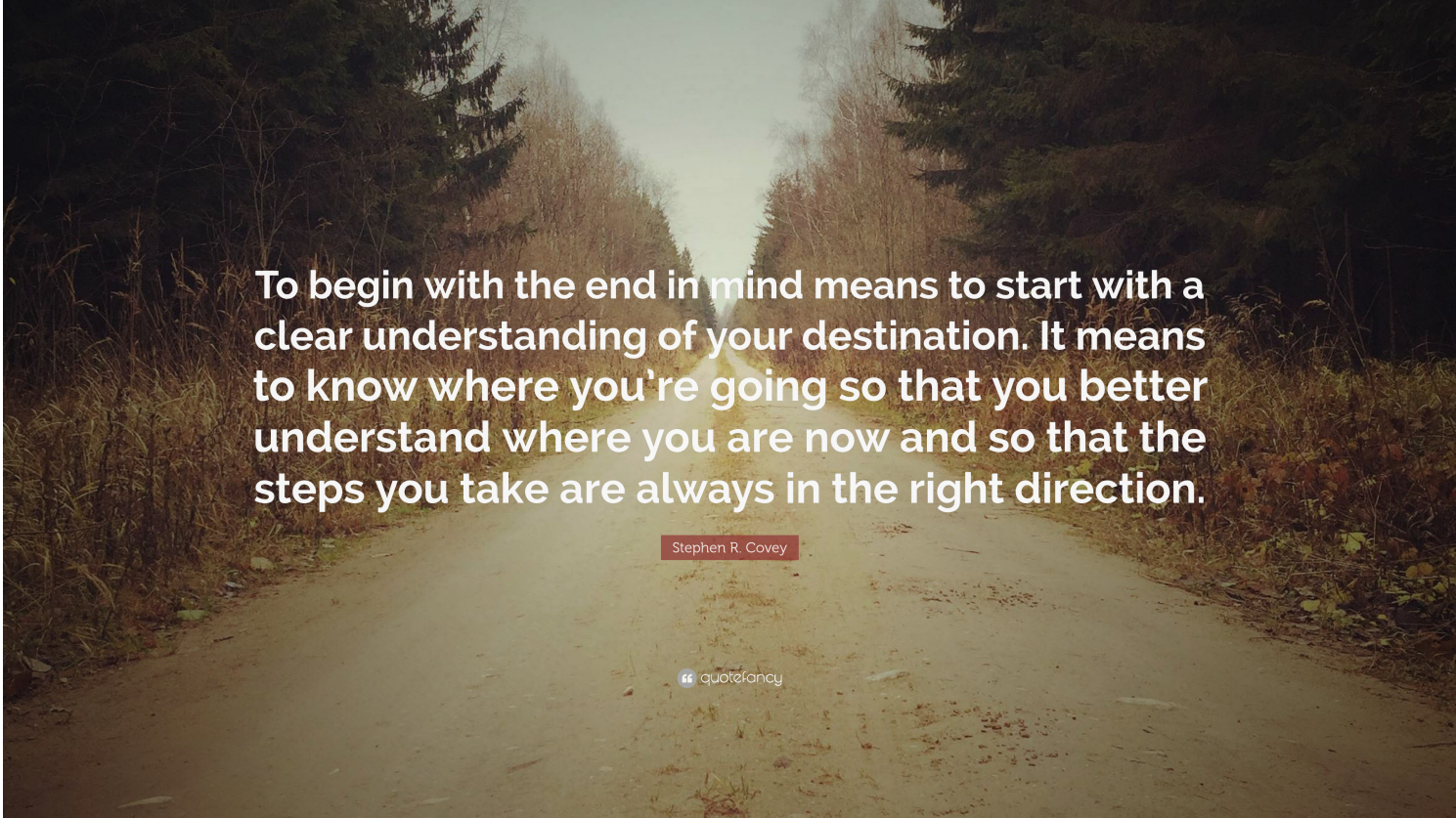


# Title IX Investigations

Title IX Personnel Training – Wednesday, 10 August 2022

Utah System of Higher Education (USHE)

# Begin with the End in Mind



To begin with the end in mind means to start with a clear understanding of your destination. It means to know where you're going so that you better understand where you are now and so that the steps you take are always in the right direction.

Stephen R. Covey

quote fancy

**END**  
**DELIVERABLE:**  
**Investigative**  
**Reports**

- **“Create an investigative report that fairly summarizes relevant evidence...”**

**34 C.F.R. § 106.45(b)(5)(vii)**

# Objectives of an Investigation

- **Gather available evidence**
- **Categorize and Organize the evidence**
  - Relevant (Report)
  - Directly-related Evidence (Evidence File)
    - Inculpatory
    - Exculpatory
- **Present the evidence effectively for various audiences**
  - Parties & Advisors
  - Decision-makers
  - Institutional Officials w/ legitimate interest in the report

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# Gather Available Evidence

Considering the (1) regulatory expectations & (2)  
some promising practices

# Regulatory Expectations

34 C.F.R. § 106.45(b)(5)

- How you conduct a fact-gathering investigation matters
  - Burden of gathering evidence rests on the Institution not the parties
  - Cannot seek/use health-related records UNLESS a party gives written consent
  - Provide equal opportunities to the parties to present evidence (including witnesses to be interviewed)
  - Cannot restrict parties from discussing allegations or gathering evidence on their own
  - Must permit parties to be accompanied by an advisor of their choice w/ equally applied restrictions
  - Parties need to receive written notice, with sufficient time to prepare for meetings and interviews
  - Provide an equal opportunity to 'inspect and review' the evidence you've gathered

# Notifying Parties about the Investigation

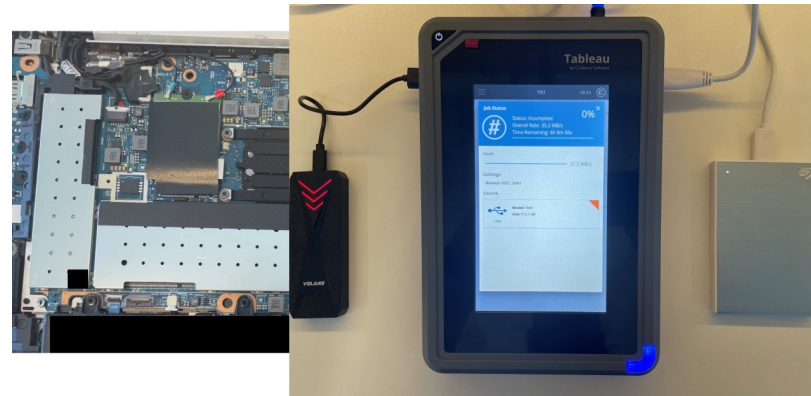
34 C.F.R. § 106.45(b)(2)

- What should Notice of Investigation/Allegations (NOIA) include?
  - Notice of the Institution's grievance process
  - A description of the allegations that has sufficient details about "who, what, when, where, and how"
  - Statements of Rights:
    - Respondent (accused) is presumed NOT responsible
    - Both parties have a right to an advisor
    - Both parties have a right to inspect and review evidence
    - How knowingly false information may be handled if it is shared during the investigation
    - If new allegations are discovered after the investigation starts, a statement that parties will be informed of the new allegations

# Sources of Information or Evidence



**Interviews (Testimonial)**



**Non-testimonial**



# Interviewing

Some promising practices

## PRE-QUESTIONING TIPS

- Introduce interviewer, their role, and the process (demystify, contextualize)
- Set expectations for interview (e.g., ability to request breaks, recording/note-taking, not having an answer)
- Comfort and self-care

## QUESTIONING TIPS

- Open-ended, non-suggestive questions
- Use cues to invite more sharing about a particular topic (“help me understand...” or “tell me more about...”)
- Trauma-informed approaches (e.g., FETI) – using question stems that invite reflection and recall on physical sensation
- Active listening without responses that convey bias or the appearance of bias (this can be challenging)

# Interviewing

Some promising practices

- Use questions that help interviewees/participants describe rather than conclude
  - Example: “You indicated you were coerced. What did they say or do that led you to explain it that way?”
  - Example: “You said you were incapacitated. Tell me more about being incapacitated.”
- Try to avoid compound questions
- Using question stems that begin with “why” can be difficult for participants/interviewees to process; it can shift their focus from remembering/recalling
- Avoid interrupting a participant/interviewee (this can be hard when a question comes to mind, but writing that question down to ask later can be beneficial)
- Be mindful about question phrasing that blames a person for an act or inaction

# Interviewing

Some promising practices

- Forecast the need to schedule follow-up meetings or interviews to clarify/reconcile information (interviewing is iterative)
- If an interviewee references a text, phone call, email, note, or picture; request to see it (I ask for screen shots to be emailed & advise not to destroy/delete)
- For text exchanges and emails request to see entire conversations (not excerpts or isolated contributions)
- If you're recording – use redundancy to ensure content is not lost.
- Interviewing as primarily “dot collecting” as opposed to “dot connecting”

# Interviewing

Some things to avoid

- **Asking participants/interviewees to talk about conversations that are protected by privilege**
  - “What did you talk about with the victim advocate?”
  - To do so, you need to the party who holds the privilege to waive it
  - An investigator could not, without a party’s permission, access counseling and health records even if the Institution operates the clinic where the records reside
- **Exploring a party’s sexual history and predispositions should be avoided**
  - Presumptively irrelevant
  - There are some narrow exceptions where this could be relevant

# Documenting Interview Content

## Video Recording

- **Common practice for criminal proceedings (Iron Cty. CJC)**
- **Less common in higher education**

## Audio Recording

- **Attorney Consultant reported that this is a trend in Title IX Investigations**
- **Recording can cause interviewees to experience heightened anxiety**

## Detailed Summary

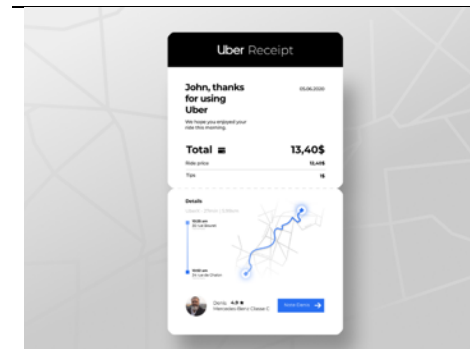
- **Historical practice that is pretty common in higher education**
- **A good practice is to share the summary with interviewee for verification**

# Non-testimonial Sources of Evidence

Weekly Timesheet

Easy Plan | 02/05/2017 to 02/12/2017 | **39.00**

DETAILS	DESCRIPTION	MON	TUE	WED	THU	FRI	SAT	SUN	TOTAL
Ally's Brd	Design Furniture								
Concrete for fountain installation	Bibble		5:00	8:00	9:00	5:00			27:00
Freeman Spotting	Design Design								
Custom Design	Bibble	5:00	1:00	1:00	3:00	2:00			12:00
Dylan Softbank	Design Lighting								
Garden Lighting	Bibble	2:00				1:00			3:00
TOTAL		7:00	6:00	9:00	12:00	8:00			42:00



### 1. Don't assume.

- a. We all view the world through our own unique filters.
- b. Most shortcomings in my interviews/reports come from assumptions.
- c. Ask lots of clarifying questions.

### 2. Be genuinely curious and listen.

- a. Shutting up and listening is hard!
- b. The K.I.S.S. rule helps.

### 3. Recording your interview does require extra time and work, but it provides:

- a. Accuracy.
- b. Better context- their words have more impact than mine.
- c. Accountability for everyone involved.
- d. An opportunity to focus on listening with minimal note taking.
- e. A great learning tool.
- f. Reviewing/transcribing = better follow up questions and investigation = less gaps in the investigative report.

### 4. Honey gets more flies...

- a. Most people have negative emotions or preconceived ideas about an investigative interview.
- b. Anyone I interview has already done more than they needed to in allowing me to interview them. I should behave accordingly.

### 5. Professionalism, transparency and good listening builds better rapport than actively trying to build rapport.

- a. It allows you to interview them, they do not want their time wasted with forced rapport building.

### 6. A table with the specific allegations that correspond to school policy makes it much easier for people to connect and relate conduct to policy.

### 7. Read the allegations verbatim.

### 8. Multiple perspectives are necessary to maintain a fair, neutral and thorough investigation.

9. University departments have their own individual cultures within the wider campus culture.

- a. It is useful to speak to department chairs/deans/other faculty to establish a cultural baseline.

10. Academic Freedom

- a. “You keep using that word. I do not think it means what you think it means.”
- b. Focus on what the school policy says.

11. Keep thorough notes

- a. Actively maintain timeline notes
- b. Notes while transcribing

12. Give yourself plenty of time to interview

- a. Prep time
- b. Long interviews
- c. Post interview reflection

13. Be transparent and forthright with mistakes – notate them in your report and describe efforts to correct them.



Sometimes it might feel like staring at these shelves... (heavy sigh)



## Other Considerations & Questions

- How many people should you have investigate?
- What sort of information gathering is permissible before notice – what some refer to as “preliminary inquiry?”
- When should I think about using an external investigator?
- What should I do about non-Title IX allegations (collateral misconduct) that arise in the complaint or during the investigation?
- How should we facilitate interviews – Zoom, phone, in-person?
- Other questions you may have had while investigating

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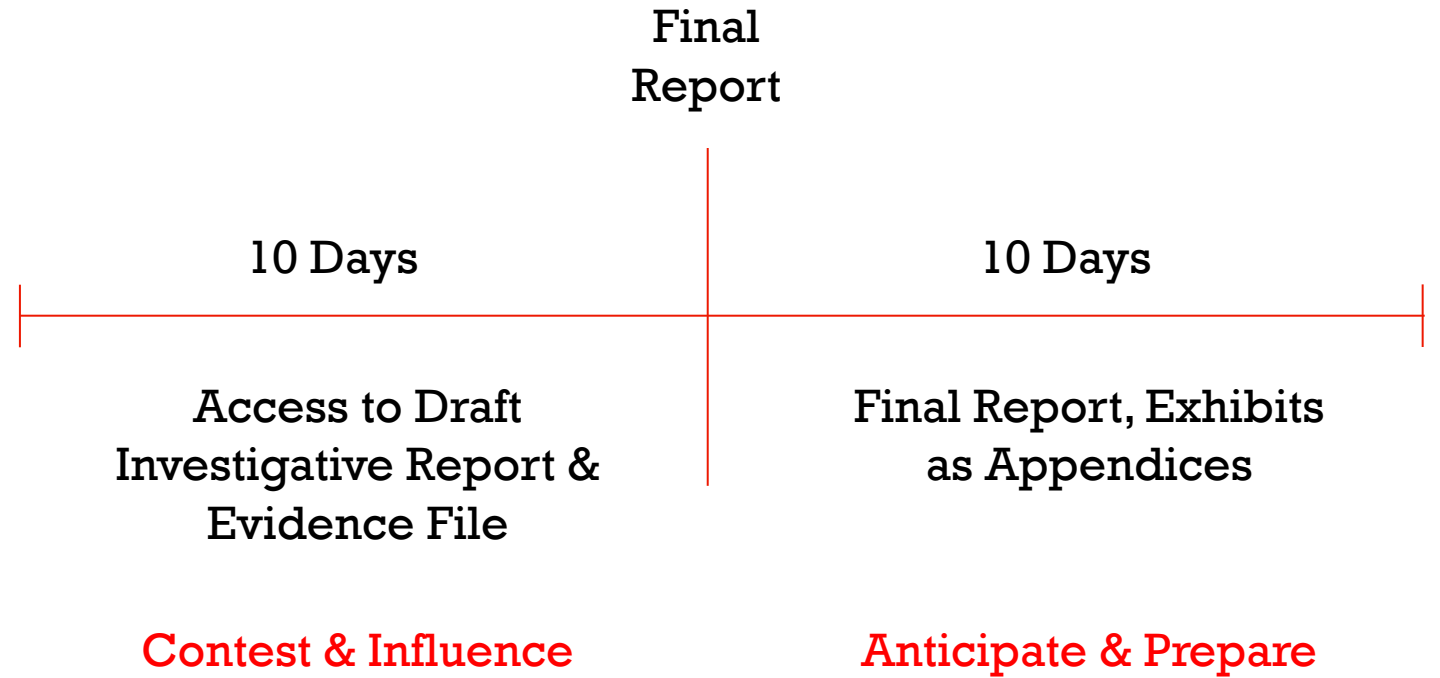
# Organizing Evidence for Review by Parties & Report Writing

Classifying and categorizing the evidence  
gathered

## Organizing Evidence to Share It

- There are two facets to sharing evidence that is gathered in an investigation:
  - “Provide both parties an equal opportunity to inspect and review **any** evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint” 34 C.F.R. § 106.45(b)(5)(vi)
    - The purpose of this is to give parties an opportunity to meaningfully respond – within 10 days of access – to the investigation before it is finalized.
  - “Create an investigative report that fairly summarizes relevant evidence” 34 C.F.R. § 106.45(b)(5)(vii)
    - Another 10 day review period is required after the report is finalized to allow the parties to prepare for the hearing
- It is worth reading pp. 30248 – 30249 of the Federal Register to better understand how OCR thinks about these facets

Organizing  
Evidence to  
Share It



## Preamble Footnote 1021

- “The Department notes that the universe of evidence given to the parties for inspection and review under § 106.45(b)(5)(vi) must consist of all evidence directly related to the allegations; determinations as to whether evidence is “relevant” are made when finalizing the investigative report, pursuant to § 106.45(b)(5)(vii) (requiring creation of an investigative report that “fairly summarizes all relevant evidence”). Only “relevant” evidence can be subject to the decisionmaker’s objective evaluation in reaching a determination, and relevant evidence must be considered, subject to the rape shield and legally recognized privilege exceptions contained in the final regulations. This does not preclude, for instance, a recipient adopting a rule or providing training to a decision-maker regarding how to assign weight to a given type of relevant evidence, so long as such a rule applies equally to both parties.”

# Relevance

(see Federal Register 30336-337)

- Determining what is or is not relevant is an important task for investigators and decision-makers.
  - The regulations require training on “issues of relevance”
  - The regulations decline to define the term “relevant”
  - The regulations encourage people to use “logic and common sense” to ascertain relevance (p. 30320)
- Operationally, the 2020 regulations do identify some types of evidence that are presumed to be irrelevant:
  - “evidence about the complainant’s sexual predisposition is never relevant” (preamble p. 30337)
  - “evidence about a complainant’s prior sexual behavior are not relevant with two exceptions” (Id.)
  - Privileged information is irrelevant unless the privileged is waived in writing

# Relevance

“the Department expects decision-makers to apply a single admissibility rule (relevance)” (p. 30351)

## relevant adjective

 Save Word

rel·e·vant | \ 're-lə-vənt  \

### Definition of *relevant*

- 1 a** : having significant and demonstrable bearing on the matter at hand
- b** : affording evidence tending to prove or disprove the matter at issue or under discussion

// *relevant* testimony

## Rule 401. Test for Relevant Evidence

Evidence is relevant if:

- (a)** it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b)** the fact is of consequence in determining the action.

### NOTES

(Pub. L. 93-595, §1, Jan. 2, 1975, 88 Stat. 1931; Apr. 26, 2011, eff. Dec. 1, 2011.)

## Relevance

“the Department expects decision-makers to apply a single admissibility rule (relevance)” (p. 30351)

**“*Relevant* means related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45, and if applicable § 106.46. Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.”**

**Potential Guide – 2022 NPRM (p.656) – 34 C.F.R. § 106.2**



# Culpable

“meriting condemnation or blame”

## INCULPATORY

- Evidence that tends to demonstrate the accused is responsible for a policy violation
- Favors a Complainant

## EXCULPATORY

- Evidence that tends to demonstrate the accused is not responsible for a policy violation
- Favors a Respondent

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# Presenting the Evidence in a Report

Be Mindful of Different Audiences

# Components of an Investigative Report

- **Executive Summary – Succinct Narrative of the Matter**
- **Allegations from the Complaint**
- **Implicated Policies - Replicate Policy Definitions**
- **Timeline/Sequence of Investigation (Initial Disclosure to the Investigative Report)**
- **Summary of Relevant Evidence**
  - **Interview Summaries**
  - **Listing of Non-Testimonial Artifacts**
- **Tentative/Proposed Findings of Fact (OPTIONAL) – though these may be included, a decision-maker has to make their own independent findings.**
- **Templates are handy (adapted ATIXA template)**

A Useful Format  
to signal  
Relevance

## Single Allegation Summary

- Complainant's assertions about the allegation
- Respondent's assertions about the allegation
- Witnesses' assertions about the allegation
- Non-testimonial Artifacts related to the allegation

## Tentative of Finding of Fact

If a piece of evidence appears between the allegation and the tentative of finding of fact, we have deemed the evidence relevant

# Templates

- **Examples of Report Templates**
  - Association of Title IX Administrators (ATIXA)
  - National Association of College & University Attorneys (NACUA) – example from June 2014 – “CONSENT, CREDIBILITY, AND CONFIDENTIALITY: TACKLING CHALLENGING ISSUES IN TITLE IX INVESTIGATIONS”
  - SUNY System - Student Conduct Institute’s Title IX Toolkit
  - Google “Title IX Report Template” you’ll get several campus templates
  - Request examples from USHE schools