

Advanced Title IX Investigator Training

May 26, 2021 & June 11, 2021

ODHE

Advanced Title IX Investigator
Writing Workshop



Bricker & Eckler
ATTORNEYS AT LAW

Disclaimers



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

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

Presentation Rules



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

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

Can We Post these Materials?



34 C.F.R. §106.45(b)(10)(i)(D)

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

Topics



Writing Interview Summaries and Investigation Reports

- Summarizing investigative interviews
- Structuring your investigative reports
- Common Mistakes that Prevent Clarity in Written Decisions
- Best Practices for Writing Neutral Decisions on Sensitive Subjects

Review of Your Role



1. The **gatherer** of all relevant evidence
2. The **organizer** of all relevant evidence

Writing Interview Summaries (1 of 2)



- No magic formula
- Try to draft them near the time of the interview
- Summarize the discussion with as much detail as possible
 - Include policy and procedure discussions
 - Include questions asked and answered
 - Use quotations when possible

Writing Interview Summaries

(2 of 2)



- Must be readable
- Must be accurate
- Incorporate feedback promptly
 - Otherwise you might forget what was said or what the feedback is referencing
- Put the work in
 - If your summaries are accurate and readable, they may become the bulk of your report (depending on your institution's report format)
 - Putting the work in now may save you time later

Writing Investigation Reports



From the Title IX Regulations...

The new Regulations provide that the investigator must create a report that:

- Fairly summarizes relevant evidence (34 C.F.R. §106.45(b)(5)(vii))

What does this mean?

Preparing to Write

Timing and Form

- Don't start writing the Final Report before the investigation has concluded, if you can help it
 - However, your interview summaries may be the bulk of your report and you will have to write those as the investigation proceeds
 - Starting the report too soon might give the impression that you have pre-judged the facts or have confirmation bias
- Find out whether your institution has a template for reports
 - Use it and your policy as a checklist

Investigation Reports



Basics

- Summarize **facts**
- No findings of fact; No determinations
- Provide to parties and advisors at least 10 days before the hearing
- Did you create a draft and share it with the parties when you shared the evidence?
 - If so, make sure to distinguish between the DRAFT report and the FINAL report because the FINAL report must address your consideration of the feedback provided

Things to Keep in Mind



Two or more “stories”

- Each case includes at least TWO stories, maybe more
 - (1) The underlying case
 - (2) The investigation of the underlying case

Story One of (at least) Two



The Underlying Facts

Each case includes at least TWO stories in one:

(1) The facts of the underlying case

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

Story Two of (at least) Two



The Investigation of the Underlying Case

Each case includes at least TWO stories in one:

(2) The investigation of the underlying case

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

Different Ways to Tell These Stories



Structural Considerations

- Template
- Typical practice for your institution
- Common structural tools
 - Chronology
 - Topic or allegation
 - Perhaps by chronology within each topic or allegations
 - Chronology of how the information came into the investigation
 - By Witness Summary

Where to Begin?



Structuring Your Report - Introduction

Should preview both stories

- How did the underlying “story” get to the Title IX Office?
- What about the underlying story was reported?

Identify relevant individuals with just factual information

- Complainant
- Respondent
- Investigator
- Witnesses

Where to Begin?

(Cont.)



Structuring Your Report – Introduction

The Allegations

- Refer back to the Notice when drafting your descriptions of the allegations
 - Do they match your description?
 - If not – why?
- Did both parties receive Notice of the issues you've investigated?
- Did something come up during the investigations that requires further notice or charges?
- Remember to use the names and definitions of violations as they existed when the conduct is reported to have occurred
 - Same policy for definitions and procedure? Or a split?

Identify and include all alleged policy violations



- Always include definition of prohibited conduct alleged from applicable policy
- Always include related definitions as appropriate (e.g. consent, incapacitation) or any code of conduct included if done together
- Include verbatim, in entirety
 - This will take up space but it's worth it
 - Acts as a check on the process to ensure accuracy
 - Gives the parties and advisors a reference point within the report itself

Process and Procedure



Structuring Your Decision – Step-by-Step

Procedural Steps beginning with Formal Complaint:

- Can work well between the introduction and discussion of facts
- Pieces of this description may need to be repeated later
- Include the following for your Decision-Maker(s):
 - Formal Complaint
 - Notifications to the parties
 - Interviews with parties and witnesses
 - Site visits
 - Methods used to gather other evidence

Explaining the Facts



Structuring Your Report – What Happened According to Whom?

- Infinite ways to structure a report
 - We are providing suggestions *ONLY*
- Structure may need to change depending on the type of case and information presented
 - Think about this early in the writing process
- Remember – you are telling at least TWO stories to anyone reading your report
 - Both must be readable

Explaining Your Structure



Example Explanation

“The information in this report is a summary of facts as agreed upon by the parties and witnesses. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate.”

Other Basics to Include



Issues of Relevance and Procedure

- Address any relevance decisions you made during the investigation
 - Witnesses NOT interviewed (and why)
 - Records NOT requested (and why)
- Any procedural anomalies that need explained?
 - Explaining them in the report gives the parties an opportunity to address them prior to the hearing

A statement regarding relevant evidence



“All relevant information gathered during the course of the investigation has been included in this report.”

- Identify if you thought something was not relevant and why – consider still including in attachment for decision-maker
- Provide a table or list of all relevant evidence gathered and attach that evidence

Helpful Synthesis



- If you can, synthesize the information from multiple parties and witnesses
 - May work best in an overview/introduction section or a conclusion section
- Where the stories diverge:
 - “Information from [Complainant]”
 - “Information from [Respondent]”

Synthesis 101



Look for opportunities to logically combine related facts

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

Synthesis Example #1



Logically combine related facts to tell a story

Pre-Gaming at Apartment 12

Complainant and Witnesses A, B, and C, reported that they each took 3 shots of vodka when they arrived at Apartment B. Appendix, pp. 6-9. Witnesses agree that approximately two hours after Complainant and Witnesses A, B, and C arrived and took vodka shots, Respondent arrived at Apartment 12 with Witness D. Appendix, pp. 4-9. During his Title IX interview, Respondent reported that he did not take any shots of vodka and had a clear memory of the night. Respondent also reported that he did not observe Complainant take any shots of vodka that night, did not see Complainant stumbling when she walked around the apartment, and did not hear Complainant slur her speech at any time. Appendix, p. 7.

Synthesis Example #1 – Takeaways



Can you apply these takeaways in your cases?

Several things worth noting in this example:

- The information is presented under a topic heading
 - "Pre-Gaming at Apartment 12"
- Information comes from different sources and is blended together
 - Parties and witnesses
 - References to appendix suggest that the information came from several different interview summaries

Synthesis Example #2



Logically combine related facts to tell a story

Report that Respondent choked Complainant

As previously mentioned, Complainant reported four separate acts that might rise to the level of a policy violation. First, Complainant reported that Respondent choked her during their argument on September 1, 2020. Formal Complaint, p. 1. When Complainant described this incident to the Title IX investigator, she said that Respondent used his hand to encircle her throat and then squeeze, preventing her from breathing or talking. (Sept. 10th Interview of Complainant). Complainant submitted photographs of her neck during the Title IX investigation, which are included in the Appendix to this Report on pages 10 and 11. Two witnesses, Witness A and Witness B, reported to the Title IX investigator that they observed bruising on the Complainant's neck when they saw the Complainant the morning of September 2, 2020. (Sept. 12th Interview of Witness A; Sept. 20th Interview of Witness B).

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

Synthesis Example #2 - Takeaways



Can you apply these takeaways in your cases?

Several things worth noting in this example:

- The information is presented under a topic heading
 - “Report that Respondent Choked Complainant”
- Information comes from different sources and is blended together
 - Parties and witnesses
 - References to multiple interview summaries and photographs
 - When things cannot be logically combined, begin a new paragraph (“Respondent denied...”)

Analysis of Disputed & Undisputed Facts



Be careful to avoid drawing any conclusions

Complainant and Respondent's Accounts of Events

- A. Areas of Agreement
- B. Areas of Disagreement

Consider Feedback



And document that Consideration

- Remember...
 - “**Prior to completion of the investigation report**, the recipient 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, and the parties must have at least 10 days to submit a written response, **which the investigator will consider prior to completion of the investigative report.**”
- Make sure the investigation report reflects your consideration
 - Don’t just go through the motions

Common Writing Mistakes

Consistent and Precise Language



Inconsistent Terminology

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

Word choice

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

Common Writing Mistakes

Empathy and Tone



Empathy

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

Tone

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

Common Writing Mistakes

Cite Your Source



Failing to include sources of information (discussed earlier)

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

Confusing Quotation Marks

- Is the quoted language from the interviewee?
- Is the quoted language actually a quote from someone else?
 - Footnote 10: The quoted language was attributed to Respondent by Claimant during Claimant’s October 10, 2020 Title IX interview.

Common Writing Mistakes

Structure



Topic sentences and transitions

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

Pronouns

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

Common Writing Mistakes

Miscellaneous



Typos

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

Run-on sentences/Sentence fragments

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

Editing Exercise #1



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

Issues:

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

Fix:

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

Editing Exercise #2



Respondent engaged in sexual intercourse with Complainant from behind.

Issues:

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

Fix:

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

Editing Exercise #3



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

Issues:

- Pronouns are not clear

Fix:

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

Closing Thoughts



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

Additional information available at:

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

Find us on **Twitter** at
@BrickerHigherEd

Questions?

