

The Investigative Process

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1:00 - 2:30 PM - Eastern

Our Hopes...

Welcome & Introductions

What this workshop is:

1. Unpack legal requirements
2. Identify what needs to change in your policy
3. Networking/discussion with colleagues/expert faculty

What this workshop is not:

1. Not legal advice
2. Not a “how to” operationalize roles - focus is on integrating mandates into policy
3. Not a “one-size-fits-all” given institutional context



Agenda:

1. The investigative process within the Final Regulations
1. Attendee Participation and Responses
2. Q & A

Formal Complaint = Formal Investigation

A Formal Complaint is a:

- A document filed by a complainant, or
- Signed by the Title IX Coordinator

Alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment. § 106.30

Formal Complaint = Formal Investigation

- “Document filed by a complainant:” a document or electronic submission that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. § 106.30.
- Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party. § 106.30.

Formal Complaint = Formal Investigation

- The filing of a formal complaint of sexual harassment triggers the grievance process set forth in § 106.45.
- The § 106.45 grievance process includes:
 - Investigation conducted by a neutral, objective investigator(s)
 - Live-hearing providing for cross-examination by the advisor for both parties
 - Informal resolution, if applicable



ACTIVITY

Formal complaint considerations...

1. Does the document or electronic submission from a Complainant have to use the words “formal complaint” to trigger the grievance process under § 106.45.?
2. How much information must be in a Complainant’s complaint to constitute a formal complaint?

File **Message** Help Tell me what you want to do

Delete Archive Reply Reply All Forward Quick Steps Move Tags Editing Speech Zoom Share to Teams Insights

Complaint



Charlie Daniels <charlie.daniels@fictitiousstate.edu>

Reply Reply All Forward ...

Fri 6/12/2020 10:06 AM

To TitleIX <TitleIX@fictitiousstate.edu>

Dear Title IX Coordinator,

I work in the library in an open space next to Bailey James. I have to walk by Bailey's desk every time I go to my desk. Over the past month, every time I've passed Bailey's, desk I can see that Bailey is watching pornographic videos on their iPad. This occurs when I am returning from my morning, lunch and afternoon breaks. There have been four times that Bailey has forgotten to turn off the sound and I can hear what's happening in the videos. This is very distracting. I've said something to Charlie twice and both times Bailey indicated they are brushing up on techniques for when I finally decide to go out with them again. I can't focus on my work and I even used three of my paid vacation days to avoid coming to work. I read the sexual harassment policy. I am filing a formal complaint against Bailey. This must stop.

Charlie Daniels

Acquisition Technician

Reading Library

Fictitious State University

Complaint - Message (HTML)

File **Message** Help Tell me what you want to do

Delete Archive Reply Reply All Forward Quick Steps Move Tags Editing Speech Zoom Share to Teams Insights

Complaint



Charlie Daniels <charlie.daniels@fictitiousstate.edu>

To TitleIX <TitleIX@fictitiousstate.edu>

Reply Reply All Forward ...

Fri 6/12/2020 10:06 AM

Bailey James raped me on Saturday night. I want to file a complaint. Bailey deserves to be expelled. I've heard Bailey has done this before.

Charlie Daniels

Senior

Economics major, Sociology minor

Fictitious State University '21

Complaint - Message (HTML)

File **Message** Help Tell me what you want to do

Delete Archive Reply Reply All Forward Quick Steps Move Tags Editing Speech Zoom Share to Teams Insights

Complaint



Charlie Daniels <charlie.daniels@fictitiousstate.edu>

To TitleIX <TitleIX@fictitiousstate.edu>

Reply Reply All Forward ...

Fri 6/12/2020 10:06 AM

Bailey James sexually assaulted me last semester and won't leave me alone even though I've asked several times to stop contacting me. I want Bailey to leave me alone and never be able to do this to anyone else again here or anywhere else.

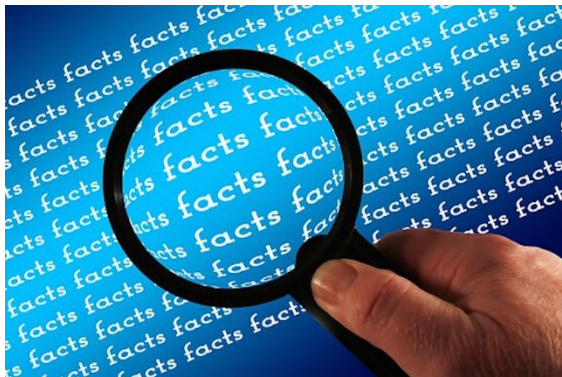
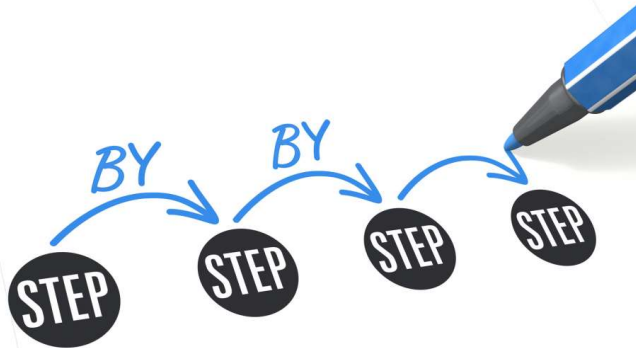
Charlie Daniels

Senior

Economics major, Sociology minor

Fictitious State University '21

Explaining the Investigative Process



1. Formal complaint filed
2. Title IX Coordinator assigns a trained neutral/unbiased investigator to investigate the allegations.
3. Notice of Allegations § 106.45(b)(2)
4. Burden of proof and burden of gathering evidence rests on University; not parties.
§ 106.45(b)(5)(i)

Explaining the Investigative Process

5. Investigator will conduct a thorough and objective search for relevant facts and evidence pertaining to the formal complaint.
6. Investigator will request and conduct interviews with the Complainant, Respondent and witnesses.
7. Written notice to be provided to each party including the date, time, location, participants, and purpose of all investigative interviews or other meetings with sufficient time for the party to prepare and participate.
§ 106.45(b)(5)(v).

Explaining the Investigative Process

8. The parties have a right to have an advisor present during the interview(s), who may or may not be an attorney.
 - Explain the Advisor's role within the investigative process.
9. The parties have equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory or exculpatory evidence, or not to participate.
10. The investigator may independently identify and interview witnesses and obtain evidence other than offered by the parties.

Explaining the Investigative Process

11. Investigator may decline to interview witnesses unlikely to yield relevant information. The investigator will decline to interview character witnesses if they have no relevant information about the incident.
12. All interviews will be audio recorded (if applicable). Interviewees may request their recorded interview.
13. Neither party shall be restricted from discussing the allegations under investigation or from gathering and presenting evidence. § 106.45(b)(5)(ii)

Explaining the Investigative Process

14. The investigator will seek, but not require, a waiver of legal privilege if information protected under a legally recognized privilege is provided by or sought. § 106.45(b)(i)(5)
 - Information protected by legal privilege may not be relied upon by the investigator or decision-makers unless the privilege is waived. § 106.45(b)(x)

Explaining the Investigative Process

15. Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove:
- That someone other than the Respondent committed the conduct alleged by the Complainant, or
 - If the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent are offered to prove consent.

§ 106.45(b)(6)(i)

Explaining the Investigative Process

16. Once the investigator finishes gathering the available evidence, the investigator will compile all the information directly related to the allegations raised in the formal complaint, including the evidence upon which the school does not intend to rely on in reaching a determination.
 - This information is compiled into the “investigative file.” § 106.45(b)(5)(vi)

Explaining the Investigative Process

17. The investigator shall send the parties and their advisor the “investigative file” (redacted), so that each can meaningfully respond to the evidence prior to the conclusion of the investigation. § 106.45(b)(5)(vi).
 - Hard copy
 - Electronically

18. Respondent maintains a presumption of innocence throughout the investigative process.



CHAT

Consider how you will provide the parties with the information obtained from party and witness interviews.



POLL

Which method will your campus use to provide the parties with information from interviews?

Explaining the Investigative Process

19. Upon receiving the “investigative file”, the parties have 10 days to submit a written response, to be included as an addendum to the “investigative file,” which the investigator will consider prior to completion of the “investigative report.” § 106.45(b)(5)(vi).
- Parties can argue for evidence not included in report to be included in report.
 - *May* offer parties opportunity to ask questions of one another or the witnesses.
 - Parties *may* offer additional witnesses/evidence
 - Investigator provides party responses to “investigative file” to the other party. Parties have 2-3 (or so) days to respond to the other party’s response.

Explaining the Investigative Process

20. Investigator creates an “investigative report” that fairly summarizes relevant evidence and, at least 10 days prior to hearing, sends to each party and the party’s advisor, the investigative report for the parties’ review and written response. § 106.45(b)(5)(vii).
- Optional whether to allow parties to offer additional evidence or witnesses (and then supplement the “investigative report”), or to allow the parties to respond to the other party’s response/additional evidence (if allowed, add to “investigative report”).



CHAT

What happens to the rest of the “investigative file” that contains the “non-relevant evidence?”



Evidence “directly related” to the allegations



Relevant evidence



Other evidence

Explaining the Investigative Process

21. Upon reviewing the “investigative report” and any written responses thereto, the Title IX Coordinator will determine whether the investigation reveals facts requiring or permitting dismissal of the formal complaint.
- If dismissal is warranted, the Title IX Coordinator will inform the parties, in writing, of the dismissal decision, the reason therefore, and an opportunity to appeal the dismissal.

Explaining the Investigative Process

22. If the Title IX Coordinator determines that the matter should not be dismissed, the Title IX Coordinator will send a Notice of Hearing contemporaneously to the parties. § 106.45(b)(3)

23. Final “investigative report,” and attachments thereto (i.e., relevant evidence relied upon within the “investigative report,” parties’ responses to “investigative file” and “investigative report,” etc.) submitted to decision-maker(s) prior to the hearing.

- Parties should have all the information provided to the decision-maker(s).



QUESTIONS

Reasonable Timeframe for Resolution § 106.45(b)(1)(v)

- Policy must include reasonably prompt timeframes for the conclusion of the grievance process, including for filing and resolving appeals and informal resolution(if applicable).
- Note when the “clock” starts ticking (e.g., “after the University has notice of the allegation of a policy violation” or “after the filing of a “formal complaint”).
- Institution has discretion on how to calculate “days,” (i.e., business days, calendar days, school days, etc.)

Reasonable Timeframe for Resolution § 106.45(b)(1)(v)

- Allow for temporary delay of the grievance process or limited extensions of time frames for good cause.
- Good cause for delay, *includes but is not limited to*:
 - Absence of a party, a party’s advisor, or witness;
 - Concurrent law enforcement activity; or
 - The need for language assistance or accommodation of disabilities.

Reasonable Timeframe for Resolution § 106.45(b)(1)(v)

- Good cause does not include delays caused solely by administrative needs.
- “Absence of a party” does not mean a party or witness can indefinitely delay the process by refusing to cooperate. While Schools need to attempt to accommodate schedules in order to provide parties with a meaningful opportunity to exercise the rights granted to the parties under the final regs, the final regs provide that a grievance process can proceed to conclusion even in the absence of a party. (Preamble, p. 891 (*unofficial*))
- Written notice of the delay/extension and reason therefore must be sent to the parties.



CHAT

What *other* reasons for delay will you include in your policy?

Case study:

Two days before the scheduled §106.45 live-hearing, Respondent informs the Title IX Coordinator that they are leaving school immediately to travel home to be with their mother who is near the end of life due to Stage IV metastatic breast cancer. The Respondent does not know when they will return. The University is allowing the Respondent to complete their remaining coursework online for the remainder of the semester.

Reasonable Timeframe for Resolution § 106.45(b)(1)(v)

Other possible reasons for delay:

- The complexity of the case
- The number of parties or witnesses involved
- University closure or academic breaks
- Any other extenuating circumstances articulated by the TIXC or investigator.



QUESTIONS

Defining the Role of Advisor

- Each party has a right to an advisor of their choosing, who may or may not be an attorney. § 106.45(b)(2)(B).
- School may not limit the choice or presence of an advisor for either party. § 106.45(b)(2)(B).
- Advisors need not be free of bias or conflict of interest.
- Restrictions may be established regarding extent of advisor's participation in the grievance process, as long as restrictions provided equally to both parties.

Defining the Role of Advisor

- Advisor may inspect and review evidence provided to the party under § 106.45(b)(5)(vi). § 106.45(b)(2)(B).
- Advisor conducts cross-examination of other party and witnesses at the live hearing. § 106.45(b)(6)(i).
- “If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.” § 106.45(b)(6)(i).



ACTIVITY

Advisor Considerations...

1. What reasonable restrictions will you place on role of advisors within the investigatory, hearing, and appeal processes?
2. Who will be your university-appointed advisors? How will you ensure equity in the appointment of advisors?
3. Will you allow the parties to change advisors throughout the process?
4. Will your advisors differ from “support persons?”



QUESTIONS

Final Investigative Report



- Final Regulations state only that an investigative report “must fairly summarize relevant evidence.”
- “Relevant evidence” may differ from “evidence directly related to the allegations.”
- It is the investigator’s role to determine what is “relevant evidence” after parties have reviewed all evidence collected.

Final Investigative Report

- Explanation of alleged misconduct
- Applicable offenses
- Description of procedural steps taken during the investigation*
- Evidence obtained
- Witnesses interviewed
- Supportive measures (whether they were or were not provided)
- Jurisdictional statement
- Summary of relevant evidence



- OR -

Final Investigative Report

- Identify undisputed facts, corroborated facts and contested/disputed facts, and/or
- Analysis of the relevant evidence, including a credibility analysis, and/or
- Recommended findings or conclusions.

Final Investigative Report

“The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative process.”

Final Regulations, preamble p. 1031 (unofficial version).



QUESTIONS

Rights of the Parties within the Investigative Process

- The right to receive a written Notice of Allegations that provides sufficient detail about the allegations and the applicable Policy provisions for the Respondent to be able to respond and for both parties to understand the scope of the investigation.
- The right to be treated equitably throughout the investigative process.
- The right to offer evidence to be considered and provide witnesses to be interviewed (fact and expert witnesses).

Rights of the Parties within the Investigative Process

- The right to have an advisor present during the interview(s), who may or may not be an attorney.
- The right to a written notice including the date, time, location, participants, and purpose of all investigative interviews or other meetings with sufficient time for the party to prepare and participate.
- The right to review and provide a written response to the evidence collected prior to the finalization of the investigative report (must allow at least 10 days).

Rights of the Parties within the Investigative Process

- The right to review and provide a written response to the “investigative report” (must allow at least 10 days).
- The right not to be restricted from discussing the allegations under investigation.
- The right not to have legally privileged information disclosed or relied upon without a voluntary waiver of the privilege.
- The right to decline to give a statement about the allegations.

Rights of the Parties within the Investigative Process

- The complainant has a right to “rape shield” protections.
- The Respondent has the right to the presumption of innocence until proven otherwise after the conclusion of the grievance process under § 106.45.
- The right to have the burden of proof and burden of gathering evidence rest on University; not parties.



TAKEAWAYS

The New York Times

Civil Rights Law Protects Gay and Transgender Workers, Supreme Court Rules

The court said the language of the Civil Rights Act of 1964, which prohibits sex discrimination, applies to discrimination based on sexual orientation and gender identity.



- On June 15, 2020, the U.S. Supreme Court ruled that Title VII protects gay and transgender workers from workplace discrimination on the basis of sexual orientation and gender identity.
- Likely Title IX implications to this ruling. Title VII often informs the interpretation of Title IX within civil litigation.



QUESTIONS



RESOURCE

[6-week Online Bootcamp for Investigators with >3 years experience](#)

**not included in membership*

[3-day Virtual Conference for Investigators with <3 years experience](#)

**free for members*

[2-day Virtual Conference for Hearing Panels working on Student Cases](#)

**free for members*



RESOURCE

Office for Civil Rights

<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>

- [Title IX Regulations Addressing Sexual Harassment](#) (unofficial copy)
- [Title IX Regulations Addressing Sexual Harassment](#) (Federal Register)
- [Title IX: Fact Sheet: Final Title IX Regulations](#)
- [Title IX: U.S. Department of Education Title IX Final Rule Overview](#)
- [Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule](#)
- [OCR Blog](#)



EVALUATION

Thank you!

Please remember to complete the event evaluation. Your comments will help us continually improve the quality of our programs.

