basis of sex in educational programs and activities that receive or benefit from Federal financial assistance includes:

- Sexual harassment (with a broader definition under the 2020 Regulations)
- Discrimination based on gender identity and sexual orientation (Executive Order dated January 20, 2021)
 - Consistent with recent Court rulings

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Title IX Historical Timeline

1972	Title IX becomes law
1975	US Dept. of Health Education & Welfare issues Title IX regulations
1980	Title IX enforcement transferred to the new ED OCR office
1992	SCOTUS recognizes student right to money damages for sexual harassment (<i>Franklin v. Gwinnett County Schools</i>)
1997	US DOE's OCR issues guidance on sexual harassment recognizing responsibility of institutions to respond
1998	SCOTUS sets standard for teacher-on-student harassment liability as "deliberate indifference" after "actual notice" of misconduct. (<i>Gebser v. Lago Vista Sch. Dist.</i>)
1999	SCOTUS adds to <i>Gebser</i> requirements for a narrow definition of "sexual harassment." (<i>Davis v. Monroe County Bd. of Educ.</i>)

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Gebser v. Lago Vista Indep. School District,
524 U.S. 274 (1998)

A school board can be liable for money damages under Title IX for **employee-on-student sexual harassment** under certain circumstances.

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Davis v. Monroe County Bd of Education,
526 U.S. 629 (1999)

A school board can be liable for money damages under Title IX for **student-on-student sexual harassment** under certain circumstances.

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Title IX Guidance and Regulations Over Last 20 Years

- 2001 DOE Guidance
- October 2010 DCL
- April 2011 DCL*
- April 2014 Q&A*
- April 2015 DCL & Resource
- May 2016 DCL*
- September 2017 DCL
- September 2017 Q&A
- August 2020 Regulations

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"Sexual Harassment" under 2020 Title IX Regulations

Under the new regulations, prohibited "sexual harassment" means conduct on the basis of sex that satisfies one or more of the following:

- an employee conditioning the provision of an aid, benefit or service on an individual's participation in unwelcome sexual conduct (i.e., quid pro quo)
- unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person equal access to an education program or activity (i.e., hostile environment)
- sexual assault (as defined by Clery Act), or "dating violence," "domestic violence" and "stalking" (as defined by Violence Against Women Act)



Sexual Assault Policies and Procedures
Student Rights under Title IX
Campus Safety | Sexual Assault | Sexual Harassment

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Key Provisions of 2020 Title IX Regulations

- Requires schools to offer clear, accessible options for any person to report sexual harassment
- Empowers survivors to make decisions about how a school responds to incidents of sexual harassment
- Requires schools to offer survivors supportive measures, such as class or dorm reassignments or no-contact orders



Sexual Assault Policies and Procedures
Student Rights under Title IX
Campus Safety | Sexual Assault | Sexual Harassment

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Key Provisions of 2020 Title IX Regulations [cont'd]

- Protects K-12 students by requiring elementary and secondary schools to respond promptly when any school employee has notice of sexual harassment
- Restores fairness on college and university campuses by upholding a student's right to written notice of allegations, the right to an advisor, and the right to submit, cross-examine, and challenge evidence at a live hearing



Sexual Assault Policies and Procedures
Student Rights under Title IX
Campus Safety | Sexual Assault | Sexual Harassment

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Source: U.S. DOE

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David C. Coe, Secretary, 1 Sioux Falls

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David C. Storch, J. Simon, J. L. Storch, J. L. Storch, J. L. Storch

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Legal Theories Used to Advance Sexual Harassment Claims in Education Institutions

- State law claims:
 - Negligent supervision and retention
 - Negligent training
 - Emotional distress
- Federal law claims:
 - Title IX (covering sexual harassment in education)
 - Section 1983 of the Civil Rights Act
 - Violation of the Equal Protection Clause of the 14th Amendment, and
 - Violation of Due Process under the 14th Amendment.

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Potential Areas of Liability

Failure of the District to:

- revise and maintain a Title IX policy
- identify Title IX Coordinator, who is responsible for implementing Title IX and responsible for responding to incidents
- notify all parents or guardians of students, students, and employees about the Title IX Coordinator and how to report an incident of sex discrimination in a program or activity it operates

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Potential Areas of Liability

Failure of the District to:

- understand what the US DOE defines as “actual knowledge” of a Title IX incident that triggers a duty to report to the Title IX Coordinator
- failure to distribute and conspicuously post information and conduct training regarding the approved Title IX policy and procedures


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Potential Areas of Liability

Failure of the District to:

- provide training that is comprehensive and continuous for all Title IX or Title IX-related personnel to ensure they are knowledgeable about Title IX policy and procedures and are able to perform their roles free from any conflict of interest or bias
- ensure a prompt and equitable grievance process that is compliant with all US DOE directives




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Per Viam: Title IX Coordinator

- Must be called Title IX Coordinator
- Must be designated and “authorized” to coordinate compliance efforts



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Per Viam: Recordkeeping

34 C.F.R. 106.45(b)(10)

- Records related to alleged sexual harassment must be maintained for a minimum of 7 years:
 - Investigation records
 - Disciplinary sanctions
 - Remedies
 - Appeals
 - Records of any actions taken, including supportive measures
- Must document for every instance:
 - Why response was not deliberately indifferent
 - That measures were taken to restore or preserve equal access to the educational program or activity
 - If no supportive measures provided, why that was not deliberately indifferent




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Per Viam: Title IX Training

- Required for all staff (identify and report sexual harassment)
- Required for Title IX Coordinator, investigators, and decisionmakers (both decision and appeal)




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U.S. Department of Education Title IX Regulations and Resources

- New US DOE Title IX Website:
https://sites.ed.gov/titleix/?utm_content&utm_medium=email&utm_name&utm_source=govdelivery&utm_term
 - Title IX Regulations Addressing Sexual Harassment (2020)
 - 2033 Pages...rule amendments are 26 pages
 - Title IX: Fact Sheet: Final Title IX Regulations
 - Title IX: U.S. Department of Education Title IX Final Rule Overview
 - Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule
 - Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule
 - OCR Webinar: Title IX Regulations Addressing Sexual Harassment (Length: 01:11:29)




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Discussion



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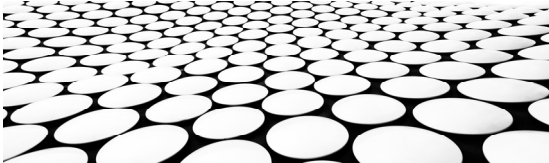
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III. INTAKE OF THE COMPLAINT/PREPARING FOR THE INVESTIGATION

BRETT ARENZ
IN-HOUSE COUNSEL, SIOUX FALLS SCHOOL DISTRICT 49-5



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GRIEVANCE PROCESS GENERALLY

- Due Process – right to investigation and adjudication
- Grievance Procedures
 - Formal complaint, supportive measures, disciplinary sanctions, remedial measures
- Jurisdiction
 - Sexual Harassment, U.S.A., school property/activity/event (exercise control)
- Notice Requirements
 - Actual knowledge - any employee of an elementary and secondary school

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DEFINITIONS

- Actual knowledge
- Complainant
- Respondent
- Advisor – chosen or appointed; may be attorney, but not required
- Decision-maker (hearing, appeal, disciplinary)
- Sexual harassment
 - Sexual Assault, Dating Violence, Domestic Violence, Stalking

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RECEIVING REPORTS

- Title IX Coordinator or any employee
- Any person may report (does not make them the complainant)
- Actual knowledge of sexual harassment or allegation of sexual harassment triggers response (even if no formal complaint filed)

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DISTRICT RESPONSE TO REPORT OF SEXUAL HARASSMENT

- Prompt Response
- Equitable Treatment
 - For complainant
 - For respondent
- Supportive Measures
 - Supportive measures vs. disciplinary sanctions

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PROMPT RESPONSE

- As soon as reasonably possible – contact complainant to:
 - discuss the availability of and offer supportive measures;
 - consider the complainant's wishes with respect to supportive measures;
 - inform the complainant of the availability of supportive measures with or without the filing of a formal complaint; and
 - explain to the complainant the process for filing a formal complaint.

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DISMISSAL OF A FORMAL COMPLAINT

- **Must** dismiss a formal complaint if alleged conduct:
 - Would not constitute sexual harassment, even if proved
 - Did not occur in District's education program or activity
 - Did not occur against a person in the United States
- **May** dismiss if:
 - Complainant notifies wish to withdraw in writing to Title IX Coordinator
 - Respondent no longer enrolled/employed
 - Special circumstances preventing gathering of evidence
- Must send notice to all parties, stating reason
- **Does not preclude District action under other policies**
 - Title IX Coordinator may redirect after dismissal

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FORMAL COMPLAINTS

- Contains an allegation of sexual harassment and a request that the District investigate the allegations is required before the District may conduct a formal investigation of sexual harassment or take any action (other than supportive measures) against a person accused of sexual harassment.
- At a minimum, a formal complaint must:
 - contain the name and address of the complainant and the student's parent or guardian if the complainant is a minor student;
 - describe the alleged sexual harassment,
 - request an investigation of the matter, and
 - be signed by the complainant or otherwise indicate that the complainant is the person filing the complaint.
- May be filed with Title IX Coordinator in person, by mail, or by email

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NOTICE OF FORMAL COMPLAINT

- Notice to contain:
 - this Title IX Grievance Process, including any informal resolution process;
 - the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview; "sufficient details" shall include to the extent known identities of persons involved, the conduct allegedly constituting sexual harassment, and the date and location of the incident;
 - a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility will be made at the conclusion of the grievance process;
 - that each party may have an advisor of their choice, who may be, but is not required to be, an attorney;
 - that each party is entitled to inspect and review evidence; and
 - a reference to any provision in the District's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.
- Other

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DETERMINATION / DECISION-MAKER

- Decision-maker (not Title IX Coordinator) must issue written decision
- Provided simultaneously to the parties
- Must include appeal procedures

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APPEALS PROCESS

- Must include the procedures and permissible bases for the complainant and respondent to appeal
 - Upon determination regarding responsibility
 - Dismissal of a formal complaint
- Appeal Standing
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time of determination/dismissal; OR
 - Conflict of interest or bias for or against complainants or respondents that affected the outcome; AND
 - Timely
- Disciplinary sanctions stayed during appeal

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INFORMAL RESOLUTION

- Not required to offer
- May offer only after:
 - Written notice to the parties disclosing (i) allegations of complaint; (ii) requirements of informal resolution process, including any preclusion from resuming a formal complaint after agreeing to a resolution; (iii) consequences from participating in informal process, including records that will be maintained or could be shared
 - Voluntary written consent from the parties
- Not permitted if allegations involve an employee sexually harassing a student

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FINAL DETERMINATION, DISCIPLINARY SANCTIONS

- In no case shall the District impose disciplinary consequences or sanctions against a respondent who has been accused of conduct which may constitute sexual harassment, until the Title IX Grievance Process has been completed.
- Final Determination = Title IX Decision → then sanctions and remedies
 - Disciplinary Sanctions – imposed by persons charged under Board policies
 - Non-disciplinary Remedies – Title IX Coordinator responsible
- Emergency Removal / Administrative Leave

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IV. Interview Process / Techniques

Brett Garland
South Dakota School Safety Program Director
605-381-1814



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Basic Interview

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Interview Or Interrogation

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What Is An Interview?




A structured conversation used to collect information from a Complainant, Witness, or Respondent.

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An Interrogation Is...

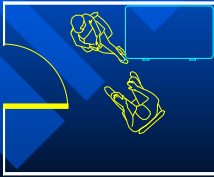
The more formal and systematic questioning of a person suspected of having committed an offense in order to secure a confession.



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The Interview Setting

- *Must be private – One on one best*
- *Small room – 8x10 – no phone*
- *No barriers*
- *Reduce distractions*
- *Do not talk down to subject*
- *Interview in social zone – approx. 3 feet away*



The diagram shows two stylized human figures. One figure is on the left, and the other is on the right. A yellow curved line connects them, representing the 'social zone'. A yellow arrow points from the text 'Interview in social zone' to this line. A blue square box is positioned above the right figure, and a blue arrow points from the text 'approx. 3 feet away' to the space between the two figures.

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Interviews are:

- *Non-accusatory*
- *Subject Driven*
- *About Listening*
- *Used to Gather Facts*
- *An appropriate time to observe behavior*



A photograph of two women in an office. One woman, wearing a dark blazer, is sitting at a desk and looking towards the other woman. The second woman, wearing a light-colored top, is standing and looking back at the seated woman. They appear to be in a professional conversation.

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The Interview (cont.)

- *20% Interviewer/80% Interviewee.*
- *Designed to elicit narrative responses.*



A photograph of a woman in profile, facing right. She is speaking, and a cloud of small, colorful letters (A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z) is floating around her head, symbolizing narrative responses.

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An Interviewer Should...

- *Attempt to quickly build rapport.*
- *Purpose is to allow the subject to feel comfortable with you.*
- *Let interviewee understand that by talking to you, he/she will feel better.*

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An Interviewer Should...

- *Look for commonalities with subject.*
- *Devil is in the details.*
 - *Smile and a handshake.*
 - *Offer of goodwill (water, soda,)*
 - *Be polite, but not condescending.*
 - *Show empathy.*

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Characteristics Of An Effective Interviewer/Interrogator

...

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ATTITUDE

- *Objective*
- *Cordial, Polite*
- *Even Tempered*
- *Sincere*
- *Interested*
- *Understanding*

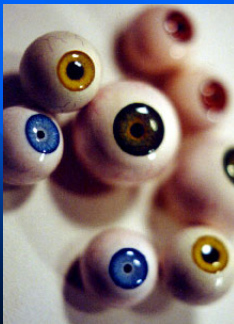
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Posture

- *Sit upright.*
- *Face your subject – be frontally aligned.*
- *Lean forward when appropriate.*
- *Be open...don't cross your arms.*
- *Avoid slouching or leaning back in your chair.*

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Eye Contact



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- *Maintain eye contact when asking a question or getting an answer.*
- *Avoid staring, even during a 'stupid' response.*
- *Remember that eye contact is a taboo in some cultures.*
- *Be careful not to express your feelings with your eyes*

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Facial Expressions

Avoid expressions of:



Anger

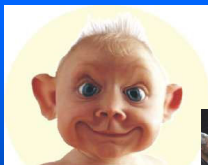


Disgust



Shock

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Humor



Disbelief



Skepticism

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Listening

- *Listen to the answer before asking the next question.*
- *The answers will give the interview direction.*
- *Guide and control the conversation should the information go beyond the scope of the investigation.*

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Interviewing Techniques



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Questions??

- *Ask a question when it appears the person is ready to give an accurate answer.*
- *Ask 1 question at a time.*
- *Avoid the 'implied answer' or 'leading questions'.*
- *Keep question short and simple.*
- *Keep 'yes/no' questions to a minimum.*

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More About Questions????

- *Negative questions invite negative answers.*
- *Avoid*
 - *Personality issues*
 - *Ambiguous language*
 - *Ridicule*
- **Control The Interview With:**
 - **Confidence**
 - **Authority**

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Always Remember The 5 W's

- *Who* W
- *What* W
- *Where* W
- *And - Mr. H....* H
- *When* W
- *Why* W
- *How!* OW!

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Interview Questions

- *Be careful asking Complainants, "Why" they did or did not do something.*
- *Instead..."Tell me more about....."*

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Interview Questions

- *You may have to acknowledge the trauma/pain of a difficult situation.*
 - *What are you able to tell me about your experience?*
 - *Tell me more about....*
 - *What was your thought process during the experience?*

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Interview Questions

- *What were your reactions to this experience?*
 - *Physically?*
 - *Emotionally?*

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Interview Questions

- *What was the most difficult part of this experience for you?*
- *What if anything can't you forget about your experience?*

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Some Pitfalls To Keep In Mind

- *Don't jump to conclusions...*
– *It doesn't count if it is not stated.*
- *Don't make promises you can't keep.*
- *Don't degrade or cause the interviewee to feel diminished.*

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And Still More...

- *Showing Anger*
- *Displaying Your Prejudices*
- *Hurrying*
- *Threatening*

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Ending The Interview

- *Sensitivity and empathy are keys to successful interviews.*
- *Be patient and thorough.*
- *Ask if they would like to add any other information or provide helpful information.*
- *Provide your contact information at the conclusion of the interview.*

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What are we going to talk about?

- Analyzing the Evidence
- Drafting the Report
- Finalizing the Report

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Analyzing The Facts

Impartial & Unbiased
Investigator must be both impartial and unbiased

- Do not prejudge facts – each case is unique and different
- Do not make inferences based on party status (i.e., complainant or respondent)
- Avoid stereotypes
- Avoid any appearance of bias – would a reasonable person believe a conflict of interest exists between the party or a witness?
- When in doubt, get out

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Analyzing the Evidence

Do Not Make Assumptions

- Trauma manifests in different ways:
 - Delayed or reluctant reporting
 - Memory Issues
 - Remaining in an abusive relationship
 - Being calm, composed, or emotionless
- If a party shows classic trauma signs, that does not mean that the respondent is responsible for causing it
- If a party does not show the classic trauma signs, that does not mean that the alleged conduct did not occur

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Analyzing the Evidence

Investigator Must Consider all Relevant Evidence

- Evidence is relevant if it tends to show that a fact material to the investigation is either more likely to be true or less likely to be true
- Evidence can be direct or circumstantial.
 - » Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact
 - » Circumstantial evidence is evidence that relies on an inference to connect it to a conclusion of fact
- Inculpatory evidence is evidence that shows or tends to show the respondent is responsible for the alleged conduct
- Exculpatory evidence is evidence that shows or tends to show the respondent is not responsible for the alleged conduct

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Analyzing the Evidence

Improper Evidence

- In making factual findings, an investigator cannot consider:
 - **Sexual History** - Information about the complainant's sexual history unless it is (a) offered to prove someone other than the respondent committed the alleged conduct; or (b) offered to establish prior specific incidents that indicate complainant's consent to the alleged conduct
 - **Privileged Information** - Without express consent of the party, the investigator cannot obtain information that is subject to a legal privilege such as doctor-patient, attorney-client, right against self-incrimination etc.

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Drafting The Report

Outline of the Report

1. Background
2. Jurisdiction
3. Summary of Allegations
4. Description of Investigation
5. Summary of Facts

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Drafting the Report

BACKGROUND

- Names, addresses, ages of the complainant and respondent
- Identify the date of filing of the Formal Complaint and its specific allegations
- Identify the date notice was given to the parties by the Title IX Coordinator of the filing of the Formal Complaint
 - » If the parties are minors, notice also will be given to parents
- Identify the investigator
- Identify exhibits that are used in the report

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Drafting the Report

JURISDICTION

- Identify whether the alleged conduct in the Formal Complaint would constitute sexual harassment if true
- Confirm that the alleged conduct occurred within the United States
- Identify where the alleged incident(s) occurred – they must have occurred on school property or at events over which the school district exercised substantial control over the respondent

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Drafting the Report

Summarize Allegations & Applicable Policy

- Identify the specific incident(s) alleged in the Formal Complaint
- For each incident, identify what parts of the school district's Title IX policies are applicable
- May be other policies implicated (student Handbook, employee handbook etc.) but focus of this report is on Title IX

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Drafting the Report

Describe the Investigation Process

- Identify witnesses interviewed and their relationship to the parties. Identify witnesses that were not interviewed and explain why
- Identify relevant documents (texts, emails, screen shots, photos etc.)
- Identify any evidence that the investigator concluded was not relevant
- Identify any changes made to the report after the receipt of the comments from the parties

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Drafting the Report

Make Factual Findings/Summaries

- Summarize each witness interview(s), starting with Complainant and Respondent
- Summarize other relevant evidence
- The investigator may make a credibility finding as long as that finding is not based on the party's status as a complainant or respondent. May not need to make an actual finding, but provide relevant facts to allow decision-maker to analyze.
 - » If a credibility finding is necessary, explain why you found the testimony of one witness more credible than another. Factors to consider on credibility include (a) the ability and opportunity of the witness to observe; (b) the witness's intelligence and memory; (c) the witness's mannerisms when speaking with the investigator; (d) whether the witness has made contradictory statements at an earlier time; (e) any apparent bias, conflict of interest, or prejudice; (f) the existence of corroborating information; and (g) the reasonableness of the statements in light of all other relevant evidence.
- Ultimately, credibility and findings on whether policy has been violated is made by the decision-maker, not the investigator

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Drafting the Report

Choose Your Words Wisely

- Your report is supposed to be neutral, not accusatorial
- Avoid using words such as "clearly" or "obviously"
- Avoid identifying any party as a "perpetrator" or a "victim"
- Use quotation marks carefully – use the direct source of the quote such as a witness statement, screen shot or email and cite to its location in the Exhibits
- Investigator is not the decision-maker

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Drafting the Report

Provide Draft Report to Parties

- Each party must have at least 10 days to review the draft report and all evidence, either via electronic documents or hard copy
- Investigator must review the responses and should include them as exhibits to the report

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State Bar of South Dakota





Thank You!

Any Questions?

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