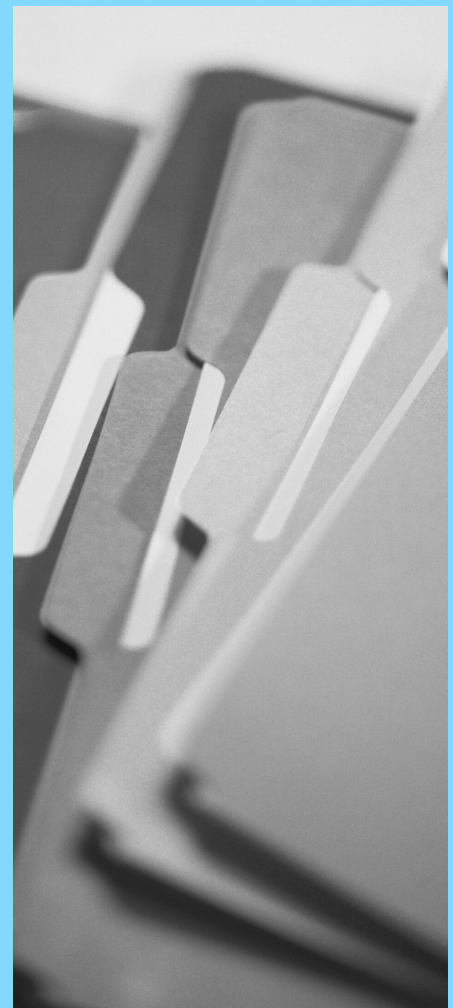


COLLECTING AND MAINTAINING EVIDENCE IN TITLE IX INVESTIGATIONS



REQUIREMENTS AND BEST PRACTICES

Section 106.45(b)(5)(i) of the 2020 Title IX Regulation places the burden of gathering evidence “sufficient to reach a determination of responsibility” on the institution. The U.S. Department of Education (hereinafter the Department), in the Preamble of the Regulations, explains that institutions are expected to “undertake a thorough search for relevant facts and evidence pertaining to a particular case, while operating under the constraints of conducting and concluding the investigation under designated, reasonably prompt time frames and without powers of subpoena.” 85 Fed. Reg. at 30292 (May 19, 2020).

This document is offered as a resource to assist institutions with developing processes and procedures regarding collecting and maintaining evidence in Title IX investigations. The best practices and recommendations in this document should be adapted and adjusted so that they do not conflict with local law and other published policies or procedures already in place.



Requirements for the Collection of Evidence

Institutions must provide both parties with an equal opportunity to present evidence and witnesses to the investigator. During an investigation, institutions are required to search for relevant evidence and to accept both “relevant” evidence and “directly related” evidence from the parties. Remember that accepting evidence does not mean that the evidence is necessarily trustworthy, reliable, relevant, will carry any weight, or will even be considered by the Decision-Maker; the quality of the evidence and its relevance will be determined later in the process.

- **Relevant Evidence.** Evidence is considered relevant “if it has the tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.” Fed. R. Evid. 401.
- **Directly Related.** Evidence is considered directly related if it is evidence that is directly related to the allegations in the formal complaint. This includes evidence that the institution does not intend to rely upon in reaching a determination regarding responsibility, including inculpatory and exculpatory evidence, whether obtained from a party or other source. 85 Fed. Reg. 30438 (May 19, 2020).

In addition to collecting relevant evidence, the investigator must also accept the following evidence if offered and directly related to the allegations in the formal complaint:

- Expert witness testimony, reports, or findings Section 106.45 (b)(5)(ii).;
- Evidence related to character 85 Fed. Reg. 30247 (May 19, 2020).;
- Evidence related to the findings of a polygraph examination 85 Fed. Reg. 30247 (May 19, 2020).;
- Evidence gathered by law enforcement in the course of a concurrent criminal investigation, if available 85 Fed. Reg. 30303 (May 19, 2020).

Best Practices for the Collection of Evidence

Although not explicitly required, the following are considered best practices when collecting evidence:

Transparency

At the start of the investigation, the investigator should clearly inform the parties of the following:

- Their right to present witnesses and evidence;
- The methods that may be used to submit evidence (email, regular mail, in person, etc.);
- The reasons for collecting certain types of evidence (i.e. information related to intoxication, clothing, medical information etc.);
- That any evidence submitted will be shared with the other party, advisors and decision-maker, and that it may be subject to further review depending on the outcome of the process. (subpoena, appeal, etc.);
- That institutions are **prohibited from collecting** a party's records that are protected by a legally recognized privilege (i.e., medical, psychological, attorney-client, etc.) without first obtaining that party's voluntary and written consent to do so. Section 106.45 (b)(5)(i).
- Any institutional prohibition against knowingly making false statements or knowingly submitting false information.



Best Practices for the Collection of Evidence, Cont.

Collect (Almost) Everything

The investigator is encouraged to accept everything that is offered to them by the parties and witnesses and any evidence that is discovered during the investigation, regardless of whether the investigator believes the evidence is relevant, with few exceptions. Those exceptions may include:

- **Evidence that you are not qualified to assess.** For example, if an item of clothing is offered and it is alleged that a specific person's DNA exists on the item, you might accept the item solely to note that it does or does not have visible stains, but not so that you can look at it and make a judgement call as to whether or not it contains the DNA of the specified individual. If analysis of the evidence is ultimately conducted by another entity you might accept a report of the analysis conducted, or testimony from witnesses regarding the analysis.

Evidence from an expert witness offered by a party (e.g. lie detector results or reports of a sexual assault forensic examiner) is likely to be directly related, and if so would be included in the evidence review process. Once you have determined that the document is directly related, your next determination is whether or not the document is relevant, in which case you will include it in your summary of relevant evidence report. If you have reason to doubt whether it is authentic, you may need to pose questions to the expert who authored the report, but ultimately the decision as to whether or not the report is authentic and/or reliable falls to the Decision-Maker as part of the hearing process. Questions about relevance, or how to read a forensic examination report, should be referred to the Title IX Coordinator.

Best Practices for the Collection of Evidence, Cont.

- **Evidence that is protected by a legally recognized privilege, such as medical records and legal records.** These records should only be accepted if submitted by the patient (medical records), or by the client (legal records). In other words, the person who received the medical care from a therapist is the one who “owns” the privilege of both accessing and submitting those documents. Where this type of information is offered, it is strongly recommended that the investigator fully explain that the information will be reviewed by other parties, their respective advisors, and any other deciders (hearing officers, appeals officers) involved in the case. It is helpful to have the party sign an acknowledgement that these records will be (a) maintained as part of the file, and that (b) the other party and their advisor, as well as other administrators who are part of the process within the institution, may view those records.
- **Evidence that is illegal to possess.** If you are offered evidence that is illegal to possess, such as illegal drugs or images of children in a state of undress or engaged in sexual acts, do not accept it. If such evidence is submitted to you, immediately inform the Title IX Coordinator. Evidence of this nature should never be stored or maintained by the institution. However, you may be able to include photographs or a written description of the proffered illegal evidence in your investigation. Investigators are encouraged to consult with the Title IX Coordinator to discuss how to include the existence of such evidence in the institution’s investigation and adjudication process.

Maintaining Evidence

The Regulatory Requirements

Once obtained, the evidence must be retained and stored using a method and manner that is both secure and maintains the parties' right to privacy. Most, if not all of the evidence collected will be of a sensitive nature. Investigators should work with the Title IX Coordinator to understand what practices the institution uses for the safe and secure storage of investigation evidence. It is also important to know how long the institution is obligated to retain the information and when it may be destroyed. Under Section 106.45(b)(10) of the Final Title IX Regulations the requirement for retention of records is seven (7) years. 85 Fed. Reg. 30571 (May 19, 2020). Individual institutions and/or states may also have record retention requirements providing for a longer retention period.

Best Practices for Maintaining Evidence

Although not explicitly required, the following practices are considered best practices for storing and maintaining evidence.

Evidence and Privilege Logs

Investigators are encouraged to keep a log of all of the evidence offered and collected throughout the investigation, including statements. Where information is collected but not shared with the parties the investigator should log the evidence and document the reason for not producing it or sharing it with the parties. Finally, the investigator should log items of evidence that were offered, but not collected and should document the reason for not collecting the item.

Maintaining Evidence, Cont.

Evidence logs should include the following information:

- A brief description of the evidence;
- The source of the evidence (i.e., how was the evidence discovered or by whom was it offered);
- Whether the investigator deems the evidence to be a) directly related to the allegations in the formal complaint; b) directly related but not relevant, or c) neither directly related nor relevant.
- Whether the evidence was included in the compilation of evidence shared with the parties, and whether it was redacted, in whole or in part when it was shared;
- The reason(s) for (a) the investigators classification of the evidence as relevant, directly related, or neither, and (b) for redactions, if any.

It is recommended that the investigator share the evidence log with the parties to allow the parties to dispute the investigator's classification of the evidence. If disputes are made, the investigator should consider the argument made and make changes, as appropriate.

Secure Cloud Based Networks

Electronic records, including documents, videos, and audio recordings should be maintained in a secure location. Cloud based networks are preferred locations for secure evidence storage. Institutional internal networks or external platforms permit the institution to store and share information in a secure manner. Investigators should confirm with the Title IX Coordinator how such information is to be maintained.

Sharing Evidence

Regulatory Requirements for Sharing Evidence

Section 106.45(b)(5)(vi) requires that the institution provide the parties with an equal opportunity to review any evidence obtained during the investigation that is directly related to the allegations in the formal complaint, including evidence upon which the institution does not intend to rely in reaching a determination regarding responsibility, including inculpatory and exculpatory evidence, whether obtained from a party or other source. This evidence must be provided to the parties and their advisor in electronic format or hard copy. Making a hard copy file available for viewing in the Title IX Coordinator's office is no longer an option. The parties must be given ten days to provide a written response to the evidence prior to the completion of the investigative report.

The institution may choose to share records in a manner that will prevent either party from copying, saving, or disseminating the records.

Best Practices for Sharing Evidence

It is strongly recommended that institutions use one consistent method, in all cases, for sharing evidence. Although not explicitly required, the following are best practices for sharing evidence:

Secure File Sharing Software

Although it has been a common practice by some institutions for evidence to be emailed, we recommend that evidence be shared using secure electronic file sharing platforms and developing protocols that guide institutional practice for sharing evidence via a secure electronic platform. Such a practice aids in the protection of privacy for those involved in an investigation and reduces opportunities for sensitive information to be copied, duplicated, reproduced, forwarded or sent to individuals or agencies outside of the investigation and resolution process.

Sharing Evidence, Cont.

Non-disclosure agreements or restrictions on distribution of evidence shared

The Final Rule permits institutions to place restrictions on the dissemination of information shared with the parties. Institutions should consider imposing upon the parties and their advisors restrictions on the dissemination of any of the evidence for any reason. This may include development of a policy that prohibits dissemination, copying, forwarding, or sharing any of the evidence, and requiring that the parties and their advisors sign an agreement that they will not do so.

Redactions

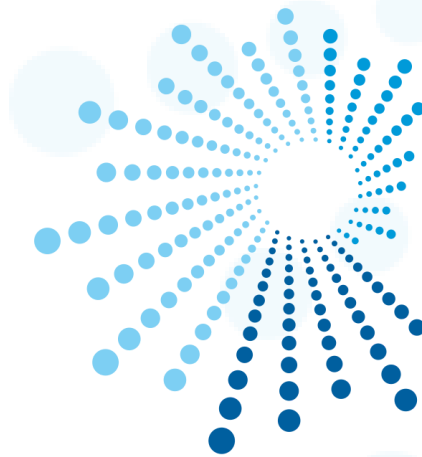
The Department permits investigators to redact information that is not directly related to the allegations or that is otherwise barred from use. If redactions are made, the investigator should maintain an unredacted copy of the evidence. The redaction and reasons for the redactions therefore should be documented by the investigator, as described above.

With respect to sensitive items of evidence, such as nude images and videos, the investigator may consider redacting identifying features or pixelating graphic information. This decision should be made in consultation with the Title IX Coordinator.



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