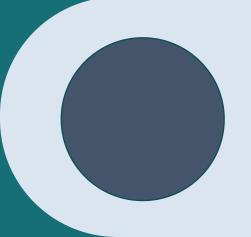
## Title IX Investigator Annual Training

August 8, 2023









### Meet Our Team



Sean Somermeyer
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## Ballast Offerings





Drafting & Updating

Policy and process development and review

2

Training

Legally compliant Title IX and nondiscrimination trainings tailored to individuals' roles and knowledge base

3

Investigators, Alternative Resolution Facilitators, & Decisionmakers

Trained, skilled, experienced, and practical



Interim Roles

Interim services to fill gaps in various Title IX positions



Advice & Coaching

Legal and nonlegal advising



## Ballast Philosophy & Approach



Collaborative partnerships that honor institutional knowledge and values



Practical solutions that are compliant and make sense for your specific institution and community



Reasonable and fair pricing that acknowledges the financial constraints institutions are facing



First-hand experience and understanding from individuals who have previously worked within higher education institutions



## Agenda

- Title IX Legal Overview
- Scope of Title IX & Definitions
- Title IX Process Overview
- Beginning the Investigation
- Evidence
- Interviewing
- Trauma-Informed Considerations
- Investigation Report
- Next Steps in the Process
- Decision-Making Overview
- Discussion & Questions



## Title IX Legal Overview

- Title IX basics and key terms
- Title IX personnel and their roles
- Training mandates
- VAWA Offences
- FERPA
- MN State Law





No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

20 U.S.C. § 1681



### Title IX Basics

Prohibits gender discrimination in education programs and activities

Applies to students, employees, volunteers, etc.

Includes sexual harassment



### Sexual harassment =

conduct on the basis of sex that satisfies at least one of the following:

#### Quid Pro Quo

 Employee conditions an outcome on an individual's participation in unwelcome sexual conduct

#### Hostile Environment

 Unwelcome conduct that is so severe, pervasive, and objectively offensive that it denies a person equal access to a program or activity

#### **VAWA Crimes**

- Sexual assault
- Dating Violence
- Domestic Violence
- Stalking



## Key terms

- Reporting party/Complainant: individual who experienced the sexual harassment
  - Third-party Report: A report from someone else about an individual who experienced sexual harassment
  - Witness: An individual who may have knowledge about the incident
- Responding party/Respondent: individual accused of sexually harassing someone
- Grievance process: the investigation process and/or informal process used by an institution to address formal complaints of sexual harassment
- Formal complaint: document requesting the institution to move forward with the grievance process. Can be filed by either the reporting party or the Title IX Coordinator.
- Supportive measures: resources or accommodations that help either party in the aftermath of a report and/or during a grievance process. Access to supportive measures is not contingent upon pursuing a grievance process.



### Essential Compliance Elements

#### Institutions must:

- Respond promptly in a manner that is not "deliberately indifferent"
- Investigate formal complaints
- Follow and publish the grievance process outlined in the regulations
- Take action to stop the harassment, prevent the recurrence, and remedy the effects
- Designate a Title IX Coordinator
- Publish a Notice of Nondiscrimination
- Disseminate a policy prohibiting sex discrimination
- Offer supportive measures
- Conduct training for Title IX personnel and those with heightened responsibilities
- Train students and employees





## Title IX Coordinator: Role and Responsibilities

Must designate at least one Title IX Coordinator

Should have significant autonomy and seniority

Consider how the Coordinator best fits into the institution's org chart

- Creates and implements legally compliant policy and procedures
- Oversees response to reports and formal complaints as well as informal and grievance procedures
- Implements supportive measures and facilitates connection to resources
- Ensures sanction and remedy compliance
- Training oversight
- Recordkeeping



# Investigator: Role and Responsibilities

- Can be internal or external
- Burden to collect sufficient evidence
- Conducts fair, prompt, and impartial investigations
  - Identifies witnesses and evidence
  - Provides parties opportunity to submit evidence
  - Identifies factual issues
  - Maintains records, recordings, etc.
  - Creates an investigation report
- Works in coordination with the Title IX Coordinator, particularly around evidence and report review
- Maintains impartiality and avoids bias
- Receives annual training



## Decision-makers: Role and Responsibilities

## Hearing Panel Members/Adjudicator(s)

- Attends and conducts a live hearing
- Determines whether the institution's policy has been violated under the appropriate standard of evidence
- Determines sanctions, if necessary
- Writes a Notice of Decision that includes a rationale for the finding
- Avoids bias and conflicts of interest
- Receives annual training





#### Appeal Officer(s)

- Determines a ruling on a party's appeal by reviewing appropriate investigation/hearing materials
  - Not a "re-do" of the investigation
- May meet with parties
- Writes a Notice of Decision that includes a rationale for the outcome
- Avoids bias and conflicts of interest
- Receives annual training

## Training Mandates

#### **Definitions**

- Sexual harassment
- Education program or activity

#### Other

- Institutional policies and procedures
- Any technology for live hearings
- Training materials must be posted on institution's website and maintained for seven years
- Training cannot rely on sex stereotypes

#### Concepts

- Conducting an impartial investigation and hearing process
  - ... While protecting the safety of complainants and promoting accountability
- Serving impartially, without bias, and without conflicts of interest
- Relevance regarding questions, evidence, and the investigation report
- Dynamics of sexual assault, dating violence, dating violence, and stalking



## The Clery Act and the Violence Against Women Act (VAWA)

#### Clery

- Consumer protection law
- Institutions must provide accurate, timely, and complete information on specific types of crimes that occur on or adjacent to campus, including sexual assault
- Clery Act violations come with significant fines

- Policy, procedure, prevention, and training requirements for
  - Dating violence
  - Domestic violence
  - Stalking
  - Sexual assault
- Requires Annual Security Report including institution's policies and crime statistics

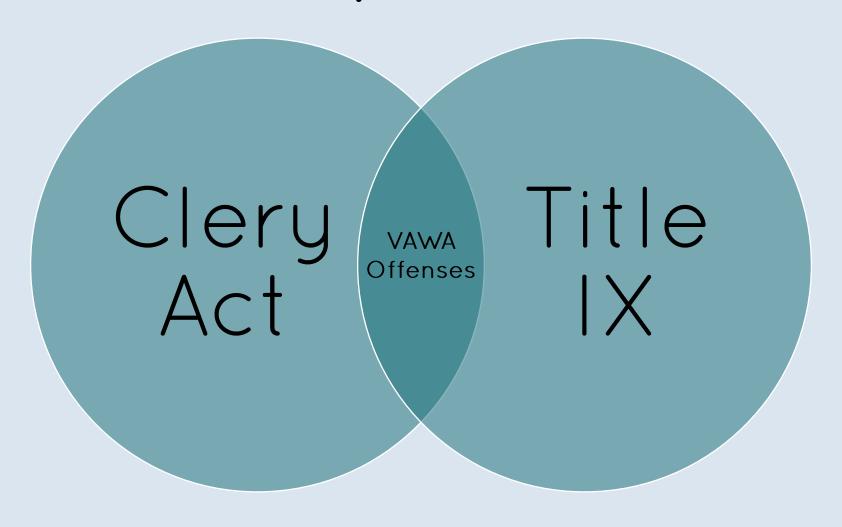
#### **VAWA**

#### Institutions must:

- Prohibit sexual assault, dating violence, domestic violence, and stalking
- Provide clear definitions for the above misconduct and for consent
- Incorporate training and prevention programs for administrators, students, and employees



### Relationship between Laws





#### What about FERPA?

- Right to know what records exist
- Right to dispute accuracy
- Right to control access
  - Legitimate educational interest
  - Reporting Party can know determination
  - Disciplinary sanctions when found responsible for sexual misconduct
- VAWA trumps FERPA



### MN State Statute 135A.15

#### Institutions must:

- Incorporate sexual harassment policy requirements
- Inform victims of their rights
- Include reporting procedures and disciplinary processes in their policy
- Incorporate an amnesty policy
- Coordinate with law enforcement
- Health services must be confidential and screen for sexual violence and harassment

- Provide an online reporting system that permits anonymous reports
- Report annual statistics on sexual assault
- Data privacy stipulations
- Training requirements for administrators, campus security, and students
- Full Statute Link



## Scope of Title IX & Definitions

- Defining sexual harassment
- Defining education program or activity
- Parties' relationships with the institution
- When Title IX does <u>not</u> apply



# Sexual harassment = conduct on the basis of sex

#### Quid Pro Quo

 Employee conditions an outcome on an individual's participation in unwelcome sexual conduct

#### Hostile Environment

 Unwelcome conduct that is so severe, pervasive, and objectively offensive that it denies a person equal access to a program or activity

#### **VAWA Crimes**

- Sexual assault
- Dating Violence
- Domestic Violence
- Stalking



#### Hostile Environment Considerations

- Perspective of a "reasonable person" (consider age, abilities, positions of authority, etc.)
- Is it "severe, pervasive, and objectively offensive"?
- Does the conduct deny "equal access"? Does not need to be a total or complete loss of access, but equal?
- Consider the type of misconduct, how often it happened, where it took place, etc.





### Examples of Sexual Harassment

- Unwelcome sexual flirtations, advances, touches, or propositions
- Verbal abuse of a sexual nature
- Requests for sexual favors
- Recording video or photographs of a sexual nature without consent
- Cyber harassment
- Punishing or threatening to take adverse action against a subordinate or student for refusing to comply with sexual demands



### Sexual Assault

Any sexual act directed against another person, without the consent of that person, including instances where the individual is incapable of giving consent.

**Rape:** Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without their consent, including instances where they are incapable of giving consent because of age or temporary or permanent mental or physical incapacity.

**Fondling:** The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

**Incest:** sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law



### Sexual Assault contd.

Any sexual act directed against another person, without the consent of that person, including instances where the individual is incapable of giving consent.

**Statutory Rape**: Nonforcible sexual intercourse with a person who is under the statutory age of consent

**Sexual assault with an object:** The use of an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

**Sodomy:** Oral or anal sexual intercourse with another person, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity



#### Consent

Institutions are not required to maintain a particular definition of consent; however, they should include a definition in their policy.

Consent is words or overt actions by a person clearly and affirmatively communicating a freely-given, present agreement to engage in a particular form of sexual contact.



## Incapacitation

- An individual's physical and/or mental inability to make informed, rational judgments
- Incapacitated individuals cannot give consent to sexual contact
- Intoxication vs. Incapacitation
- Examples include: sleep, unconsciousness, or intermittent consciousness
- Signs include: slurred speech, difficulty walking, vomiting
- May also exist due to mental or developmental disability
- Frequent decision point for adjudicators: 1) Was the complainant incapacitated; and 2) did or should the respondent (or a reasonable person) know/have known?



## Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Dating violence does not include acts covered under the definition of domestic violence.



#### Domestic Violence

A felony or misdemeanor crime of violence committed:

- By a current or former spouse or intimate partner of the Complainant;
- By a person with whom the Complainant shares a child in common;
- By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
- By a person similarly situated to a spouse of the Complainant under domestic or family violence laws
- By any other person against an adult or youth Complainant who is protected from that person's acts under domestic or family violence laws.



## Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others; or suffer substantial emotional distress.

Course of conduct means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.



## Sexual exploitation

A form of sexual harassment that involves one or more of the following behaviors committed for any purpose, including sexual arousal or gratification, financial gain, or other personal benefit:

- taking sexual advantage of another person without consent;
- taking advantage of another's sexuality; or
- extending the bounds of consensual sexual contact without the knowledge of the other individual.

What are some examples of sexual exploitation?



#### Retaliation

Any intimidation, threats, coercion, or discrimination against any individual because the individual has made a report, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.



## Education Program or Activity under Title IX

#### What does it mean?

- Locations, events, or circumstances...
- On or off campus...
- Over which the institution exercises substantial control over the context in which the harassment took place.

#### Additional requirements:

- Must have occurred within the United States.
- Includes conduct that occurred in any building owned or controlled by an officially recognized student organization.
- Institution must also have exercised substantial control over the responding party.



## Parties' relationship with the institution

#### Reporting Party

Must be participating or attempting to participate in the institution's education program or activity at the time of filing a Formal Complaint.

\*Broad interpretation of "participating or attempting to participate in"

#### Responding Party

An institution's ability to take disciplinary action under Title IX is limited when the Responding Party is not affiliated with the institution.

\*But... should still consider appropriate action steps to facilitate reporting party's participation in education programs and activities.

What about a reporting party from outside the institution who reports against a current student or employee?



## A Note about Sex-Based Discrimination

Discrimination based on sex or gender (i.e., adverse or preferential treatment based on someone's sex, gender identity, sexual orientation, etc.) is still prohibited under Title IX; however, institutions are not obligated to implement all the same Grievance Process requirements as stated in the regulations in order to address and/or investigate those types of concerns.





- Conduct that occurs outside the US; however, VAWA might still apply in these instances
- Sexual harassment that is not sufficiently severe, pervasive, and objectively offensive
  - Examples?
- Sexual harassment that occurs outside an institution's education program or activity



#### Title IX Process Overview

- General process phases
- Due Process Rights of the Parties
- Notice of Allegations
- Consolidation of Complaints
- Intersections with Law Enforcement



#### Reporting Methods

Direct
communication
from the reporting
party to the Title IX
Coordinator

Third-party reports from faculty, concerned friends, RAs, etc.

Online reports

Anonymous reports



### Initial Conversation with a Reporting Party

#### **Process Options:**

- Law enforcement report
- Grievance Process
  - Informal Process
- Taking time to decide what to do next, if anything
- Potential for TIXC Formal Complaint
- Preservation of evidence
- Other options permitted by your policy, if not Title IX?

#### **Supportive Measures:**

- Cannot be punitive
- No-contact directives
- Accommodations for housing, classes, etc.
- Confidential resources
- Community resources
- Campus security escorts
- Etc.

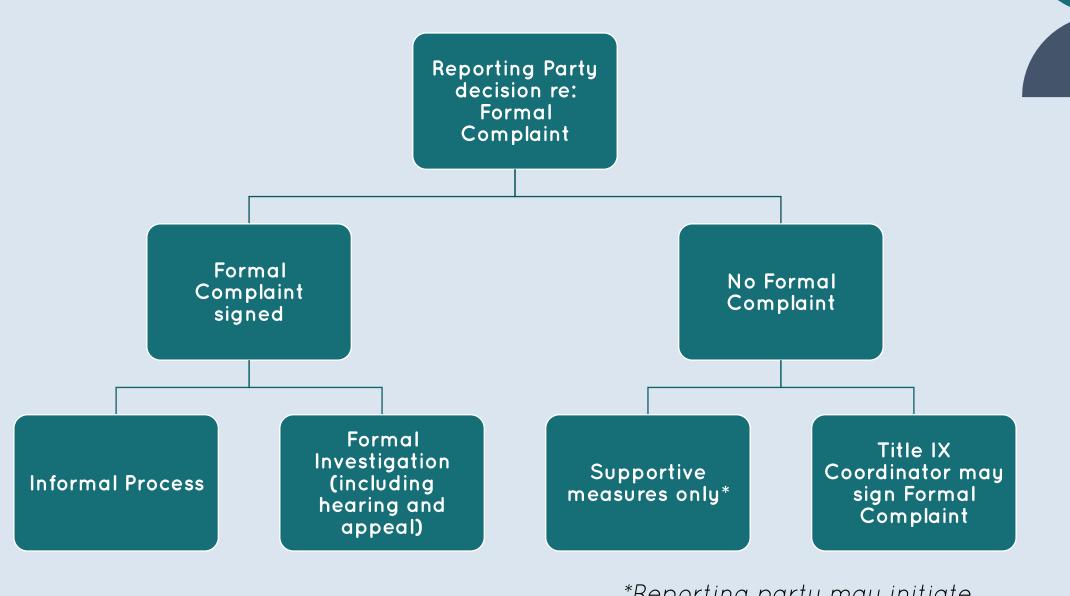
\*Explain that access to these resources is not contingent upon moving forward with a formal complaint

#### **Next steps for TIXC:**

- Does the reported incident fall within the scope of your policy? If so, which process would apply?
- Notify others at the institution who need to know?
- Timely warning?
- Emergency removal?
- TIXC Formal Complaint if reporting party declines Grievance Process?









\*Reporting party may initiate Formal Complaint in the future.

#### The Informal Resolution Process

- Can take the shape of shuttle diplomacy, mediation, etc.
- The opportunity to pursue Informal Resolution can be available up until a responsibility determination is made.
- It is possible that an investigator would need to pause/stop their investigation while the parties attempt Informal Resolution OR that an investigation would follow an unsuccessful Informal Resolution.
- Investigators should not utilize any information that may have been gleaned by the Informal Process facilitator as part of the investigation – keep these processes separate.



#### Due Process & Rights of the Parties

Notice of policies, meetings, investigation, outcome, etc.\* Supportive measures (cannot penalize responding party in any way unless and until they are found responsible)

Impartial Title IX personnel

Ability to discuss allegations

Advisor of choice

Opportunity to identify witnesses and provide evidence

Ability to review evidence and investigation report

Ability to appeal

\*Must include that the responding party is presumed not responsible until a determination is made at the end of the grievance process.



#### Notice of Allegations

- Notice of grievance process and the informal process
- Information about the allegations known at the time (names, conduct constituting sexual harassment, date and location of incident)
- Responding party presumed not responsible, and that the determination of responsibility occurs at conclusion of the process
- Rights of parties to an advisor, to review evidence, etc.
- Any code of conduct provision prohibiting knowingly making false statements/submitting false information
- Provide with sufficient time for parties to prepare a response
- \*If additional allegations arise during the investigation, TIXC needs to provide an amended or additional notice to both parties. Investigators should therefore alert TIXCs immediately if they learn of any new allegations from either party.



#### Consolidation of Complaints

"An institution may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances."



#### Cross-complaints

Does the process change at all when both parties are accusing each other of misconduct?





### Intersections with Law Enforcement

- Potential for evidence from law enforcement to be incorporated into Title IX investigation (police reports, medical forensic exam reports, etc.)
- Even with concurrent processes, it is oftentimes difficult to get evidence from open law enforcement cases
- Investigations are sometimes delayed in order to accommodate law enforcement investigations





# Beginning the Investigation

- Investigation process overview
- Role of the Coordinator during Investigations
- Conflicts of interest & bias
- Investigation philosophy
- "Reasonably prompt" timeframes
- Investigation strategy
- Scenarios



#### The Investigation





#### Investigation Process

Title IX Coordinator determines who the investigator will be

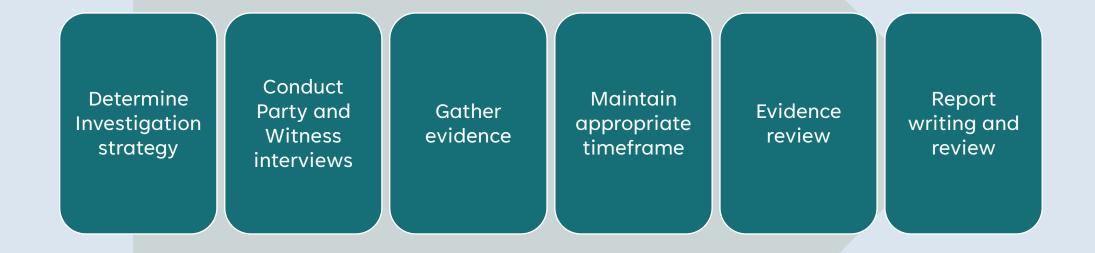
Investigator determines investigation strategy (in coordination with TIXC)

Witness and party interviews

**Evidence collection** 



### An Investigator's job is to conduct a thorough, prompt, and impartial investigation. Steps include:





### Responsibilities of the TIXC During an Investigation

- Update Notice of Allegations if new allegations arise
- Dismiss complaints if information learned by investigator constitutes a dismissal
- Assist with any unexpected information learned by the Investigator (new potential complainants, significant mental health concerns, unrelated conduct concerns, etc.)
- Help hold Advisors accountable to institutional guidelines
- Assist with investigation strategy if needed
- Provide notices of meetings to the parties

- Provide contact information to parties and witnesses, and help with scheduling interviews if needed
- Help setting up interview rooms/virtual meeting links if needed
- Transmit any evidence already provided by the parties to the Investigator
- Facilitate the evidence and report review stage
- Work with Investigator regarding investigation timeline and close of evidence









Biases *for* or against reporting or responding parties individually or generally



A material connection to the parties, witnesses, or issues that would cause a reasonable person to question partiality



Immediately disclose any potential conflicts of interest to the Title IX Coordinator



Conflicts of interest may be raised on appeal



Incorporate an avenue for parties to raise potential conflicts of interest early in the process



#### Avoiding Bias

Bias = tendency to like or dislike; may involve stereotypes

Might be implicit

Avoid prejudgment of the facts



#### Frequent biases

- Race
- Gender
- Gender identity
- Gender expression
- Sexual orientation
- Religion

- National origin
- Ethnicity
- Age
- Disability
- Marital status
- Veteran status



### Investigation Philosophy





### Investigation Legal Requirements

Regs say the institution must gather evidence "sufficient to reach a determination of responsibility."

Preamble says institutions must "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."







1. An investigation involves an impartial collection of information aimed at assisting the decision-maker in arriving at a conclusion.







2. Not "sides" of a "story."

Instead, we're doing our best to understand: What happened?

(I use the word "account.")







3. I take in and review anything offered (for the most part) unless it is clearly beyond the scope of the investigation or not related.







4. Transparency—I let parties know as I take in evidence and always give them the opportunity to respond.







5. Evaluating and weighing evidence and determining credibility is up to decision makers.

But investigators need to think about these issues and test evidence during the investigation process.







6. Because a Title IX investigation is not a criminal investigation, we may not have access to some kinds of information or some witnesses.

Goal is to be thorough, complete within our powers, and fair.





#### What does "prompt" mean?



Regs require "reasonably prompt" timeframes



Temporary delays for "good cause" are ok, as long as they're accompanied with written notice of the delay to the parties



Incorporate grievance process timeframes into your policy, but build in opportunity for discretion (case complexity, law enforcement investigation, breaks, etc.)



Consider incorporating weekly updates to the parties



#### Investigation Strategy: Initial Steps

Evaluate intake materials

Think through types of evidence available

Think about any time constraints – evidence that may disappear?

Create a list of witnesses

Think through challenges to evidence collection

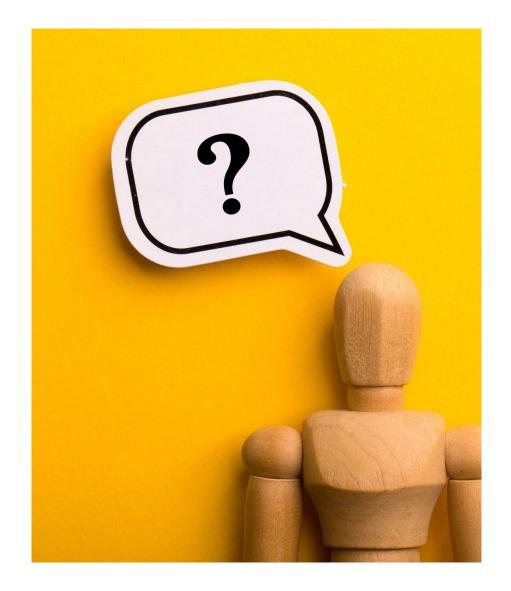




Prepare a file that allows easy tracking, including evidence log, witness list with contact info and dates, etc.







Identify the likely issues in the case, e.g. incapacitation, coercion, consent.

Think through the information needed to make good decisions about those issues, then draft questions for each witness focused on eliciting that information.





#### For example: Consent

What clear words or actions by the complainant gave the respondent permission for the specific sexual activity that took place?

Collect information that will help decision makers arrive at a conclusion in the context of the Policy's definition.



#### Scenario

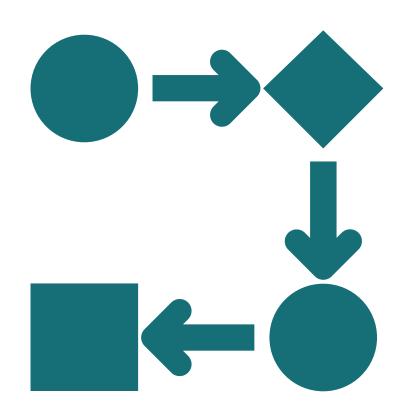
Kris and Petra met on Tinder, where they exchanged messages and agreed to meet up "for some naked smash." Petra went to Kris's dorm room, where they conversed for a few minutes, then started making out while lying down on Kris's bed. During the investigation, Petra reported that they each removed their own clothing. Petra told the investigator they "both just started kissing" and that she "didn't mind" when Kris started touching her chest and buttocks. She said they were "both into it," but then Kris started putting their fingers into her vagina, which she did not consent to and did not want. She said she told Kris to stop, but they took "a really long time" before they removed their fingers. She said she thinks she had to tell Kris to stop "at least twice." Petra said she then told Kris she was not okay with what was happening, and she got up, got dressed, and left. Kris told the investigator that Petra "essentially agreed" in their Tinder messaging to have sex, so "anything was on the table." Kris also said Petra was "enjoying herself and into it" and that they understood from Petra's participation in the touching and kissing that she consented to vaginal contact. Kris said that as soon as they heard Petra say "stop doing that," they removed their fingers from her vagina.



#### Scenario

Michael and Jenna dated for six months last year. On a Saturday in May, they attended their college's "spring fling"—an outside music festival that starts at 2 p.m. and goes until 10 p.m. They started drinking vodka (which Michael provided) from water bottles when they arrived at the festival around 2 p.m. Jenna told the investigator that she "kept drinking from my bottle pretty regularly" until around 7 p.m., when she and Michael left the festival. She said she also drank water during this time, but she did not eat anything. (Jenna is 5'6" and weighs 115 pounds.) The water bottle was a standard 16-ounce bottle, and it was empty by 7 p.m. The day was unseasonably warm and sunny, and they both got sunburned. When they left the festival at 7 p.m., they went to Michael's room, where they had sex. Michael agrees with this account of the day. Jenna tells the investigator she was blacked out at that point, does not remember having sex with Michael, but does remember waking up naked in his bed around midnight. At that point, they joked about her being "really wasted" while they were at the festival. Michael says he remembers joking about that, but says Jenna was walking and talking "pretty normal" when they went to his room—she was just "a little goofy and more outgoing." Michael produces texts from Jenna with a timestamp of 5:38 p.m., indicating she had gone to the bathroom and was trying to find him. The texts are coherent.

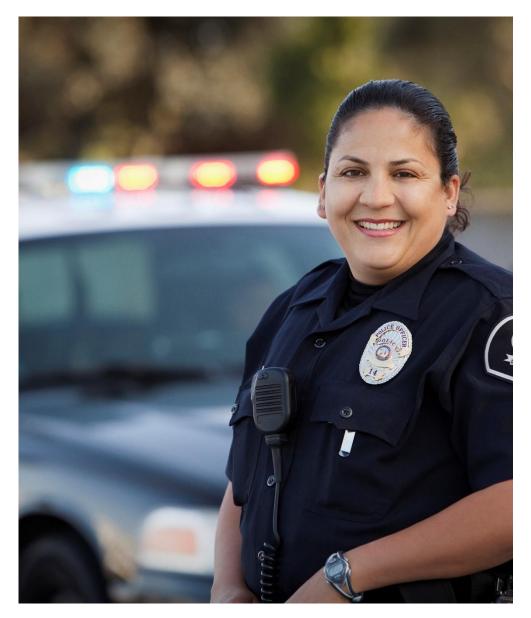




Loop through this process as many times as needed during the investigation.







# Consult with others who may have knowledge

Public safety officers can be a big help.

Who are your go-to people that help you think through evidence?



### Evidence

- Types of evidence
- Taking in evidence & evidence guidelines
- Relevance
- Evidence considerations
- Weight of evidence
- Credibility?



## Types of Evidence

Direct or testimonial evidence

Documentary evidence

Real evidence

Circumstantial evidence

Hearsay evidence Character evidence



## Evidence Examples

- Interviews or statements
- Texts
- Emails
- Social media posts
- Journal entries or letters
- Dating apps

- Videos
- Photographs
- Public Safety reports•
- Expert reports
- Medical reports
- Keycard swipes

- Voicemails
- Wi-Fi pings
- Phone records
- Polygraph results
- Clothing
- Physical items (weapons, trash, etc.)





### Evidence Guidelines

- All relevant evidence both inculpatory and exculpatory must be objectively evaluated and considered.
- No "gag-orders"
- No restriction on parties gathering evidence
- Equal opportunity to present witnesses and evidence, and to review all evidence
- No limits to the types or amount of evidence which may be offered by parties



### Standards of Evidence

- Preponderance of the evidence: "more likely than not" that the policy was violated (50.1% and above).
- Clear and convincing standard: highly and substantially more likely to be true than untrue.



#### Overview of taking in evidence

Remember that taking in evidence/information does not mean that the evidence must or will be used in the Investigation Report or in the decision-making process.

Throughout the process, including at the decision-making stage, the evidence will be evaluated for

- Reliability
- Relevance
- Weight





### No General Rules of Evidence Apply in Title IX Processes

"A school may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence."

(Regs Preamble)

(But be aware of limitations set out in the Regs.)





## Under the Regs, a school must exclude:

- •A party's treatment records (unless the party gives prior written consent)
- •Information protected by a legally recognized privilege
- •Questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior, **unless** offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent





# Under the Regs, a school must accept

- Expert witness testimony, reports, or findings.
- Evidence related to character.
- Evidence related to the findings of a polygraph examination.
- Evidence gathered by law enforcement during a concurrent criminal investigation, if available.



#### But...

...admissibility of relevant evidence is different from weight, reliability, and/or persuasiveness of that evidence. No rules on how relevant evidence must be evaluated for weight or reliability.

School may adopt rules on weight, reliability, credibility if rules do not conflict with the Regs and apply to both parties.





## Example

A school MAY adopt a rule regarding the weight (but not the admissibility) of polygraph evidence, as long as the rule applies to complainants and respondents equally.



### Relevant vs. Related Evidence

#### Relevant

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."

Federal Rules of Evidence 401

#### **Directly Related**

Directly related evidence "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."

34 C.F.R. § 106.45(b)(5)(vi)





## Relevant Evidence

Tends to prove a fact at issue in the hearing, such as

- whether a disputed incident occurred;
- witness credibility;
- the impact of any misconduct on the complainant (e.g. mental or emotional distress, physical injury, or academic difficulty); and
- what sanctions or remedies might be appropriate.





## Relevant Evidence

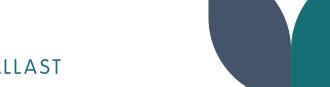
#### In summary:

Does the evidence tend to prove or disprove the allegations?

A determination regarding relevancy can rely on logic, experience, or science.

FED. R. EVID. (401), Legal Information Institute, Cornell Law School.

https://www.law.cornell.edu/rules/fre/rule\_401





## Directly Related Evidence

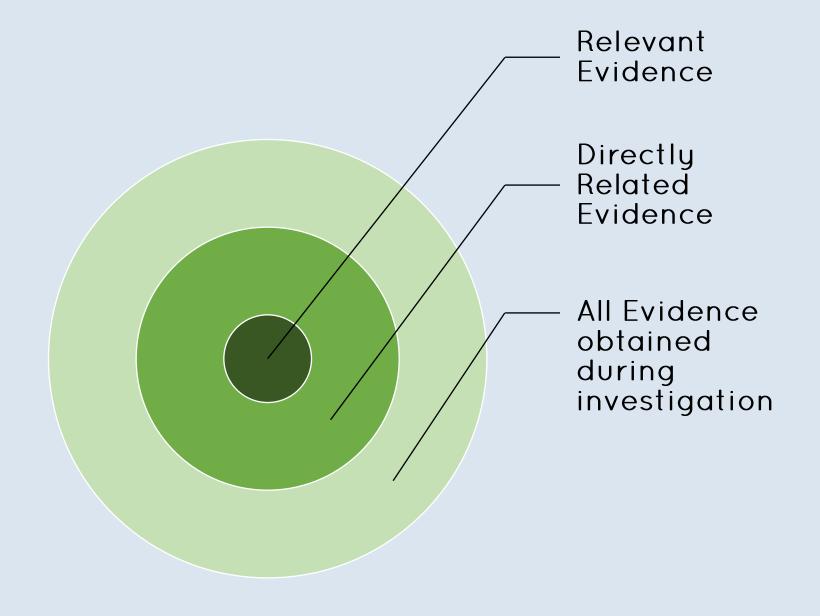
No given definition.

• Common sense evaluation.

• Arguably a very wide net.









## Examples: Relevant or Related?

What the Complainant had for dinner

Fact that the parties are in the same math class

Witness
statement that
the skies were
clear on the night
of the incident



# Direct or testimonial evidence: personal observation or experience

- •Interviews or statements
- •Generally, a primary source of information in a Title IX investigation





Questions about Direct or Testimonial Evidence Accept written statement instead of interview?

What about uncooperative witnesses?



## Documentary evidence: supportive writings or documents

#### A long list of examples:

- Texts
- Emails
- social media posts
- Journal entries
- Videos
- Public safety reports

- Expert reports
- Medical reports
- Keycard swipes
- Wi-Fi pings
- Polygraph results
- Phone records
- Etc.



### Documentary Evidence: Thoughts and Questions

Can often be especially persuasive.

Think about evidence here that might be time sensitive and act accordingly (security videos, card swipes, texts, social media).

Validate certain types of documents, like journals and texts.



## Documentary Evidence: Thoughts and Questions





Do I have to read through all these texts?



## Documentary Evidence: Thoughts and Questions

Should I seek out experts?





#### "Real" Evidence: Physical Objects

- Clothing
- Weapons
- Trash
- Miscellaneous items









Do I have to take things in?



What do I do with objects I'm given?



Work with the Title IX Coordinator on a storage solution for the institution.



### Real Evidence: Thoughts and Questions



### Hearsay Evidence

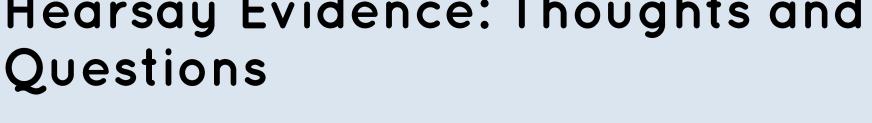


**Definition:** Testimony given by a witness who relates not what they know personally, but what others have told them, or what they have heard said by others.





## Hearsay Evidence: Thoughts and





No prohibition against accepting it in Title IX processes.



Fact that it is hearsay can be taken into account in weighing the evidence.



# Character Evidence: Thoughts and Questions



Under current Regs, must take character evidence in if it is offered.



Should be weighed accordingly.



I would not independently pursue character evidence.





# A few words about Circumstantial Evidence

#### Circumstantial evidence is:

Indirect evidence that does not, on its face, prove a fact in issue but gives rise to a logical inference that the fact exists.

#### Another way to think about it:

Evidence not drawn from direct observation of a fact in issue.





Anything that is not direct evidence—direct observation—is circumstantial.

Circumstantial evidence can be powerful.

In the legal context, there is no distinction between circumstantial evidence and direct evidence in terms of weight or importance.

**Examples:** security videos, card swipes, fingerprints, text conversations, weapon at the scene, etc.

#### BALLAST

## Circumstantial Evidence



Weight of evidence is the believability or persuasiveness of evidence in probative value, not the quantity or amount of evidence. Weight of evidence is not determined by mathematics but depends on its effect in inducing belief.

Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/wex/weight\_of\_evidence



### Remember...

Schools can make rules about how much weight decision makers should afford certain kinds of evidence.

#### Examples:

- Polygraphs
- Character evidence

Parties may argue about the weight of certain evidence during the hearing or in written statement.



# Which kinds of evidence carry the most weight?

Direct or testimonial evidence

Documentary evidence

Real evidence

Hearsay evidence

Character evidence





## Assessing Credibility

**Credibility:** The extent to which the decision-maker can rely on a witness's testimony to be accurate and helpful in their understanding of the case.



# EEOC Statement on credibility in Sexual Harassment Cases (1999)

#### Inherent plausibility

Is the testimony believable on its face? Does it make sense?

#### Demeanor

Did the person seem to be telling the truth or lying?

#### Motive to falsify

Did the person have a reason to lie?

#### Past record

Did the alleged harasser have a history of similar behavior in the past?

#### Corroboration

Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with them at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?





### Remember!

None of these factors are determinative as to credibility.

#### For example:

- the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility.
- the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that they did so again.



## Assessing Credibility Contd.

#### Possible Factors:

- Logic/Consistency of information provided
- Corroborating evidence
- Consistency of information substance of statements
- Plausibility of all information given
- Amount of detail provided. Factual detail assessed against assertions that have no supporting detail. (But consider whether there may be other reasons.)





#### A Note about Demeanor

Be careful about relying on demeanor when it comes to credibility.

Much of what you hear about "how to tell if someone is lying" is not based on actual research and has been debunked or is considered pseudoscience.







#### It's not easy to spot a liar

Associated with lying X No significant relationship Associated with truth-telling

CUES	ASSUMED RELATIONSHIP	ACTUAL RELATIONSHIP
VOCAL		
Hesitations (use of speech fillers, e.g., "ah," "um," "er," "uh," and "hmmm")		X
<b>Speech errors</b> (grammatical errors, word or sentence repetition, false starts, sentence change, sentence incompletions, slips of the tongue, etc.)	<b>Ø</b>	X
High-pitched voice		
Speech rate (number of spoken words in a certain period of time)	X	X
Latency period (period of silence between question and answer)	X	X
Pauses (silent, filled, or mixed)		X
VISUAL		
Gaze aversion (looking away from the conversation partner)		X
Smiles (smiling and laughing)	X	X
Facial fidgeting (face touching or rubbing hair)		X
Self-fidgeting (touching, rubbing, or scratching body or face)	<b>Ø</b>	X
Fidgeting (undifferentiated)	<b>Ø</b>	
$\begin{tabular}{ll} \textbf{Illustrators} & (\textbf{h} \textbf{a} \textbf{n} \textbf{d} \textbf{a} \textbf{r} \textbf{m} \textbf{m} \textbf{o} \textbf{v} \textbf{e} \textbf{m} \textbf{e} \textbf{s} \textbf{i} \textbf{g} \textbf{s} \textbf{e} \textbf{d} \textbf{s} \textbf{o} \textbf{r} \textbf{o} \textbf{s} \textbf{o} \textbf{e} \textbf{e} \textbf{e} \textbf{e} \textbf{e} \textbf{e} \textbf{e} e$	X	<b>Ø</b>
Leg and foot movements		X
Posture shifts (movements made to change seating position)	<b>Ø</b>	X
Head movements (head nods and head shakes)	<b>Ø</b>	X
Eye blinks (blinking of the eyes)	<b>Ø</b>	X





#### A Note about Past Record

Also be careful about relying on a party's past record.

Determinations should be made (mostly) based on the evidence in front of you.







#### A Note about Memory



Memory errors do not necessarily destroy credibility

Most people's memories are not that great

Trauma affects memory

Substance use may affect memory



#### A Note about Eyewitness Accounts

Can be powerful.

#### BUT

Well-intentioned eyewitness testimony can be problematic because our brains are not always great at accurately interpreting and remembering what we see.

And eyewitness testimony can be "contaminated."





#### Assessing Credibility: Final Thoughts

- It's important to have **reasons** supporting credibility decisions.
- Remember that unlikable is not the same as not credible.
- Credibility determinations should not be based on gender, sexual orientation, race, ethnicity, nationality, ability, religion, etc.
- Reach conclusions based on the evidence/information provided, NOT based on speculation, rumors, character assessment, etc.





#### Scenario One

In the first interview, the Complainant, Jessica, tells you that she and the Respondent, Max, went to her room after a party. Jessica also shares that the incident occurred in her room, and she was blacked out during much of the night. During a second interview, Jessica tells you she now thinks the incident occurred in Max's room. Jessica and Max live in the same residence hall.

Jessica's roommate, Chelsea, tells you Jessica and Max came to Jessica and Chelsea's room for about 30 minutes around 11 p.m., then left. Chelsea does not know where they went after that. Chelsea also tells you that Jessica went to another male student's room earlier in the evening. Chelsea says Jessica told her that she intended to hook up with that male student that night. Chelsea says she stayed in her room all evening studying and did not drink that night.

In your interview with her, Jessica did not mention going to the other student's room earlier in the evening. In the second interview, you ask her about this. She denies that she went to the other student's room and denies telling Chelsea that she planned to hook up with that student.

In your interview with Max, he tells you he and Jessica left a party around 11 p.m. and went directly to his room, where they had consensual sex. He tells you Jessica was drunk, but she was talking coherently and did not have any trouble walking to the residence hall from the party.

The incident occurred in September, and it is now May of the following year.



#### Scenario Two

The Complainant, Alex, tells you he vaguely remembers kissing the Respondent, Justin, in the yard outside a campus house where a party was occurring on the night in question. Alex says he thinks he initiated and consented to the kissing. He says he did not consent to Justin unzipping his pants and touching his penis, and he remembers that when Justin did this, he pushed Justin away. He says Justin was quite intoxicated and fell to the ground at that point but was uninjured. He says Justin swore at him, then got up and walked away. Alex says he does not remember much about the evening, including how he got to the party, but he remembers this interaction because it was so upsetting to him and "sobered him up" for a few minutes. He does not remember how he got home from the party.

Justin tells you they were drunk but "functional" at the party. They tell you they talked with Alex at the party inside the house for a few minutes but did not meet up with Alex outside the house. Justin says they left the party on their own around midnight and walked home.

After you had initial interviews with each party, another student who lives in the house where the party occurred comes to see you. She tells you she heard through the campus rumor mill about the incident between Alex and Justin. She gives you Justin's key ring, which includes his campus ID card, which she says she found in the side yard of the house the next day.



## Interviewing

- Interview preparation and set up
- Interviewing basics
- Questioning skills
- Interview process
- Interviewing the Complainant
- Interviewing the Respondent
- Witness interviews
- Working with Advisors
- Wrapping up the interview stage



#### Interview preparation

- Review Notices of Allegations to get general overview
- Think through who you need to talk to and in what order
- Know what is at issue (as best you can)
- Prepare questions for each interview in advance
- Background check (Google) parties and witnesses





### Physical set up

- In person or virtual?
- Importance of private, comfortable, neutral space
- If in person: water, fidget toys, candy, nice chairs
- Ensure there's enough space for the advisor
- If virtual, ask if they are in a private, comfortable space





#### Making an investigation record

- Record the interview. Parties have the right to listen to the recording as part of the evidence review.
- OK to take notes if that helps you.
- Maintain all investigation files in coordination with the Title IX Office.
- Investigation Reports and notes are occasionally subpoenaed by a court.





### Interviewing Basics

Open-ended questions initially, followed by questions aimed at detail, clarification, and depth.

Eye contact; listening posture.

Non-verbal feedback and encouragement to talk.

Non-judgmental, non-accusatory tone and language.

Non-reactive to difficult revelations.



## Questioning Skills

Simple, direct questions

No compound questions

Don't assume an answer in how question is phrased

Have a purpose for asking every question



#### Examples

- Help me understand . . .
- Talk to me about . . .
- Tell me more about . . .
- A few minutes ago, you told me x, but I think you just told me y. I want to make sure I have that right . . .
- There seems to be disagreement on x. Can you help me make sense of that?





#### Initial Interview Phase





Establish rapport to the extent possible but try to avoid small talk.

Have a checklist of information to cover initially.





#### Witness Information Checklist

- Are you in a private place where you can talk freely?
- RECORDING pursuant to College's policy, this conversation will be audio recorded today. Parties will be able to review the recording as part of the evidence review process.
- ADVISOR IF ONE NOT PRESENT
- PRONOUNS, NAME, ETC—How should I address you?
- MY ROLE
  - o I am an attorney, but not representing you, the College, or the parties; our conversation today is not privileged.
  - o I am retained by the College to conduct a neutral, fact-finding investigation. It is not my job to determine whether there has been a policy violation
  - O Currently, I am gathering relevant facts and will prepare a report of those facts for the parties to review before a panel/decision maker determines whether there has been a policy violation. The panel will use my report to help them make a determination after a hearing.
  - Your name and any relevant information you provide to me will be a part of the report. You may be called as a witness at the hearing.
- College prohibits RETALIATION in any way against anyone who participates in this process. IF you
  witness, experience, or otherwise have concerns relating to retaliation, please contact the Title IX
  Coordinator.
- AMNESTY POLICY
- Confidentiality
- QUESTIONS, BREAKS, ETC. If you need clarification on anything I ask you today, please let me know. Please let me know if you need a break, water, etc.
- I request that you commit to telling me the truth today, and throughout this process.
- "I don't know" or "I don't remember" is an okay answer.
- If Northfield: I live in town—won't acknowledge you if we run into each other.





#### **Basic Interview Process**

- Start with broad questions, providing opportunity to talk through the events:
  - "Tell me how you know \_\_\_\_\_ person...."
  - Follow up with "I'd like to open it up and let you talk about your experience on \_\_\_ day..."
- Encourage free flow of information, not necessarily chronological. Can come back to work out/confirm chronology and other details.
- Encourage sharing of details that are important to them – may lead to other memories or information.



#### Narrowing the focus

- Ask follow up questions, focusing on areas of conflicting evidence or gaps in information.
- Ask for more specific details if vagueness or lack of clarity.
- Fill gaps, answer remaining questions.
- Switch to "close-ended," directive questions towards the end.
- Check preparation notes to see if you've covered all info identified up front.
- Take your time. Don't be afraid of silence.



### Interview Wrap Up

Who else should I talk to?

Any relevant documentation (texts, social media messages, emails) not already discussed?

Anything else you want me to know?

Let them know you may need to follow up as the investigation progresses.



### Complainant's Interview



First interview is likely to be pretty open-ended.



Will follow up with more focused, direct questioning in second interview (usually a hard interview).





Also open-ended to start with but may get more directive more quickly because you already have information from Complainant.



Focus on listening. The more you can get them to talk, the better information you'll get.



Respondents should have same opportunity to share their experience as Complainant.



More directed focus later in interview.

## Respondent's Interview





#### Overview of Witness Interviews

Same basic approach as with C and R interviews.

May need to be more directive to keep witness on track.

Interview all witnesses either party asks you to.



#### Interviewing Witnesses

Starting the witness interview

Anticipating witness questions

Resistant and quiet witnesses

Lying witnesses



#### Advisors

- Advisors assist parties throughout the process; can be attorneys, advocates, friends, family members, mentors, etc.
- Parties have the right to an advisor of their choice
- Advisors may attend meetings and interviews with the party
- If a party does not have an advisor, the institution must provide an
  advisor to conduct cross-examination on the party's behalf <u>during the</u>
  <u>hearing</u>. These advisors are not required to be trained
- Institutions might have Advisor Guidelines for both the general process as well as the hearing



#### Working with Advisors

- Be respectful and expect the same of them.
- Identify them for the record.
- Stop and remind them of rules if necessary.
- Special cases: parents, attorneys, friends
- What if no advisor is present?



#### Wrapping up the Interview Stage

- Determine whether follow-up interviews are needed as you write up your report and prepare for evidence review.
- Listen to/check recordings if you need clarity about something a witness or party said.
- Decide on relevance of documents and other evidence. Parties get to review all evidence, but you get to determine what you believe is relevant to include in or with the report.



## Trauma-Informed Considerations

- Impact of trauma on functioning and memory
- Neurobiology of Trauma
- Interviewing from a traumainformed lens
- Cultural implications



# The Impact of Trauma on the Body and Brain



Trauma overwhelms our normal coping responses, which provide a sense of control and safety.

Trauma can impact individuals in multiple, significant ways:

- Neurologically
- Emotionally
- Psychologically
- Socially
- Biologically



#### Neurobiology of Trauma

- Growing body of research on this, specifically within the context of sexual violence
- During a traumatic event, an individual's ability to control their physical movements, to think rationally, and to encode memories may be significantly impaired
- This is a hard-wired response that is meant to offer protection
- This mainly has to do with the release of specific hormones during a traumatic event





#### Interviewing through a traumainformed lens

- Helps you be a better investigator.
- Puts interviewees at ease
- May provide context for counterintuitive reactions or occurrences
- Does NOT mean that you don't probe for credibility



#### Tips for being trauma-informed

- Be an authentic, non-judgmental human. Work on fostering trust, especially during an initial interview
- Slow down; silence is ok. Remember that memory recall may be slow or out of order.
- Be thoughtful about the language you use and phrasing of questions (avoid "why?" questions)
- Emphasize transparency to the extent you are able
- Help parties understand what to expect, ideally in advance
- Consider the physical (or virtual) environment of the interview
- Don't automatically draw negative inferences based on a behavior or reaction that may be related to trauma
- Don't use evidence of trauma as evidence that a policy violation occurred
- A trauma-informed approach should not unfairly favor the complainant OR prejudice you against the respondent



### Cultural Implications

- Cultural norms and background may impact the way parties react to an incident and how they present during the investigation process
- Be aware of these potential influences; however...
- Beware of biases and stereotypes
- Consider additional training or seeking out appropriate expertise if necessary





# The Investigation Report

- Overview of the Report
- Parts of the report
- Preparation



## Investigation Report Must...

"fairly summarize relevant evidence"

#### Investigative Report

- Report will be the primary basis for the decision.
- Report must be detailed—include all relevant evidence.
- Investigator makes decisions about relevance of information. Parties can challenge.
- Investigator will finalize report after considering parties' responses to report and evidence.





# Parts of a Report

- Heading
- Procedural summary
- Definitions
- People interviewed
- Documents/evidence reviewed (attachments)
- Interview methodology
- Summary of Interviews (may be complex subdivisions)
- Analysis/commentary (under some policies)
- Conclusion



# Preparation

- Take your time.
- Good proof reading, grammar, clarity establishes your credibility as a professional and makes reading easier for everyone.
- How long will it take to write?
- Write at the end or as you go through interview process?



# Next Steps in the Process

- Directly related evidence review
- Investigation Report review
- The Hearing
- Appeals



## Directly Related Evidence Review

#### Must:

- Provide review of evidence "directly related" to the allegations for parties and their advisors
- Include inculpatory and exculpatory evidence
- Include evidence upon which the institution does not intend to rely upon in making a decision

- Allow at least 10 days for review and submission of a response
- Provide copies of evidence directly to parties/advisors in electronic or hard copy format
- Evidence must be made available for review at the hearing

#### Next steps:

- If responses are submitted, investigator considers them prior to completing the Investigation Report
- Additional evidence collection needed? Other action?
- What if evidence is submitted during or after the review period?







- Close of evidence should occur when you've completed all evidence collection and are no longer taking in additional evidence.
- Determine a close of evidence date with the TIXC, and notify both parties well in advance of the date.
- Follow up on any promised evidence that you haven't yet received from parties/witnesses prior to the close of evidence.
- New evidence might arise during the evidence review stage. Consider closing evidence after that review period, and prior to the report review.



### Investigation Report Review

- Consider having the TIXC review the report prior to review by parties to ensure adherence to the institution's policies and procedures and catch any issues or questions
- Must be made available for parties and advisors to review (in hard copy or electronic format) 10 days prior to hearing
- Written responses to the report are permitted and provided to the hearing panel



# The Hearing

- Needs to be live but can be virtual (must include video)
- Provides opportunity for parties' advisors to ask questions of the other party and witnesses
- Institutions must provide an advisor to parties who do not have an advisor during the hearing specifically for the questioning portion
- Can have a single decision-maker or multiple, but someone must make relevancy determinations during the hearing
- TIXC or another individual may be present to enforce hearing decorum and process
- Must be recorded



# Investigator's Role in the Hearing

Generally, investigator is not asked to appear at the hearing, but it is allowable and may happen.





# The Appeal Process

Available to both parties for final determination of responsibility and dismissal of formal complaints



#### Required reasons for appeal:

Procedural irregularity that affected the outcome

New evidence that was not reasonably available at the time the decision was made that could affect the outcome

Conflicts of interest or bias from an official involved in the case that affected the outcome

\*Can allow additional grounds for appeal if desired\*



# Investigator's Role in Appeals

Even less likely for investigator to be involved here, but it could happen.

Appeal is not a re-do of the hearing, so generally are not evidence-based questions here.



# Decision-making

- When can investigators also serve as <u>decision-makers?</u>
- Decision-making process
- Sanctions & remedies
- Recordkeeping



# When can investigators also serve as decision-makers?

- The investigator cannot be the decision maker under current Title IX regulations
- However, if investigating allegations of non-Title IX sexual misconduct, the investigator may be the one to make determinations about responsibility.



### The Decision-making Process

#### Standard of Evidence

Preponderance of the evidence ("more likely than not" / 50.1% likely) OR the clear and convincing standard

#### **Process**

Apply the applicable policy definitions to the evidence provided.

Must provide a detailed, written rationale for your decision; must include evidence supporting the conclusions.

#### **Decision-Makers**

- What are the undisputed facts and what are the disputed facts?
- What does the evidence show regarding the disputed facts? Which evidence is most credible? Why?
- What is the weight of the evidence provided?
- Using the appropriate standard of evidence, did a policy violation occur? Analyze each element of a policy definition under the evidence standard.
- What is the rationale for your decision?



### Sanctions & Remedies

# Determining Sanctions as the Decision-Maker

- First determine your finding(s) about the allegation(s); then move on to sanctioning if applicable.
  - Provide a rationale for each finding/allegation.
  - Impact statements may be helpful when considering sanctions.

#### Investigators: Keep in Mind

Investigator should be sure to ask questions during interviews and include information in the report that decision-makers need to determine sanctions.



### Sanctions & Remedies

Need to stop, prevent, and remedy!

Consider educational and developmental sanctions

Engage in a risk assessment to help determine appropriate sanctions

Sanctions should reflect the severity of the behavior (consider prior misconduct)

Consider any
loss/injuries to the
Reporting Party or
the institution and
how to rectify those,
if possible

Can consider past cases of similar misconduct with assistance from Title IX Coordinator



#### Notice of Decision

#### Needs to include:

- Allegations
- Procedural steps
- Findings of fact
- Decision(s) regarding responsibility
- Rationale for each allegation/decision
- Sanctions, if applicable, and rationale
- Whether remedies will be provided
- Appeal process information

#### Other requirements:

- Deliver notice simultaneously to the parties
- Decision/sanctions become final when parties are notified of the appeal decision OR when the deadline to submit an appeal has passed





## Recordkeeping

Records must be retained for at least **seven years**.



#### Records to maintain:

- Actions taken and responses to reports
- Investigation and adjudication documents, recordings, etc.
- Training materials for decisionmakers, investigators, Title IX Coordinators/Deputies, and informal resolution facilitators



# Discussion? Questions?



# Keep in touch!

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