



**Title IX Investigator Training**

Carroll University – January 5, 2024

**Bricker Graydon**

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**Presentation Rules**

**Bricker Graydon**

**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

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**Can We Post these Materials?**

**Bricker Graydon**

**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

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Topics (1 of 2)



Conduction Investigations  
Writing Interview Summaries and Investigation Reports

- Review Investigation Preparation and Techniques
- Summarizing investigative interviews
- Structuring your investigative reports
- Common Mistakes that Prevent Clarity in Writing
- Best Practices for Neutral Writing on Sensitive Subjects

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Introduction to Investigative Techniques

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Review of Your Role



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

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**Initial Review**

- Review notes and information collected by the Title IX Coordinator
- Review Notices to Complainant and Respondent
- Review Policy/Code of Conduct
- Define Scope of Investigation
  - What elements do you think will be disputed?
  - Agreed upon?

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**Begin Evidence List**

- |   |   |
|---|---|
| <ul style="list-style-type: none"> <li>• If there is a criminal investigation, work with law enforcement to collect and preserve evidence</li> <li>• <b>Types of evidence</b> <ul style="list-style-type: none"> <li>– Electronic communications</li> <li>– Security information</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>– Pictures, videos, audio</li> <li>– Police reports</li> <li>– Personnel files</li> <li>– Prior complaints against respondent</li> </ul> |
|---|---|

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**Begin Witness List**

- If there is a criminal investigation, work with law enforcement to ensure permission to question witnesses
- Who should be included?
- Who should NOT be included?
- In what order should the witnesses be interviewed?
- Be flexible

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### Craft Questions for Each Witness

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- Refer to the policy
- Consider what information they are likely to have related to each element
- Consider what information they are likely to have that may assist the decision-maker in determining credibility
- Be flexible

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### Organizing for the Interview

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- What should you have with you?
  - Allegations
  - Investigation log
  - Investigation notes cover sheet
  - Pre-prepared questions
  - Evidence you may need to reference or show witness
  - Policy or Handbook

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### Note-taking Tips

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- Use predictable symbols in the margin to easily skim during the interview:
  - ? ← Follow-up questions
  - \* ← Potential evidence
  - W ← Potential witness
- Try to record exact quotes when possible

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### Setting Up the Interview

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- Identify yourself, your role, and a general outline of what you're investigating
- Consider requesting the TIX Coordinator check in with those who fail to respond or refuse to participate
- Don't give up on the interview till you've tried at least 3 times, in at least 2 different methods

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### Set the Stage

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- Make introductions
- Be hospitable
- Give overview of why they are being interviewed
- Explain retaliation policy
- Invite questions

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### Begin Broadly

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- Elicit a monologue about the incident
  - What happened earlier that day before the incident?
  - What happened with regard to the incident?
  - What happened next?

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### Freeze Frames

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- Ask the witness to “freeze” on the moment and describe details
  - What could they see? Feel? Smell? Taste? Hear?
  - Where was the other person? How were they positioned?
  - Where were you? How positioned?
  - What did you say to the other person? Them to you?
  - Describe other person’s tone, demeanor, body language

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### Ask Follow-Up Questions

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- Re-review your notes
- Re-review the elements of each charge
  - Have you elicited all of the information this witness might have about each element?
  - Do you have an understanding of how the witness obtained the information they shared?

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### Credibility

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- Gather facts to assist **decision-maker**
- Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by witnesses

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**When Consent is at Issue**

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- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent
- Apply definition of consent consistently and impartially

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**Evidence of Consent? (1 of 3)**

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- What words or actions did complainant use to convey consent/non-consent?
  - Must examine sexual contacts, acts in detail
- Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

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**Evidence of Consent? (2 of 3)**

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- Who took off what clothes?
- Who provided the condom?
- Who initiated physical contact?
- Who touched who where?
- “They gave consent” = What did you say to them, and what did they say to you?

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**Evidence of Consent? (3 of 3)**

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- [Ask the respondent] What did complainant say to you and/or what actions did they take to show consent?
  - “How did you know they wanted to have sex?”
- If applicable, what role, if any, did respondent play in complainant’s intoxication/incapacitation?

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**Closing the Interview**

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- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you

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**After the Witness Leaves**

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- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email

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### Physical Evidence

- Follow up on anything identified during interviews
- Is law enforcement involved? Could they be?
- Ensure physical evidence is in a secure location and documented in the investigation log

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### Inspection and Review of Evidence

- **Provide ALL Evidence to both parties and advisors**
- Include everything directly related to allegations, even if you don't expect decision-maker to rely on it
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report

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### Create Investigative Report

#### Fairly Summarizes the Relevant Evidence

- Summarize **facts**
- No determination
- Provide to parties and advisors
- Allow 10 days to review

*(Need help? Report-writing training available!)*

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Relevancy

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**Relevancy: Legally Privileged Information (1 of 3)**

Section 106.45(b)(5)(i): when *investigating a formal complaint*, recipient:

- “[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so **for a grievance process under this section**”

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**Relevancy: Legally Privileged Information (2 of 3)**

Section 106.45(b)(1)(x):

- A recipient’s grievance process **must... not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of,** information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege

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**Relevancy: Legally Privileged Information  
(3 of 3)**

- Preamble identifies medical and treatment records
- Other typical privileges recognized across jurisdictions but with variations (will want to involve your legal counsel for definitions in your jurisdiction):
  - Attorney-client communications
  - Implicating oneself in a crime
  - Confessions to a clergy member or other religious figures
  - Spousal testimony in criminal matters
  - Some confidentiality/trade secrets

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**Relevancy: Complainant's Sexual Predisposition or Prior Sexual Behavior**

- Questions and evidence regarding a complainant's sexual predisposition or prior sexual behavior are **not relevant** (34 CFR § 106.45(B)(6)(i))
- **Except:**
  - If offered to prove someone other than the respondent committed the conduct alleged; or
  - If evidence/questions concern specific incidents of the complainant's prior sexual behavior **with the respondent and** offered to prove consent

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**Quick Reminders About Advisors**

- Parties are entitled to an advisor of their choice, who may be an attorney
  - Encourage parties to consult with their advisor, and to use them to draft statements, etc., if they find it helpful
- Advisors have the opportunity to review documents in the same manner that the parties do
- Advisors do not have rights beyond those granted in your policy

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### FERPA Releases

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- A **signed FERPA release** will be required for any advisor (including attorneys) that isn't either:
  - An employee or,
  - If the party is a minor student, the student's parent

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### Acquaint Advisors with the Process

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- Offer advisors the **opportunity to meet with the Title IX** Coordinator at the beginning of the process to help them understand the procedure, and give them the opportunity to ask questions
- Continually **cite to the policy** so the advisors can follow along with the process and know what to expect next

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### Advisors and the Prohibition on Retaliation

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- Remind advisors that they are prohibited from retaliation
  - If they do so in their capacity as an advisor, it may be imputed to the party
  - Could result in the advisor being prohibited from further participation in the process

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**Include Advisor on Communications with Party**

- Once a FERPA form is received, copy the advisor on every communication with the party
- If a party communicates directly with you without copying the advisor, copy the advisor on your response
- If an advisor communicates directly with you without copying the party, copy the party on your response
- If an advisor asks a procedural question by email, address the response to both the advisor and the party

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**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

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**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

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**Writing Investigation Reports** 

**From the Title IX Regulations...**

The 2020 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?

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**Preparing to Write the Report** 

**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 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

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**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

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### 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

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### 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

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### 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

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### 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

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### Where to Begin? (1 of 2)



#### 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

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### Where to Begin? (2 of 2)



#### 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?

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### Identify and include all alleged policy violations



- Always include definitions 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

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### Process and Procedure



#### Structuring Your Writing – 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

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### 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

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### Explaining Your Structure



#### Example Explanation

“The information in this report is a summary of facts provided by the participating 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.”

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### Other Basics to Include



#### Issues of Relevance and Procedure

- Address any relevance determinations 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

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### 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 including in attachment(s) for the decision-maker, even if you’ve concluded it is not relevant
- Provide a table or list of all relevant evidence gathered and attach that evidence

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### 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]"

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### 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

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### 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 12. 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.

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### 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

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### 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. 10<sup>th</sup> 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. 12<sup>th</sup> Interview of Witness A; Sept. 20<sup>th</sup> Interview of Witness B). Respondent denied that he choked Complainant. In his statement to the Title IX Investigator...

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### 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...")

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**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

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**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

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**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

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### Common Writing Mistakes Empathy and Tone



#### Empathy

- Stay away from charged words of advocacy
  - Clearly/obviously
  - Innocent/guilty
  - Victim/perpetrator
- 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

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### Common Writing Mistakes Cite Your Source



#### Failing to include sources of information

- If explaining this in every sentence (“Bob stated this happened”) weighs down your writing, use footnotes to add clarity.
- 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 Complainant during Complainant’s October 10, 2020 Title IX interview.

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### 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

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### Common Writing Mistakes Miscellaneous



#### Typos

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

#### 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

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### Closing Thoughts on Writing



- 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
- Any questions or further discussion?
  - Best practices that have worked for you?
  - Mistakes you've learned from?

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Questions?



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