

Advanced Title IX Coordinator Training

May 21, 2021 & June 9, 2021

ODHE

Advanced Title IX Coordinator
Writing Workshop



Bricker & Eckler
ATTORNEYS AT LAW

Disclaimers



We can't help ourselves. We're lawyers.

- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- We will send a copy of the slides after this presentation to all who registered their email address when signing in
- We will take questions at the end as time permits

Presentation Rules



Again... we can't help ourselves. We're still lawyers.

- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

Can We Post these Materials?



34 C.F.R. §106.45(b)(10)(i)(D)

- Yes!
- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution electronically to post

Documentation, Investigation Reports, Decisions, & Appeals

- Recordkeeping for Supportive Measures, Dismissals, Referrals
 - Coordinating the drafting of investigation reports, decisions, informal resolution documentation, and appeals
 - Structure of reports & decisions
- Common Mistakes that Prevent Clarity in Written Decisions
 - Best Practices for Writing Neutral Decisions on Sensitive Subjects

Recordkeeping Basics



34 C.F.R. §106.45(b)(10)

- Develop a process for required recordkeeping, including:
 - Maintaining all investigatory, informal resolution, and appeal records for a period of **seven** years
 - Collecting and publicly posting all materials used to train TIX team

Documenting Supportive Measures



- Document all aspects
 - The offer of supportive measures (have a list that you use with everyone)
 - Discussion of specific measures
 - Basis for *not* providing a certain supportive measures to a party
- Consider sharing this documentation with the party
 - Email
 - Memo or checklist

Supportive Measures Reminders



- What we do for one, we do for the other
 - Unless there's a reason not to, in which case – write that reason down
 - Be neutral and unbiased
 - If you are uncomfortable documenting the reason for the distinction – consider whether the rationale is truly neutral and unbiased
- Remember to continue documenting throughout the process
 - Discussions re: supportive measures may come up on multiple occasions and lead to different results

Documenting Dismissals & Referrals



- Exit Ramps
 - Who
 - What
 - Where
 - When
 - Why
- Consider using **IRAC** style – Issue, Rule, Application, Conclusion
 - We'll look at examples in a few slides

Mandatory Dismissal Refresher



Dismissal of a formal complaint— §106.45(b)(3)(i)

The recipient **must** investigate the allegations in a formal complaint

- **(BUT)** If the conduct alleged in the formal complaint
 - **would not constitute** sexual harassment as defined in §106.30 even if proved,
 - did not occur in the recipient's **education program or activity**, ...
 - or **did not occur against a person in the United States**,
- then the recipient **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient's code of conduct.**

Permissive Dismissal Refresher



36 CFR 106.45(b)(ii)

May dismiss if:

- (1) Complainant asks in writing to withdraw the Formal Complaint
- (2) Respondent is no longer enrolled or employed by the recipient
- (3) “Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the Formal Complaint or allegations therein”

Written Notice of Dismissal (1 of 2)



36 CFR 106.45(b)(3)(i)

- “Dismissal” from Title IX does not preclude action under another provision of the recipient’s code of conduct, employee handbook, etc.
- Recipient “must promptly send written notice of the dismissal **and reason(s) therefor** simultaneously to the parties.”
 - Applies to both Mandatory and Permissive Dismissal
 - Show your work

Written Notice of Dismissal (2 of 2)



- Explain the reasons for dismissal/referral in a readable and understandable way
- Explain the issue, the rules that apply for purposes of dismissal, your analysis applying the facts to the rules, and draw your conclusion
 - IRAC

Rationale for Dismissal



“Show Your Work”

Application of Policy to Allegations

- IRAC or CRAC
 - Issue/Conclusion
 - Rule
 - Application
 - Conclusion
- “Rule” = your policy provisions
- “Application” = your explanation of whether the facts, as alleged, meet the jurisdictional requirements
- Conclusion = the result of your analysis for each allegation

IRAC Example #1



Student A reported that her ex-girlfriend of three years called her disparaging names during the relationship and tried to control her interactions with others.

Issue:

Does the conduct alleged constitute Title IX Sexual Harassment under your Policy?

Rule:

[Insert definitions from your policy that might address the alleged conduct]

Application:

Explain whether the information above means that Student A has alleged conduct that meets your Policy definitions.

Conclusion:

“For these reasons, the conduct reported by Student A does not meet the definition of Sexual Harassment or Dating Violence under the Title IX Policy. However, this matter is being referred to the Office of Student Affairs for review of potential violations of the Mutual Respect Policy.

IRAC Example #2

Complainant reported that Respondent, a fellow student who had asked her out on several occasions despite her explanation that she is not interested romantically, inappropriately touched her arm while the two were talking at an off-campus party last weekend. More specifically, Complainant reported that Respondent asked her to find a quiet spot where they could be alone, then put his hand on her shoulder and gradually moved it down the length of her arm in a way that “gave [her] the creeps.”

- Issue:** Does the conduct alleged constitute Title IX Sexual Harassment under your Policy?
- Rule:** [Insert definitions from your policy that might address the alleged conduct]
- Application:** Explain whether the information above means that Complainant has alleged conduct that meets your Policy definitions.
- Conclusion:** “For these reasons, the conduct reported by Complainant does not meet the definition of Sexual Harassment or Fondling under the Title IX Policy. However, this matter is being referred to the Office of Student Affairs for review of potential violations of the Mutual Respect Policy.”

IRAC in Other Settings



- Investigation reports
 - But remember – no conclusions as to the allegations
- Title IX Hearing Decisions
- Appeal Decisions
- Informal Resolution Documentation
 - Ex: Rationale for terminating an Informal Resolution

Coordinating the Writing of Your Team

(1 of 2)



- Before
 - Templates, training, Q&A re: expectations
- During
 - Be available to assist with clarity, form, procedure
 - Be careful not to take over the work that's been delegated to others under your Policy or by the Regs
- After
 - Review to ensure readability, consistency, neutrality
 - Consult with GC when necessary

Coordinating the Writing of Your Team

(2 of 2)



- Remember, you may have been separated from a writing project for a reason
 - You can't be the decision-maker, appeals officer, or informal resolution officer
 - If you aren't the investigator – don't write the investigation report
- Don't substitute your reasoning for others on your team
- Don't let your dealings with the parties affect your review of the team's work
 - Ex: Demands for supportive measures, experiences with the parties' legal counsel
 - Make sure the process was followed and documented

Coordinating the Writing of Your Team - Investigators

(1 of 2)



- Does the report make sense?
- Does the report include enough detail for someone unfamiliar with your campus or the case to understand what is being said?
- Does the report comply with your Policy and with the Regs?
 - Ex: Was the evidence shared with the parties before the final report?
 - Ex: Were all the parties given an equal opportunity to present fact and expert witnesses, and other inculpatory and exculpatory evidence?

Coordinating the Writing of Your Team - Investigators

(2 of 2)



- Does the report accurately describe **the information gathered** and the **process** of gathering it?
- Is the report neutral in tone? Equal opportunities for both parties?

Coordinating the Writing of Your Team – Decision-Makers

(1 of 2)



- Does the decision make sense?
- Does the decision include enough detail for someone unfamiliar with your campus or the case to understand what is being said?
- Does the report comply with your Policy and with the Regs?
 - 34 C.F.R. 106.45(b)(7)(ii)

Coordinating the Writing of Your Team – Decision-Makers

(2 of 2)



- Does the decision accurately describe the process leading up to the hearing?
- Did the Decision-Maker “show their work”?
- Is the decision neutral in tone?

Decision Checklist



34 C.F.R. 106.45(b)(7)(ii)(A)-(E)

- **Allegations**
- **Procedural Steps**
- **Findings of Fact**
- **Application of the Policy to the Facts**
- **A statement of, and rationale for, the result as to each allegation:**
 - a determination regarding responsibility,
 - any **disciplinary sanctions** the recipient imposes on the respondent, and
 - whether **remedies** designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant;
- **Appeal**

Coordinating the Writing of Your Team – Appeals Officers (1 of 2)



- Does the appeal decision make sense?
- Does the appeal decision include enough detail for someone unfamiliar with your campus or the case to understand what is being said?
- Does the report comply with your Policy and with the Regs?
 - Remember the bases for appeal included in the Regs
 - Are there others in your Policy?

Coordinating the Writing of Your Team – Appeals Officers (2 of 2)



- Does the appeal decision accurately describe the process leading up to the hearing?
- Did the Appeals Officer “show their work”?
- Is the appeal decision neutral in tone?

Coordinating the Writing of Your Team – Informal Resolution Officers



- Are the agreed-upon terms of the Informal Resolution in a written agreement?
 - Important if there are disputes later
 - Important if OCR reviews the matter
- Does the agreement make sense? Are the terms realistic?
- Does the agreement (or other documentation) describe the process that the parties to the resolution?
 - Specifically, does it explain that the Informal Resolution process was used instead of a formal process after the parties gave voluntary written consent to the process?

Things We May Have Told Your Decision-Makers



... and possibly your Investigators in the near future

- Each case includes at least TWO stories, maybe more
- Set the scene visually
- Be clear as to the source of information. Compare:
 - “Bob stated this happened.”
 - “This happened.”
- Make sure it is readable
 - Could someone unfamiliar with the incident pick up the decision and understand what happened?

Story One of (at least) Two



The Underlying Case

Each case includes at least TWO stories in one:

(1) The facts of the underlying case

- On August 25, 2020, Complainant and Respondent attended a party together at Thompson Point Residence Hall
- Complainant reports A, B, and C
- Respondent reports X, Y, and Z

Story Two of (at least) Two



The Investigation of the Underlying Case

Each case includes at least TWO stories in one:

(2) The process of the underlying case

- On August 30, 2020, Complainant filed a formal complaint
- On September 5, 2020, Complainant spoke with Investigator
- On December 10, 2020, Complainant shared the Investigation Report with Witnesses 1, 2, and 3

Different Ways to Tell These Stories



Structural Considerations

- Template
- Typical practice for your institution
- Remember the required components
- Common structural tools
 - Chronology
 - Subject Matter
 - IRAC or CRAC

Where to Begin?



Structuring Your Investigation Reports and Decisions

Introduction

- Should preview both stories
 - How did the underlying story get to the Title IX Office?
 - What about the underlying story was reported?
 - What are the **allegations**?
 - Remember to use the names of violations as they existed when the conduct is reported to have occurred
 - Same policy for definitions and procedure? Or a split?

Structuring Your Facts

Remember – Suggestions Only

- Use the structure that works for your institution
- Use the structure that works for the particular case
 - Your structure may change depending on the case
 - Think about the following:
 - Chronology
 - When does synthesizing facts help the reader?
 - When does separating facts help the reader?
 - Where does hearing testimony fit?

Synthesis 101

Look for opportunities to logically combine related facts

- Undisputed facts at the beginning
 - May give a framework without creating repetition
- Disputed facts
 - Facts may be related by:
 - Timing
 - Source
 - Topic

Synthesis Example #1 (Decision)



Logically combine related facts to tell a story

Pre-Gaming at Apartment B

Complainant and Witnesses A, B, and C, reported that they each took 3 shots of vodka when they arrived at Apartment B. Report, pp. 3, 6-7. This was largely consistent with their hearing testimony, except for Witness C who said they misspoke during their Title IX interview. Hearing Transcript, p. 4. At the hearing, Witness C testified that they only took one shot of vodka at the party. Hearing Transcript, p. 4. Later in the evening, approximately two hours after Complainant and Witnesses A, B, and C arrived and took vodka shots, Respondent arrived at Apartment B with Witness D. During his Title IX interview and at the hearing, Respondent reported that he did not take any shots of vodka and had a clear memory of the night. Report, p. 4; Hearing Transcript, p. 6. Respondent also reported in his interview and at the hearing that he did not observe Complainant take any shots of vodka that night, did not see Complainant stumbling when she walked around the apartment, and did not hear Complainant slur her speech at any time. Report, p. 4; Hearing Transcript, p. 6.

Synthesis Example #1 – Takeaways



Can you apply these takeaways in your cases?

Several things worth noting in this example:

- The information is presented under a topic heading
 - "Pre-Gaming at Apartment B"
- Information comes from different people and is blended together
 - Parties and witnesses
- Information comes from different documents and is blended together
 - The Investigation Report and the Hearing Transcript

Synthesis Example #1 – Takeaways (cont).



More takeaways

Several things worth noting in this example:

- Discrepancies between the investigation and hearing testimony are noted
 - Witness C
- Transitions to demonstrate shifts in time or topic
 - "Later in the evening, approximately two hours after Complainant and Witnesses A, B, and C arrived and took vodka shots, Respondent arrived at Apartment B with Witness D."

Synthesis Example #2 (Decision)



Can you apply these takeaways in your cases?

Report that Respondent choked Complainant

As previously mentioned, Complainant reported four separate acts that might rise to the level of a policy violation. First, Complainant reported that Respondent choked her during their argument on September 1, 2020. Report, p. 1. When Complainant described this incident to the Title IX investigator, she said that Respondent used his hand to encircle her throat and then squeeze, preventing her from breathing or talking. Report, p. 4. Under cross-examination at the hearing, Complainant stated that Respondent used his left hand only, but that his hand was large enough to wrap entirely around Complainant's neck. Hearing Transcript, p. 10. Complainant submitted photographs of her neck during the Title IX investigation, which were included in the investigation report on pages 10 and 11. Two witnesses, Witness A and Witness B, reported to the Title IX investigator that they observed bruising on the Complainant's neck when they saw the Complainant the morning of September 2, 2020. Report, p. 6. Both witnesses provided testimony at the hearing that was consistent with their prior statements to investigators. Hearing Transcript, p. 12.

Respondent has consistently denied that he choked Complainant. In his statement to the Title IX Investigator...

Synthesis Example #2 - Takeaways



Can you apply these takeaways in your cases?

Several things worth noting in this example:

- The information is presented under a topic heading
 - “Report that Respondent Choked Complainant”
- Information comes from different people and is blended together
 - Parties and witnesses
- Information comes from different documents and is blended together
 - The Investigation Report and the Hearing Transcript

Synthesis Example #2 – Takeaways (cont.)



More takeaways

Several things worth noting in this example:

- Discrepancies between the investigation and hearing testimony are noted
 - Complainant's description of the choking
- Transitions to demonstrate shift from individual factual allegation to the response to that allegation
 - First discussing information supportive of Complainant's report
 - New paragraph to discuss response from Respondent

Common Writing Mistakes

Consistent and Precise Language



Inconsistent Terminology

- Referring to individuals or locations differently in different places in the report
- May leave the reader with the impression that you are talking about different places or people
 - Tom, Tom Smith, Mr. Smith, Thomas
 - Tom's room, Room 4A, Hubbard Hall

Word choice

- Be as precise as possible
- This can add time to the writing process, but can pay off in terms of clarity
- Avoid charged language

Common Writing Mistakes

Empathy and Tone



Empathy

- Stay away from charged words of advocacy
 - Clearly/obviously
 - Innocent/guilty
 - Victim/perpetration
- Watch your use of adjectives and adverbs – unless they are in a quote
 - “really drunk”
 - “forcefully pushed”

Tone

- Be non-judgmental
- Recognize the impact of your words

Common Writing Mistakes

Cite Your Source



Failing to include sources of information (discussed earlier)

- If explaining this in every sentence weighs down your writing, use footnotes to add clarity. (“Bob stated this happened.”)
- Citing the source of your information helps the reader and underscores your neutrality

Confusing Quotation Marks

- Is the quoted language from the interviewee or the interviewer?
- Did someone else put the language in quotation marks?
- Footnote 4: The quoted language was attributed to Respondent on page 6 of the Investigation report.
- Footnote 10: The quoted language was attributed to Respondent by Claimant during Claimant’s October 10, 2020 Title IX interview.

Common Writing Mistakes

Structure



Topic sentences and transitions

- Provide a roadmap in your introduction and under new headings
- Sentences should flow from one-to-another
- Remember – telling two or more stories to someone unfamiliar with the case

Pronouns

- Be careful of pronoun usage so that the reader always knows who is saying or doing what
- When using pronouns, make sure you are using the right pronouns for the individual

Common Writing Mistakes

Miscellaneous



Typos

- They happen to everyone, but
- Typos in every sentence undermine the integrity of a decision

Run-on sentences/Sentence fragments

- Make sure each sentence has a subject and a verb
- If combining multiple independent clauses, consider whether to separate sentences

Editing Exercise #1



Respondent engaged in sexual intercourse with Complainant from behind.

Issues:

- No source of the information
- From behind what? Complainant?
- Word choice

Fix:

According to Complainant, Respondent and Complainant were both standing near the pool table at the time that Respondent began to sexually penetrate Complainant's vagina with his penis. Complainant reported that her body was facing away from Respondent at the time, towards the table, and that Respondent pushed her forward...

Editing Exercise #2



Complainant couldn't explain why she was sitting on the couch by herself.

Issues:

- Pronouns are not clear

Fix:

At the hearing, Complainant testified that she observed Witness A sitting on the couch by herself. Complainant said that she could not explain why Witness A was sitting alone.

Editing Exercise #3



Respondent stated that he was uncomfortable cuddling with women that he was not close with during his freshman year.

Issues:

- Confusing
- Misplaced modifier (to what part of the sentence does “during his freshman year” refer?)

Fix:

Respondent explained that during his freshman year, he was uncomfortable cuddling with women with whom he did not have a close relationship.

Editing Exercise #4 (Version 1)



There was no evidence to support Complainant’s assertion that the activity occurred without her consent.

Issues:

- Sounds judgmental because the “assertion” itself is being disregarded
- If Complainant’s assertion was not tested by cross-examination, make that clear

Fix:

At the hearing, Complainant declined to answer questions posed by Respondent’s advisor about the issue of consent. For this reason, Complainant’s prior statements may not be considered in reaching this decision. See Section 4.B. of the Title IX Policy.

Editing Exercise #4 (Version 2)



There was no evidence to support Complainant’s assertion that the activity occurred without her consent.

Issues:

- Sounds judgmental because the “assertion” is being disregarded
- If Complainant’s assertion was not tested by cross-examination, make that clear

Fix:

Complainant testified that the sexual activity occurred without her consent. This assertion must be weighed against the testimony of two eyewitnesses, both of whom provided consistent accounts of their observations, and the testimony of Respondent.

Closing Thoughts



- Clear and consistent writing is important at every stage in the process
- Remember your role
 - Author?
 - Reviewer?
- Make sure that the documents generated by the Title IX Office comply with your policy and the Title IX regs
- All written documents may be read by others at some point

Additional information available at:

Title IX Resource Center at www.bricker.com/titleix

Find us on **Twitter** at
@BrickerHigherEd

Questions?

