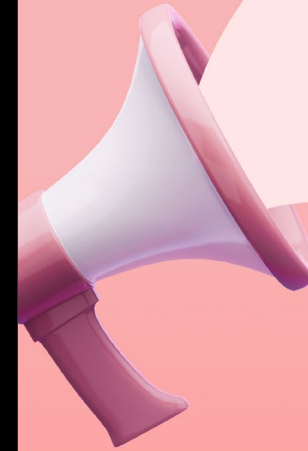


The Need for Speed: Achieving Prompt(er) Investigations Under Title IX

Title IX Conference:
Higher Ed & K-12 Training
July 23-24, 2024



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Today's Panel



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General Requirements for Grievance Procedures

2020 Rule

- Treat parties equitably by following the grievance process required by the Rule
- Objectively evaluate all relevant evidence—including both inculpatory and exculpatory evidence
- Presume that the respondent is not responsible until a decision is made
- If additional procedures are adopted, must be applied fairly between parties
- Investigator must be trained
- Investigator **cannot be the same person as the decisionmaker or appellate decisionmaker**

2024 Rule

- Treat parties equitably throughout the grievance process
- Objectively evaluate all relevant **and permissible** evidence—including both inculpatory and exculpatory evidence
- Presume that the respondent is not responsible until a decision is made
- If additional procedures are adopted, must be applied fairly between parties
- Investigator must be trained
- Investigator **can also serve as a/the decisionmaker**

Remember

- Under OCR regulations, a school, college, or university **may not** use a grievance procedure other than the Title IX grievance procedure to address conduct that the OCR regulations say must be handled using the Title IX grievance procedure—doing so can risk losing federal funding
- Although courts use a “deliberate indifference” standard for Title IX lawsuits for money damages, it is increasingly common for plaintiffs to point to noncompliance with OCR regulations as evidence of deliberate indifference and to support state law claims (e.g., negligence, breach of contract)

What Precedes an Investigation?

2020 Rule

- Title IX Coordinator communicates with the complainant regarding the process and supportive measures
- Complainant files or Title IX Coordinator signs a formal complaint
- Notice of allegations sent to all known parties

2020 Rule

- Title IX Coordinator communicates with the complainant regarding the process and supportive measures
- Eligible person makes or Title IX Coordinator initiates a complaint
- Notice of allegations sent to all known parties
- Title IX Coordinator communicates with the respondent regarding the process and supportive measures

Framing the Investigation: The NOA

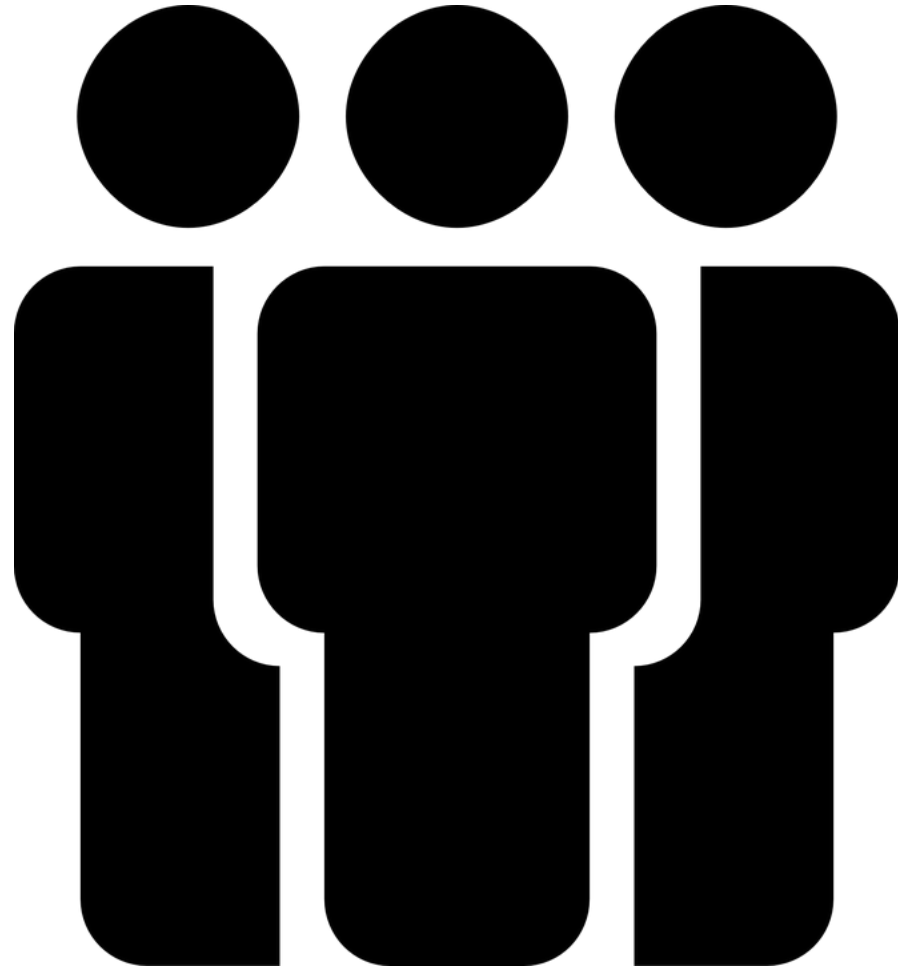
2020 Rule

- Parties must receive a notice of allegations before the investigation begins
- Must include sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known
- NOA must be supplemented if, during the investigation, the educational institution decides to investigate allegations that were not in the original NOA

2024 Rule

- Parties must receive a notice of allegations before the investigation begins
- Must include sufficient information available at the time to allow the parties to respond to the allegations. Sufficient information includes the identities of the parties involved in the incident(s), the conduct alleged to constitute sex discrimination, and the date(s) and location(s) of the alleged incident(s), to the extent that information is available
- NOA must be supplemented if consolidation or if, during the investigation, the educational institution decides to investigate allegations that were not in the original NOA

What are the pros/cons of single investigator- decisionmaker model?



Overriding Investigation Themes

2020 Rule

An educational institution with actual knowledge of sexual harassment in an education program or activity of the educational institution against a person in the United States, must respond **promptly** in a manner that is **not deliberately indifferent**. An educational institution is deliberately indifferent only if its response to sexual harassment is **clearly unreasonable in light of the known circumstances**.

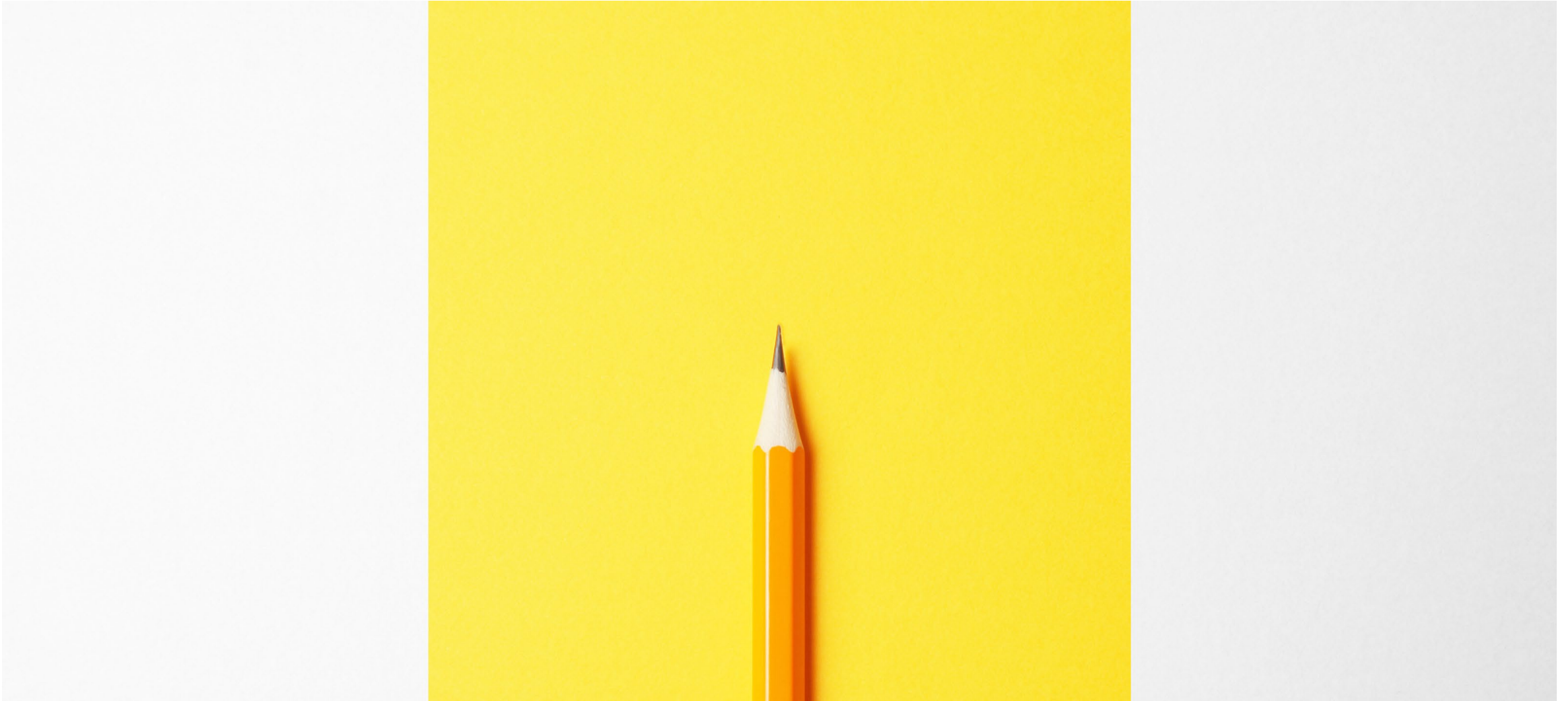
2024 Rule

An educational institution must provide for **adequate, reliable, and impartial** investigation of complaints.

Implied Requirements for Investigations

- Use a preponderance of the evidence standard (both 2020 and 2024 rules technically allow clear and convincing, but not really)
- Do not consider credibility during the investigation part of the process except as necessary to understand what evidence to probe/consider and what evidence is relevant
- Both the 2020 and 2024 rules allow oral notice in many circumstances where notice is required to the parties (more frequently in 2024), but OCR will nonetheless expect you to prove that those communications were made

What are the pros/cons of the flexibility to use more oral (instead of written) notice?



Timeframes

2020 Rule

Include reasonably prompt time frames for conclusion of the grievance process ... and a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with **written notice** to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

2024 Rule

Establish reasonably prompt timeframes for the major stages of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with **notice** to the parties that includes the reason for the delay. The investigation is a major stage for which a timeframe should be provided and complied with.

New Provision: 2024 Rule

- The 2024 Rule includes a provision allowing the reasonable delay of the NOA for to the extent the postsecondary institution has reasonable concerns for the safety of any person as a result of providing the notice
- Reasonable concerns must be based on individualized safety and risk analysis and not on mere speculation or stereotypes

Tips to avoid losing time if there are safety concerns or other delays at the start of the investigation?



OCR Case Processing Manual – Case Planning

SECTION 301 **CASE PLANNING**

Case planning will begin as early as possible, will be thorough, and will continue throughout the processing of every case to ensure high quality decisions, prompt investigations and the efficient use of OCR resources. Planning decisions will reflect sound legal standards and will be adjusted as necessary to consider information obtained during case processing. See section 702. The scope of OCR’s investigation and resolution activities will depend upon the allegation(s), issue(s), applicable legal standard(s), and the evidence obtained during the investigation.

Regional Office management and investigative staff are accountable for effective planning and will participate in critical planning decisions commensurate with the nature and complexity of the case to ensure consistent and high-quality casework.

The following essential elements of case planning will be addressed in every OCR file (unless inapplicable):

- The allegation(s);
- OCR’s jurisdiction over the subject matter and entity;
- The legal standards, statutory and regulatory authority, and elements of proof;
- The scope of the investigation;
- The investigative strategy (i.e., what data and/or information are necessary to resolve the case and The means and methods OCR will employ to obtain the relevant data and/or information); and
- The resolution.

The case file will contain documentation that supports the decisions OCR makes. Planning documentation will be organized so that it can be readily located in the case file.

What case planning methods do you find most effective to improve timeliness in investigations?



Collecting Evidence

2020 Rule

- Burden of proof and of gathering evidence on the institution, not the parties
- Focus of investigation is on “relevant evidence” (not defined) but must share all “directly related evidence” collected during the investigation
- Three categories of evidence that is excluded from relevance

2024 Rule

- Burden of conducting an investigation that gathers sufficient evidence to make a determination is on the institution, not the parties
- Focus on “relevant” and “not otherwise impermissible” evidence
- Three categories of evidence that is not permissible even if relevant

“Relevant” Definition (2024 Rule)

- “Relevant” is defined as “related to the allegations of sex discrimination under investigation as part of the grievance procedures....”
- States further that “questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred
- States further that “Evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.”
- The Federal Rules of Evidence helpfully define “relevant” as evidence that makes a fact or issue in dispute more or less likely to be true.
- Per the preamble to the final rule: “These regulations adopt a definition of ‘relevant’ that reflects its plain and ordinary meaning and is intended to provide clarity for recipients that do not have extensive familiarity with legal concepts. The Department therefore declines to adopt the Federal Rules of Evidence’s definition of ‘relevant.’”

Impermissible Evidence (2024 Rule)

The following types of evidence, and questions seeking that evidence, must not be accessed or considered except to determine whether an exception applies; must not be disclosed; and must not otherwise be used, regardless of whether they are relevant:

- **Medical Evidence.** A party's or witness's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party or witness, unless the educational institution obtains that party's or witness's voluntary, written consent for use in the educational institution's grievance procedures
- **Privileged Evidence.** Evidence that is protected under a privilege as recognized by Federal or State law or evidence provided to a confidential employee, unless the person to whom the privilege or confidentiality is owed has voluntarily waived the privilege or confidentiality
- **Rape Shield Evidence.** Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the respondent that is offered to prove consent to the alleged sex-based harassment. The fact of prior consensual sexual conduct between the complainant and respondent does not by itself demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred

Rights of Parties to Present Witnesses & Evidence

2020 Rule

- Provide an equal opportunity to parties to present witnesses, including fact witnesses, and other evidence

2024 Rule

- Provide an equal opportunity to parties to present fact witnesses and other evidence
- When investigating a complaint alleging sex-based harassment involving a student party, can allow expert witnesses as long as parties have the same right to do so

Right to Discuss Allegations Under Investigation

2020 Rule

- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence

2024 Rule

- Take reasonable steps to prevent and address unauthorized disclosure of information and evidence obtained solely through the grievance process
- Must protect the privacy of parties and witnesses without restricting the parties' ability to obtain and present evidence, consult with family, confidential resources, or advisors, or prepare for grievance procedures
- Disclosures for administrative proceedings or litigation related to the complaint are authorized

How do party and witness disclosures of information impact investigations and how can you avoid those concerns?



Consider Party and Witness Warnings

“Please be aware that while you have the right to discuss this case with others for authorized purposes, disclosing information can have significant consequences. Whether you intend it or not, widely sharing information can lead others involved in the case to feel retaliated against, which can lead to complaints. Sharing information before a party or witness’s interview can also impact the credibility of parties or witnesses in the case. These actions could affect the investigation’s integrity and impact the outcome of the case. We urge you to limit your disclosure of information and evidence obtained solely through the grievance process to only what is necessary to obtain and present evidence, consult with family, confidential resources, or advisors, prepare for grievance procedures, or participate in any administrative proceedings or litigation related to the complaint. If you have any questions, please contact me before sharing the information.”

Advisor Requirements

2020 Rule

- Provide the parties the same opportunity to have others present
- Includes the opportunity to have an advisor of choice at any related meeting or proceeding
- The educational institution may establish restrictions regarding the advisor's participation if they are equally applied to the parties

2024 Rule

- Provide the parties the same opportunity to have others present
- In investigations involving a complaint alleging sex-based harassment involving a student party, must provide the parties the same opportunity to have an advisor of choice at any related meeting or proceeding

How do advisors positively and negatively impact the timing of Title IX investigations? How can you limit any negative impact?



Notice of Interviews

2020 Rule

The investigator must provide to any party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate

2024 Rule

Only when a higher education institution is investigating a complaint alleging sex-based harassment involving a student party must the investigator provide to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all meetings or proceedings with sufficient time for the party to prepare to participate

Where do you fall on the question of whether to provide notice in all cases, even if not required? In writing or is oral ok? Is the answer different in K-12?



IMPORTANT

New Provision: 2024 Rule

K-12: If a complainant or respondent is an elementary or secondary student with a disability, the educational institution **must** require the Title IX Coordinator to consult with one or more members, as appropriate, of the student's IEP team or 504 team, if any, to determine how to comply with the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 ("Section 504"), throughout the educational institution's implementation of grievance procedures under § 106.45.

Higher Ed: If a complainant or respondent is a postsecondary student with a disability, the Title IX Coordinator **may** consult, as appropriate, with the individual or office that the educational institution has designated to provide support to students with disabilities to determine how to comply with Section 504.

Evidence Sharing

2020 Rule

Must send, in an electronic format or hard copy, to each party and the party's advisor, if any, any evidence obtained as part of the investigation that is directly related to the allegations raised in the formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source

2024 Rule

- For a complaint alleging sex-based harassment involving a student party, a postsecondary institution must provide each party and the party's advisor, if any, either (1) access to the relevant and not otherwise impermissible evidence or (2) a written investigative report that accurately summarizes this evidence, with the option to request access to the relevant and permissible evidence
- For all other cases, must provide each party and the party's advisor, if any, either (1) access to the relevant and not otherwise impermissible evidence or (2) an accurate description of the evidence, with the option to request access to the relevant and permissible evidence

Party Response to Evidence

2020 Rule

- 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

2024 Rule

- A recipient must provide a reasonable opportunity to respond to the evidence or to the accurate description of the evidence
- For a complaint alleging sex-based harassment involving a student party, a postsecondary institution must provide the parties with a reasonable opportunity to review and respond to the evidence or the investigative report prior to the determination of whether sex-based harassment occurred

Investigative Report

2020 Rule

Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response

2024 Rule

- For a complaint alleging sex-based harassment involving a student party, a postsecondary institution must either provide access to the relevant and permissible evidence or to an investigative report that accurately summarizes this evidence, with the option to request access to the relevant and permissible evidence
- An investigation report is not required for any other cases

What methods can help speed up the evidence-sharing and report review process?



Bias in Investigations

- Personal biases, whether conscious or unconscious, can influence an investigator's judgment, leading to partiality in gathering evidence, interviewing witnesses, and making determinations
- Example: An investigator might subconsciously give more weight to testimony from someone they perceive as more credible based on irrelevant characteristics such as gender, race, or socioeconomic status

Conflicts of Interest in Investigations

- Investigators with a conflict of interest might have a personal or professional stake in the outcome of the investigation, which can compromise their impartiality.
- Example: An investigator who has a close relationship with one of the parties involved might inadvertently favor that party in their investigation.

Prejudgment in Investigations

- Forming opinions about the case before all evidence is collected and reviewed can lead to a biased investigation and flawed conclusions
- Example: An investigator who assumes a respondent's guilt based on previous unrelated incidents might not thoroughly investigate exculpatory evidence

What tips can you provide to help avoid bias, conflicts of interest, or prejudgment



Questions

