

# Due Process and Conducting Investigation: THE BASICS



# During the training we will test your knowledge via quizlets





# INTRODUCTION TO TOPIC

## **DUE PROCESS**



The Phrase “due process” is found in the 5<sup>th</sup> and 14<sup>th</sup> Amendments to the US Constitution. Requires federal and state governments (respectively) provide substantive fairness and certain procedures before depriving life, liberty, or property interests.

**Due Process means essentially a guarantee of basic fairness.**

## **Fundamental fairness requires:**

1. Notice
2. An opportunity to be heard at a specific time and in a meaningful way.
3. A decision supported by evidence that meets the standard of proof.

**Due process is not a single event that occurs in isolation.**



# What Does the Way I Investigate Have to do With Due Process?

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Whenever an employee is facing possible discipline based on an alleged violation of policy, they are entitled to due process.

# Inquiries into disputed facts must be conducted in a predictable manner and:

1. require the parties involved (Complainant/ Respondent) receive proper notice (the Title IX Coordinator will send the notices)
2. require policies/impacted by allegations be outlined in specificity,
3. require the parties involved are given a meaningful opportunity to present and respond to evidence,
4. require that investigations are conducted by unbiased investigators.



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# Due Process Quizlet

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1. Due process requires employees know the policies they must follow while on the job. **TRUE or FALSE**
  
1. An HR Manager Receives a report that an employee has violated a policy. After informing the line manager of the need for an investigation, the HR Manager's first step should be to:
  - a) interview the reporter,
  - b) notify the subject of the investigation that a complaint has been filed against them,
  - c) decide if the alleged behavior is addressed in MCCCD policy.

# When to do an investigation

When you are assigned to investigate by the Title IX Coordinator.

Even if you are approached about a Title IX complaint or allegations of sexual harassment, you must refer the complaint to the Title IX Coordinator.



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# What does an investigation entail?

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Investigations should be done both promptly and thoroughly—employing a two-investigator model.

Interviewers should plan all interviews carefully—including the order of the interviews—and should prepare a list of detailed questions designed to gain information that might prove or disprove the complaint.

**NEVER** rely solely on memory. Take good and detailed notes and gather supporting documents (texts, emails, pictures, etc.).

Review the Complainant's statement or interview notes. The complainant should be interviewed first to clarify the details of the complaint.

Don't take allegations as fact.



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# The “musts” in an investigation

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1. Your investigation **MUST** be documented in writing.
2. Your investigation **MUST** be thorough.
3. Your investigation **MUST** be timely.
4. Your investigation **MUST** be confidential.



# On What Should Investigations Focus?

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On the effect of the behavior/conduct

On expected standards of behavior, as delineated in the policy and to gather facts related to the allegations being made.

On context. When, where, and in front of whom did the alleged action take place? Were there witnesses? Did the situation occur at the work place?

On patterns of behavior. Prior complaints? Prior discipline? ← *this is helpful in the sanction phase.*

On seeking corroboration.



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# Words have special meanings

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- The person who brings a matter to our attention is a “**Complainant**” and not a victim or survivor. The reported conduct is not a case or claim.
- If the report is made regarding someone, that person is a “**Respondent**” of the investigation, not a target or perpetrator.

Using proper terminology reinforces your role as a neutral fact finder.



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# When to Investigate Quizlet

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When the subject employee admits to the conduct alleged by the reporter, there is no need to conduct an investigation or document the complaint and admission.

## **TRUE or FALSE**

Employee A approaches you with an allegation that a co-worker has subjected him to inappropriate sexual behavior. Knowing the subject is about to retire, it is appropriate to:

- a) document the complaint, but due to the circumstances, not investigate;
- b) investigate immediately;
- c) place the employee on paid administrative leave until she retires.



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# LET'S REVIEW THE INVESTIGATIVE CHECKLIST



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**Scope of the Investigation = Establishing parameters**  
Identifying the scope is the most critical responsibilities facing investigators.

### **Too Narrow of a Scope**

Risk missing important pieces of evidence

Risks missing additional, but related, violations

Gives the impression that the investigation is being undertaken for the sake of appearance, and not to uncover wrongdoing

### **Too Broad of a Scope**

Risks investigations dragging on

Risks wasting resources and productivity

Risks causing loss of credibility in the process (creating fishing expeditions)

Risks becoming a distraction to others



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# Scoping an investigation = Developing an investigative plan

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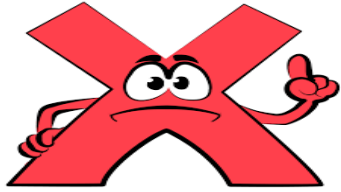
Let's review the 5  
Reminders Handout





# Investigation Do's and Don'ts

DON'T



- Don't ignore complaints from disgruntled or departing employees/students.
- Don't be an investigator who is perceived to be biased
- Don't think someone else will investigate, so you don't have to.
- Don't delay in starting the investigation.
- Don't wait for an informal complaint to turn in to a lawsuit.
- Don't ignore "off the record" complaints—there is no such thing.

DO



- Do follow up on each and every complaint, regardless of what you believe the merit of the complaint may be.
- Do be an investigator who is knowledgeable, fair, and unbiased.
- Do investigate all allegations.
- Do allow for flexibility with your investigative plan.
- Do provide all parties with the prohibition against retaliation and the knowledge that you are a neutral fact-finder.

# Investigation Quizlet

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The scope of the investigation is the most important aspect of the investigation and should not change at all during the investigation. **TRUE or FALSE**

In order to ensure fairness, you should interview the same number of witnesses on each side (the reporter and the subject)

**TRUE or FALSE**

Investigators must make credibility determinations after all of the interviews have been completed.

**TRUE or FALSE**



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# Documentation



# Types of Documentation

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- 1. Primary Documentation:** Intake sheets/reporting forms can outline the allegations being made. The intake/report sheets are a good first step in the reporting and documenting process. Written statements are also primary documentation.
- 2. Secondary Documentation:** The impressions and conclusions from the investigator's interviews and conversations with interviewees.
- 3. Tertiary documentation:** Information from external or third parties may include text messages, emails, reports, , created by or sent by others. External documentation will vary in its relevance and value.

# Why is documentation necessary?

All documentation should be numbered and include the name of the investigators, the interviewee.

Any collected documentation (texts, emails, reports, etc.) must be labeled and listed on the evidence log.

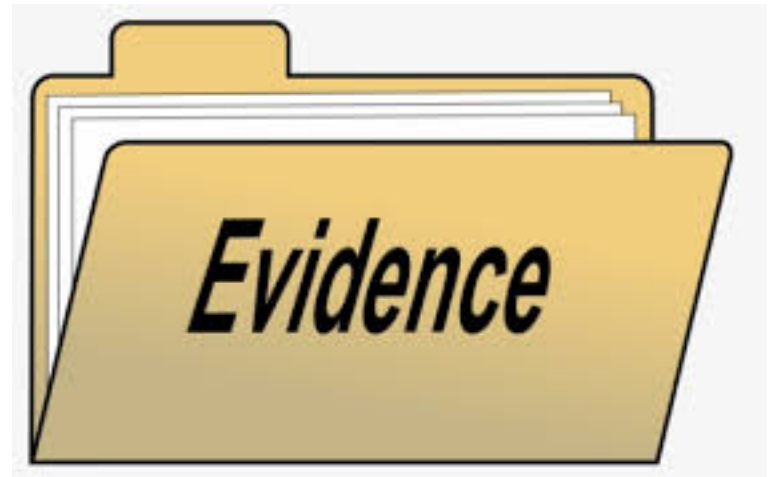
Let's look at the Evidence Log and the Privilege Log



# Standard of Proof (Evidentiary Standard)

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**Preponderance of the Evidence:** Judgment in favor of the complaining party if he/she is able to show that a particular fact or event was more likely than not to have occurred.



# 5 Principles of Preponderance Standard

- 1. Levels the playing field.** It is meant to ensure no advantage to one party over another.
- 2. Easily met.** Preponderance is a minimal and easily met standard. You should not be looking for compelling proof.
- 3. Who do you believe.** If you simply believe one party and not another, a preponderance can be met by that alone.



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## **4. Definition**

Black's law dictionary calls preponderance 50% plus a feather; so any slight evidence leaning towards one side is enough.

## **5. Benchmark**

If you believe you need more than the weight of a feather, you are not following the preponderance of evidence standard.



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# Documentation and Standard of Proof Quizlet

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1. In the course of investigating a claim of harassment where there are no witnesses, it is enough to make a determination based on the fact that you believe one party over the other. (True or False)
2. Select the option that best defines undisputed facts. a) one party was more credible, so the fact is undisputed. b) the fact can be verified through documentation, c) more witnesses confirmed that fact than did not.
3. It is acceptable to draw the conclusion that a determination could not be made because there were no witnesses to the conduct/event (True or False)

# Inculpatory/Exculpatory Evidence

## Inculpatory

Inculpatory evidence is evidence that establish the “guilt” of the subject.

Inculpatory evidence shows, or tends to show, the subject’s involvement the alleged act.

For example, inappropriate text messages sent by the subject to the reporter are inculpatory evidence of inappropriate behavior.

## Exculpatory

Exculpatory evidence is evidence that tends to show that the subject has not engaged in the alleged behavior.

For Example, in the investigation, 5 of 5 witnesses confirm that the subject was not in the meeting where the alleged behavior took place, even if there is no written documentation of who was at the meeting.



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# What are Title IX investigations to determine?

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Your job is to determine whether evidence is out there. You are not making determinations as to whether a policy was violated.

Your documentation should not address legal standards or try to fit the facts to legal standards.

In Title IX investigations, your job is to complete an investigation ONLY. You ask the right questions, talk to the right people, and set up the evidence so the determination of responsibility can be made at the hearing.





Training created by Melissa Flores, Associate General Counsel, Sr. at Maricopa County Community College District, 2020.  
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