

Title IX Training Series Part 2: Informal Resolutions and Investigations

Liebert Cassidy Whitmore | June 2, 2021

Presented By: Jenny Denny

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**Title IX Training Series:
Informal Resolutions and
Investigations**

Presented By: Jenny Denny

Agenda

- Changing Landscape
- Pre-Investigation Matters
- Training Reminders
- Impartiality
- Informal Resolution Process
- Investigations
 - Notice
 - Evidence Review
 - Investigative reports

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Changes Are Coming...

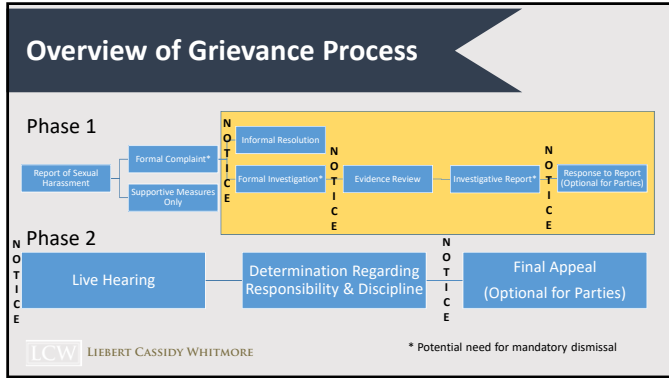
- April 2021: OCR announced comprehensive review
 - Forthcoming: Q&A guidance, formal rulemaking process
- Now scheduled: public hearing
 - June 7-11, 2021

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The Grievance Process – Issues Before the Investigation

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Notice of Allegations

Must provide written notice to the parties:

- Notice of the allegations with sufficient detail (identity of the parties, conduct allegedly constituting sexual harassment, date, location if known)
- Notice of the grievance process, including the availability of an informal resolution process
- Presumption that Respondent is not responsible
- Statement that determination occurs at end of grievance process

34 CFR § 106.45(b)(2)(i)

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Notice of Allegations

Must provide written notice to the parties:

- Sufficient time to prepare before interview
- Right to Advisor
- Right to evidence review
- Code of conduct provisions re: false statements and false information
- Reissue notice if new allegations are added

34 CFR § 106.45(b)(2)(i)

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Timeline

- Must be reasonably prompt
- Can delay for good cause
 - Must provide written notice to the Parties

34 CFR § 106.45(b)(1)(v)

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Required Training

- Coordinators
- **Individuals Facilitating Informal Resolution**
- **Investigators**
- Decisions Makers

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Required Training Components

- Definition of sexual harassment
- Scope of education program or activity
- **How to conduct investigation and prepare investigative report**
- How to implement grievance process
 - Hearings
 - Appeals
 - Informal resolution process
- **How to serve impartially**
- Decision-makers: Hearing technology and issues of relevance

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Required Training Components

Additionally, facilitators must also be trained on how to conduct informal resolution processes

"It is not the intent of the Department in referring to resolution processes ... as 'informal' to suggest that personnel who facilitate such processes need not have robust training and independence.."

85 CFR § 30405

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Impartiality

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Lack Impartiality = Consequences

- Conflict of interest or bias may be grounds for appeal - 34 CFR § 106.45(b)(8)(i)(C)
- Creates lack of confidence in integrity of the process

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Impartiality

Title IX Coordinator, **Investigator**, Decision-Maker, and **Individual Facilitating an Informal Resolution Process** must be free of:

- Conflict of interest or
- Bias

34 CFR § 106.45(b)(1)(iii)

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Impartiality

Separation of Roles

Title IX Coordinator or Investigator cannot serve as a Decision Maker:

- Prevents influence on decision
- Avoids consideration of non-relevant information obtained/gleaned as a Coordinator or Investigator

See Preamble 30370

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Impartiality

- Serve impartially
- Without
 - Pre-judgement of the allegations
 - Conflicts of Interest
 - Bias

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Impartiality

Free of Conflicts of Interests

- Actual or perceived conflict between personal interest and professional title IX duties
- Personal interests should not be allowed to enter the decision-making process

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Impartiality

Treating all parties impartially without ... bias against an individual's sex, race, ethnicity, sexual orientation, gender, identity, disability or immigration status, financial ability, or other characteristic. Any person can be a complainant, and any person can be a respondent, and every individual is entitled to impartial, unbiased treatment regardless of personal characteristics.

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Impartiality

Biases

- Personal feelings or attitudes that impact our actions
- Ideas, beliefs, and assumptions
- Often based on stereotypes and without full awareness
- Past experiences and current perceptions drive our perspectives and our actions
- Under stress or pressure, we gravitate even more strongly toward our unconscious bias

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Impartiality

Types of Biases

- Anchoring
 - The tendency to rely too heavily on one piece of information when making decisions
 - Fixation on initial information and fail to adjust to later information
- Bandwagon effect
 - The tendency to do (or believe) things because many other people do (or believe) the same thing

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Impartiality

Types of Biases

- Bias Blind Spot
 - The tendency to see oneself as less biased than other people, or to identify more bias in another than in oneself
- Confirmation
 - The tendency to confirm what we already believe is true
 - Influences

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Types of Biases

- Affinity/Similar to Me Effect
 - The tendency to have an affinity or get along better with people similar to you

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Impartiality

- Be self-aware and mindful
- Assess actual or perceived conflicts of interest
- Recognize possible biases
- Use conflict checks form, self-report conflicts or bias, or recuse

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Case Study

At a hearing, the Respondent claims the investigator had a conflict of interest because the investigator's wife works for the Complainant's father. The Respondent also claims the investigator was biased because the investigator did not speak to witnesses the Respondent identified. The investigator testifies that the surveillance video captured the entire incident and that is why he did not see the need to speak to witnesses Respondent identified who were not at the scene.

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Discussion

Additionally, the investigator testifies that he could not possibly be biased because he regularly teaches and writes about equity and inclusion.

Are there issues of conflict of interest or bias in this investigation? How can these be avoided? What are the possible consequences of bias or conflicts of interest?

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The Grievance Process – Informal Resolution

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Informal Resolution

- Does not involve a full investigation and adjudication
- Possible at any time prior to determination regarding responsibility
- Cannot use for student complaint against employee

34 CFR § 106.45(b)(9)

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Informal Resolution

Must provide notice of:

- Allegations
- Rules/requirements of the informal resolution process
- Circumstances under which the IRP precludes Parties from resuming formal complaint arising from the same facts
- Consequences of participating
- Records that will be maintained or could be shared
- Right to withdraw from process

34 CFR § 106.45(b)(9)

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Informal Resolution

- Only after Formal Complaint
- Not required, totally voluntary
 - May not be appropriate for all formal complaints
 - Title IX Coordinator should determine if Informal Resolution is appropriate
 - Requires both Parties' voluntary, written consent
- Title IX Coordinator should not be facilitator
- Understand pros and cons

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Determining Whether to Offer Informal Resolution

- Considerations
 - Outcome of an individualized safety and risk analysis
 - Nature of the alleged conduct
 - Whether allegations involve multiple victims
 - Whether allegations involve a pattern of conduct
 - Other evidence-informed factors indicative of increased risk to campus safety
 - Whether the circumstances warrant the Title IX Coordinator signing a formal complaint

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Examples of Informal Resolution Processes

- Mediation
 - Participant-focused, structured dialogue facilitated by a neutral and impartial mediator
 - Parties' needs and interests are explored without judgement to reach a mutually agreeable solution

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Examples of Informal Resolution Processes

- Arbitration
 - Parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments
 - Different from mediation because the arbitrator has authority to make a decision about the dispute

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Examples of Informal Resolution Processes

- Restorative Justice
 - Focuses on harm caused rather than the guilt or responsibility of the offender
 - In conference, Parties and a District representative discuss their perspectives, feelings, needs, and expectations of each
 - Intent is to acknowledge and understand the harm caused and work collaboratively to identify ways to repair that harm and restore community

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Examples of Informal Resolution Processes

Restorative Justice Resources:

- University of San Diego Center for Restorative Justice: PRISM - Promoting Restorative Initiatives for Sexual Misconduct on College Campuses
 - <https://www.sandiego.edu/soles/restorative-justice/campus-prism.php>

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Examples of Informal Resolutions

Informal Resolution Agreements can include:

- Academic accommodations
- Apology or agreement to repair harm
- Education/Training
- Mutual restrictions/stay away orders
- Counseling/Treatment
- Other sanctions or discipline
 - Restrictions on participation in district's programs
 - Voluntary resignation, withdrawal, accepting lesser discipline

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Case Study: Informal Resolution

Carlos reports to the Title IX Coordinator that he broke up with Rudy last semester. At the time of the breakup, Rudy was a student at the District, but he is no longer enrolled. Carlos recently realized Rudy was stalking him on campus and filed a formal complaint. Rudy is now an adjunct employee at the District. The District initiated its grievance process. Can the District offer the Parties informal resolution?

Yes, No, or Maybe?

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Answer

No

- Cannot offer informal resolution process to resolve student complaints against employees
- Although Rudy was a previously a student, he is now only an employee. His employment relationship is why the District still has the ability to respond to Carlos's formal complaint
 - If Rudy was not a current student or an employee, the District has discretion to dismiss the Title IX complaint

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Case Study: Informal Resolution of Sexual Assault Complaints

Nikhil alleges he was sexually assaulted by his ex-girlfriend, Valeria, while he was asleep. Valeria and Nikhil are both in the District's nursing program. Valeria allegedly took photos of Nikhil during the incident and posted them on social media when Nikhil broke up with her. Nikhil reported that Valeria stalked him on campus and at the hospital where they work. Nikhil claims Valeria also retaliated against him by showing the photo to doctors at the hospital after he complained. Would you recommend the District offer the Parties an opportunity for informal resolution?

Yes, No, or Maybe?

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Answer

Maybe

- Offering informal resolution is never required
- Previous OCR guidance stated mediation is not appropriate (even on a voluntary basis) in cases involving allegations of sexual assault
 - This guidance is withdrawn, but still a best practice

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Case Study: Informal Resolution

The District began an investigation into a student's formal complaint of sexual harassment against another student. The investigator completed her interviews of the Complainant and two other witnesses. The Complainant called the Title IX Coordinator and stated she wants to engage in the informal resolution process. **Did the Complainant waive her right to participate in the informal resolution process by completing the investigative interview?**

Yes, No, or Maybe?

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Answer

No

- A district may facilitate an informal resolution process at any time prior to reaching a determination regarding responsibility

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Case Study: Minors on Campus

A minor student in the dual enrollment program filed a formal complaint against another minor student in the same program. The Parties are interested in informal resolution. The Complainant agrees to participate in informal resolution with the following caveat: she does not want her parents to find out about her formal complaint or the informal resolution because she was cutting class and drinking during the incident.

Discussion: Should the informal resolution process be offered to these students? What are things to consider?

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Possible Outcomes of Informal Resolution

- No agreement reached
 - District begins/resumes formal complaint investigation
- Formal resolution process agreement reached
 - Parties sign agreement (parents if minors are involved)
 - District closes complaint
 - Parties cannot appeal resolution
 - District will not re-instate formal complaint process

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Possible Outcomes of Informal Resolution

- Party withdraws from informal resolution process
 - Document withdrawal in writing; and
 - Resume/begin investigation

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Case Study: Withdrawal

Before the Parties signed the resolution agreement, the Complainant called the Title IX Coordinator and requested to proceed with a formal investigation. Can the District enforce the resolution agreement?

Yes, No, or Maybe?

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Answer

No

- Informal resolution must be voluntary
- Parties can withdraw from informal resolution at any time prior to signing the resolution agreement

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Case Study: Documentation

After the Parties resolved a complaint of sexual harassment through informal resolution and fully executed the resolution agreement, the Title IX Coordinator closed the file. Should the Title IX Coordinator shred the original formal complaint and the informal resolution facilitator's notes since the matter was resolved?

Yes, No, Maybe?

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Answer

No

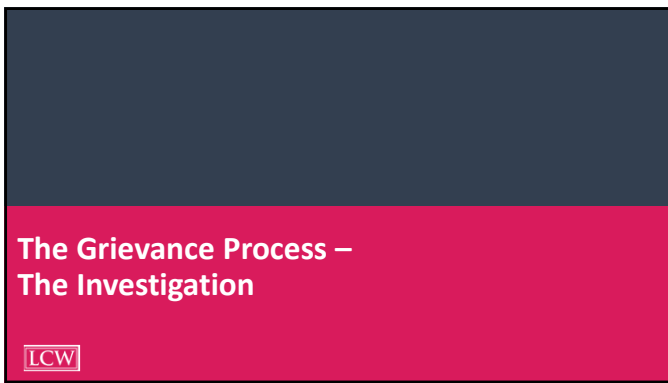
- Any information received is documented; including investigation record
- Records kept for 7 years
- If an informal resolution agreement is achieved, it will be documented
 - It will not be forwarded for further review
 - Any future misbehavior will be independently addressed regardless of previous informal resolution agreements

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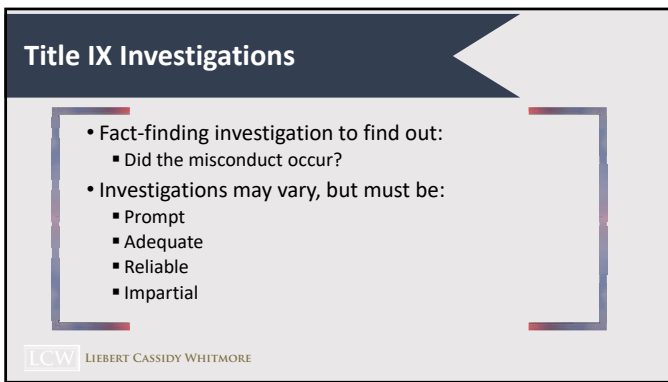
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The Grievance Process –
The Investigation

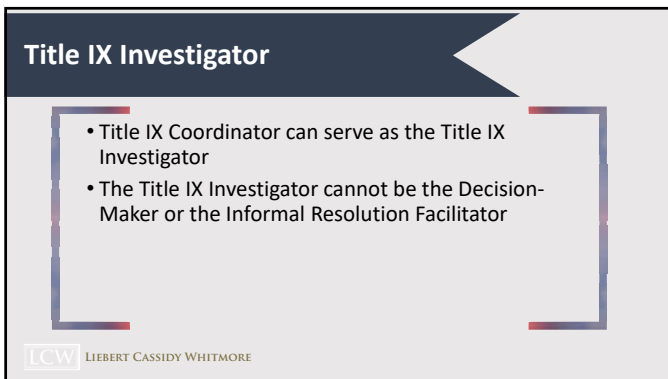
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Title IX Investigations

- Fact-finding investigation to find out:
 - Did the misconduct occur?
- Investigations may vary, but must be:
 - Prompt
 - Adequate
 - Reliable
 - Impartial

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Title IX Investigator

- Title IX Coordinator can serve as the Title IX Investigator
- The Title IX Investigator cannot be the Decision-Maker or the Informal Resolution Facilitator

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The Investigator

The investigator must:

- Be free of biases and conflicts of interest
- Conduct the investigation– gather inculpatory and exculpatory evidence
- Be trained on issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Write the report

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The Investigation

- Inculpatory evidence tends to support a determination that the respondent's *is* responsible for alleged conduct; evidence that tends to establish guilt
- Exculpatory evidence tends to support a determination that the respondent *is not* responsible for the alleged conduct; evidence that tends to exonerate

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The Investigation

- Parties have right to discuss allegations, gather evidence, identify witnesses/evidence
- District can present evidence
 - “[T]he Department recognizes that the recipient is not a party to the proceeding, but this does not prevent the recipient from presenting evidence to the decision-maker, who must then objectively evaluate relevant evidence...”

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Standard of Evidence

- Title IX regulations require “preponderance of the evidence” or “clear and convincing evidence standard” 34 CFR § 106.45(b)(7)(i)
- California law requires “preponderance of the evidence” Ed. Code, § 67386
 - It is more likely than not that the fact occurred

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Credibility Determinations

Investigator may include credibility assessment but not determination of responsibility

- If an investigator’s credibility determination is actually a determination of responsibility, it violates the regulations

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Assess Witness Credibility – DFEH Guide’s Factors

1. Inherent plausibility
2. Motive to lie
3. Corroboration
4. Extent an individual was able to perceive, recollect or communicate about the matter
5. Evidence of dishonesty

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**Assess Witness Credibility –
DFEH Guide’s Factors**

- 6. Habit/consistency
- 7. Inconsistent statements
- 8. Manner of testimony
- 9. Demeanor

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Evaluating the Evidence

- Report must fairly summarize relevant evidence
- The report may include recommended findings or conclusions
- Decision-maker cannot give deference to recommended findings
- Decision-maker has obligation to objectively evaluate relevant evidence

Preamble at p. 30308

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Relevance

- Not defined in regulations
- Evidence having any tendency in reason to prove or disprove any allegation at issue (Cal. Evid. Code CFR § 210)
- Can rely on logic, common sense, experience or science

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Relevance Considerations

Does the evidence:

- Indicate bias on the part of a witness
- Corroborate an allegation
- Provide motive/justification for an allegation
- Provide witness leads
- Provide evidence that might exonerate accused

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Relevance of Privileged Information

The District cannot use, seek disclose, or consider legally privileged information unless the party has waived the privilege voluntarily and in writing

- Attorney/Client, Marital, other privileges
34 CFR § 106.45(b)(1)(x)
- Doctor/Patient/Therapist (Medical Records)
34 CFR § 106.45(b)(5)(i)

Info deemed not relevant per September 4, 2020, Q&A Guidance

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Relevance of Sexual History

- Questions and evidence about Complainant's sexual predisposition or prior sexual behavior are not relevant
- Unless
 - Questions/evidence offered to prove someone other than Respondent committed the alleged conduct; or
 - Questions/evidence concern specific incidents of the Complainant's prior sexual behavior with respect to Respondent and offered to prove consent
34 CFR § 106.45(b)(6)(i)-(ii)
- But, Ed Code section 67386, consent can be revoked at any time, past relationship by itself does not indicate consent

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Consent

- Affirmative consent standard (Ed. Code § 67386)
 - Affirmative, conscious, and voluntary agreement to engage in sexual activity

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Relevancy Determinations

Initial steps for determining relevancy of evidence in Title IX Sex Harassment Complaint Process

- Step 1: Review the evidence being offered
- Step 2: Consider the allegations
- Step 3: Ask yourself whether the evidence being offered has the potential to prove/exonerate/explain or disprove an incident under investigation

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Case Study

The mother of a 16-year-old student Complainant provides the investigator with medical records and a written waiver and release to use the records, to show the student told the campus medical center staff about the sex assault and later about depression and anxiety from the alleged incident. The student Complainant objects.

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Yes, No, or Maybe

Can the investigator consider this information?

Not in California. In California, minors aged 12+ have the legal right to control their medical records. The investigator should only consider the medical records with the Complainant's consent in this case.

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Evidence Review

Complainant and Respondent:

- At least 10 days time
- Right to inspect and review evidence *directly related to the allegations (note this is different from relevance)*
- Right to submit written response to evidence
- Investigator must consider response before completing report

34 CFR §106.45 (b)(5)(vi)

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Case Study

After reviewing the evidence, a Respondent's advisor, who is a lawyer, requests that the investigator interview an expert—a medical doctor, who will provide his opinion that medication taken by the Complainant affects memory.

Are parties allowed to produce expert witnesses to provide evidence?

Yes, No, or Maybe

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Yes, No, Maybe

Yes

- District must provide an equal opportunity for the Parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

34 CFR §106.45(b)(5)(ii)

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Investigative Report

- Introduction / statement of scope of investigation
- Methodology and persons interviewed (taped?)
- Chronology: factual and procedural steps (complaint, notices, interviews)
- Summarize allegations
- Factual findings (depends on policy)
- Relevant evidence
- Credibility assessments (depends on policy) but never determinations of fault
- Summarize policies allegedly violated
- List attachments

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Investigative Report

- Must provide final investigative report to Parties at least 10 days prior to hearing
- Parties must have opportunity to review and provide written response

34 CFR §106.45 (b)(5)(vi) and (vii)

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How parties may raise bias or other challenges to report:

Report on its face reveals that investigation was not thorough, neutral, or fair :

- Key witness identified not interviewed
- Key document provided not reviewed
- Key questions not asked
- Findings don't seem supported by evidence

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Breakout Room Discussion

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Case Study for Discussion

Gregory, a student volunteer in the Performing Arts Division, reports that he has been in a relationship with the Division Chair, Gina. According to Gregory, Gina threatened him by stating that if he ends the relationship or tells HR, she would post several compromising pictures she took of him on the Internet.

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Case Study for Discussion

Gregory says Gina made this threat when he was volunteering as an usher at the college's production of Goldilocks and that she was yelling at the time. He reported that two other student volunteers, Tracy and Morgan, were nearby when Gina made this threat. Gregory files a formal complaint.

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Case Study for Discussion

1. Does this trigger the District's Title IX obligations? Why?
2. Should the District offer informal resolution? Why?
3. Should the District investigate? Why?
4. If the District initiates an investigation, what do you investigate?
 - a. Who should be interviewed?
 - b. List three examples of relevant evidence and irrelevant evidence
5. Must the District share the evidence collected? Why?

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Questions?

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Next Title IX Training Series

- Part 3
 - Hearings
 - Determinations of Responsibility
 - Discipline

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Thank you!

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