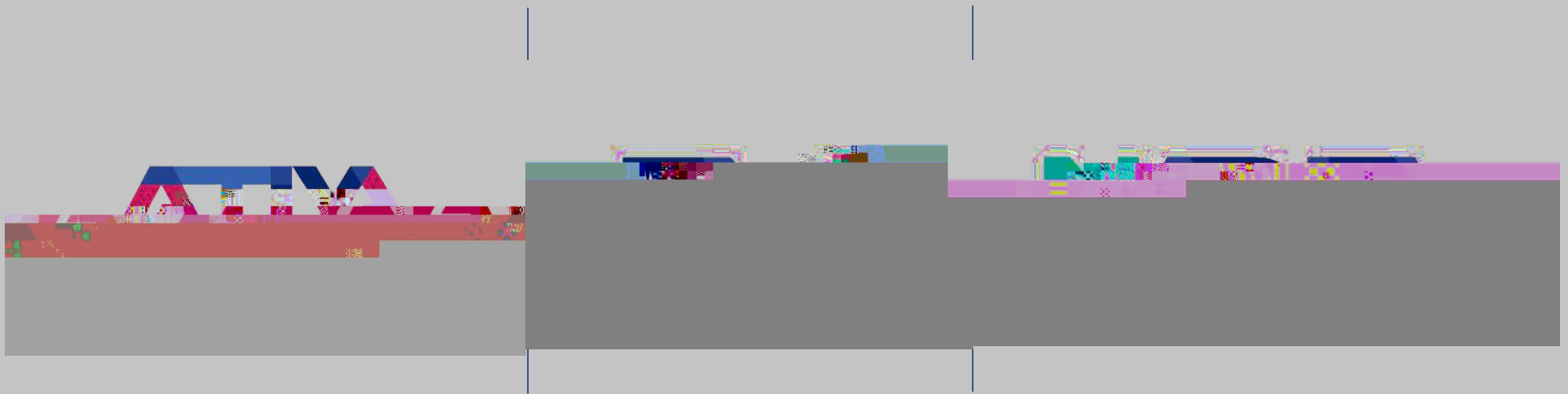


March 2021

Civil Rights Investigator Level Two: Advanced

Training & Certification Course



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.



AGENDA

8 Issue Spotting

9 Consent Construct

10 Creating Timelines


11 Case Study

12 Trauma and Investigations

13 Investigation Strategy

14 Note-taking and Recordkeeping





Remember: As an Investigator, you have no “side” other than the integrity of the process!

TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

“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 educational program or activity receiving federal financial assistance.”





10 STEPS OF AN INVESTIGATION

1. Receive Notice/Complaint
2. Initial Assessment and Jurisdiction Determination
3. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
4. Notice of Investigation to Parties/Notice of Formal Allegation (“Charge”).
5. Establish investigation strategy
6. Formal comprehensive investigation
 - Witness interviews
 - Evidence gathering

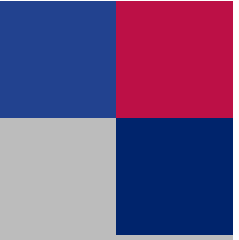
10 STEPS OF AN INVESTIGATION

7. Draft report
8. Meet with Title IX Coordinator (or legal counsel) to review draft report and evidence
9. Provide report all evidence directly related to the allegations to parties and their advisors for inspection and review with 10 days for response
10. Complete final report
 - Synthesize and analyze relevant evidence
 - Send final report to parties for review and written response at least 10 days prior to hearing



STAYING IN YOUR LANE





DUE PROCESS

- What is Due Process?
- Due Process in Procedure
- Due Process in Decision

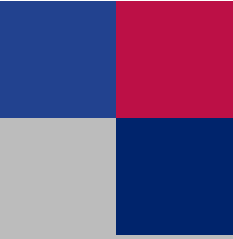
WHAT IS DUE PROCESS?

- The set of rights-based protections that accompany disciplinary action by a school, college, or university.
- Dictated by law & regulations, courts, system, district, school, or college policies and procedures.
- Private schools refer to this as “Fundamental Fairness”
 - Though courts and the OCR are increasingly using the term Due Process

DUE PROCESS IN PROCEDURE

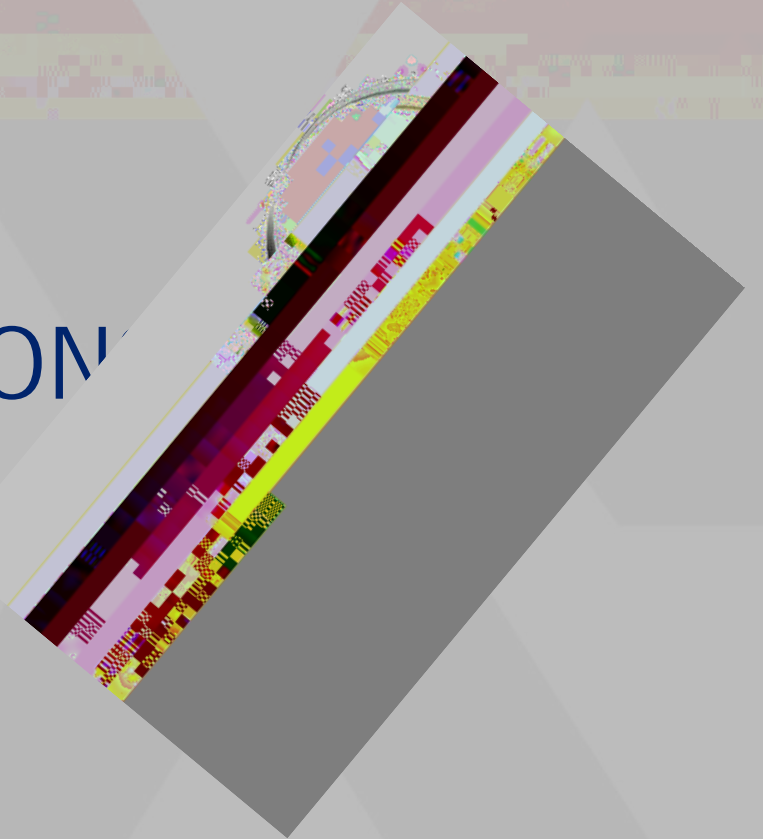
- A school's process should include (at a minimum):
 - Detailed and specific Notice of Allegation and/or Investigation
 - Notice of Hearing
 - Right to present witnesses
 - Right to present evidence
 - Right to an Advisor of their choice
 - Opportunity to be heard and address the allegations and evidence
 - Right to review all relevant evidence AND the investigation report prior to a hearing
 - Right to cross-examination
 - Right to appeal





EFFECTIVE INVESTIGATION

- Active Accumulation of Evidence
- Consistent
- Planned/Strategic
- Documented
- Impartial



CIVIL RIGHTS INVESTIGATION MODEL HALLMARKS

Investigation is a critical part of the Title IX grievance process

- Active identification and strategic gathering of evidence
- Emphasized transparency, communication, and fairness
- Grounded in the concepts of neutrality and equity
- Enhanced Due Process protections for parties
- 2020 Title IX Regulations made substantial changes and additions to grievance resolution processes

A NOTE ABOUT TERMINOLOGY

- Formal complaint
- Grievance process
- Recipient
- Complainant
 - Individual(s) affected by alleged conduct or circumstances
- Respondent
 - Individual(s) alleged to be responsible for alleged conduct or circumstances

A NOTE ABOUT TERMINOLOGY (CONT.)

- Sexual harassment
 - Quid pro quo
 -



CLERY ACT AMENDMENT: VAWA SECTION 304

VAWA Section 304 created extensive new policy, procedure, training, education, and prevention requirements for:

- Sexual assault
- Stalking
- Dating violence
- Domestic violence

-



TITLE IX REGULATIONS

- 2020 Title IX regulations
 - Effective and enforceable August 14th, 2020
 - Amend the Code of Federal Regs. and have force and effect of law
 - Some provisions already mandated by due process case law in some jurisdictions
 - Intervening variables (litigation and legislation) may impact enforcement in the short or long term
- The regulations are significant, legalistic, surprisingly prescriptive, very due-process heavy, and go well beyond

REGULATIONS HAVE THE FORCE AND EFFECT OF LAW

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REGULATIONS HAVE THE FORCE AND EFFECT OF LAW

- OCR “regulatory guidance” or “sub-regulatory guidance”
 - Influential but not strictly enforceable (e.g., 2011 and 2015 DCLs)
- State and local preemption issues – 2020 Title IX regulations pre-empt state law

PROMPTNESS



JURISDICTIONAL ISSUES

- Emphasizes the Davis standard
 - Control over the harasser and the context of the harassment
 - “education program or activity” means...
 - locations, events, or circumstances under substantial control
 - any building owned or controlled by an officially recognized student organization
- Regulations specify “harassment...against a person in the United States”
 - Off-campus conduct, study abroad programs, or school-sponsored international trips – “nothing in these final regulations would prevent...”

JURISDICTIONAL ISSUES

- The definition of sexual harassment covers the in-program effects of out-of-program misconduct (though not the misconduct itself)
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the

REQUIREMENTS UNDER THE REGS

- A recipient with actual knowledge of sexual harassment in an education program or activity of a recipient in the United States must respond in a manner that is not deliberately indifferent
- Mandatory dismissal
 - Does not constitute sexual harassment (§ 106.30)
 - Does not fall within jurisdiction
 - Program or activity inside the United States
 - Complainant participating in or attempting to participate in ed program
- Does not preclude action under another policy (General Non-Discrimination Policy, conduct code, etc.)

REQUIREMENTS UNDER THE REGS





REQUIRED DEFINITIONS – TIX REGULATIONS

Sexual Harassment is conduct on the basis of sex meeting one of the following conditions:

- 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;
- 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
- “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)
“Stalking” as defined in 34 U.S.C. 12291(a)(30)

HOSTILE ENVIRONMENT: “UNWELCOME”

Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than

HOSTILE ENVIRONMENT: “REASONABLE PERSON”

Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the Complainant”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced

HOSTILE ENVIRONMENT: "SEVERE"

- Physical conduct is more likely to be severe
- Accompanied by threats or violence
- Consider the circumstances (e.g., the ability for Complainant to remove themselves from the harassment)

HOSTILE ENVIRONMENT: “PERVASIVE”

- Widespread
- Openly practiced
- Well-known among students or employees – reputation of a department, person, etc.
- Occurring in public spaces (more likely to be pervasive)
- Frequency of the conduct is often a variable in assessing pervasiveness (look to intensity and duration)
- Unreasonable interference with school or job
- A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986)





HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

- Totality of the circumstances to consider:
 - Effect on the Complainant's mental or emotional state
 - Whether the conduct was directed at more than one person
 - Whether the conduct unreasonably interfered with the Complainant's educational or work performance
 - Whether the statement was an utterance of an epithet which was offensive or offended by discourtesy or rudeness
 - Whether the speech or conduct deserves the protections of acad~~✗~~dll~~✗~~dll~~✗~~

SEXUAL ASSAULT

Any sexual act directed against another person, without the consent of the Complainant including instances

SEXUAL ASSAULT (CONTRD.)

- Sexual Assault with an Object - To use 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 or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
- Forcible 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.

SEXUAL ASSAULT (CONTD.)

- Incest - Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by [insert state] law.
- Statutory Rape - Nonforcible sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].

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. For the purposes of this definition —
 - 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 the domestic or family violence laws [insert your state here];
 - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of [insert your state here].

DOMESTIC VIOLENCE (CONTD.)

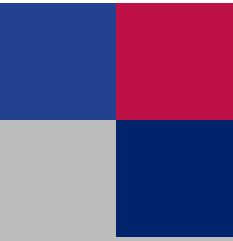
- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must

STALKING

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to —
 - Fear for the person’s safety or the safety of others; or
 - Suffer substantial emotional distress.
- For the purposes of this definition:
 - 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.

STALKING (CONTD.)

- Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
- Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
- The TIX regulations insist this definition not be interpreted to violate First Amendment.



INVESTIGATING RETALIATION CLAIMS

- Basic Legal Principles
- Investigating Retaliation Claims

RETALIATION: BASIC LEGAL PRINCIPLES

Title IX regulations prohibit recipients from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title IX.

- Protected activity under Title IX:
 - Reporting sex discrimination, including sexual harassment and assault.
 - Filing a discrimination complaint.
 - Assisting someone in reporting discrimination or filing a complaint.
 - Participating in any manner in an investigation of discrimination, for example as a witness.
 - Protesting any form of sex discrimination (e.g. lack of equity in athletics).

INVESTIGATING RETALIATION CLAIMS: KEYS TO UNDERSTANDING

- Establishing retaliation, unlike establishing sexual harassment, requires proving motive – the intent to retaliate.
- Someone’s intention is rarely displayed openly. Therefore, the legal framework is about whether a retaliatory motive can be inferred from the evidence.
- Gathering details of what occurred is critical.

PRELIMINARY ELEMENTS OF A RETALIATION CLAIM

- The following elements establish an inference of retaliation:
 - Did the individual engage in protected activity?
 - Usually straightforward,
 - Unless there is a question of reasonableness of belief or manner.
 - Was the individual subsequently subjected to adverse action?
 - Do the circumstances suggest a connection between the protected activity and adverse action?
 - Did individual accused of retaliation know about activity?
 - How soon after the protected activity did the adverse action occur?
 - If these three elements are not shown, the claim fails.



INVESTIGATING RETALIATION CLAIMS: IS THE EXPLANATION LEGITIMATE?

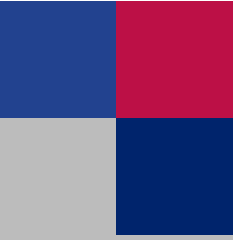
Factors to consider:

- The explanation makes sense
- The action was consistent with established policy or practice
- No adverse action was taken against others who engaged in protected activity
- Complainant was treated the same as other individuals

INVESTIGATING RETALIATION CLAIMS IS THERE EVIDENCE OF PRETEXT?

Factors to consider:

- The explanation given is not credible
- Other actions by the same individual are inconsistent with the explanation
- The explanation is not consistent with past policy or practice
- There is evidence of other individuals treated differently in similar situations



OTHER CIVIL RIGHTS OFFENSES

-





SEXUAL EXPLOITATION

- (Cont.) Examples



CONSIDERATIONS IN ISSUE SPOTTING

- Engaging in issue spotting based on the Complainant's statement is an important first step in development of your investigation strategy
- You will continue to identify issues as you interview others and gather evidence
-



TRAVIS AND JUSTIN

Travis was on the lacrosse team for three weeks. Travis reported that he was being sexually harassed by Justin, the lacrosse team captain. In the span of two weeks, Justin has asked Travis out three times. The first time Justin asked Travis out, it was in the locker room when they both were naked, and Justin put his hand on Travis' back. The second time Justin asked, he was pretty drunk and got in Travis's personal space at a bar. The third time, Justin walked up next to him in the shower and tried to grab Travis's buttocks. Travis also kissed Justin at a party the weekend before the shower interaction.

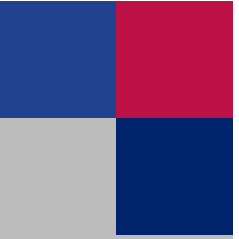
DIANE



DIANE

Diane is a faculty member working with a small team of seven student research assistants who meet each morning to check-in with each other and the status of their grant





CONSENT CONSTRUCT

- Force
- Incapacity
- Consent
- Case Study

CONSENT

- Informed, knowing, and voluntary (freely given)
- Active (not passive)
- Creates mutually understandable permission regarding the conditions of sexual activity
- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
- Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally



FORCE

1. Was force used by the Respondent to obtain sexual or intimate access?
 - Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force
 - Consider the impact of power dynamics

FORCE (CONT.)

Types of force to consider:

- Physical violence: hitting, restraint, pushing, kicking, etc.
 - This may also involve alleged violations of other policies (e.g., harms to persons, violation of law, etc.)
- Threats: anything that gets someone to do something they wouldn't ordinarily have done absent the threat
 - This requires an analysis as to the viability of the threat and whether a reasonable person would believe the Respondent could or would carry out the threat

INCAPACITY

2. Was the Complainant incapacitated?

- Incapacity ≠ impaired, drunk, intoxicated, or under the influence.
- What was the status of the Complainant in terms of:
 - Situational awareness
 - Consequential awareness
- What was the reason for incapacity?
 - Alcohol or other drugs (prescription or non-prescription)
 - Mental/cognitive impairment
 - Injury
 - Asleep or unconscious



BEHAVIORAL CUES

Evidence of incapacity context clues:

- Slurred speech
- The smell of alcohol on the breath in combination with other factors
- Shaky equilibrium; stumbling
- Passing out
- Throwing up
-

BEHAVIORAL CUES (CONT.)

Evidence of incapacity context clues:

- Known Blackout
- Although memory is absent in a blackout, verbal and motor skills are still functioning
- Outrageous or unusual behavior (requires prior knowledge)

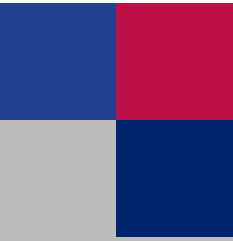






CONSENT ANALYSIS

3.



CREATING TIMELINES



TIMELINE CONSTRUCT



TIMELINE CONSTRUCT (CONT.)

- If Complainant did not have anything to drink, or only had a small amount, you need to consider if the individual was drugged. You will need to ask:
 - Where were you when you were drinking?
 - Did you leave your drink at any time then resume consuming?
 - Did anyone provide drinks for you?

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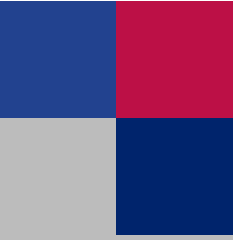


TIMELINE CONSTRUCT (CONT.)

- The Decision-maker will need to make an assessment if, based on the standard of evidence, the Complainant was incapacitated
- If the answer is “No,” proceed to the Consent analysis
- If the answer is “Yes,” move to part two of the Incapacity analysis
-

CREATING A TIMELINE EXAMPLE

- Use documentary



CASE STUDY



AMY







TODD

Around 1:00 a.m., somebody started passing out Jell-O shots

TODD

I took her upstairs, opened the door for her, and let her in. She asked me to get her a glass of water, and I did. I started to take off again, but she asked me not to go. When I turned around, she kissed me, hard. We kissed for a while, but she wasn't feeling well and went into the bathroom again. When

WHAT IS TRAUMA?

- Exposure to an event or events that creates a real or perceived threat to life, safety, or sense of well being and bodily integrity
- May result from war, natural disasters, severely distressing events
- When the brain senses a threat, releases hormones or chemicals throughout the body to help react to the threat and/or trauma
- The brain does not distinguish between “types” of sexual assault
 - Interprets stranger or acquaintance equally as threats to survival

WHAT IS TRAUMA? (CONT.)

- The brain also does not typically differentiate between an actual threat and a perceived or subjective threat
 - Sometimes also a function of prior experiences, rather than the immediate situation

MEMORY AND TRAUMA

- Memory is formed in two steps:
 - Encoding: organizing sensory information coming into brain
 - Consolidation: grouping into memories and storing the stimulus
- Trauma can interfere with the encoding and/or the consolidation of memory
- May create fragmented memories
- Recall can be slower and more difficult
- Alcohol may interfere further with memory
- However, sensory information (smell, sound, etc.), may still function properly

TRAUMA & INTERVIEWING

- Expecting a Complainant to give a linear account in the days after an incident, or after having been triggered, is not always realistic
- Memory fragmentation can occur
- Having “inconsistent” memory, pausing, and stumbling to provide an account are not outside the bounds of what one could expect from a person who has experienced trauma
- Considerations for credibility?

TRAUMA & INTERVIEWING (CONT.)

- Allowance for sleep cycles prior to interviews (if within 96-120 hours)
- A non-linear account, with jumping around and scattered memories is not uncommon
- If alcohol is an additional factor, narrow and detailed questions will be difficult for reporting parties to access and may create additional stress
-

TRAUMA & INTERVIEWING (CONT.)

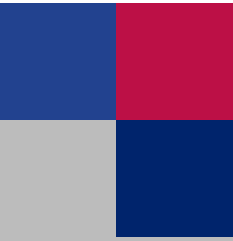
- Empathy is critical
 - However, remember to remain impartial
- Tell me more about...
- Help me understand your thoughts when...
- What was going through your mind when...
- What are you able to remember about...?
 - 5 senses
- What were your reactions to this experience?
 - Physically
 - Emotionally
- What, if anything, can you not you forget about this experience?

TRAUMA & CREDIBILITY

- Trauma may help explain elements that negatively impact a party's credibility
 - Inconsistencies in a party or witness's statement
 - Lack of linearity in a party or witness's account or statement
 - Lack of memory about an incident
 - Memory errors by a party or witness
 - Demeanor or affect
 - Brief answers, or answers lacking in detail

TRAUMA & CREDIBILITY (CONT.)

- However, while trauma may help explain issues that impact credibility, it typically does NOT excuse them
 - An assessment of credibility must focus on issues such as the reliability, consistency and believability of the parties
 -



INVESTIGATION STRATEGY

STRATEGY IS KEY

- The investigation team, in consultation with the Title IX Coordinator or designated Deputy strategizes throughout the entire investigation. This includes:
 - What are the issues presented?
 - Are there undisputed facts? Which ones are significant to the investigation?
 - Are there facts in dispute? Which ones are significant to

OTHER ELEMENTS TO CONSIDER IN STRATEGY

- Strategize when to interview Complainant and Respondent
- What are the key issues involved?
 - What additional strategies do you need to address key issues?
- What additional documentary evidence will be important to the investigation?
- Discuss your methodology for this case (which approach will you use?)
- Timeline (within 30-60 days will vary by case)



STRATEGY EXERCISE

- Use your issues list
- Develop your strategy
 -

STRATEGY EVOLUTION

- Find an opportunity to let your subconscious work on the gaps in information
 - Turn your brain off ... walk away and do something else
 - Use colleagues: co-investigator and others
- If you are too busy analyzing what you know, you will not focus on the need to identify what is missing, what is yet to be obtained, or why certain witnesses have not told you things that it would have been logical or expected to hear from them
- Look for evidence that should be there that is not for some reason

NOTE-TAKING

- Taking notes may slow down the interview in a good way
- Use pre-prepared numbered questions as a framework but be flexible
- Note-taking should occur throughout the entire interview, not just when a Respondent makes a pertinent disclosure

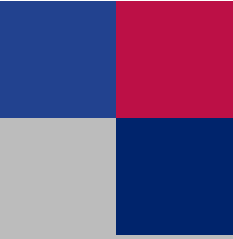
NOTE-TAKING (CONT.)

- Notes should be complete and detailed
 - Important for assessing credibility
 - Decision may turn on small details
- Where possible, include verbatim statements on critical issues – Use their words, not yours
- Keep notes on what is told to the Complainant, Respondent, and witnesses
- You may want to summarize perceptions of credibility
 - Recognize, however, that notes and evidence may be subject to review









MEETING CONSIDERATIONS

- A review from Investigator One



THE INVESTIGATORS

- Maintain professionalism, but balance with relaxed atmosphere
 - Attire
 - Demeanor
- You are an extension of the environment
- Your neutrality is key but should be balanced with compassion
- Maintain good eye contact and comfortable, open body language

OTHER CONSIDERATIONS



MANAGING EXPECTATIONS

- No one is happy at the end of these cases
- People who conduct investigations with skill rest secure in the knowledge that all involved, including witnesses, are treated objectively and fairly
- Be sure the parties understand parameters of the policy, what it does and does not cover, how process plays out, and what process can and cannot accomplish
- Provide ample opportunity for interviewee (especially the Complainant and the Respondent) to ask questions





CONDUCTING INTERVIEWS

- Explain that you will be taking notes or recording and why
- Acknowledge that they may have told others what

INTERVIEW GUIDELINES

- Pay attention to alcohol/drug consumption and timing of consumption (your “horizontal timeline”)
- Be cognizant of the difference between what was “heard” (rumor) and what was “witnessed” (facts)
- Ask who else you should talk to and ask for any relevant documentation (i.e., texts, emails, etc.)
- Discuss non-retaliation
- Discuss FERPA issues

CONDUCTING INTERVIEWS (



CONDUCTING INTERVIEWS (CONT.)

At the end:

- What else do you think might be important for us to know?
- What other questions are there that you thought we might ask that we didn't?
- Ask who else you should talk to and ask for any relevant documentation (i.e., texts, emails, etc.).
- Is there anything you want me to ask the other party (or any witness)? (“Appendix C” – covered in Investigator One)
- If you have not ascertained this, try to determine what

IMPACT OF NON-PARTICIPATION

- Engagement expectations
 - What happens if a party declines to be interviewed?
 - Requests for written questions
 - Refusal to answer questions
 - Refusal to engage in process
 - What happens if a party declines to testify at the hearing?
 - What happens if a party refuses to submit to cross-examination?
- Evidentiary preclusions under 2020 regulations
- Evidentiary “vacuum” resulting from non-participation



GATHER THE EVIDENCE

- Collect the evidence from all sources
- Organize it according to the investigation strategy and allegations
 - Chronology
 - Geography
 - Policy prohibitions
 - Alleged violations

ASSESS CREDIBILITY

- Accuracy and reliability of information
- “Credible” is not synonymous with “truthful”
- Memory errors, evasion, misleading may impact
-

COMMON ERRORS IN ASSESSING CREDIBILITY

- Misplaced emphasis on nonverbal indicators of deception such as nervousness/anxiety
- Misplaced emphasis on inconsistency of information provided by an interviewee
 - Research shows truthful memory recall includes the natural omission or subsequent recollection of details
- Confusion about memory
 - Stress and emotion may lead to enhancement of memory or to the disruption of encoding and retrieval processes

COMMON ERRORS IN ASSESSING CREDIBILITY

- Misplaced focus on the status of the parties
 - No scientific studies support the notion of neurobiological response differences between perpetrators and victims
- Bias in interviews
 - Presumptions of guilt can influence credibility assessments

INTERVIEW TACTICS

- Reverse Chronological Order
- Use of a Model Statement
- Asking unexpected questions
- Asking the individual to recall information in unexpected ways, e.g. sketch
- Asking interviewees for details that the investigator can check
 - Truth tellers generally add more “checkable” details
 - Liars provide details that are difficult to verify
- The Funnel



FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating evidence

- Strongest indicator of credibility
- Independent, objective authentication
 - Party says they were in class, teacher confirms
 - Party describes text conversation, provides screenshots
- Corroboration of central vs. environmental facts
- Not simply alignment with friendly witnesses.

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating evidence

- Can include contemporaneous witness accounts.
 - More “separate” the witness, greater the credibility boost
- Outcry witnesses.
 - Does what party said then line up with what they say now?
- Pay attention to allegiances
 - Friends, teammates, group membership
 - This can work both directions (ex. honest teammate)

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent plausibility

- Does what the party described make sense?
 - Consideration of environmental factors, trauma, relationships
- Is it believable on its face?
- “Plausibility” is a function of “likeliness”
 - Would a reasonable person in the same scenario do the same things? Why or why not?
 - Are there more likely alternatives based on the evidence?



FACTORS TO CONSIDER FOR CREDIBILITY

Motive to falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
 - Think academic or career implications
 - Also personal or relationship consequences
- What if the allegations are false?
 - Other pressures on the Complainant– failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

FACTORS TO CONSIDER FOR CREDIBILITY

Past record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations
 - Even if found “not responsible,” may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship

FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

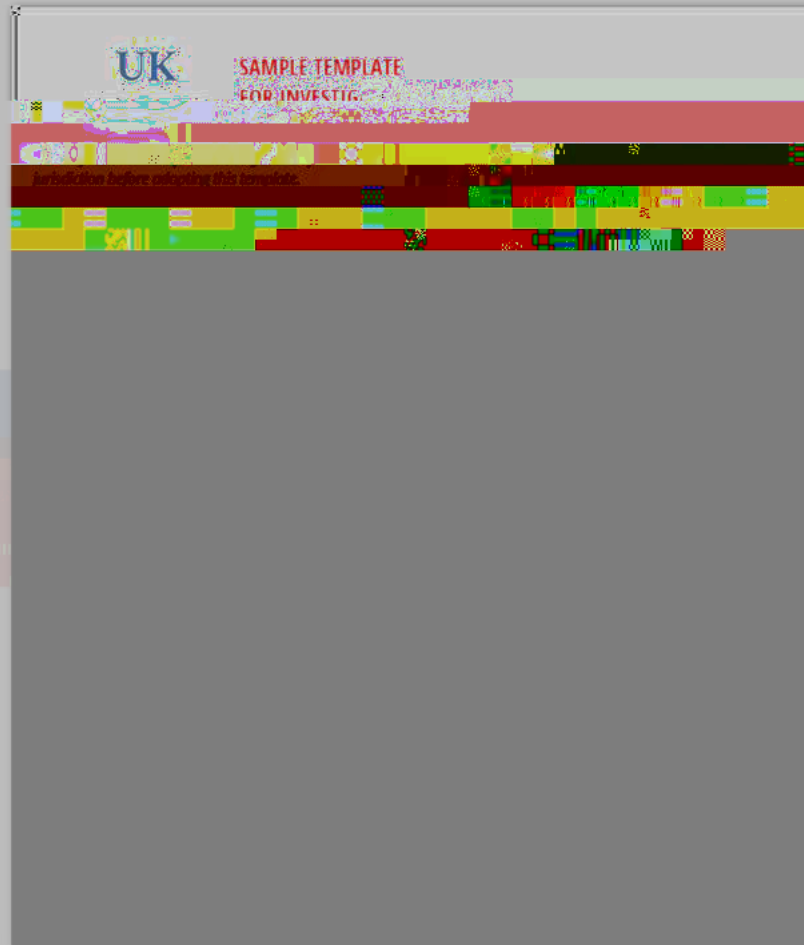
- Is the party uncomfortable, uncooperative, resistant?
- Certain lines of questioning – agitated, argumentative
- BE VERY CAREFUL
 - Humans are excellent at picking up non-verbal cues
 - Human are terrible at spotting liars (roughly equivalent to polygraph)
- Look for indications of discomfort or resistance
- Make a note to dive deeper, discover source

CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

- Indicate where to look to the Decision-maker without rendering conclusions or making findings related to credibility
- NOT GOOD
~~“The Decision-maker should find Mark to be unbelievable in his testimony about having received consent for the following reasons...”~~
- GOOD
“Mark’s testimony about X contrasts with Mariana’s testimony about X, and the accounts of Witness 1 and Witness 7 aligned with Mariana’s testimony, not Mark’s, during the investigation.”

SYNTHESIZE AREAS OF DISPUTE

- Examine only actions that have a direct relation to the situation under review or a pattern of incidents
- Narrow the scope to areas in dispute or disagreement between the parties
 - Two lists: contested and uncontested facts
- Use evidentiary and report review periods to clarify disputed facts
- Present evidence in report organized around facts relating to alleged policy violations
- Contested facts will form the bulk of the Decision-maker's work in making a determination



THE INVESTIGATION REPORT

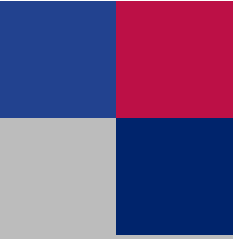


ALSO INCLUDE IN THE INVESTIGATION REPORT

- Results of interviews with parties and witnesses
- Results of interviews with experts
- Summary of other information collected (i.e., information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of texts, emails, and social networking messages, etc.)

THE INVESTIGATION REPORT

- A skeleton template is helpful
- The investigation report is the one comprehensive document summarizing the investigation, including:
 - Detail the allegations and how they were brought forward
 - Explain the role of the parties and witnesses, and any relations between them
 - Results of interviews with parties and witnesses
 - Results of interviews with experts
 - Summary of other information collected (i.e., information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of texts, emails, and social networking messages, etc.)



BIAS, PREJUDICE, AND CONFLICT OF INTEREST

- What are bias and prejudice?
- Common forms of bias and prejudice
- Impacts of bias and prejudice
- Conflict of interest

WHAT ARE BIAS AND PREJUDICE?

Bias

- A preference or tendency to like or dislike
- A cognitive process
- A thought process developed over time through repeated personal experience
- Implicit or explicit
- Formed from stereotypes, societal norms, cultural experience, expectations of the people around you

Prejudice

- A preconceived opinion that is not based on fact, reason, or actual experience
- Can be classified as cognitive prejudice, affective prejudice, and conative prejudice
- Can include injury or damage as a result of some judgment or action of another in disregard of one's legal rights

COMMON FORMS OF BIAS WITHIN INVESTIGATIONS

- Gender Bias
 - Showing favoritism toward one gender identity/expression over another
- Racial Bias
 - Showing favoritism toward one race over another or associating negative traits toward one race over another
- Confirmation Bias
 - Interpreting ambiguous evidence to support one's own opinions or existing position
- Affinity Bias
 - The unconscious tendency to gravitate toward those who have similar identities to us

IMPACTS OF BIAS WITHIN INVESTIGATIONS

- Effects our perception of parties and witnesses
- Impacts the ability to build rapport, connect, and create safe/neutral spaces for all participants throughout the investigation
- Creates risk of *flawed* decision-making when collecting evidence and questioning participants
- Written materials become subjective and include biased language
- Presents moments for assumptions not based on evidence to be made during the investigation
- Increases opportunity for a party to successfully litigate
- Reticence to ask needed questions, pursue evidence, or witnesses who should be questioned

COMMON FORMS OF PREJUDICE WITHIN INVESTIGATIONS

- Cognitive Prejudice
 - What people believe is true based on stereotypes
 - Can include expectations, impressions, criticisms, and assumptions
- Affective Prejudice
 - What people dislike and like
 - Considered an emotional form of prejudice
- Conative Prejudice
 - Refers to how people tend to behave toward another person or group of people (often driven from first impressions or impulsive conclusions)
 - Directly related to cognitive and affective prejudices

BIAS AND PREJUDICE

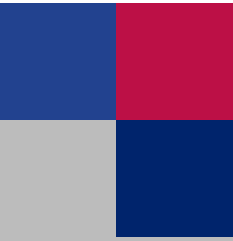
COMMON IDENTITIES IMPACTED

- LGBTQIAA2SP+
- Gender identity/Expression
 - Example: Non-conforming identities
- Race
 - Example: BIPOC
- Ethnicity
 - Example: International students/employees
- Religion
 - Example: Muslim
- Athletes
- Fraternity and Sorority Members

CONFLICT OF INTEREST

-





INCLUSIVE INVESTIGATIONS

- Bias-free writing
- Tips for inclusive investigations
- Considerations for inclusive investigations
- Importance of visibility

BIAS-FREE WRITING

- Words communicate ideas, but also reflect power, status, and privilege
- Language can reflect social capital
- Conscious and purposeful use of language can promote equity, justice, and inclusion
- The use of bias-free language ensures the content does not exclude, demean, or offend groups
- Bias-free communication attempts to include all identities of people in a way that doesn't make assumptions about the receiver of the communication
- Bias-free writing does not discriminate

CONSIDERATIONS FOR INCLUSIVE INVESTIGATIONS

- Educate members of the Title IX Team
 - Avoid labels
 - When in doubt, ask
- Be mindful of power dynamics and targeting within the process
- Don't make assumptions
 - Describe identities and group connections as they have been described by parties

IMPORTANCE OF VISIBILITY

- People trust what they see and what they know
 - Limited visibility equates to limited trust
 - Includes trust in policy and procedures
 - Includes trust in the investigation
- Visibility Bias
 - Directly impacts the effectiveness of the work
 - Regularly assess the prevalence of visibility bias as it relates to the Title IX office and program
 - Visibility does not always equate to bias or impartiality
 - Be cautious, too much targeted visibility can create a different type of bias



Association of
Title IX Administrators

Questions?

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