



Ratwik, Roszak & Maloney, P.A.

444 Cedar Street, Suite 2100
Saint Paul, Minnesota 55101

(612) 339-0060
www.ratwiklaw.com

A DEEP DIVE INTO TITLE IX INVESTIGATIONS

Christian R. Shafer
crs@ratwiklaw.com

September 30, 2022

I. RECAP OF THE GENERAL RULES FOR CONDUCTING TITLE IX INVESTIGATIONS

- A. Independent Investigator.** The investigator must be a neutral party, with no conflicts of interest regarding or bias for or against either the Complainant or Respondent, or Complainants or Respondents in general.
- B. Burden of Proof.** The school or district retains, at all times, the burden of proof and the burden of gathering sufficient evidence to reach a determination regarding responsibility. This burden does not rest on either party. 34 C.F.R. § 106.45(b)(5)(i).
- C. Privileged Information.** A school or district cannot require, allow, rely upon, or use evidence that either constitutes or seeks disclosure of any information protected by a legally recognized privilege, unless the person holding such privilege has waived the privilege. 34 C.F.R. § 106.45(b)(1)(x). Examples of

Title IX Trumps
FERPA

NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel.

©2022 Ratwik, Roszak & Maloney, P.A.

privileged information that may arise in this context would include communications between pupils and qualified school counselors, *see* N.D.C.C. § 31-01-06.1, as well as the lawyer-client and physician-patient privilege.

- D. **External Records.** A party's medical or psychological records may only be obtained, accessed, considered, disclosed, or otherwise used with the voluntary written consent of the student, or of a parent if the student is a minor. As part of this consent, students and parents should be advised that any medical or psychological records that are disclosed to the investigator will be shared with the other party or parties in the course of the investigation, as all parties have the right to review and respond to all evidence prior to the completion of the investigation report.
- E. **Data Privacy.** The duty to comply with the Title IX regulations is not obviated or alleviated by the Family Educational Rights and Privacy Act ("FERPA"). 34 C.F.R. § 106.6(e). The commentary relating to the regulations makes clear that the same applies to state laws, such as North Dakota's Open Records Laws, *see* N.D.C.C. §§ 44-04-18 *et seq.*
- F. **Consolidation of Complaints.** Multiple formal complaints may be consolidated into a single investigation if the allegations of sexual harassment arise out of the same facts or circumstances. 34 C.F.R. § 106.45(b)(4).
- G. **Presentation of Evidence.** The parties must be given equal opportunities to present witnesses, including both fact and expert witnesses, as well as other inculpatory and exculpatory evidence. 34 C.F.R. § 106.45(b)(5)(ii). The school or district cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence. 34 C.F.R. § 106.45(b)(5)(iii).
- H. **Notice of Interviews & Other Proceedings.** If a Complainant or Respondent is expected to attend a hearing, investigative interview, or other meeting, that party must be given written notice of that hearing, interview, or meeting, with sufficient time to prepare. The notice must contain the date, time, location, and purpose of the meeting, hearing, or interview, as well as a list of the other individuals who will attend or participate.

Non-party witnesses are not entitled to advance notice of an interview under the regulations.

- I. **Review of Evidence.** All parties and their advisors must be given the opportunity to inspect and review any evidence obtained by the investigation that is directly related to the allegations, regardless of whether or not the school or

district intends to rely on that evidence to reach a determination. 34 C.F.R. § 106.45(b)(5)(vi). This requirement extends to all evidence, inculpatory or exculpatory, whether obtained from a Complainant, Respondent, witness, or other third party, so long as the evidence is directly related to the allegations in the complaint. *Id.*

The parties must have at least ten (10) days to submit a written response to the evidence before the investigator can complete the investigation report. 34 C.F.R. § 106.45(b)(5)(vi). The investigator must consider any written responses from the parties before completing the report. *Id.*

- J. Investigation Reports.** The investigative report must fairly summarize relevant evidence. 34 C.F.R. § 106.45(b)(5)(vii). A copy of the investigative report must be provided simultaneously to all parties and advisors. *Id.* Each party must have an additional 10 days to respond to the investigation report in writing. *Id.*

II. CONDUCTING AN EFFECTIVE INVESTIGATION – FIRST STEPS

A. Before Investigating, Some Up-Front Reporting May Be Necessary.

1. **Report any suspected crimes to law enforcement.** Examples of crimes that should be reported to law enforcement include, but are not limited to, assault, sexual assault, possession or distribution of child pornography, etc.
- a. **Maltreatment of Minors Reporting.** Remember your obligation as a mandated reporter when you know or have reason to believe a child is being neglected or physically or sexually abused or has been neglected or physically or sexually abused within the preceding three years. *See* N.D.C.C. ch. 50-25.21.

- B. Act Promptly.** Even minimal delays may result in lost evidence or provide opportunities to conceal the truth or come up with a “story.” In addition, the investigation must follow any applicable legal timelines, including any Title IX requirements.

C. Data Practices Consideration in Investigations

1. Although the Department of Education has concluded that Title IX obligations are not obviated by FERPA or state data privacy laws, the district’s (or school’s) inability to use, store, or disseminate the collected data may still be impacted by those laws. A broadly written notice about how the school or school district intends to use the data and who it will be

shared with, should be provided before all interviews, especially interviews of the parties. Additionally, notice of the fact that the interviewee can choose not to provide the data will assist in averting claims of coercion.

2. **Garrity Warnings.** *Garrity* warnings should not be used in Title IX proceedings. Parties have the right to choose not to participate in the Title IX grievance process, and coercing any individual refusing to participate in an investigation or proceeding is defined as retaliation under the regulations. 34 C.F.R. § 106.71.

- D. Determining the Scope and Strategy of the Investigation.** Most investigations follow the same pattern: (1) receive complaint and/or interview Complainant; (2) interview fact witnesses; and (3) interview the Respondent. Under the new Title IX regulations, however, both parties must be afforded an equal opportunity to present witnesses. Accordingly, a fourth step, reviewing witnesses identified by the Respondent, may need to be added to this pattern in Title IX investigations.

At each stage of this process, the investigator should reevaluate whether additional investigation is warranted or needed and who should be interviewed next.

1. **Review Policies Beforehand.** It is beneficial to review any applicable school (or district level) policies prior to conducting the investigation. As a best practice, the investigator should also review the grievance procedure prior to conducting the investigation.
2. **Identifying Fact Witnesses.** For purposes of Title IX investigations, both the Complainant and the Respondent must have the opportunity to present fact witnesses. However, the investigator may also independently determine that an individual should be interviewed as a fact witness. When making this determination, the investigator should consider the following:
 - a. Does the complaint list witnesses to the alleged misconduct?
 - b. Does the complaint leave out individuals who may have important information relevant to the investigation?
 - c. Who was present for the alleged misconduct?
 - d. Who can provide necessary background information?

e. Who received the initial complaint?

Keep in mind that additional witnesses may also be identified through a review of the relevant documents or other evidence.

*May want
2 admin present
during
interview*

E. **Determining Who Will be Present at Each Interview.** As mentioned, parties are entitled to advance notice of who will be present at each interview or proceeding, as well as the purpose of that interview. 34 C.F.R. § 106.45(b)(5)(v). A party has the right to have their advisor present during the interview. 34 C.F.R. § 106.45(b)(5)(iv).

However, depending on the circumstances, it may be beneficial to have more than one school or district representative present. The investigator will need to make a determination as to who else may be present.

Upon request, an employee who is in a union has a right to have a union representative present if it appears that the interview may result in discipline. Some union contracts provide this right even if there is not a request by the employee. Investigators should bear this in mind when preparing for the interview of an employee-Respondent.

F. **Prepare a Response to Common Distractions.** Before conducting any interview, the investigator should decide how he/she will respond to the following types of complications:

1. The interview subject demands that the interview be recorded;
2. The interview subject's advisor or union representative repeatedly interjects or tries to help the interview subject frame his or her answers;
3. The interview subject refuses to answer questions; *-subject does not have to answer*
4. The interview subject asks who you have interviewed or plan to interview;
5. The Respondent asks whether the employer is going to discipline him or her; and *"The decision maker will make a decision"*
6. The Respondent or his/her union representative asks for a written list of questions or asks to be allowed to submit written answers to questions in lieu of a face-to-face interview.

PRACTICE EXERCISES FOR INITIAL INVESTIGATION PREPARATION

1. Suppose your Title IX Coordinator receives a formal complaint from three Complainants alleging that a Respondent has engaged in an escalating pattern of sitting too close to the Complainants, grabbing them without permission, groping them, and licking them. The Complainants indicate that telling the Respondent to stop has been ineffective, and has only resulted in further escalation. The Complainants originally brought their complaint to two teachers, who remembered their training and contacted the Title IX Coordinator. The alleged incidents reportedly occurred in the hallway, the lunchroom, at theater rehearsal, and in math class. The students' math teacher is not one of the two teachers who contacted the Title IX Coordinator. One Complainant alleges that the Respondent groped her in the lunchroom on September 13, 2022. All three Complainants say they have talked to their friends about these incidents, both in person and via text or social media messages.

In pairs or small groups, take some time to identify:

- a. Who is on your initial list of interviewees;
 - b. What source(s) of evidence, besides interview testimony, are likely to be involved;
 - c. What steps need to be taken to preserve evidence;
 - d. Who, if anyone, needs to be notified that is not already aware of the report (e.g., other staff, parents, etc.); and
 - e. Any other steps that you believe should be taken prior to commencing the investigation.
2. During a pending investigation in which Student A claims to have been sexually harassed by Student B, a group of unnamed students creates an anonymous social media account alleging that they, too, have been harassed by Student B, and that they stand in support of Student A.
- a. Does this impact the scope of your investigation? If so, how?
 - b. Brainstorm some strategies for figuring out who is behind the anonymous account. What questions do you ask? Who do you ask them to?
 - c. Student B complains that this anonymous group is lying and is cyberbullying Student B with these claims. Is that in the scope of your Title IX investigation, or does it require a separate investigation? Discuss what sorts of facts might affect your answer.
3. You are investigating a complaint where Student Y allegedly sexually assaulted Student Z in a school bathroom after the end of the school day. The Title IX Coordinator learned of this complaint from the principal and school resource officer, who in turn found out about the allegations when Students E, F, G, H, I, J, K, and L went to confront Student Y and disrupted art class. The principal provided the following descriptions:

- a. Student E found Student Z crying in the locker room and learned of the allegations directly from Student Z.
- b. Students F and G are friends with Student Z, but were not present in the locker room and learned of the allegations from Student E.
- c. Student H is friends with Student E and was present in the locker room for Student E's conversation with student Z, but is not friends with Student Z.
- d. Students I and J are friends with Student E but were not present in the locker room for the conversation between Students E and Z.
- e. Student K briefly dated Student Y earlier in the school year and the relationship did not end amicably. Student K heard other students were going to confront Student Y and decided to join in. Student K does not know Student Z.
- f. Student L was in the back of the group and believed they were confronting a completely unrelated student.

In pairs or small groups, discuss amongst yourselves the pros and cons of interviewing each of students E through L, and whether you would include them on your initial list of interviewees based on the information you currently have.

4. In pairs or small groups, take turns being the investigator and each of the following roles:

- a. The lawyer who demands that the complaint be dismissed because these allegations would never result in criminal charges;
- b. The parent who asks to be interviewed instead claiming they "already got all the answers" from their child;
- c. The union representative who insists that if their constituent refuses to be interviewed you cannot proceed with the investigation; and
- d. The non-school counselor/therapist/psychologist who insists that they be given the opportunity to review all of the investigator's questions before the interview commences.

If you are working in small groups, anyone who is not role-playing as the investigator or distractor should keep track of any responses by the investigator that you thought were particularly effective or ineffective. The distractor and any observer(s) should provide feedback on how they might have responded differently if they were in the investigator's shoes.

III. INTERVIEW BASICS

- A. **Provide Required Notice.** As discussed yesterday, the Title IX regulations require that Complainants and Respondents be provided notice containing certain required elements with “sufficient time” to prepare for the interview. Witnesses do not receive this notice.
- B. **Explain the Purpose of the Interview.** Do not make any comments that could be perceived as minimizing the complaint. This explanation should also reflect the statement of purpose that was provided in the notice of interview.
- C. **Define your Role in the Investigation.** Regardless of your other roles, make it clear that you are there as an impartial investigator. Do not take sides.
- D. **Explain the Investigation Process.** Explain that the school or district will follow up on information it receives, in accordance with Title IX procedures. Ask the interviewee to report any retaliation (from whatever source) immediately. When interviewing a party (Complainant or Respondent), discuss the opportunities that party will have to respond to the evidence and the investigation report.
- E. **Do Not Promise Confidentiality.** As discussed yesterday, information provided during a Title IX investigation may be available to the Complainant, Respondent, and, potentially, other witnesses. and must be released in accordance with its provisions. Both parties, and their advisors, have the opportunity to review the evidence, and the decision-maker will also review the final investigation report.
- F. **Ask Specific Questions.** Who, what, when, where, why, how? Get as detailed of information as possible. Do not allow an interview subject to make generalizations or to offer conclusions as opposed to facts.
- G. **Ask the Tough Questions.** Even if the subject matter is uncomfortable—in a sexual harassment investigation, the subject matter is often uncomfortable. That does not absolve the investigator or the school or district of its obligation to provide due process.
- H. **Ask for Documents.** Ask each interviewee if he/she has any tangible evidence that corroborates his/her recollection of events. Documents such as e-mail correspondences, notes, diary entries, time sheets, or calendars, might all contain relevant and valuable information. Recordings of voice mail messages might also contain helpful information.

- I. **Ask Each Interview Subject to Identify Other Witnesses to the Alleged harassment.**
- J. **Do Not Guarantee Results.** Investigators should not expressly or implicitly guarantee any particular outcome of the investigation. Nor should they suggest or imply that disciplinary action will be taken against the Respondent. Remember, the Respondent is presumed not responsible until the grievance process is completed.

IV. GENERAL TIPS FOR INTERVIEWING COMPLAINANTS AND FACT WITNESSES

- A. **Ask Short, Open-Ended Questions.** The goal is to have the witness talk more than the investigator. Investigators should avoid “leading” questions. This is not a time for cross-examination.
- B. **Always Cover the Who, What, When, Where, Why and How Questions.** Follow each line of questioning to its logical conclusion based on the witness’s *personal knowledge*, as opposed to what he or she has heard from others. Get the details.
- C. **Assume that the Investigator will Defend the Interview Questions in Court or an Administrative Appeal.** Be impartial and thorough. Keep in mind that the interview summaries *will* be considered relevant evidence and be made available to the parties. Take thorough, but professional notes.

Practice Pointer: Title IX interviews, particularly interviews involving students, may involve slang or otherwise non-professional terms for body parts or actions (e.g., “boobs” instead of “breasts”). If those terms appear in interview summaries, they should be clearly identified as quotes from the interviewee.

- D. **Keep Bias in Mind.** The investigator should also bear in mind that their alleged bias for or against a Complainant or Respondent, or Complainants or Respondents in general, may form the basis for an appeal of the final determination regarding responsibility. The investigator should plan and structure their interview of the Complainant to ensure that a fair and equal opportunity will be given to the Respondent to address the same issues.
- E. **Observe Witness Demeanor.** Document those observations in the investigation notes.
- F. **Follow Up.** If a witness answers “I don’t know” or “I can’t recall,” break the question down and/or rephrase it to determine whether the witness does not have

the information or is being evasive. If you believe the witness is being evasive, circle around and come back to the question at other points in the interview. If you have an objective reason to believe that the witness would know or remember particular information, do not hesitate to express surprise when the witness answers “I don’t know” or “I don’t remember.”

- G. Visual Representations.** If you believe it would be helpful, have the witness draw a picture of the alleged misconduct or the location at which it occurred. It may also be helpful to have the witness take you to the site of the alleged misconduct for a personal inspection.
- H. Disclose as Little as Possible.** Use your judgment as to how much to tell the witness about the complaint, subject to data privacy and Title IX requirements.
- I. Ask the Complainant if Extent of Complaint Has Been Covered.** In order to safeguard against the Complainant later coming up with additional complaints/accusations that the school or district has never been informed of and then saying that the school or district did not respond appropriately to those complaints/accusations, it is important to ask the Complainant whether what they have stated is everything that forms the basis of his/her complaint.
- J. Impact.** Inquire about the impact of the alleged conduct. This is particularly critical for an evaluation of whether the alleged conduct is severe, pervasive, and objectively offensive, and is effectively denying the Complainant equal access to the school or district’s education program or activity.
- K. Understand the Complainant’s Concerns.** Remember the Complainant may be embarrassed or fear retaliation.
- L. Take Appropriate Action.** If the Complainant expresses a desire that you do not do anything with the information he/she tells you, explain that the school district must take appropriate action and why.
- M. Do Not Make Promises.** Do not make any promises about who will be interviewed or when the investigation will be completed. Do not disclose the identity of witnesses, except to the extent required by Title IX.
- N. Retaliation.** Ask the Complainant to bring any retaliation to your attention and explain what that means.
- O. Supportive Measures.** Remind the Complainant that questions about supportive measures can be directed to the Title IX Coordinator.

PRACTICE EXERCISES FOR INTERVIEWING COMPLAINANTS AND WITNESSES

- 1. In pairs, interview your partner about what they did for the Fourth of July this past summer (Summer 2022). Get the basic facts — who, what, when, where, and why — as well as any other information you can out of your partner. When it is your turn to be interviewed, you must be honest, but should be as unhelpful as possible. The interviewer should practice asking broad questions that get narrower as they gather information, and practice asking follow-up questions. As you are being interviewed, keep track of questions your partner asks you that you feel were particularly helpful or particularly unhelpful. Share them with your partner once you have both had the opportunity to be interviewed.**

- 2. In pairs or small groups, come up with potential options for responding to the following questions, comments, or occurrences. Role-play these scenarios if you feel that role-playing would be effective.**
 - a. At the end of the interview, the Complainant's parent asks you to hold off on interviewing anyone else for two weeks while the Complainant decides if they still want to move forward with the process.**
 - b. The Complainant or their advisor demands to know the exact date that each step of the grievance process will be completed.**
 - c. A community member witness who the Complainant identified as someone with knowledge and information explains that they want to assist the investigation, but are concerned how it will impact the witness's participation in a non-school-sponsored cribbage where the Respondent is also a member.**
 - d. A witness agrees to be interviewed, only to spend the entire interview changing the subject to the witness's belief that one of the parties (either the Complainant or the Respondent) has been embezzling money from the hockey booster club.**

- 3. During their interview, a student-Complainant tells you that the teacher-Respondent makes him or her "uncomfortable." Assume you have no information besides this statement. In pairs or small groups, brainstorm follow-up questions that you would ask the Complainant. Be prepared to share your questions with the group as a whole.**

- 4. Consider the same scenario, except where the Respondent who makes the Complainant "uncomfortable" is also a student. Do any of your follow-up questions**

change? Do you have additional follow-up questions? Discuss in your pair or small group.

5. In pairs or small groups, take turns interviewing each other about something the witness is unlikely to recall (such as what they ate for each meal last Tuesday, or the theme of their junior prom, or the first song they ever sang at karaoke). The investigator should practice asking follow-up questions to gather as much details as they can, even if the interviewee is unable to recall the exact answer by the end of the exercise.

6. You have been assigned to investigate an allegation of forcible groping of a Complainant's groin area in a classroom. Without necessarily crafting specific questions (unless everyone in your pair or group is comfortable doing so), what sorts of considerations inform how you would frame questions to a Complainant or witness who is:

- a. Four years old;**
- b. Eight years old;**
- c. 12 years old;**
- d. 16 years old;**
- e. A newly hired staff member; or**
- f. A veteran staff member?**

Include considerations of how you might build rapport with the Complainant or witness, who else is likely to be present in the room for this interview and what sort of distractions they may pose, the language or terminology each of the Complainants or witnesses is likely to use to describe the actions and body parts related to this sort of allegation, and what sorts of follow-up questions may be necessary depending on the language or terminology that they use in answering your questions.

V. INTERVIEWING THE RESPONDENT

- A. Avoiding Bias.** Prior to interviewing the Respondent, the investigator should review the summary, notes, and any recording, if applicable from the Complainant's interview. The investigator should then prepare questions to ensure that the Respondent's interview will be comparable to the Complainant's interview, including with respect to who is in attendance, what questions are asked, what topics are covered, and what statements regarding the investigation process are made by the investigator.
- B. Opening Remarks.** Prior to asking any questions, the investigator should explain the following to the Respondent, the Respondent's advisor, and the Respondent's union representative, if applicable:
 - 1. The role of the investigator as a neutral fact finder;
 - 2. Any data privacy notice, which the Respondent should be asked to sign prior to asking any questions;
 - 3. Ground rules for the interview, such as not interrupting each other and professional conduct; and
 - 4. Any other initial statements, ground rules, or explanations that were provided to the Complainant.
- C. Refusals to Answer.** The investigator should decide in advance how to respond if the Respondent refuses to voluntarily answer questions. Typically, an individual will voluntarily cooperate if he/she knows that the interview may be his/her only chance to tell his/her side of the story.
- D. Follow-up Questions.** Be prepared to ask appropriate follow-up questions in order to obtain the full response to each allegation. In addition to the general considerations discussed above, the following tips may help an investigator get the full response from a Respondent:
 - 1. **Be Blunt.** Do not dance around delicate topics. Ask the question directly.
 - 2. **Ask Why.** If the Respondent admits to any particular action, ask what his/her intent was.
 - 3. **Check Credibility.** If the Respondent denies the allegations, ask whether he/she believes anyone would have a reason to fabricate the allegations.

4. **Closing Remarks.** Before ending the interview, the investigator should:
 - a. Ask for any other information that may be helpful, or other information that the Respondent would like to provide;
 - b. Provide the Respondent with the same information regarding retaliation that was provided to the Complainant;
 - c. As with the Complainant, the Respondent's ability to gather and present evidence cannot be restricted. 34 C.F.R. § 106.45(b)(5)(iii). Again, the investigator will need to be careful regarding how he or she phrases the warning to the Respondent not to tamper with witnesses.
5. **Additional Tips for Interviewing the Respondent**
 - a. Be prepared for anger and defensiveness on the part of the Respondent. As with the Complainant, avoid making any statements that could be interpreted as bias for or against the Respondent, regardless of any emotion displayed by the Respondent.
 - b. Insist on details of the Respondent's version of the facts. Do not settle for a general denial.
 - c. Do not merely state the Complainant's allegations and ask the Respondent to simply verify or deny. Remember, the Respondent is entitled to the same opportunity to present evidence as the Complainant.
 - d. Do not threaten.
 - e. Do not describe what disciplinary action might be taken. Advise the Respondent that any decisions regarding disciplinary action will be made at the conclusion of the investigation, and only after a determination regarding responsibility has been made.
 - f. Do not make any promises about when the investigation will be completed or who will be interviewed.
 - g. Do not reveal the names/identities of witnesses. The Respondent will eventually learn this information, but identifying witnesses in the interview risks allowing Respondents to adjust their answers.

Practice Pointer: However, if the Respondent reveals that they have communicated with one or more witnesses about your interviews, follow up to learn what the Respondent said and to whom.

PRACTICE EXERCISES FOR INTERVIEWING RESPONDENTS

1. In pairs or small groups, discuss how you would respond to a Respondent's refusal to answer your question, while making sure that your proposed response is not threatening or coercive. Develop responses for a number of scenarios, including language for:

- a. A Respondent who refuses to answer any questions whatsoever;
- b. A Respondent who answers only background questions (name, grade in school or years of employment and job title, etc.) and refuses to answer any substantive questions; and
- c. A Respondent who asks if they can "plead the Fifth" to one or more of your questions.

2. In pairs or small groups, brainstorm responses and potential follow-up questions for a Respondent who can remember specific details of everything except the facts relevant to the alleged incident(s) that is/are the subject of the formal complaint. When does it make more sense to pursue follow-up questions, and when does it make more sense to call out the Respondent's apparently selective memory?

3. Suppose you are investigating allegations that the Respondent has been making homophobic and transphobic comments toward the Complainant at recess last Wednesday, and about the Complainant to the Respondent's friends during fourth period social studies class last Monday and during lunch last Tuesday. The recess incident was allegedly a one-on-one conversation. During the social studies and lunch incidents, the Respondent was allegedly sitting with friends at a table adjacent to the table where the Complainant was seated.

Take turns in pairs or small groups role-playing as the Investigator and as the Respondent. The Respondent begins the interview by saying "I have read the allegations in the Notice of Complaint, and none of them are true." Practice asking follow-up questions to this general denial. Keep track of questions or areas of questioning that are particularly helpful or unhelpful in your investigation.

4. In pairs or small groups, come up with potential responses to a Respondent who asks what will happen if they admit to the alleged conduct. Do your responses change

based on the nature of the allegations, or are they largely consistent? Be prepared to discuss with the group.

5. Brainstorm potential reasons why it could be harmful to the investigation to tell who the Respondent who you have interviewed. Even though they will ultimately learn the identities of all the witnesses you interviewed in your report, there are reasons why disclosing their identities in the interview can make your interview less effective. What do you think those reasons might be?

VI. ASSESSING CREDIBILITY

A. Credibility Clues. When interviewing the Complainant, the Respondent, or any other witness, the investigator should look for credibility clues.

1. Eye contact;
2. Unnatural or inconsistent hesitations;
3. Change in skin coloration (i.e. face turning red or white);
4. Change in pitch of voice;
5. Change in affect over the course of the interview;
6. Subtle or direct attempts to influence the outcome of the investigation through inducement or threat;
7. Statements reflecting a skewed view of reality.

B. Consistency. When assessing credibility, consider the consistency of the witness/party statements.

1. Are there other witnesses or documents that support or refute the interviewee's testimony?
2. Is the conduct of the parties consistent with their description of the overall environment?
3. Does the chronology make sense from a practical standpoint?
4. Is the described behavior consistent with what came before and afterward?
5. Are there unexplainable lapses in recollection or periods of time that are not accounted for?

PRACTICE EXERCISES FOR CREDIBILITY DETERMINATIONS

1. Think of a time, whether during an investigation or in your own life, when you could tell, or thought you could tell, that someone was lying to you. In pairs or small groups, discuss how you were able to determine that the other person was lying. What were the signs? What other information, if any, helped you determine that this person was lying?

- b. **Whether and how you might attempt to determine who the other individuals in the Snapchat group are;**
 - c. **Appropriate ways to describe this evidence in your interview summary of this witness;**
 - d. **Individuals or entities who need to be notified and the timing of such notices;**
 - e. **Addressing evidence of photos or videos that you are able to identify as videos or photos of minor students other than the Complainant; and**
 - f. **Responding to allegations that one of the members of the Snapchat group chat is a staff member.**
3. **As part of an investigation, a Complainant staff member provides you with screenshots that they say are copies of Instagram direct messages (“DMs”) between Complainant and Respondent in which Respondent is engaged in harassment. Respondent, after reviewing these screenshots, claims that they are forged/Photoshopped. In your pairs or small groups, discuss how you might go about resolving this dispute, assuming that these DMs have not been publicly posted on social media.**

Be prepared to share your pair or small group’s thoughts with the group as a whole after you have discussed all three scenarios.

VIII. WHAT DOES IT MEAN TO BE RELEVANT?

Both investigators and decision-makers are tasked with limiting their reports and/or the questions asked by the parties during cross-examination to information and questions that are “relevant.”

- A. Evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence” and when “the fact is of consequence in determining the action.” Fed. R. Evid. 401.
- B. The only type of evidence that is **never** relevant in a Title IX investigation is evidence relating to the Complainant’s sexual predisposition or prior sexual behavior. *See* 34 C.F.R. § 106.45(b)(1)(iii) & 106.45(b)(6).
- C. Other than this restriction, an investigator must use judgment when drafting the investigation report to determine whether the evidence is related to a fact that would potentially impact the outcome of the complaint, and whether the evidence makes that fact more or less likely to be true.
 - 1. Investigators must be cautious, however, to avoid intruding on a decision-maker’s role and resolving issues of responsibility in the investigation report. Such overreach may expose the investigator to an allegation of bias, or could constitute a procedural irregularity justifying appeal.
- D. Likewise, when reviewing a written cross-examination question, or a question at a live hearing, a decision-maker must decide whether the question goes to a fact that will help determine the outcome of the complaint, and whether an answer to that question would make the fact more or less likely to be true.

IX. WRITING AN INVESTIGATION REPORT

- A. **Timing of Completion of Investigation Report.** The Title IX regulations provide that, “prior to completion of the investigative report,” the school or district “must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy.” The parties have at least ten days to submit a written response to the investigator before the investigation report can be completed.
- B. **Provision of Investigation Report to Parties.** The investigation report must be provided to the parties at least ten days before the decision-maker makes a decision (or at least ten days before any hearing, if the school or district has a hearing procedure).

C. Required Contents of the Investigation Report. The Title IX regulations provide that the investigation report must “fairly summarize” the relevant evidence.

D. Tips for Writing an Investigation Report.

1. Summarize each interview separately.
2. Include a list of each exhibit considered.
3. Identify the allegations under investigation.
4. Make specific findings and identify the relevant evidence that supports each finding.
5. If any evidence is excluded as irrelevant, explain why that evidence was excluded.
6. Explain any credibility determinations and the basis for each such determination (e.g., the witness’s statement is not credible because he or she contradicted himself or herself multiple times or is directly contrary to video evidence).
7. Write objectively, avoiding unnecessary adjectives. For example, it may be necessary to describe a party as wearing a “yellow” shirt. Unless quoting a party or witness as part of a witness summary, however, it is unnecessary (and potentially evidence of bias) to refer to an action as “brutal” or “traumatic.”
8. Write professionally. Remember that the investigation report will be sent to the parties before a determination is made, the decision-maker (who may be the investigator’s superior at the school or district), and, potentially, will be an exhibit in further administrative proceedings or a lawsuit.
 - a. Check spelling and grammar before finalizing the investigation report.
 - b. Avoid colloquialisms, jargon, slang, profanity, and contractions, unless directly quoting a party or witness, in which case, the word or phrase should be inside of quotation marks.
9. The investigation report should be concise, but thorough.

- E. Addressing Parties' Responses to the Evidence.** Before the Investigator can finalize the investigation report, any written response to the evidence by the parties has to be considered. The written responses are not themselves evidence, and do not need to be circulated amongst the parties.

As a best practice, "consider" means something more than "read." Investigators should be prepared to professionally address a party's written response in writing as part of the report. This may vary from explaining certain investigative steps that were or were not taken, explaining why certain witnesses were or were not interviewed, or at a minimum acknowledging any disagreements that a party may have raised with the evidence.

Practice Pointer: A party's written response to the evidence should be provided to the decision-maker, who will have to also consider the parties' written responses to the investigation report. Leaving a decision-maker to consider a written response that was not expressly addressed by the investigator, particularly if the investigator and decision-maker are not members of the same organization, can lead to confusion and inconsistent messaging.

PRACTICE EXERCISES ABOUT RELEVANCE DETERMINATIONS AND WRITING INVESTIGATION REPORTS

1. Imagine a scenario where two students were previously in a consensual dating and sexual relationship, but when Complainant ended the relationship, Respondent allegedly sexually assaulted them. Respondent contends that the last sexual encounter was also consensual. In pairs or small groups, brainstorm circumstances under which each of the following would or would not be relevant, or if any of them are always relevant or never relevant, subject to the assumption that there are no particularly specific lurid details at issue in this allegation:

- a. The number of previous instances of sexual conduct between the Complainant and Respondent;**
- b. The length of the prior romantic relationship between Complainant and Respondent;**
- c. The length of the prior sexual relationship between Complainant and Respondent;**
- d. The ages of the Complainant and Respondent;**
- e. The Complainant and the Respondent's preferred sexual position(s);**
- f. The Complainant and the Respondent's preferred sexual act(s);**
- g. The Complainant and/or the Respondent's status with regard to special education services;**
- h. The sexual orientation(s) of the Complainant and/or the Respondent;**
- i. The gender identity of the Complainant and/or the Respondent;**

- j. The respective sexes of the Complainant and the Respondent;
- k. The respective ages of the Complainant and the Respondent;
- l. Whether the Complainant or the Respondent has/have a history of being sexually abused;
- m. The respective races of the Complainant and the Respondent;
- n. The location(s) of any previous sexual encounters between Complainant and Respondent;
- o. The language(s) spoken by the Complainant and the Respondent; and
- p. The behavior of the Complainant's and/or Respondent's advisor(s) during their respective interviews.

Be creative, but reasonable, in your arguments for why any of the above is or is not relevant, or the circumstances under which it could be relevant. Be prepared to share your thoughts with the group as a whole.

2. In your pairs or small groups, brainstorm a list *non-sexual* slang terms that you overhear your students or children use.¹ Discuss how you would explain each of those terms in an investigation report if you had to do so.

3. Discuss how you would explain the following slang terms related to social media and texting in an interview summary/investigation report:

- a. A Twitter or Instagram "DM;"
- b. A Snapchat "streak;"
- c. A "thumbs up" or "haha" reaction in iMessage;
- d. "Abbrevs" in text messages (e.g., "LOL," "WTF");
- e. "Going live;" "Instagram Live;" "Facebook Live;"
- f. Emojis;"
- g. "Stories" (on Facebook, Instagram, or Snapchat); and
- h. A TikTok "challenge."

4. Think back to the interviews you have done of your partner(s) or group member(s) earlier today. Was there any information you learned during your interview that you would exclude from your final report because it is irrelevant? If so, what evidence and why?

¹ To ensure the comfort and safety of all participants and avoid inadvertently sexually harassing anyone during a training on investigating sexual harassment, please refrain from using any vulgar slang terms.

X. AVOIDING BIAS AND CONFLICT OF INTEREST

A. Conflicts of Interest. The investigator's role is to investigate the complaint objectively. Accordingly, the investigator cannot have any personal interest in the outcome of the investigation. The following are examples of personal interests that may present a conflict of interest that disqualifies the investigator from serving impartially:

1. Financial interest in the outcome of the investigation.
2. Personal interest stemming from the investigator's personal relationship with a party to the investigation, or that of the investigator's family.
3. Professional interest or incompatible roles within the school or district.

B. Bias. The investigator must not allow any personal bias to influence the outcome of the investigation. A biased investigation, such as one based on the predetermination that "all boys are violent" or "all girls are liars" will likely result in an appeal and/or liability under Title IX. Similarly, the investigator cannot allow his or her past experience with a particular party or witness to influence the outcome of the investigation. Instead, all investigations must be based on credible, relevant evidence considered as part of that investigation.

C. Addressing Implicit Biases.

1. Avoid characterizations or statements based on an individual's race, sex, gender, sexual orientation, disability status, religion, or other protected class status.
2. Give equal consideration to Complainants, Respondents, and witnesses, regardless of their race, sex, gender, sexual orientation, disability status, religion, or other protected class status.
3. Impose the same ground rules, adopt the same tone of voice, and otherwise treat all interviewees the same, regardless of race, sex, gender, sexual orientation, disability status, religion, or other protected class status.
4. Avoid "spokesperson questions" such as asking for the "female's" view on things or the "boys' perspective."
5. Investigators should examine their own behavior and be aware of their own unconscious biases. An investigator should refrain from making

assumptions about different student or employee groups based on race, sex, gender, sexual orientation, disability status, religion, or other protected class status.

SELF-REFLECTION QUESTIONS ABOUT BIASES

Note: Personal or implicit biases can be challenging conversations and admissions. It is important for Title IX Investigators to have these reflections, but sometimes the most productive reflections on these topics do not involve others. As such, the following are a list of prompts to consider on your own time.

- 1. We have talked about a lot of different potential Title IX scenarios today—were there any that you thought you might personally find difficult to investigate?**
- 2. Did any of the scenarios discussed during training pose unexpected emotional challenges or triggers that you may not have been aware of before discussing them? Think about which ones and why.**
- 3. Think about whether there are any types of Title IX scenarios, whether it is because of the nature of the allegations, the identity of the Complainant, the identity of the Respondent, the relationship between the Complainant and the Respondent, or the basis for the claim (e.g., sexual propositions, harassing comments based on sexual orientation or gender identity, sexual assault) that you do not believe you could effectively serve as a neutral investigator. Is there anything you can do, or any steps you could take, to be able to remain neutral in these scenarios? If not, what is your planned response if you are asked to investigate this sort of complaint?**
- 4. Would you be more naturally inclined to be sympathetic to a Complainant who was a student or a staff member? Why? What steps can you take to ensure neutrality?**
- 5. Would you be more naturally inclined to be sympathetic to an older student or a younger student who reported sexual harassment? Why? What steps can you take to ensure neutrality?**
- 6. Could you believe a high schooler who reported being sexually harassed by an elementary school student? If not, why not? What steps would you need to take to be neutral as an investigator in this sort of complaint?**
- 7. Could you believe a staff member who reported being sexually harassed by a student? Does the age of the student matter? Are there steps you could take to ensure your neutrality in this sort of investigation?**

8. Are there any specific individuals who you have a professional relationship with that you do not believe you could remain neutral while investigating? Who are they? What is your planned response if you are asked to investigate them?

