

Title IX Training – Day 1

Ivy Tech Community College

Jodie Crosby Ferise, JD, EdD
James Nussbaum, JD

Church Church Hittle + Antrim
February 25, 2024



cchalaw.com

Meet Today's Trainers

Jodie Ferise, JD, EdD



- More than 20 years in higher education
 - Faculty member, senate president
 - Associate provost
 - Chief international officer
 - General counsel
 - Government relations, lobbyist
- Title IX experience
 - Training
 - Policy development
 - Adjudicator/panel chair
 - Investigator
 - Advisor
 - Informal resolution facilitator

Meet Today's Trainers

James Nussbaum, JD



- 10+ years as higher education counsel
 - In-house counsel responsible for athletics, employment, student affairs...
 - Outside counsel for schools in Indiana and across the country
 - Presents for national associations on issues facing higher education
- Title IX experience
 - Investigator and Adjudicator
 - Managed litigation
 - Agency complaints
 - Training
 - Gender equity in athletics

Housekeeping



Disclaimer on Language

Sexual harassment could happen to anyone in any relationship.

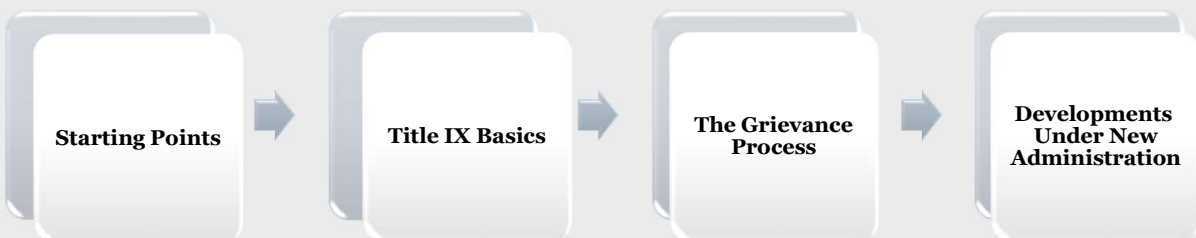


What if I have
a question
during these
sessions?



Why am I
here?

Our Plan for This Session



Section One: Starting Points



Finding our “True North”



Every participant, every reporter, every witness, is a member of your campus community. Each is inherently valuable as a human being and worthy of being respected and believed.

Discrimination, harassment, and sexual violence cause extreme damage to individuals and to the campus culture you are trying to develop and maintain.

Ivy Tech's “True North”

Ivy Tech Community College (the College) is committed to cultivating an inclusive community where **every person** is valued and respected. We recognize that discrimination and harassment of every kind, including that involving sexual violence, is a direct threat to the effective development of such a community.

ITCC Interim Discrimination and Harassment Policy

Ivy Tech’s “True North”

Ivy Tech Community College (the College) is committed to cultivating an inclusive community where every person is valued and respected. We recognize that discrimination and harassment of every kind, including that involving sexual violence, is a direct threat to the effective development of such a community. **As such, Ivy Tech Community College prohibits discrimination and harassment against students, employees, or other beneficiaries, on the basis of race, color, ethnicity, national origin, marital status, religion, sex, gender, sexual orientation, gender identity, disability, age, or veteran status, or any other characteristic protected by local, state, or federal law or regulation, in admission or access to or employment in its education program and activities.**

ITCC Interim Discrimination and Harassment Policy

Terms to Know – Complainant/Respondent

Complainant: An individual within the College community who may have experienced discrimination or harassment (even if they have not submitted a Formal Complaint).

Respondent: a member of the College community alleged to have engaged in conduct that could constitute discrimination, harassment, or retaliation under this policy.

Terms to Know – Complainant/Respondent

Use Complainant rather than:

- victim
- survivor
- reporting party
- accuser
- plaintiff

Use Respondent rather than:

- perpetrator
- offender
- responding party
- accused
- suspect
- defendant

Terms to Know – Title IX Coordinator, General

Must appoint a Title IX Coordinator who is responsible for:

- Coordinating and monitoring institutional TIX compliance
- Navigating reports of policy violations as they arise
- Overseeing grievance procedures
- Presenting education and training opportunities
- Monitoring policies and procedures and updating as appropriate

Terms to Know – Title IX Coordinator, Ivy Tech

- **College Title IX Coordinator** tasked with overseeing Title IX compliance for the Ivy Tech system.
- Each campus has a **Campus Title IX Coordinator** tasked with overseeing Title IX compliance on their respective campuses.

Terms to Know - Title IX Coordinator, Ivy Tech

<u>Duties of Title IX Coordinator</u>	
<u>College</u>	<u>Campus</u>
Receipt of Report	Receipt of Report
Decision to Sign Formal Complaint	Outreach to Complainant
Dismissal of a Formal Complaint	Supportive Measures
Hearing Format Determination	Notice of Allegations

Terms to Know – Investigator

An **investigator** will be assigned to investigate the allegations.



Terms to Know – Decisional and Appellate Officials

Decisional Official: The College employee appointed to make a determination regarding a finding of responsibility under this policy.

Appellate Official: The College employee appointed to hear appeals under this policy.

Terms to Know – Title IX Advisors

Advisors: in the context of Title IX, are those who are assigned to support Complainant and Respondent throughout the grievance process.



Starting with the Why: What's at Stake



- Campus culture, safety, enrollment, retention, and reputation can all be affected.
- The 2020 Title IX regulations require any TIX coordinator, investigator, adjudicator, or those who facilitate informal resolution to be trained.
- It is a frequent source of litigation against institutions of higher education.
- The Department of Education may revoke federal funding if an institution fails to comply.
- Deliberate indifference.



Ivy Tech Community College
Interim Harassment and
Nondiscrimination Policy

- Implemented in 2024
- Covers all forms of discrimination and harassment
- Title IX and Non-Title IX Sexual Harassment

Section Two: Title IX Basics



Title IX Trivia

Who originally
introduced Title IX
legislation in the
Senate?

What was his catalyst
for introducing the
bill?

The Difference 50 Years Has Made

	Percentage That are Women	
	1971-72	2021-22
Medical School Graduates	9%	51%
Law School Graduates	7%	56%
PhD Degree Earners	11%	56%
Bachelor's Degree Earners	44%	59%
College Faculty	24%	50%
College Athletes	15%	42%

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

This is Title IX.

The Journey To Where We Are



May 06, 2020
U.S. Publishes New Regulations on Campus Sexual Assault
 Colleges and universities that receive federal funding must be in compliance with new rules by Aug. 14. The regulations rebalance "scales of justice," Education Department says.

August 01, 2024
A New Title IX Era Brings Confusion and Frustration
 A spate of lawsuits and court injunctions has complicated colleges' efforts to comply with the Biden administration's overhaul of the 32-year-old law, leaving Title IX coordinators frustrated and uncertain about how to move forward.

February 01, 2025
Department of Education Reverts to Trump's Title IX Rule
 Advocates for victims of sexual violence said the decision would put students at greater risk of harassment while conservative lawmakers and advocates applauded the move, arguing it would make students safer.

The Journey to Where We Are



- Higher Education Act of 1972
 - 2011 Dear Colleague Letter
 - 2020 Regulations
 - 2024 Regulations
 - 2024 Injunction
 - 2025 Vacatur
- Clery Act
 - Requires timely reporting of crimes
 - Policies and procedures for sexual assault
- Violence Against Women Act
 - Expands to dating violence, domestic violence, and stalking

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

But...what does it include?

ITCC Title IX Sexual Harassment Includes:

Conduct on the basis of sex or sexual in nature that is any of the following:

- 1. Quid Pro Quo Sexual Harassment** – An employee of the College conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct.

ITCC Title IX Sexual Harassment Includes:

Conduct on the basis of sex or sexual in nature that is any of the following:

- 2. Unwelcome conduct** that a reasonable person would find so **severe, pervasive, AND objectively offensive** that it effectively denies a person equal access to the College's education program or activity.

ITCC Title IX Sexual Harassment Includes:

Conduct on the basis of sex or sexual in nature that is any of the following:

- 3. Sexual assault** (as defined by the Sexual Assault for Title IX Sexual Harassment procedures definition), **dating violence, domestic violence**, and **stalking** as defined by this policy.

ITCC Non-Title IX Sexual Harassment Includes:

Conduct on the basis of sex or sexual in nature that is any of the following:

1. **Quid Pro Quo Sexual Harassment** – A College **community member** conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct.

ITCC Non-Title IX Sexual Harassment Includes:

Conduct on the basis of sex or sexual in nature that is any of the following:

2. **Unwelcome conduct** that a reasonable person would find so **severe, pervasive, OR objectively offensive** that it effectively denies a person equal access to the College's education program or activity.

ITCC Non-Title IX Sexual Harassment Includes:

Conduct on the basis of sex or sexual in nature that is any of the following:

- 3. Sexual assault** (as defined by the **Sexual Assault for Other Prohibited Discrimination and Harassment procedures definition**), dating violence, domestic violence, and stalking as defined by this policy.

Title IX Sexual Assault

Sex Offenses, Forcible—Any sexual act directed against another person, without the **consent** of the Complainant, including instances where the Complainant is **incapable of giving consent**.

Consent

Knowing, voluntary, and clear mutual agreement to engage in specific sexual activity.

Consent must be freely and actively given and communicated by clearly and mutually understandable words or actions to participate in each form of sexual activity.

Consent

Consent may be withdrawn at any time.

Consent to some sexual contact cannot be presumed to be consent for other sexual activity.

Consent cannot be compelled by force, threat, deception, or intimidation.

Consent - Incapacitation

Consent cannot be given by someone who is **incapacitated**.

Consent does not exist when the individual initiating the sexual activity knew or should have known of the other individual's **incapacitation**.

Consent cannot be given if the person is **not legally old enough** to give consent.

Ind. Code 35-42-4-9

Consent - Incapacitation

Incapacitation: When an individual is unable to understand the facts, nature, extent, or implications of the situation due to drugs, alcohol, a mental disability, or being asleep or unconscious. With respect to alcohol and drugs, intoxication or impairment is not equivalent to incapacitation.

Consent - Force

Consent may be withdrawn at any time.

Consent to some sexual contact cannot be presumed to be consent for other sexual activity.

Consent cannot be compelled by force, threat, deception, or intimidation.

Consent - Force

Force: The use of physical violence or the threat of physical violence that causes the fear of death or serious personal injury.

Title IX Sexual Assault, Forcible

Forcible Rape -- Penetration, no matter how slight, **of the vagina or anus** with any **body part or object**, or **oral penetration by a sex organ** of another person, **without the consent** of the Complainant.

Title IX Sexual Assault, Forcible

Forcible Sodomy—Oral or anal sexual intercourse with another person, **forcibly and/or against that person's will** or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Title IX Sexual Assault, Forcible

Sexual Assault With An Object—To use an **object or instrument** to penetrate, however slightly, the **genital or anal opening** of the body of another person, **forcibly** and/**or against that person's will** or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity

Title IX Sexual Assault, Forcible

Forcible Fondling—The touching of the **private body parts** of another person (buttocks, groin, breasts) **for the purpose of sexual gratification, forcibly** and/**or against that person's will** (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity

Title IX Sexual Assault, Nonforcible

Incest—Nonforcible sexual intercourse **between persons who are related to each other** within the degrees wherein marriage is prohibited by Indiana law.

Statutory Rape—Nonforcible **sexual intercourse with a person who is under the statutory age of consent** according to Indiana law IC 35-42-4-9.

Other Prohibited Discrimination and Harassment Sexual Assault

Non-consensual sexual penetration—**Sexual penetration** of another individual **without the consent** of the individual **or by force**.

Non-consensual sexual contact—**Intentional sexual touching of the intimate area of another individual** (i.e., genitals, breasts, buttocks) or **intentional sexual touching of another individual with any of these body parts, without the consent** of the individual **or by force**.

Dating Violence

Violence committed by an individual who is or has been **in a social relationship of a romantic or intimate nature** with the Complainant. Factors to consider in determining whether such a relationship exists include the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

Domestic Violence

Violence that would constitute a felony or misdemeanor crime of violence committed by an individual who:

- is a **current or former spouse or intimate partner** of Complainant under the family or domestic violence laws of Indiana;
- **shares a common child** with Complainant;
- is **cohabitating** with, or has cohabitated with, Complainant as a spouse or intimate partner; or
- **commits acts against an adult or youth victim** who is protected from that person's acts under the domestic or family violence laws of the state of Indiana.

Stalking

Engaging in a **course of conduct** directed at a specific person that would cause a **reasonable person** to fear for the person's safety, the safety of others or **suffer substantial emotional distress**.

Stalking can occur in person or using technology, and the duration, frequency, and intensity of the conduct should be considered.

Stalking tactics can include, but are not limited to watching, following, using tracking devices, monitoring online activity, unwanted contact, property invasion or damage, hacking accounts, threats, violence, sabotage, and attacks. Merely annoying conduct, even if repeated, is a nuisance, but is not typically chargeable as stalking.

Stalking, continued

For purposes of the stalking definition, a **course of conduct** requires that there be more than one incident, and the conduct must be directed at a specific person.

Reasonable person is an objective standard meaning a person in the Complainant's situation and circumstances (having similar characteristics/demographics to the Complainant).

Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Retaliation



Treating someone negatively because they exercised their rights under the policy is retaliation.

An institution's response to a Complainant or Respondent may, itself, constitute discrimination on the basis of sex.

Jurisdictional Limitations

- Institution must have actual knowledge of violation.
- Institution must have substantial control over respondent and context or building.
- Must have occurred within the United States.





Does this mean the college is responsible for things that happen off campus?

Education Program or Activity 34 CFR 106.44(a)

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



What if the respondent becomes no longer enrolled at or employed by Ivy Tech *after* the alleged conduct is reported?

Due Process Considerations

One accused of a policy violation is entitled to:

- Notice of the allegations
 - *Identity of the Complainant*
 - *Identity of witnesses*
 - *Sufficient facts to form a response*
- Opportunity to be heard
- Presumption of non-responsibility
- Process free from bias and conflict of interest
- Privacy, but not confidentiality
- Supportive measures



Doe v. Trustees of Indiana University (2024)

“The core question under Title IX is whether the people who resolved Roe’s grievances ‘**acted at least partly on the basis of sex** in [this] particular case.’ And of that Doe has not the slightest evidence.”

59

Doe v. Trustees of Indiana University (2024)

“Doe’s constitutional argument is stronger...

There were hearings before multiple bodies. Doe could (and did) present both evidence and argument...

Yet the fact that Doe received lots of process does not mean that he had an opportunity to be heard when it mattered most...”

60

Conflicts of Interest, Bias, and Prejudgment

The grievance process must remain impartial at every level:

- The coordinator, investigator, decision maker, appellate officer must be free from conflict of interest and bias and must avoid prejudgment of the issues.
- Annual training for all roles must include material on avoiding conflict of interest and bias.
- Parties must be given an opportunity to object to investigators and decision makers for perceived conflict of interest or bias.
- Conflict of interest or bias in the process is a basis for appeal of a Title IX determination.

Conflicts of Interest

Conflict of interest exists when personal or private interests or loyalties (family, friendship, financial, social, or other) compromise (or could compromise) one's ability to be impartial in their judgment, decisions, or actions.

- Actual conflict (positional responsibilities conflict with personal interest)
- Perceived conflict (reasonable to perceive competing interests might influence outcome)
- Potential conflict (duties and interests might conflict in the future)



Be Mindful of Implicit Bias

Impermissible mental shortcuts, attitudes, and stereotypes that affect understanding, actions, and decisions in an unconscious manner.



Some Examples of Implicit Bias

- Assuming an accused will always be a man
- Making judgments about racial or ethnic groups, or those for whom English is not a first language
- Applying social stigma or inherent credibility judgments to drug or alcohol use
- Associating behavioral stereotypes to particular activities or groups
- Assigning value to a narrative based upon your own lived experience

Prejudgment of the Facts

Prejudgment occurs when one forms an opinion about what has occurred before having all the necessary information.

- This is often based on deeply ingrained notions of what makes something more or less likely to be true.
- Often involves sex stereotypes and perceptions about drug and alcohol use.

Examples:

- Drinking automatically damages credibility.
- Crying – or lack thereof – is determinative of truthfulness.
- Men cannot be victims of sexual assault.
- Parties involved in a relationship cannot also experience nonconsensual sex or sexual violence.

Section Three: The Grievance Process



The Report and Intake



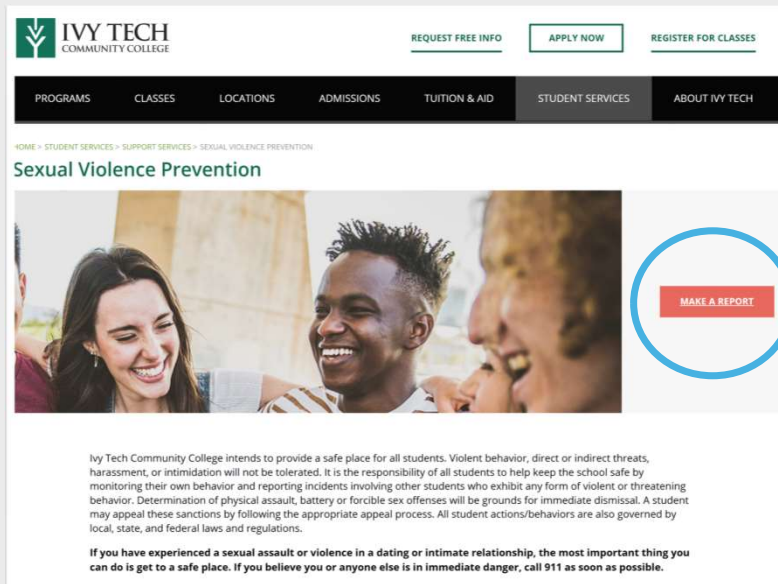
Who can file a report?

Are there times when I am required to file a report?

ITCC Statement on Mandatory Reporting

Any College employee or student-employee acting in the scope of their employment who is not a Confidential Employee and who has reason to believe that a College student or employee has been the target of or has experienced discrimination or harassment in their employment or in the College's education program or activity **must report the behavior**.

Confidential Employees must report non-identifying information regarding any Clery crime known to them to the Vice President for Public Safety and Emergency Preparedness.



IVY TECH
COMMUNITY COLLEGE

REQUEST FREE INFO APPLY NOW REGISTER FOR CLASSES

PROGRAMS CLASSES LOCATIONS ADMISSIONS TUITION & AID STUDENT SERVICES ABOUT IVY TECH

HOME > STUDENT SERVICES > SUPPORT SERVICES > SEXUAL VIOLENCE PREVENTION

Sexual Violence Prevention

MAKE A REPORT

Ivy Tech Community College intends to provide a safe place for all students. Violent behavior, direct or indirect threats, harassment, or intimidation will not be tolerated. It is the responsibility of all students to help keep the school safe by monitoring their own behavior and reporting incidents involving other students who exhibit any form of violent or threatening behavior. Determination of physical assault, battery or forcible sex offenses will be grounds for immediate dismissal. A student may appeal these sanctions by following the appropriate appeal process. All student actions/behaviors are also governed by local, state, and federal laws and regulations.

If you have experienced a sexual assault or violence in a dating or intimate relationship, the most important thing you can do is get to a safe place. If you believe you or anyone else is in immediate danger, call 911 as soon as possible.



Student - Personal Misconduct/Title IX Incident Reporting Form

If you need to report an emergency, call campus security or dial 9-1-1.

The Office of Student Success at Ivy Tech Community College is charged with upholding the Code of Student Rights and Responsibilities, which identifies behavioral expectations for all students on and off campus. If you have knowledge of an Ivy Tech student potentially violating the Code of Student Rights and Responsibilities, you are encouraged to notify our office of the incident. A copy of the Code Student Conduct is available by clicking [here](#).

Please use this form to report any behaviors that you believe have violated the student code. These behaviors may have occurred inside or outside of the classroom setting. When completing this form, please include your name, title, and contact information. **Incident reports submitted anonymously may limit our effectiveness in dealing with concerning behavior.**

Do not use this form to report academic integrity violations. For such violations, or to report concerning, worrisome, or threatening behavior, please use the incident-specific forms shown [here](#).

If a student has experienced a physical accident or injury, do not complete this form. Please instruct the student to use this form [here](#).

If you are an employee who has experienced an incident involving another employee exclusively, please contact your local human resources team for assistance.

Your Information

[Enable additional features by logging in.](#)

Your full name:

Your position/title:

Your phone number:

Your email address:

Is a student involved (Required):

Date of incident (Required):

Time of incident:

Location of incident (Required):

Specific location:

[Learn more](#)

Tell Us Who Else Was Involved

Please list the individuals involved (excluding yourself), including as many of the listed fields as you can provide.

If this incident includes employees exclusively, please contact your local HR team instead of completing this form. If you would like to file an employee report confidentially, EthicsPoint is available through Mylv.

Name or Organization	Select Gender	Select Role	C Number (Include the
<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
DOB (YYYY-MM-DD)	Phone number	Email address	
<input type="text"/>	<input type="text"/>	<input type="text"/>	

[Add another party](#)

Tell Us What Happened

Please indicate the relevant category/categories that pertain to this incident report.

Please provide a detailed description of the incident/concern using specific concise, objective language (who, what, where, when, why, and how). (Required)

Supporting Documentation

Photos, video, email, and other supporting documents may be attached below. 5GB maximum total size.

Attachments require time to upload, so please be patient after submitting this form.

Choose files to upload

[Choose Files](#)

☐ Email me a copy of this report

[Submit](#)



What if a report comes in but the would-be Complainant does not want to move forward with the process?



What if a report is anonymous?

After a Report is Received

TIXC contacts complainant for an
“Initial Assessment”

- Allow them to share details of incident
- Notify them of rights
- Provide options on how to proceed
- Discuss intentions regarding filing formal complaint
- Determine supportive measures needed
- Explore whether any immediate measures are necessary
 - No-contact directives
 - Emergency removal



77

How must a school respond?

*Davis v. Monroe County Board
of Education*

- Individual private right of action
- “Deliberate Indifference standard”



78

Emergency Removal

- Requires an individualized safety and risk assessment.
- May only be implemented when there is an immediate threat to ***physical*** health or safety.
- Respondent must be given an opportunity to challenge.
- May in some instances trigger a timely warning obligation to the campus, if circumstances dictate.



79

Title IX Coordinator receives report
and conducts initial assessment

Supportive
Measures

**What happens
when a report
is received?**

Supportive Measures

Supportive measures are **non-punitive**, individualized services offered to all parties involved in a Title IX process.

Supportive measures can be issued before, during, or after the filing of a formal complaint or even in the absence of a formal complaint.

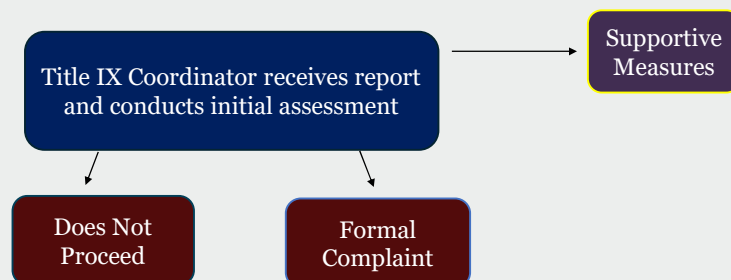


Common Supportive Measures

Counseling	Extensions of Deadlines or other Course-Related Adjustments	Modifications of Work or Class Schedules
Campus Escort Services	Mutual Restrictions on Contact Between the Parties	Changes in Work or Housing Locations
Leaves of Absence	Increased Security Monitoring of Certain Areas of the Campus	Other Similar Measures



If Complainant and Respondent share a class, an extracurricular activity, a clinical site, etc., shouldn't the *Respondent* have to be the one to move?



What happens when a report is received?



What if a report comes in but the would-be Complainant does not want to move forward with the process?

Why Not Proceed Under Title IX? Mandatory Dismissal

The Title IX Coordinator **must** dismiss a formal complaint if:

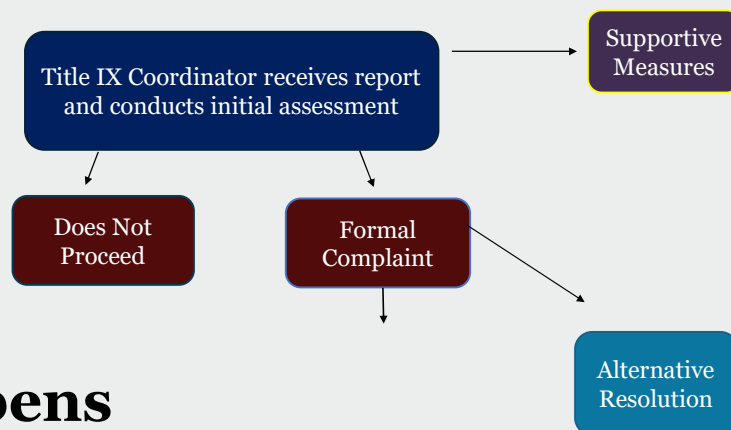
- Conduct alleged would not constitute a Title IX violation under the policy even if proven.
- Conduct alleged did not occur in an educational program or activity controlled by Ivy Tech.
- Ivy Tech does not have control of the Respondent.
- Conduct alleged did not occur within the United States.
- Complainant was not participating or attempting to participate in an Ivy Tech program or activity at the time of the alleged conduct.

Why Not Proceed Under Title IX? Discretionary Dismissal

The Title IX Coordinator **may** dismiss a formal complaint if:

- Complainant indicates in writing they want to withdraw.
- Respondent is no longer enrolled in or employed by Ivy Tech.
- Specific circumstances prevent Ivy Tech from gathering evidence sufficient to reach a determination as to a formal complaint.

**What happens
when a report
is received?**



Alternative Resolution



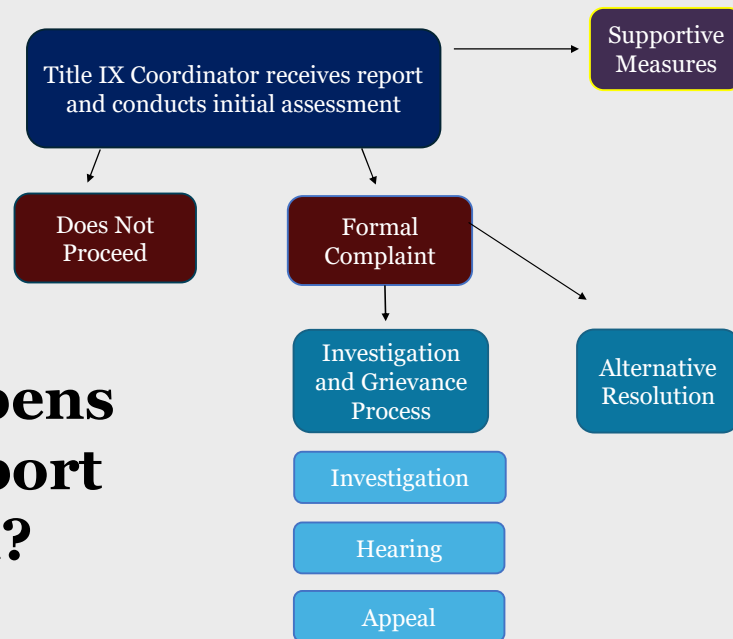
- Available as alternative; regulations call it “informal”
- Must have a formal complaint
- Both parties must agree
- Not available if employee alleged to have commit sexual harassment against a student
- May return to formal process at any time until resolution complete
- Enormous creativity in options for alternative resolution techniques

Examples of Alternative Resolution

- Re-education/training
- Shared statements/shuttle mediation
- Restorative practices/facilitated dialogue
- Negotiated resolution
 - Course changes
 - Forfeiture of study abroad
 - Probation or suspension



What happens when a report is received?



Overview of the Formal Complaint Process

1. **Investigation:** The process begins with an investigation, usually conducted by the Title IX Coordinator. The investigation will likely include interviews with the Complainant, Respondent, and witnesses; collection of document evidence including education records, emails, texts, social media, and direct messaging. It usually takes 30 school days.
2. **Exchange of Evidence and Draft Investigation Report:** When evidence collection is completed, both parties will have an equal opportunity to inspect and review the evidence obtained that is directly related to the allegations raised in the complaint along with the investigator's draft investigation report.
3. **Final Investigative Report:** The Title IX Coordinator will author a report summarizing the relevant evidence. Both parties will have an opportunity to review and respond to the investigative report.
4. **Hearing:** After the investigative report is provided, a live hearing is conducted by a decision-maker(s) in which some form of cross-examination is administered.
5. **Determination:** Written determination issued detailing whether the allegations were substantiated and, if so, discipline and remedies for the conduct.

The Formal Complaint Process Start to Finish



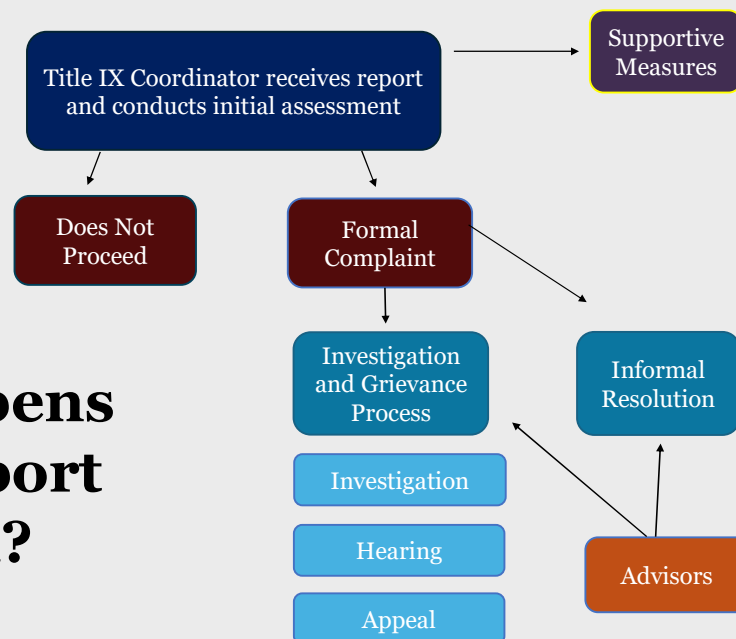
Intake
Notice of allegations
Supportive measures
Appointment of investigator
Opportunity to object
Investigation is completed
Parties review evidence
Final investigative report is issued
Hearing officer appointed
Opportunity to object
Evidence provided to adjudicator
Hearing takes place
Determination report delivered
Opportunity to appeal
Decision becomes final

Entering the Grievance Process

Notice of Investigation and Allegations

- In writing and mailed/emailed/delivered in person
- Sufficient details known at the time (identities of parties involved, conduct allegedly constituting sexual harassment, date and location of alleged incident)
- Statement that respondent is presumed not responsible
- Statement that responsibility is determined at the conclusion
- Sufficient time to prepare a response before any initial interview
- Right to advisor
- Code of conduct regarding false statements
- Amended when new information, allegation, or potential violation known

What happens when a report is received?



The Role and Qualification of Advisors

- Parties are entitled to (and at hearing must have) advisor
- Choice of party or provided by institution
- No training required
- Question witnesses on party's behalf
- Non-adversarial



The Role and Qualification of Advisors

- May attend meetings with Title IX Coordinator
- May help party prepare for investigation interview
- May attend interview (but may not participate)
- May assist with review of reports, evidence
- May assist with impact or mitigation statements
- Must attend pre-hearing meeting
- Must attend hearing and conduct cross-examination

Other Expectations of Advisors



- Maintain confidentiality and privacy of issues while serving as advisor
- Advise ethically, with integrity and in good faith
- Comply with rules of decorum and policy
- Not speak on behalf of or answer questions for party advising (except to conduct cross-examination)
- Prioritize in scheduling



What if one party has an attorney for their advisor but the other does not?

The Investigation Process

Role of the Investigator

Conduct prompt, thorough, fair, equitable, and impartial investigation

Make thorough search for relevant facts and evidence sufficient for adjudicators to reach a determination

Effectively organize documents and develop comprehensive investigation file

Prepare preliminary evidence report and final investigation report

Provide testimony at hearing related to investigation

Investigate to find relevant facts, not make outcome determination.

Qualifications of an Investigator

- Internal or external to institution
- Appropriately and regularly trained
- Not adjudicator
- Respectful of privacy
- Of appropriate temperament
- Able to engender trust
- Capable of balancing sensitivity and directness
- Free from bias and conflict of interest

Rights of the Parties in an Investigation

- Present their statements, evidence, and identify witnesses
- Discuss the allegations under investigation
- Opportunity to review and comment on the draft investigation reports and evidence
- Be accompanied by an advisor of their choice to any meeting, interview, hearing, etc.
- Written notice of the date, time, location and purpose of meetings, interviews, hearings, etc., with sufficient notice to prepare



What happens if a party or witness declines to participate in the investigation?



Are there any additional considerations for parties with special needs?

It's All About the Process

OCR and Courts will generally not second-guess the outcome of a Title IX process, as long as the investigation is done according to policy and appropriate standards.

The Hearing

Ivy Tech Standard of Evidence

Preponderance of the Evidence = More Likely Than Not



Remember that the burden is always upon the institution, not the parties, to prove that a violation has occurred.

Who is the Title IX Decision-maker?

Ivy Tech uses a hearing panel for student respondents

- 3-person panel from Pool; one is Chair
- The panel members cannot have also served as the Title IX Coordinator, an advisor, or the investigator in this case

Responsibilities of Hearing Panel

- Conduct hearing based on policy and regulations
- Hear relevant evidence
- Manage decorum and procedure
- Render pre-hearing and in-hearing procedural determinations regarding relevance and testimony
- Draft determination report
- Determine appropriate sanctions, if any



Hearing Coordinator's Role

Notice of hearing 10 business days prior to the hearing

- **List of what is required in the notice in the policy (see issue on party not participating in hearing)**

Pre-hearing coordination

Coordinating hearing logistics

- **Flow of rooms**
- **Witnesses**
- **Parties**
- **Recording**

Managing objections re: conflicts and bias

Pre-hearing

- Separate meeting(s) with parties and advisors
- Invite questions/topics ahead of time (can rule on relevance ahead of time but still opportunity during hearing)
 - If include or exclude based on relevance, document decision
- Witness presence (full agreement if witness does not need to attend hearing)
- Hearing arguments on relevance or directly related but not relevant and rule on arguments
 - Exchange rulings prior to hearing

Technology Considerations for Hearings



- All parties should be admitted to Zoom/Teams simultaneously.
- Notify parties that the hearing will be recorded.
- Ensure privacy to degree possible.
- Mention view options on Zoom/Teams screen.
- Ensure coordinator sets up breakout rooms.
- Coordinator should provide contact information.



What happens if a party or witness declines to participate in the hearing?

Hearing Tips

- Breaking the ice
 - Recording disclosure
 - Purpose of hearing
 - Technology disclosures
 - Introductions
 - Not legal proceeding
 - Truthfulness is expected
 - Introductory questions
- Trauma-informed tone setting
 - Recognition of difficulty
 - Need for breaks, pauses
 - Reassurance of decorum
 - Discussion of amnesty
 - Zoom view options
 - What to expect
 - No preconceived notions

Typical Flow of the Hearing

- Explanation of proceedings
- Summary of charges
- Opening statements
 - Complainant
 - Respondent
- Investigator presentation and questioning
- Questioning of witnesses
- Questioning of parties



Order of questioning: panel, complainant, respondent

Investigator Presentation and Questioning

- Investigator presents summary of Final Investigation Report.
 - Facts that are contested
 - Facts that are uncontested
- Investigator should not be asked for, nor should they give, their assessment or opinion of credibility, responsibility, or appropriate outcomes.
- Investigator may be asked about exclusions or perceived irregularities in investigation process.

Testimony and Cross-Examination

The institution cannot compel participation of parties or witnesses:

You are not required to answer my questions. If you choose not to answer some or all of my questions, I will still consider statements you have made in making a determination of responsibility.



Evidentiary Considerations - Relevance

Only relevant questions are allowed

- *"Questions must be submitted in writing to the Chair for a relevance determination before they are asked."*

Repetitious questions are not allowed

- *"Questions should be framed in a manner that seeks new information or clarification."*

Relevance Determinations

Evidence is relevant if it has “any tendency” to make a fact that is “of consequence” to the determination of sexual harassment **“more or less probable than it would be without the evidence.”**

- The evidence must be directed to a matter of consequence, essentially the definition of sexual harassment.
- The evidence must be probative – it must make something more or less probable. It does not have to be undisputed. Whether something is more or less likely is guided by logic and human experience.
- Technical rules of evidence are not those used in court proceedings, and hearsay evidence is allowed.

Irrelevant Evidence

Investigation does not consider:

- Incidents not directly related to alleged conduct, unless a pattern
- Character of the parties
- Complainant’s sexual predisposition or prior sexual behavior (but see next slide)
- Respondent’s disciplinary record (but can be considered if there is a finding in the sanctions process)

Evidence that Must Be Deemed Irrelevant, with Exceptions

- Questions and evidence about a Complainant's sexual predisposition must always be deemed irrelevant and therefore excluded.
- Questions and evidence about a Complainant's prior sexual history must be deemed irrelevant, and therefore excluded- with two limited exceptions:
 1. Where Respondent contends that someone other than the respondent committed the misconduct
 2. Where the question(s) or evidence concern incidents between the Complainant and Respondent and are offered to prove consent.



What if panelists disagree with the Chair's decision regarding relevance?

Panel Deliberations and Decision



- Majority decision prevails
- Deliberations are not recorded
- If finding of responsibility, then consider impact and/or mitigation statements
- Determination of sanctions

Sanctions

- Factors in determining sanctions
 - Nature, severity and circumstances of violations
 - Respondent's disciplinary history
 - Need for sanctions to end discrimination and/or prevent future
 - Need for sanctions to remedy the effects to Complainant and/or community
 - Impact on parties
 - Other information deemed relevant
- Student sanctions → Code of Student Rights and Responsibilities
- Employee sanctions → Employee Handbook

Drafting the Determination

- Use neutral tone.
- Provide as much detail as possible but rely on factual evidence.
- Indicate why certain evidence was or was not determined to be credible.
- Reconcile inconsistent evidence and indicate how determination was made.



What to Include in Determination Report

1. Identification of the allegations potentially constituting sexual harassment
2. A description of the procedural steps taken from including all witnesses interviewed
3. Precise policy language defining elements of alleged violations
4. Findings of fact supporting the determination
5. Conclusions regarding the application of the recipient's code of conduct to the facts
6. Determination for each allegation and the rationale for the finding;
7. Any disciplinary sanctions imposed including aggravating and mitigating circumstances warranting the sanctions imposed;
8. Procedures and permissible grounds for either party to appeal.

Distribution of Report

- Policy requires determination report within ten (10) business days unless extension is granted.
- Once the report is completed, it must be shared with the parties and their advisors simultaneously.
- Clearly reflect bases and process for appeal; both in cover letter and in determination.

Erny v. Indiana University (2024)

The allegations:

- Erny was found responsible for sexual misconduct and was suspended from IU. Erny claimed the process was “infected by anti-male bias” and filed suit against IU for sex-based discrimination under Title IX.
- Specifically, Erny based his claims of anti-male bias on five categories of evidence:
 - Evidence of external pressure on the University
 - **University data showing an internal pattern of sex-based decision-making**
 - **The panel’s “perplexing” decision as explained in the Outcome Letter**
 - Procedural irregularities in the investigation and hearing
 - Anti-male statements made by University employees.

The outcome:

- The District Court held that the types of evidence Erny presented could plausibly infer sex bias and allowed Erny’s Title IX claim to proceed.

Erny v. Indiana University (2024)

University Data

- 80% of hearings with male respondent and female complainants resulted in finding of responsibility for the male.
- 90% of those resulted in suspension or expulsion
- One female respondent out of five total was found responsible; her sanction was probation.

The lessons:

- Maintain meticulous data on both institution and individual adjudicator findings and examine outcomes for signs of bias.
- Provide resources for complainants regardless of gender, as both women and men can be victims of assault or harassment.

131

“Whether the hearing panel reached the wrong conclusion in Plaintiff’s case is none of the court’s concern—unless the University’s decision was based on Plaintiff’s sex. That being said, a ‘perplexing’ decision by a hearing panel can support an inference of sex discrimination.”

Erny v. IU (2024)

Erny v. Indiana University (2024)

“Perplexing” Outcomes

- An "inexplicable" decision can support an inference of sex bias
- The failure to explain inconsistencies in the determination letter could be viewed as bias against respondent.

The lesson:

Outcomes considered by the court to be “perplexing” will be scrutinized and may be viewed as implying anti-male (or anti-respondent) bias.

Both parties may appeal determinations regarding responsibility or the dismissal of a formal complaint, on the following bases:

- Procedural irregularity affected the outcome of the matter
- New evidence was discovered that could affect the outcome of the matter
- Title IX personnel had a conflict of interest or bias that affected the outcome of the matter

Grounds for Appeal



Notification of Right to Appeal

Provide following information, in bold print, in both cover email and at conclusion of determination report:

- Name of appeals officer or appeal panel chair
- Requirement that appeal must be completed in writing
- Email address to which appeal should be sent
- The timeframe in which appeal must be filed (5 business days)
- Permissible grounds for appeal

Elements of Appeal

- Appeals officer should not be same as decision maker, investigator, or coordinator.
- Preponderance standard still applies.
- Both parties may provide statement to appeals officer(s) in support of position.
- Appeals officer is not required to review all relevant evidence but may determine appeal from Determination Report and statements.
- "Appeal decisions are to be deferential to original determination."

If Appeal is Upheld

- Must describe the result and rationale for the result.
- May send back to investigator to explore newly discovered evidence.
- May order new hearing with corrections to defect(s).
- May overturn (limited circumstances).

Section Five: Developments Under the New Administration





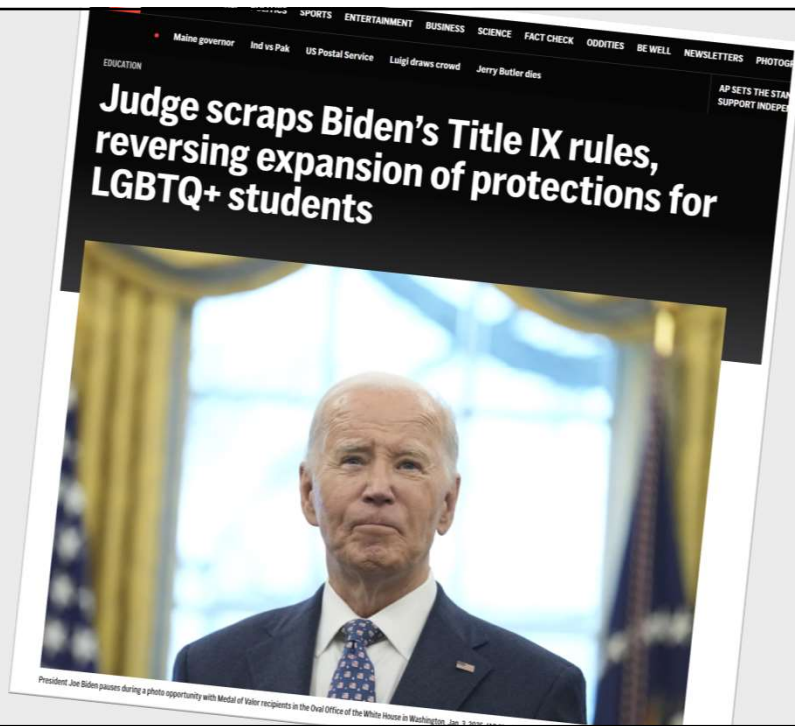
Temporary Regional Injunctions, Summer 2024

The Controversy Over 2024 Regulations

- Decreased procedural requirements
- Expanded protections for LGBTQ+, particularly related to gender identity



Nationwide Permanent Injunction January 2025



**DEFENDING WOMEN
FROM GENDER IDEOLOGY
EXTREMISM AND
RESTORING BIOLOGICAL
TRUTH TO THE
FEDERAL GOVERNMENT**

PRESIDENTIAL ACTIONS

EXECUTIVE ORDER
January 20, 2025

**ENDING ILLEGAL
DISCRIMINATION AND
RESTORING MERIT-
BASED OPPORTUNITY**

PRESIDENTIAL ACTIONS

EXECUTIVE ORDER
January 21, 2025

**KEEPING MEN OUT
OF WOMEN'S SPORTS**

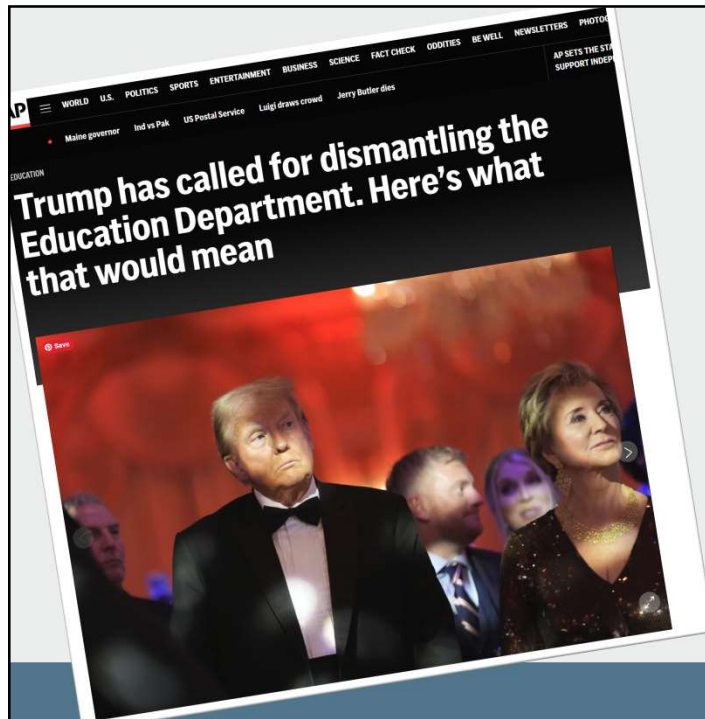
PRESIDENTIAL ACTIONS

EXECUTIVE ORDER
February 5, 2025

**2025
Executive
Orders**

Executive Orders

- Do not have the force of law
- Can affect government contracts
- Can indicate agency interpretation and enforcement priorities



Current Status
of Department
of Education
and Office of
Civil Rights

Losing the Chevron Doctrine

What was the Chevron Doctrine, how did the Loper Bright case change it, and why does it even matter?

Chevron v. Natural Resources Defense Council (1984):

- If a statute is silent or ambiguous on an issue and an agency's interpretation is reasonable, the court must defer to that interpretation, even if it would have reached a different outcome

Losing the Chevron Doctrine

What was the Chevron Doctrine, how did the Loper Bright case change it, and why does it even matter?

Loper Bright Enterprises v. Raimondo & Relentless Inc. v. Department of Commerce (2024):

- Courts must “decide legal questions by applying their own judgment.”
- Agency interpretations of statutes are not entitled to deference.

Recent Transgender Case Law

Whitaker v. Kenosha Consolidated School District (2017): The 7th Circuit held that a school district could not discriminate against a transgender student in the use of the restroom matching their gender identity.

Bostock v. Clayton County (2020): Supreme Court held that Title VII prohibits an employer from discriminating against an individual on the basis of sexual orientation.

A.C. v. Metropolitan School District of Martinsville (2023): 7th Circuit held that school district failed to provide A.C. with access to restroom consistent with his gender in violation of his rights under Title IX, the law prohibiting sex discrimination in educational programs, and the Equal Protection Clause.

147

Recent Transgender Case Law

Kluge v. Brownsburg Community School Corp.(2023): Former teacher brought action alleging that public school corporation's decision to terminate his employment for refusing to follow school's guidelines for addressing transgender students by their chosen first names and pronouns in school's database was result of discrimination on basis of his religious beliefs in violation of the First Amendment. 7th Circuit entered summary judgment for the school.

148

Where is this going?



Pregnancy and Related Conditions

- Equal access and accommodations to participate
- Leave for pregnancy, childbirth, postpartum conditions, termination of pregnancy, and related conditions
- Time off for physician appointments





Questions? Please feel free
to reach out!

Jferise@cchalaw.com
Jnussbaum@cchalaw.com

Title IX Training - Day 2 Investigations

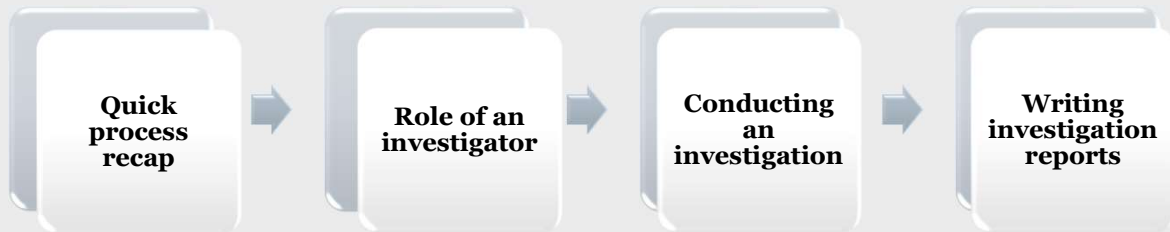
Ivy Tech Community College

Jodie Crosby Ferise, JD, EdD
James Nussbaum, JD

Church Church Hittle + Antrim
February 26, 2025



Road Map for the Session

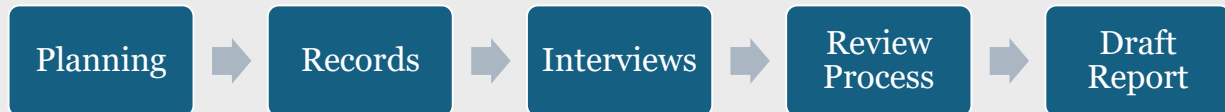


Building campus trust

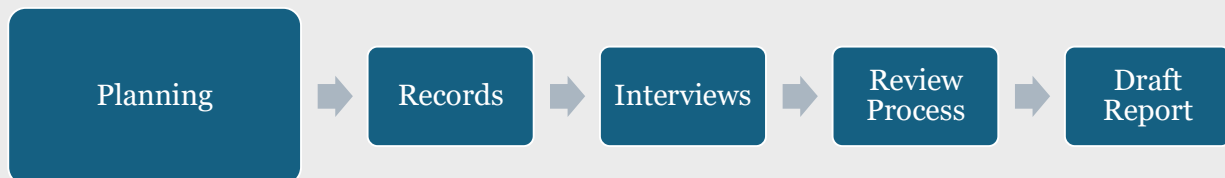
- Take every allegation seriously.
- Treat parties and witnesses respectfully and equitably.
- Engage the entire campus community through training and events.
- Be present and involved in the campus community.
- Make yourself accessible to students.



Stages of an Investigation



Stages of an Investigation



Planning an Investigation

Review Notice of Allegations and other information provided by Title IX Coordinator

Review applicable policies

Understand the elements of the alleged policy violation, and definitions such as consent if at issue

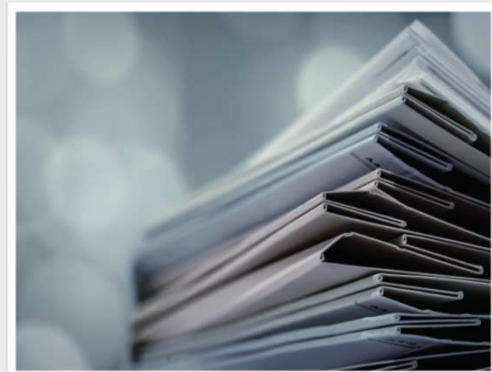
Create communication log and evidence log

Create an investigation plan

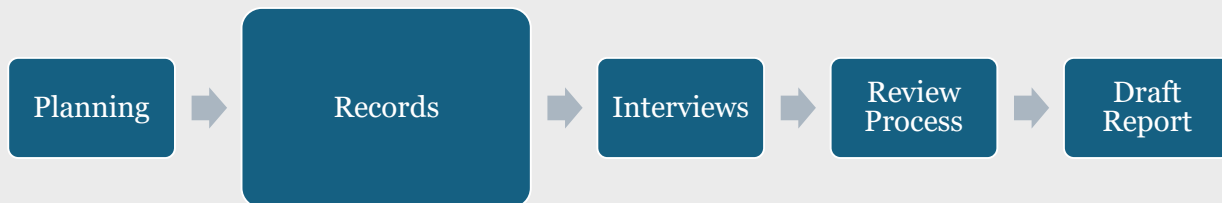


Investigation Plan –Records

- Text messages and E-mails
- Social Media
- Video Recordings/Surveillance footage
- Medical Records
- Police Reports
- Photographs



Stages of an Investigation

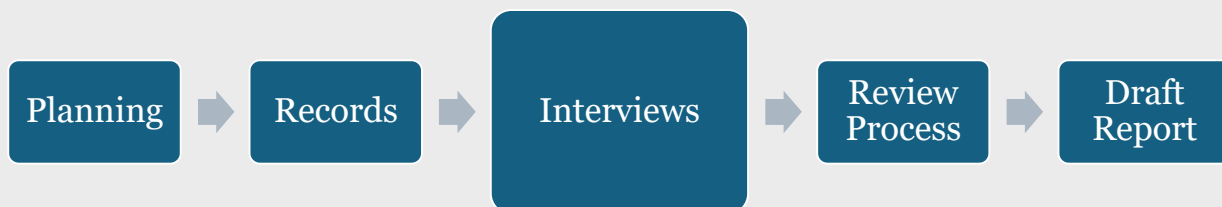


Investigation Log

- Table or Maxient entries
- What to record
 - Attempts to contact witnesses
 - Responses and non-responses
- When?



Stages of an Investigation



Scheduling Interviews/Advisor Participation

- Request interviews – usually via email – provide sufficient notice for party to prepare, include dates and times
- Once confirmed, send email with date, time, location, and what they should bring to interview
- Since advisors may accompany parties, confirm advisor participation and inform of advisor's role (supportive, cannot answer for party, non-disruptive, potted plant)
- Consider procedure meeting with advisor prior to interview to discuss policy and expectations

Before the Interview

- Open a case file in management system, if applicable.
- Review relevant policy, including relevant definitions and elements of the alleged violation(s), based on details you've received.
- Check with care team, if applicable.



Before the Interview



Set up or locate an appropriate space if you are able:

- Ensure a neutral, quiet, private setting
- Warm, inviting, calm
- Soft seating, blankets, pillows, rug, indirect lighting
- Tissues, water, fidget devices
- Noise cancellation

Preparing for the Interview-Opening Script

Examples of items to include in the opening script:

- Introductions and explanation investigator role
- Indicate date, time, place
- Have persons in attendance state name and preferred pronouns
- Acknowledgment of recording, if applicable
- If virtual, confirm private location
- Relevant policy/amnesty policy/no retaliation
- Acknowledge potential difficulty of interview
- Invite questions regarding interview or process

Preparing for the Interview - Closing Script

Examples of items to include in the closing script:

- List of evidence they've said they would provide; ask if any additional exists
- Witnesses they want you to interview and any other who might have information
- “Were there any questions you thought I would ask, but didn’t?”
- “Is there anything else you think I should know about what happened?”
- Reminder to reach out if they think of additional information later
- Ask if they have questions for you
- Explain next steps and thank them for participating

Starting the Interview

- Goals: learn the facts, gather evidence, establish a timeline, understand each party's perception of what happened
- Understand this is an interview / relaxed conversation, not an interrogation
- Empathy vs. sympathy
- Remember:
 - No obligation to participate
 - Discomfort and emotions may be extreme



Starting the Interview



- Introduce yourself; thank them for meeting with you
- Explain the purpose of the meeting:
 - Explain their rights
 - Share available resources
 - Provide options for proceeding
- Ask permission to record
- Explain terms you will use such as Complainant, Respondent, and policy violation
- Set expectations for privacy vs. confidentiality

Building Rapport

- Acknowledge how awkward, uncomfortable, and even painful this meeting may feel.
- Ask some easy, unrelated, introductory questions to allow them to begin to speak on topics that do not feel threatening (e.g., hometown, major, etc.).
- Remain neutral.



Conducting Effective Interviews

- Active listening skills - pay attention - not distracted / make eye contact / nodding / body language / not thinking of question while listening
- Mirror language used by the person you are interviewing, but find out what it means – ex. You mentioned you and x “fooled around”, what does it mean to “fool around”? Once you know what is meant, then you can use it

Conducting Effective Interviews

- Clarify language that has multiple meanings such as “had a few drinks,” “drunk,” “was acting strange,” “sex”
- Use medical terms for clarification
- Let them tell their account of what happened first, without interrupting, then follow up with open ended questions, paraphrasing, and funneling
- Acknowledge hesitation or awkwardness as normal
- Ask to send evidence such as text messages during the interview; follow up with email

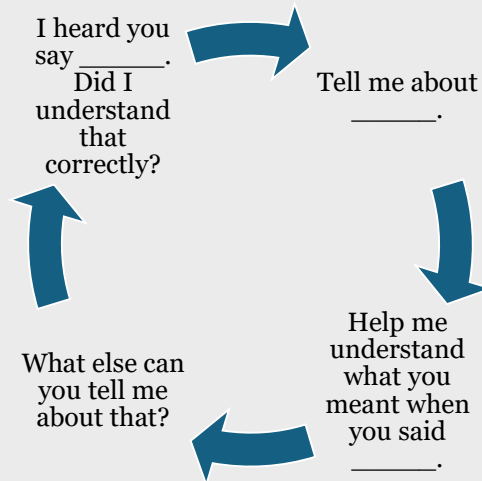
Interview Questions

What do you remember about that date?

Do you remember if you were with anyone?

Were you with Janice?

Interview Questions



Conducting Effective Interviews

- Do not do the following:
 - Ask compound, multiple choice, or leading questions
 - Ask irrelevant questions out of curiosity
 - Ask accusatory questions - “victim blaming” – “Why did you stay after? Why did not report the incident sooner? Why were you wearing that?”
 - Say “I am sorry this happened to you. That’s too bad.” Instead, I understand this is difficult for you to talk about.
 - Treat parties differently - use same technique for both parties

Amnesty

“The College strongly encourages students to report discrimination and harassment. Accordingly, students who report discrimination or harassment pursuant to this policy will not be disciplined for drug or alcohol consumption connected with the reported discrimination or harassment.”

Trauma Informed Interviews

How does trauma affect interviews?

- Lack of accurate, detailed memory
- Inability to recall in linear or chronological memory; jumping around in retelling
- Inconsistencies across multiple accounts of incident(s)

How should this affect your view of Complainant or the validity of their complaint?

- Responses to trauma vary widely.
- Signs of trauma do not prove misconduct occurred.
- Lack of trauma does not indicate misconduct did not occur.



Trauma Informed Interviewing, Continued

- Ask “What are you able to tell me?” – this relieves some pressure.
- Ask sensory questions – “What do you see, hear, smell?”.
- Explain reasoning behind difficult questions.



Are there any additional considerations for students with special needs?

Addressing Inconsistencies

- Don't be accusatory; remain neutral
- Be explicit and direct; cite source of inconsistency
- “You said X but you previously said Y. Can you help me understand? Those seem like different responses.”



What if the advisor answers questions?

After the Interview

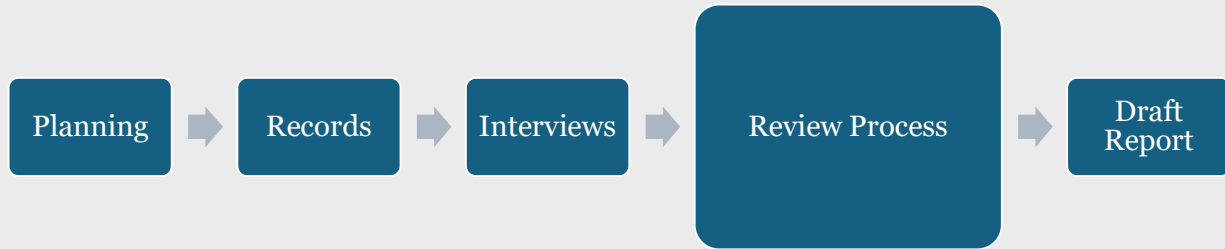


- Finalize interview notes
- **Update investigation plan**
- Follow up with document requests
- Refer to policy for appropriate next steps

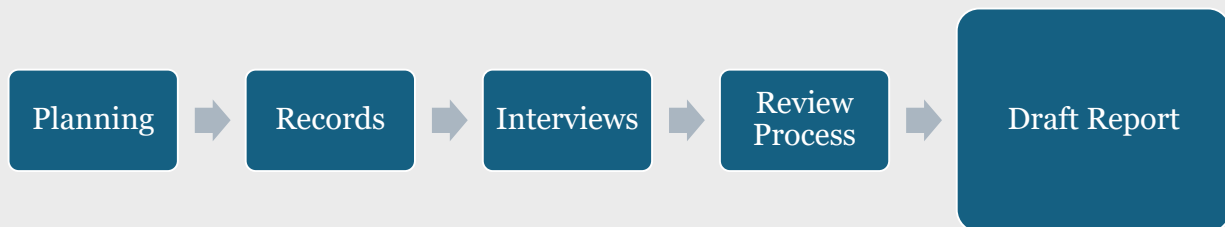


What do I do if a witness later asks for an update on the matter?

Stages of an Investigation



Stages of an Investigation



Drafting the Investigation Report

- Writing mechanics and clarity
 - Neutral tone
 - Past tense
 - Use footnotes for references to appendices for source citation or for context, background that would otherwise be disruptive
- Summarizing evidence:
 - List undisputed, disputed facts
 - Summarize testimony of parties first, then witnesses
 - Point out issues that may bear on credibility
 - Point out areas of corroboration
 - Use quotes

Drafting the Investigation Report

- The investigator may redact information that is not directly related to the allegation or that is privileged.
- Do not make findings or recommendations; that is the role of the adjudicators.



Assessing Credibility



- Plausibility
- Internal contradictions
- Motive
- Patterns of behavior
- Corroborating information



What if a party or witness provides false information during the investigation?

Distribution of Report

- Once the draft report is completed, it must be shared with the parties and their advisors.
- They will have at least 10 days to review the draft report and provide a written response.



Updating, Finalizing, and Submitting Final Report to Parties Before Hearing

- Investigator reviews comments from parties and decides if changes to the report, a response, and/or additional investigation is required
- Investigator updates report with any changes and/or additional evidence and finalizes the report - include responses to any comments from parties if applicable
- Final report is provided to parties for their review at least 10 days before the scheduled hearing



Questions? Please feel free
to reach out!

Jferise@cchalaw.com
Jnussbaum@cchalaw.com