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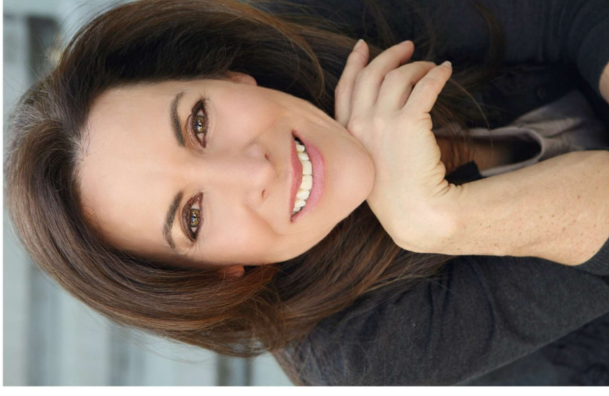
K-12 and Title IX: What to Know About the New Regulations

Part Two



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Agenda for Today

01

Basic interviewing principles/writing interview summaries

02

Understanding relevance and special categories of evidence

03

Weighing evidence and making a determination

04

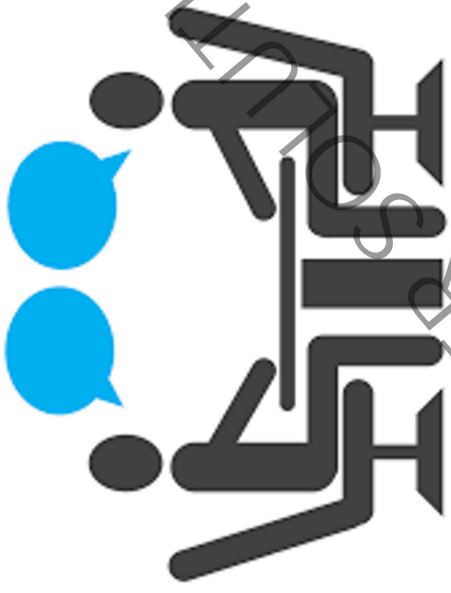
Logistics of adjudication

05

Writing investigation reports/hearing outcomes

Overarching Goals of Investigation & Adjudication





Basic Interviewing Principles & Writing Interview Summaries



Top 5 Fears/Challenges of Conducting Interviews

- 1.
- 2.
- 3.
- 4.
- 5.

Interviewing Tips

- Clear expectations and communication about process
- Kind interviewing
- Watch your language
- Asking sensitive and difficult questions
- Request documentary evidence (and confirm if necessary)
- Last question is a catch-all



Issues particular to interviewing children



- Who should ask the questions and where should the interview take place?
- Parent/witness present in the room
- Use of non-leading questions



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Help me understand ...	Tell me all about ...
What were your thoughts and feelings at that time?	What were you hearing when this was happening?
You said X. I want to make sure I understand what you mean by X.	I don't want to make any assumptions, so can you explain what you mean by X?
I am going to ask some questions about X, because it is important that I understand X.	I am going to shift gears and ask about X.
What part of their body touched your body?	How did you know the other person wanted to do X?

Specific to Witnesses

- Advise witnesses of neutrality, lack of confidentiality and retaliation
- Ask about relationship to parties/conversations about interview
- Give the witness very little specific information about the allegations
- Last question is a catch-all



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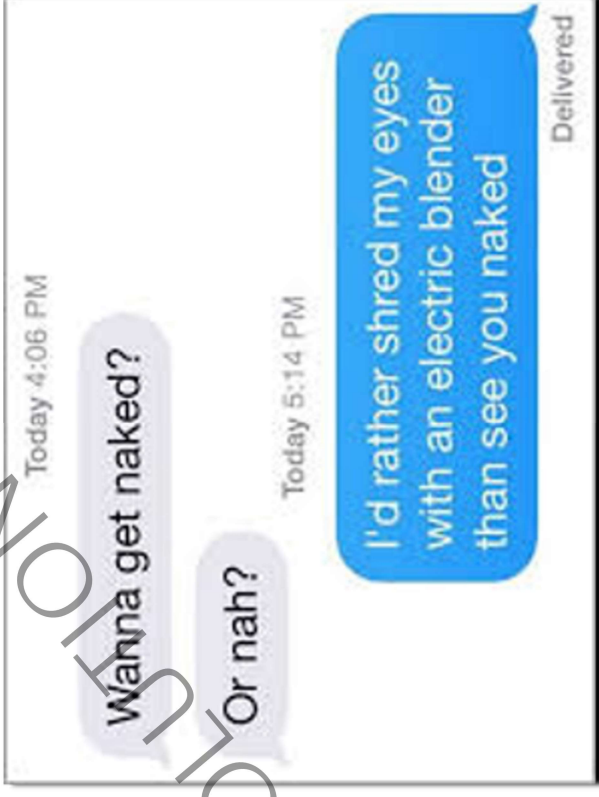
Interview Structure & Summarizing Interview

- Chronology of conversation v. order of summary
- Notes re: demeanor and physical observations
- Use of direct quotes and interviewee's own language

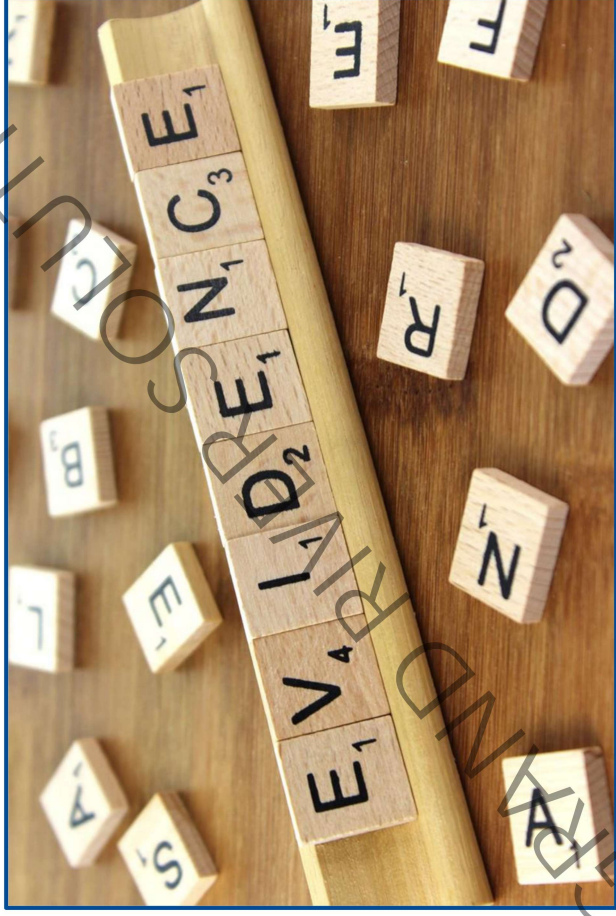


Other Evidence

- Texts/emails/voicemails
- Social media posts
- Police reports
- Photos
- Medical records
- Phone records



Understanding Relevance & Understanding Special Categories of Evidence



Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence



Relevance is Not...

- Strength of the evidence
- Believability of the evidence
- Based on type of evidence: circumstantial, direct
- Based on complicated rules of court



Is This Relevant?

1. Transcript
2. Letter from aunt that the complainant or respondent has always been nice kid
3. Polygraph exam
4. Photos of respondent making crude gestures
5. Photos of complainant drinking alcohol at a party



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General Rules About Evidence in Title IX Investigations

1) Rule about a categories of evidence ?

2) Past conduct of respondent?

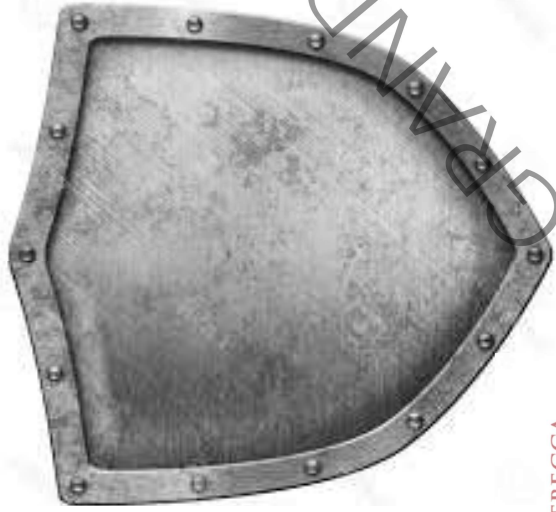
3) Past conduct of complainant?



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“Rape Shield” Rules



1. Purpose
2. When is past conduct is considered?
3. Impact

Medical Records, Therapy Records, School Records

1. Release of records
2. Relevance?
3. Sharing with other party



Weighing evidence and making a determination

Weighing the evidence and making a determination

1) Evaluate the evidence collected to determine what factually is more likely to have occurred, and then



2) Analyze whether the conduct that happened constitutes a violation of the school's policies

How to determine if a person is credible?

EEOC says
to consider

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

How to determine if a person is credible?

Jury
instruction
says to
consider:

- **Relationship** to the Plaintiff or to the Defendant
- Interest, if any, in the outcome of the case-- Anything to gain or lose from the case
- **Manner of testifying** – did they appear to be lying? Appear to be telling the truth?
- **Opportunity** to observe or acquire knowledge concerning the facts about which the witness testified
- **Candor, fairness and intelligence**
- The extent to which testimony has been supported or contradicted by other credible evidence
- **Any bias or prejudice?**
- **Inconsistency** within testimony? Reasonable/minor or significant?
- Use your **common sense** and your everyday experience in dealing with other people.

Reliable or Credible?

You can
trust it

It is convincing

Credibility versus Reliability

Reliable evidence:

- I can trust the consistency of the person's account of their truth.
- It is probably true and I can rely on it.

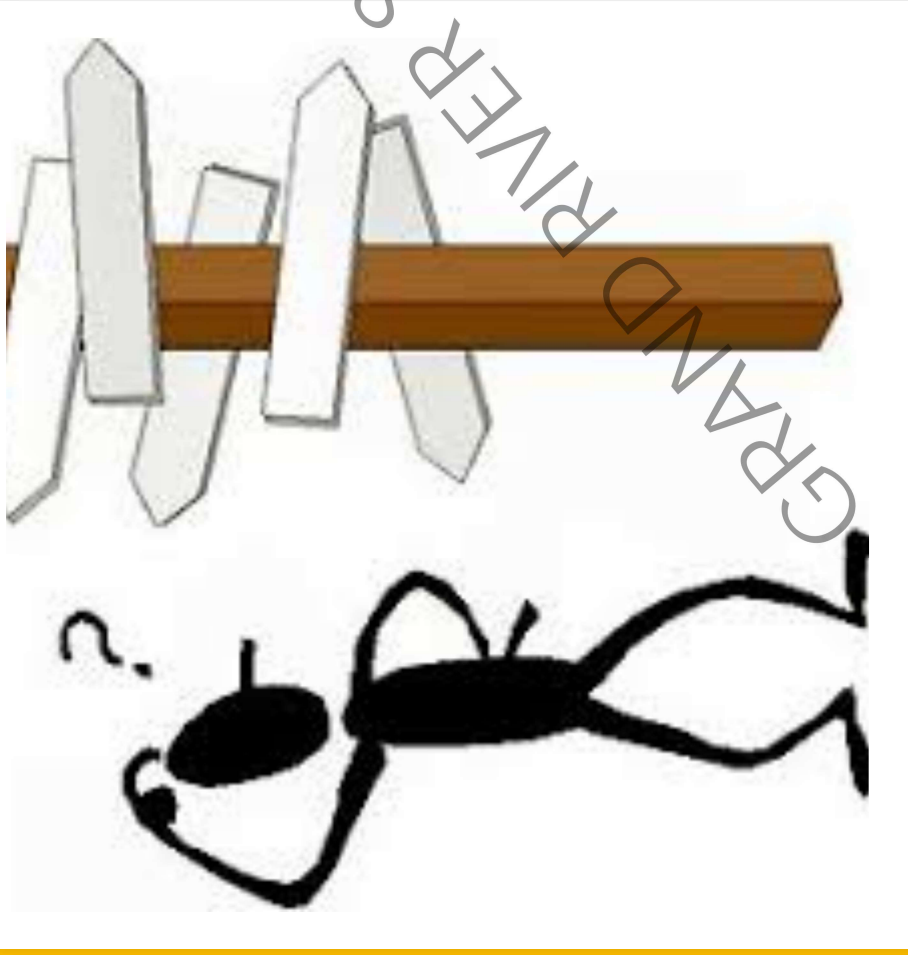
Credibility:

- I trust their account based on their tone and reliability.
- They are honest and believable.
- It might not be true, but it is worthy of belief.
- It is convincingly true.
- The witness is sincere and speaking their real truth.

I Just *KNOW* They Are Not Telling the Truth

- Bias
- Can you really spot a liar?
- Understanding clues that are culturally different from your own

HOW TO
SPOT A LIAR



Evaluating inconsistencies & unanswered questions



Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate



Weighing the evidence and making a determination

1) Evaluate the evidence collected to determine what factually is more likely to have occurred, and then



2) Analyze whether the conduct that happened constitutes a violation of the school's policies

Definition of sexual harassment

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity

Elements of this definition of sexual harassment

1. Unwelcome conduct (subjective and objective)
2. Severe
3. Pervasive
4. Objectively offensive
5. Effective denial of equal access to school's education program or activity

Options

- Report contains only facts gathered
- Report contains recommended factual findings
- Report contains recommended factual findings *and* recommendation regarding policy



Logistics of Adjudication

Someone Needs to Take Next Steps

Write Report: Decision-Maker

If so, what to do about it?

OR: Have a hearing



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Someone Needs to Take Next Steps

Cue the Decision-Maker



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Hearing Elements

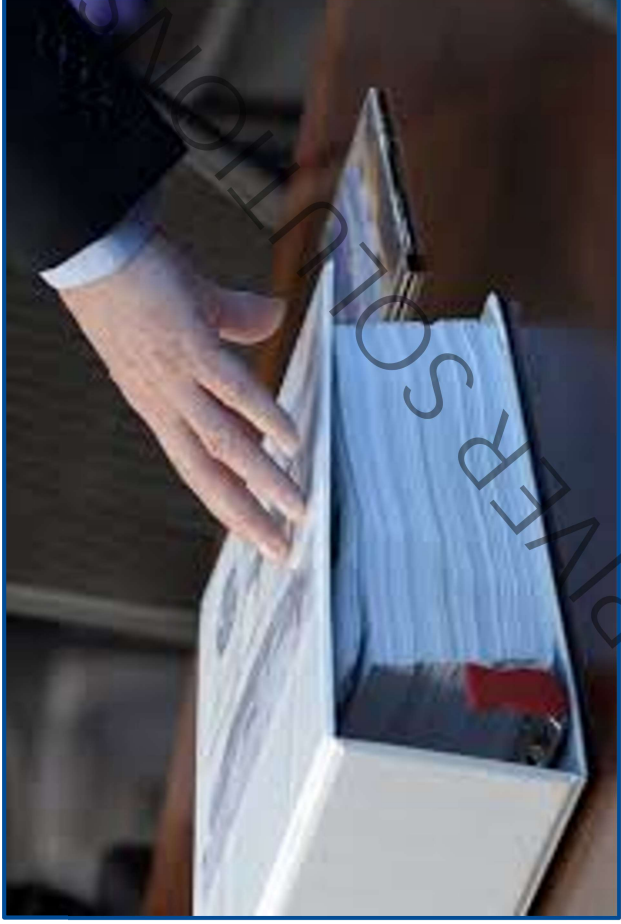
Providing advisors

Live cross examination by advisors

Exclusions of evidence if no cross-examination

No compelling attendance

Only ONE communication about hearing and sanction



Writing Investigation Reports/Hearing outcomes

Final Report

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and Remedies
- Procedure for appeal



You've Written a Report Now *What?*



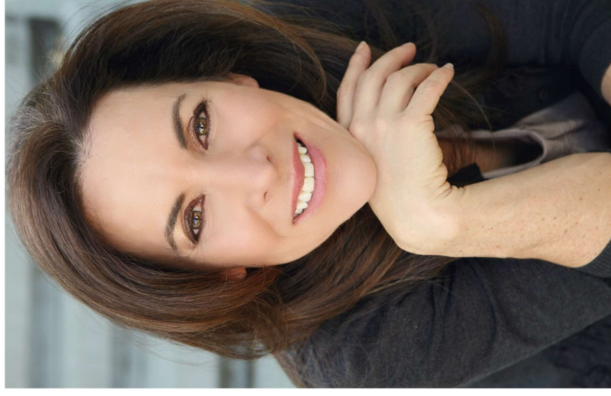
Questions?





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