

# Investigation Training for Schools

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# What We Will Cover

- Title IX: New Regulations and Guidance
- Defining Sexual Harassment and Jurisdictional Scope
- Avoiding Bias and Stereotypes
- How to Conduct an Impartial Investigation
  - Trauma-Informed Interviewing Techniques
  - Understanding “Relevant” Evidence and “Rape Shield” Exclusions
  - Fairly Assessing Evidence and Making Credibility Determinations
  - Effective Report Writing

# **Key Title IX Regulations Affecting Investigations**

# Precise Legal Requirements vs. Best Practices

*“Because these final regulations represent the Department’s interpretation of a recipient’s **legally binding obligations**, rather than **best practices**, recommendations, or guidance, these final regulations focus on precise legal compliance requirements governing recipients”*

*“These final regulations leave recipients the **flexibility** to choose to follow **best practices** and recommendations contained in the Department’s guidance, or similarly, best practices and recommendations made by non-Department sources, such as Title IX consultancy firms, legal and social sciences scholars, victim advocacy organizations, civil libertarians and due process advocates and other experts”*

-Title IX Regulations issued May 6, 2020; Executive Summary, p. 18

# Guiding Principles for Grievance Process

- Respond promptly in a manner that is not deliberately indifferent
- Equitable treatment & process
- Burden of gathering evidence and burden of proof on schools
- Equal opportunity to present witnesses and provide inculpatory and exculpatory evidence
- No “gag orders” on parties

# Conflict of Interest or Bias

- Schools must ensure that coordinators, investigators, decision-makers, individuals who conduct informal resolutions, and appeals officers do not have a conflict of interest or bias
  - Vet and select carefully all Title IX team members
  - Provide a process for self-recusal & challenge mechanism for the parties
  - Appoint different officials to serve as investigator, decision-maker, appeals officers, coordinator, and advisors in any given case

# Advisor of Choice

- All parties have the right to an advisor of choice:
  - May be present at all meetings, interviews and proceedings
  - Any restrictions on advisor participation must be applied equally to all parties
  - Schools should provide advisors at no cost to the parties
  - For colleges/universities: During live hearing, advisor will conduct cross-examination of opposing parties

# Privileged/ Health Records

- Ensure that the investigator does not access, consider, disclose, or otherwise use a party's records that are made or maintained by a health or mental health professional unless the investigator obtains voluntary, written consent to do so.
- Ensure that the investigator does not seek information that is protected by the attorney-client privilege unless the party waives the privilege.
- Ensure that the investigator does not seek information protected by the rape shield privilege unless exception applies.



# “Rape Shield” Exclusion

- Evidence of complainant’s prior sexual behavior is not relevant unless:
  1. Offered to prove that someone other than the respondent committed the alleged misconduct or
  2. Offered to prove consent from prior sexual behavior between the complainant and respondent
- For example, prior sexual behavior may be relevant to explain:
  - Presence of a physical injury
  - Pattern of communication/behavior between parties regarding consent
- Prior sexual behavior is not relevant to explain:
  - General predisposition toward engaging in sexual activity

# Review of Evidence

- All parties must have equal opportunity to inspect and review evidence that is “directly related” to the allegations, including any evidence that the investigator does not intend to rely on in the written investigation prior to finalizing the report
- Parties have at least 10 days to inspect, review and respond to the evidence

# Redactions and the “Privilege Log”

- Investigators may redact information that is not directly related to the allegations or that is otherwise barred from use, such as because of a legally recognized and unwaived privilege
- Schools may require non-disclosure agreements not to disseminate, photograph or copy the evidence for any purpose unrelated to Title IX grievance process
- Department warns against overbroad exclusion of evidence and cautions institutions to be “judicious” and “not redact more information than necessary”
- Department suggests compilation of a document akin to a privilege log to keep track of information not produced and allow parties to dispute whether the information is directly related to the allegations

# Understanding Relevance

- Evidence “**directly related to the allegations**” vs. evidence that is “**relevant**”
  - Must share evidence that is “directly related” to the allegations with the parties (broad)
  - Only “relevant” information need be summarized in investigation report (narrower in scope)
- The Final Rule does not define what is “relevant” evidence.
- Evidence is relevant if it makes a material fact more or less probable than it would be without the evidence (i.e. **tends to prove or disprove the issue of responsibility**).
- Relevant evidence includes both “inculpatory and exculpatory” evidence
- Investigator has discretion to determine the relevance of evidence received. Decisionmaker has the discretion to determine the credibility and weight of relevant evidence.

# Investigation Report

- Must fairly summarize the relevant evidence, including inculpatory and exculpatory information
- May include direct observations and reasonable inferences drawn from the facts
- May discuss consistencies/inconsistencies from various sources of information
- Investigator does not make credibility assessments/determinations of responsibility under Title IX regulations – role of decisionmaker.

# Defining Sexual Harassment Under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (Quid Pro Quo);
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. § 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. § 12291(a)(10), "domestic violence" as defined in 34 U.S.C. § 12291(a)(8), or "stalking" as defined in 34 U.S.C. § 12291(a)(30).

*"We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding [for sexual harassment no longer covered by Title IX]"*

-Title IX Regulations issued May 6, 2020; §106.45(b)(3)(i)

# Jurisdictional Scope Under Title IX

- Requirement to adopt a grievance procedure applies only to sex discrimination occurring against a person IN the United States
- **Education program or activity** includes locations, events, or circumstances over which the institution exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by an institution.

*“We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding [for sexual harassment no longer covered by Title IX]”*

-Title IX Regulations issued May 6, 2020; §106.45(b)(3)(i)

# Mandatory/Discretionary Dismissal Under Title IX

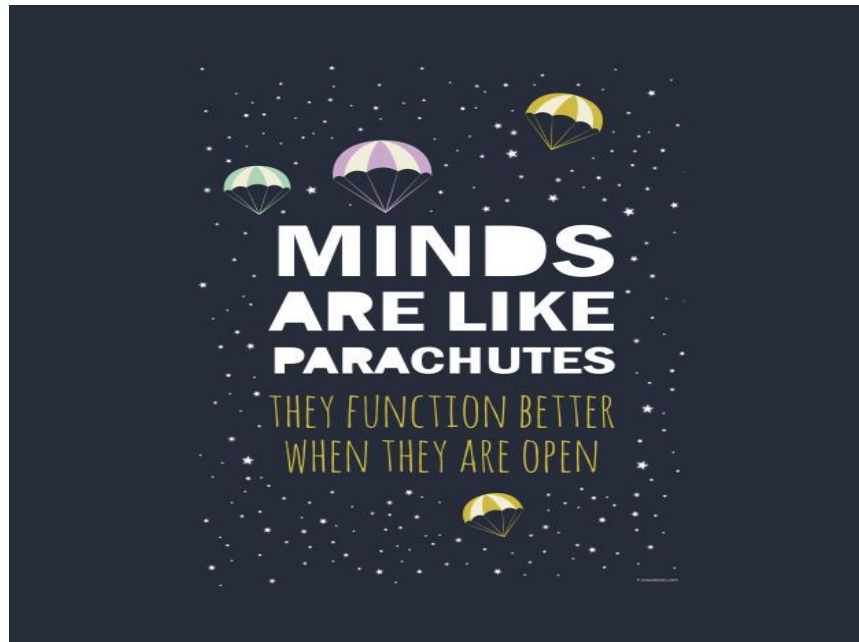
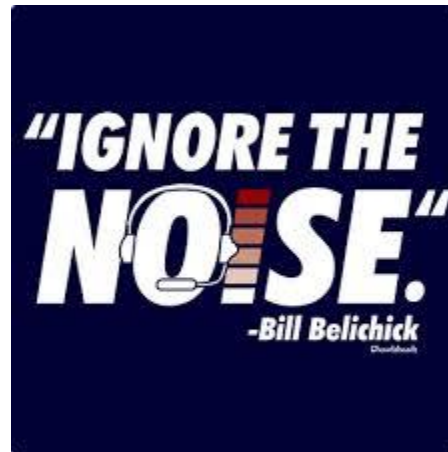
Under the Final Rule, if alleged conduct would not constitute “sexual harassment,” did not occur within the University’s program or activity, or did not occur in the United States the school must terminate its Title IX grievance process but can still proceed under institution’s conduct process,

Under the Final Rule, the school may dismiss the complaint if the Complainant withdraws their formal complaint, the Respondent is no longer enrolled or employed by the school, or the circumstances would prevent the school from gathering sufficient evidence to reach a determination on the merits.



# Avoiding Bias and Stereotypes

# How Do We Conduct Fair, Thorough and Impartial Investigations?



# How Do We Make Investigative Processes More Equitable and Inclusive?

- Check inclusivity of language of policies, interview questions, and reports
- Check gender-based assumptions
- Check race-based assumptions
- Check cultural assumptions
- Recognize challenges and barriers facing marginalized groups including LGBTQIA+ students, disabled students, students of color, Native American students, and others.

# Sexual Misconduct

- Sexual misconduct is broad term encompassing range of conduct (sexual assault, attempted sexual assault, unwanted sexual touching, sexual exploitation)

## Sexual Act

- Penetration (oral, anal, vaginal) v. “Attempted”
- Touching contact with intimate body parts (genitals, breasts, buttocks, inner thighs)
- Clothing (under/over)

## That Occurs Without Valid Consent

- Lack of consent: force (intimidation, coercion), statutory (i.e. underage), incapacitation (i.e. intoxication, disability, asleep)
- Some sexual misconduct may also violate other policies (harassment, electronic use, etc.)

# Consent

- Must consider prior/post relationship history to understand total context and how consent communicated between parties
- Must consider both verbal and nonverbal means of communication in determining whether consent given to particular sexual activity
- Must look at sexual activity as a whole to understand total context
- May be sufficient evidence of lack of consent to some acts, and not others
- Consider objective circumstances of the sexual activity as well as the parties' subjective feelings about it
- Consider circumstances of decision to disclose/report
- Key inquiry: what would reasonable person in Respondent's position have understood from other party's words and actions as to whether valid consent was given.

# Effect of Alcohol

- Alcohol can interfere with the creation of memory, but not necessarily render a person incapacitated.
  - **“Blackouts”**
- Differing perceptions about alcohol consumption
- To determine intoxication v. incapacitation issues, investigators and adjudicators must seek/understand detailed information about:
  - Alcohol consumption
  - Food/water consumption
  - Tolerance levels
  - Observations by others, if possible
  - Other evidence of incapacity (texts, video, etc.)

# Intoxication vs. Incapacitation

- Incapacitation is a state far beyond drunkenness or intoxication.
- Signs of intoxication include, but are not limited to:
  - slurred speech
  - weaving or stumbling while walking
  - Impaired fine/gross motor skills
  - exaggerated emotions
- Signs of incapacitation include, but are not limited to:
  - inability to speak coherently
  - confusion of basic facts (day of week, birthdate, etc.)
  - inability to walk unassisted
  - unconsciousness

# Incapacitation

Key Inquiry: Whether Respondent knew/should have known that Complainant was incapacitated and *took advantage of* Complainant's incapacity to engage in sexual activity



# Other Gender-Based Misconduct

**Dating Violence** – threatening or abusive behavior that can be physical or sexual that is intended to control another person where the parties are or were in a dating, romantic, or sexual relationship

**Stalking** – a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for his or her safety or the safety of others; or
- Suffer substantial emotional distress

**Sexual Exploitation** – recording images or audio of sexual activity or intimate body parts without consent, distributing such content without someone's consent, or viewing another person's sexual activity or intimate body parts without consent where the person would have reasonable expectation of privacy

# Other Types of Misconduct Investigations

- Bullying / cyber-bullying
- Hazing
- Harassment based on a protected category
- Discrimination based on a protected category
- Retaliation
- Violations of no-contact orders
- Physical assault/misconduct

# Potential Effects of Trauma

- Individuals experience trauma in different ways.
- Trauma can be caused (or triggered) by different events in a person's life.
- Scientific theories about the potential effects of trauma should never be used to determine responsibility for misconduct in a specific case.
- Memories for traumatic incident are no more or less likely to be inaccurate than memories for a non-trauma event.
- Don't necessarily assume that potential trauma presentation is related to incident at hand.

# Evaluating Non-Stereotypical Behaviors in Parties

- Appearing or communicating in “normal” way to others (including Respondent) after an incident
- Seeking out contact with Respondent after an incident
- Delays in reporting
- Not yelling, physically resisting, or leaving room during incident
- Appearing “flat”, angry, frustrated, hostile
- Recanting or displaying ambivalence about investigation process
- May not remember details in clear, linear, chronological order

**Do not rely on stereotypes, biases, assumptions to draw conclusions about what happened.**

# Evaluating Non-Stereotypical Behaviors in Parties

Instead of acting on stereotypes, we must:

- Gather information in our investigations and adjudications in a non-judgmental manner.
- Seek clarification from individuals about their specific behaviors instead of making assumptions or generalizing.
- Consider any plausible explanations of behaviors fairly with other evidence.

# Goals of an Effective School Investigation

- Timely
- Objective
- Sensitive and Respectful (Trauma-Informed)
- Equitable
- Thorough
- **Burden on school, not the parties. Must gather BOTH inculpatory and exculpatory evidence. Relentless search for corroboration.**



# Initial decisions to be made

- Preliminary inquiry/assessment
- Supportive measures
- Determining the scope of investigation
- Assigning an investigator

# Assess the Likely Scope of the Investigation

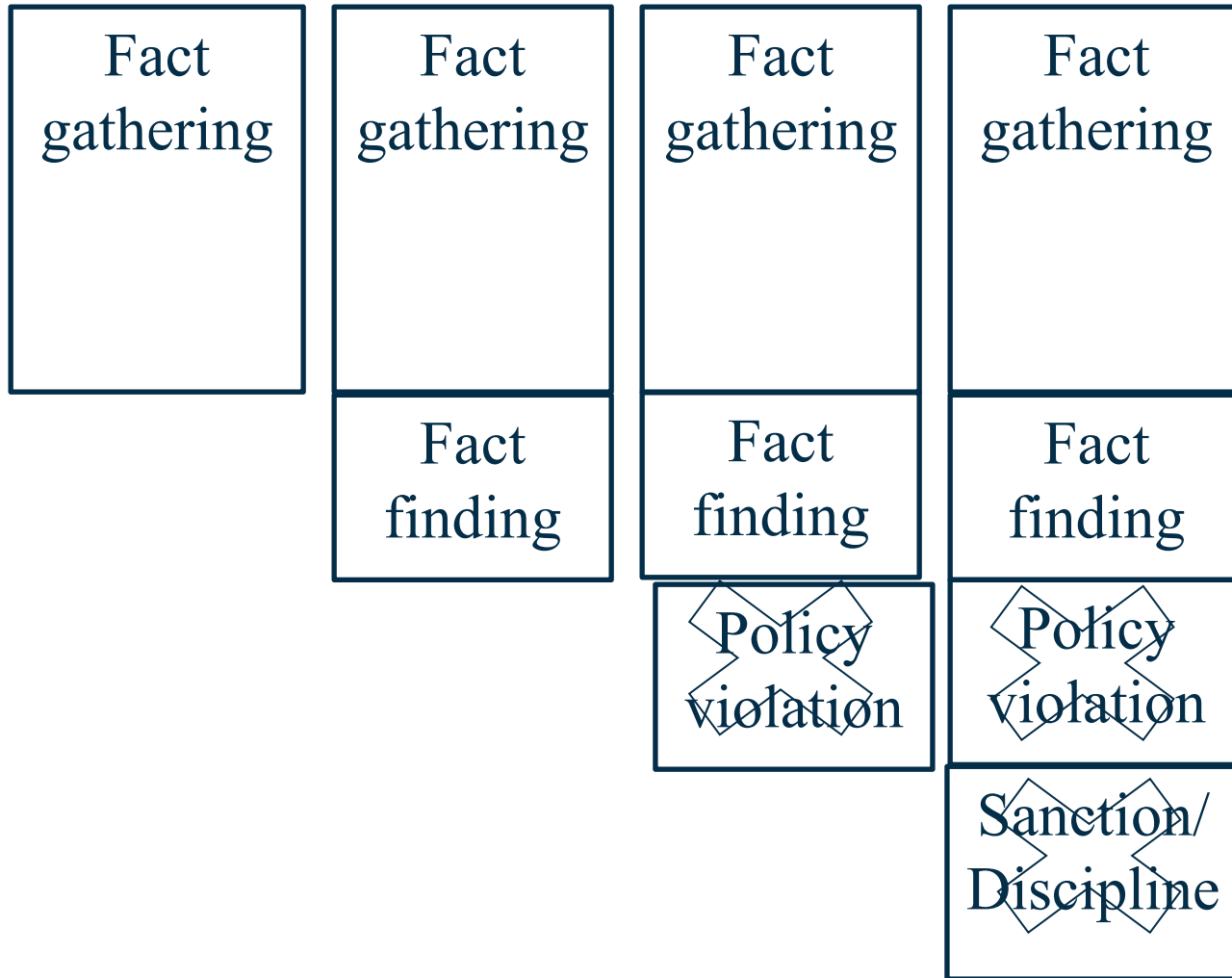
- Identify issues arising from the complaint – there may be several.
- Analyze applicable school policies and determine which apply.
- Investigate all potential violations of school policies.
- Understand scope of investigation may change as investigation proceeds.
  - Does investigation reveal other wrongdoing?
  - Does investigation identify other potential complainants?
- Investigate cross-complaints simultaneously.



# Assigning the Investigator

- Consider seriousness of allegations and training, experience and skillset of investigator
- Bias/conflicts of interest: actual or perceived
- Resources and availability
- Gender make-up
- One investigator? Two?
- External or internal

# Be Clear on the Investigator's Role



# Investigation Planning

- Identify roles
  - “Point person” for coordinating interviews.
  - Conducting interviews
  - Note taking
- Determine location of the party/ witness interviews and provide written notice to parties
- Consider timing of the interviews and allow sufficient time in between.
- Who will be present during interviews?
- Role of advisor/ support person

# Parties' Advisors in Investigations

- Types of Advisors
  - Lawyers
  - Coach
  - Parent
  - Witness
- Advisors “speaking for” students
- Investigator communications with Advisors

# Investigation Preparation & Information Gathering

- Obtain relevant policies.
- Consider known facts and identify potential sources of information.
  - Incident report/ disclosures, witnesses, electronic evidence (emails, texts, social media), phone records, documents, security video, card swipe records, physical site visit, forensic evidence (must be reviewed by trained forensic examiner).
  - Publicly available evidence (e.g. social media)
- Develop a working timeline of events and prepare outline of questions for parties/witnesses
- Secure investigation file.

# Outreach to Parties/Witnesses

- Use parallel communications for parties (updates)
- Identify and address barriers to participation by:
  - Communicating care through tone and word choice
  - Using inclusive language
  - Addressing disability accommodations and interpreter services
  - Encouraging the use of available supports/resources
- Non-responsiveness
  - Make at least 3 attempts at outreach using at least 2 different modes before concluding that someone is intentionally not responding.
  - Think about other avenues/people for outreach.

## Prior to Interview

- Apprise Respondent of the allegations and allow sufficient time before scheduling interview for Respondent to prepare response
  - As institution/investigator becomes aware of new allegations, must provide written notice to Respondent and allow opportunity for additional response
- Send written notice of any investigative interviews, meetings or hearings with the following information:
  - Date
  - Time
  - Location
  - Participants
  - Purpose of investigative interview or meeting

# Interview Demonstration



# Interview Opening Statement

- Thank the person for coming.
- Brief explanation of matter
- Mention note taking/recording.
- Explain process of the investigation.
- All information only disclosed on a “need to know” basis
- Expectations of confidentiality, candor, cooperation, no contact.
- Discuss prohibition of retaliation.
- Explain amnesty policy.
- Explain guidelines regarding advisor’s participation.
- Ask: Questions?

# Basic Interviewing Techniques

- Build a rapport—don't interrogate.
- Be sympathetic in neutral manner.
- Listen to understand and do not assume!!!
- Be comfortable with silence.
- Plan out questions, but let conversation evolve naturally.
- What are you able to tell me about your experience → Who, what, where, when, how?
- Avoid “leading” questions (*i.e.* questions that presume an answer).
- Establish a timeline.
- Make sure to ask the difficult questions!
- Get clarification.
- Ask: Anything else?
- Opportunity for follow-up.
- Avoid asking for opinions, speculation, or character evidence.



# Interview Techniques

- Focus on sensory details.
- Pay attention to emotional cues and responses.
- Look for any evidence of motive/bias/interest, even where not immediately apparent.
- Listen for “ring of truth” answers.
- Rely upon maps, photos, electronic evidence where available.
- Create running timeline.
- Be open minded, do not fill in gaps with assumptions, use language of witness, and LISTEN.
- Reflexive questioning
- Do not paraphrase or summarize

# What do you do if...?

# Capturing of Interviews

- Identify date, everyone in room, name of interviewer, start and finish times
- Collect as much detail as possible
- Legibility of notes
- Recording of interviews
- Confirming your notes, recording, transcript are accurate
- Maintaining notes, recordings
- Verbatim quotes and capture questions where asking for clarification



# Complainant Interview

- Reluctant complainants → what to do?
- Open-ended, non-judgmental questions
- Do not ask about prior sexual history (except as relevant/permitted).
- Consider impact of parents, advisors, etc.
- Handling conflicting statements (reconciliation)
- Handling difficult disclosures (explain why you need to know)
- Interview for clarification – don't interrogate.

# Complainant Interview

- What are you able to tell me about your experience?
- What are you able to tell me about . . . .
  - What you saw?
  - What you heard?
  - What you tasted?
  - What you smelled?
  - What you touched/felt?
- What are you able to tell me about how that made you feel?
- What are you able to tell me about what you thought was going to happen?
- What are you able to tell me about what your thought process was when . . . .
- Can you tell me more about . . . . ?

# Complainant Interview

- What are you able to tell me about any specific moments that stand out in your mind?
- What are you able to tell me about your physical reactions to this experience when it happened?
- What are you able to tell me about your emotional reactions to this experience when it happened?
- What are you able to tell me about impact on your life and behavior now compared to before? Eating? Drinking? Sleeping Other routines?
- Clarify the Who, What, When, Where, How, Why after giving open opportunity to share
- What, if anything, can't you forget about this experience?
- Anything else you'd like to share that we haven't talked about?



## Explain Difficult Questions

What you say . . . .	What the victim hears . . . .
Are those the clothes you were wearing when this happened?	The investigator thinks it's my fault because of what I was wearing.
Were you drinking or doing any drugs?	I knew this was my fault for drinking too much, the investigator thinks so too.
Did they physically hurt you or threaten you with a weapon?	I knew the person and they didn't hurt me or use a weapon. The investigator thinks I consented.

# After Collecting the Complainant's Experience:

- Seek clarification of facts and information to help determine elements of the alleged violation or other additional evidence (who, what, where, when, how).
- Seek information about Respondent's behavior and communication.
- Exhaustive search for corroboration (even minor details)
- Explore motive, bias, interest.
- Explore circumstances of disclosure.
- Identify witnesses, electronic evidence, other sources of evidence.

# Respondent Interview

- Acknowledge difficulty of conversation, importance of being accurate/truthful.
- Follow same structure and approach to questioning as Complainant interview
- Allow Respondent to give statement in own words, uninterrupted.
- Seek exculpatory evidence, information and/or leads, other witnesses, etc.
- Ask Respondent to explain inconsistencies with known evidence & provide opportunity for Respondent to explain evidence disclosed by Complainant and witnesses.
- Explore sensory and peripheral details disclosed by Complainant.
- Explore motive, bias, interest.
- Identify where there is agreement/dispute about what occurred

# What do you do if...?

# Witness Interviews

- Explore witness's relationship to the parties
- Ascertain the source of the witness's knowledge
- What to do about tampering of witness testimony
  - Always ask: Have you spoken with anyone about this investigation? Who? What was said? When? In writing? If so, could you provide those communications?
- Follow the same open-ended approach with narrowed follow-up questions
- Give enough information to illicit relevant information but be circumspect about what is shared

# Handling Uncooperative Witnesses

- What does your policy say about participation?
- How do you seek voluntary participation and cooperation?
- What do you do with witness “retractions”?

# Conclusion of Interviews with Parties

- Opportunity/need for follow-up
- Safety planning/interim actions
- Next steps, manage expectations
- Exchange contact information, details.
- Work with advisor/ Title IX to ensure student understands resources and how to find support.
- Explain parameters of no contact and retaliation.
- Questions?

# Difficult Investigation Issues

- Interviewee volunteers highly sensitive information
  - What if these areas of inquiry are suggested by other party?
- Disappearing evidence (Snapchat)
- Considering prior complaints & pattern evidence
- Cross complaints
- Concurrent law enforcement investigations



# How is Credibility Assessed?

- Credibility assessments are necessary to resolve material issues in dispute between parties' accounts.
- Credibility is different than "honesty."
- Evaluation of source, content, and plausibility of evidence presented.
- Specificity v. vagueness in accounts.
- Corroboration through witness testimony and evidence
- Evaluate motive and bias and apply common sense.
- Inconsistencies
- Demeanor

# Corroboration

= Sufficient independent evidence to support the facts at issue

- Corroboration  $\neq$  second witness who agrees with the first.
- Corroboration = evidentiary support for what a witness contends after evaluating source, content, and plausibility.
- Witnesses, electronic evidence, physical/medical evidence, police reports, video surveillance
- Timeline
- Be aware of subtle bias of which witnesses may not even be aware (victim blaming attitudes, group defensiveness, fear of getting in trouble).
- Sensory details/micro-corroboration

# Inculpatory / Exculpatory Evidence

- Communications between parties (pre and post incident)
- Behavior of the parties (pre and post incident)
- Statements against interest/ admissions
- Disclosures about the incident

Consider any explanations and fairly weigh.

# Motive / Bias

- Understand parties and witnesses' relationship(s) to one another.
- Understand Complainant's decision to disclose/report when they did.
- Be curious and explore theories of potential motive (those offered by the parties and those revealed by the evidence).
- Understand the difference between a false report v. good faith report that is not supported by evidence.

# Demeanor

- Trauma, shame, blame, fear, etc.
- Cultural/background differences
- Disability
- High Emotions

Demeanor should not be the sole factor that “tips the scales.”

## Before You Begin Writing the Report

- Know your policies and procedures and write a report that is consistent with them.
- Decide whether to consolidate multiple complaints arising from same incident in a single investigative report
- Have both parties had an opportunity to test/explain all information relied upon in report?
- Think about how you can make the report understandable to someone who is entirely familiar with process/parties.
  - Spoon-feed factual information.
  - Explain acronyms.
- Your report must stand on its own in the event of an internal/external review.
- Understand who will see report.
- Document efforts to obtain information/interview witnesses that were unsuccessful.
- Document delays.

# Report Contents

- Summary of allegations
- Procedural history
- Applicable policies and procedures
- List of persons interviewed and evidence received
- Evidentiary standard
- Summary of relevant evidence through findings of fact (chronological)
- Credibility Assessments, Rationale and Conclusion (not in Title IX cases)
- Attachments

# Contents of Investigative Reports

- Summary of Reporting student's allegation and Responding student's response
- A history of the case – when the report was made, when the investigator was assigned, when the interviews were conducted, etc.
- Scope of the investigation and the applicable policies
- Information considered during the investigation, including:
  - List of witnesses interviewed and when
  - List of documents and other information reviewed and who provided
  - List of witnesses proposed but not interviewed and why
  - Standard of proof
  - Factual findings
  - Credibility Assessments, Rationale and Conclusion
  - Appendix



# Evidentiary Standard

- May use “preponderance of the evidence” or “clear and convincing”
- Apply the same standard of evidence for all Title IX Complaints (employees and students)
- **Preponderance of the Evidence:** 51% or 50 plus a feather. Presume a student not responsible for misconduct unless proven responsible by a preponderance of the evidence. Preponderance of the evidence weighs the balance of probabilities. The standard is met if it is more likely than not that the alleged misconduct occurred.
- **Clear and Convincing:** Concluding that a fact is highly and substantially more probable to be true than not.

# Factual Findings

- Chronological
- Include timeline of parties' relationship up through disclosure of incident
- Relevant and material facts only
- Include both exculpatory and inculpatory evidence
- Use verbatim quotes
- Include source
- Use headings and bullet points
- Identify undisputed/disputed facts

# Rationale and Conclusion

- Clearly articulates the policy elements at issue
- Clearly articulates how a determination of responsibility/ no responsibility was reached
- Clearly identifies the evidence in support of the determination
- Clearly outlines the credibility determinations made and the basis on which they were made
  - Credibility of evidence (not persons)
- Fairly weighs the evidence, assesses credibility and explains the investigator's rationale in a neutral and professional manner.

# Attachments



- Decide what will be attached to the report (e.g., Facebook/text messages, Snapchats, photos, police report, etc.) keeping Department's guidance on relevance in mind
- Redact as appropriate
  - Keep in mind Department's guidance on relevance
  - Consider keeping "privilege log"
  - Keep unredacted originals in your file
- If the material is attached, explain the attachment and also refer to it in your report.

# The Final Product

Your report should be:

- Easy to read (e.g., use the active voice, good grammar, etc.)
- No typos
- Use consistent terminology
- Look professional (e.g., professional font, formatting, etc.)
- Consistent with other reports issued by your office
- Able to stand on its own as a full description of how the matter was brought to your attention and what was done to address the concerns to the point your investigation reached its conclusion.

# Questions?