

# **TITLE IX INVESTIGATIONS**

## **NUTS & BOLTS FOR INVESTIGATORS**

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## **Title IX Investigations**

- **Your Role** – Neutral gathering of facts and information (not decision-maker on ultimate issue)
- **Goal** – An investigation and report that is and will be seen as thorough, reliable, equitable and fair and conducted within a reasonable timeframe
- **Common Complaints** – Investigators were biased, result-oriented, more worried about protecting College than finding truth, failed to follow procedures, or didn't interview any witnesses

## **Title IX Investigations** (cont'd.)

- **Essential Components**
  - Impartiality
  - Timeliness
  - Thoroughness
  - Evenhanded/Equitable
  - Fair
- Clearly identify elements of alleged misconduct before developing a plan

## **Title IX Investigations** (cont'd.)

- Developing Plan for Investigation (review key points)
- Timing Issues (number and availability of witnesses, school calendar, complexity, criminal charges, etc.)
- Identify Sources of Evidence (handout)
- Investigative File
- Chronology of Events
- Media Issues

## **Preparing for Interviews**

- Your job is not to be a prosecutor building a case but to be neutral, and gather all relevant facts and evidence so others can decide
- Meet with co-investigator and decide on approach
  - Does one person ask all questions to all witnesses?
  - Do you divide questions by topic?
  - Do you divide questions by witness?
  - Discuss format for notes to be taken?
- Prepare a set of questions to be posed to each witness, be sure to identify who has first-hand knowledge

## **Scheduling Interviews**

- Schedule interviews as soon as possible
  - Memory inherently more reliable closer to date of incident (possible exception is Complainant's memory)
  - Leave time for follow-up interviews
  - Limit opportunity for witnesses talking to one another and impact
  - Assume there will be delays outside of your control and plan accordingly

## **Issues to Address in All Interviews**

- The information gathered in the interview:
  - will be shared with school personnel
  - will be shared as part of College's internal process
  - both parties have access to investigation report and materials gathered
  - will not be shared with others beyond those who need to know

## **Possible issues to Address with Witnesses at the Outset**

- Consider describing the alleged conduct without labeling it as “sexual misconduct”
  - Try to avoid using legal terms
- Reassure witness that you are not expecting the witness to take sides
  - “I’m looking for facts”
  - “I will not educate you about what you do not know”



## **Witnesses – Privacy Considerations**

- Let witnesses know that the best way to help preserve the integrity of the process is to raise questions or concerns to you and/or Title IX Coordinator. Talking with others is not helpful to the process and undermines parties' privacy.
- Consider request that witnesses not discuss the underlying events with other potential witnesses
  - Is there an advantage in not making this request, as it may reveal helpful information about relationships between witnesses and among witnesses and parties for credibility assessment
- Retaliation and how the College will respond

## **Potential Witness Issues**

- **Cautious/Reluctant Witnesses**
  - Build rapport – be transparent
  - See **Typical Questions** (Handout)
  - Be prepared with honest answers
  - If witness does not answer the question:
    - Ask whether s/he understands question
    - Ask the question in a different way
  - If refuses – “If you will not answer, will you tell me why?”
  - If continues to refuse – “Are there any questions you will answer?”
- **Recalcitrant Witness**
  - Remove barriers as best you can
  - Offer another time or place to meet
  - Let witness have an advisor (neutral person)
  - Propose submitting written statement (sign and date)
  - Respond in writing to specific written questions
  - Agree to record session with each side getting a copy

## Basic Interview Reminders & Tips

- Identify yourselves (and role) *simply*
  - Critical to build trust and rapport
  - Explain plan for interview and larger process
  - If advisor present - review and address process
  - Confidentiality issues
  - Need to ask difficult/sensitive questions
  - Ask for questions
- FERPA Consent Form

## **Nuts & Bolts of Interviews**

- Prepare list of questions for specific witness
- Avoid note passing – take a recess to confer
- Do not interrupt a narrative
- Listen carefully, do not hesitate to ask person to repeat something
- Do not jump from one-line or questions to another – finish one area if completely possible
  - Be sure to ask co-investigator for suggestions or questions before moving on
- Avoid multiple choice questions

## Active Listening is Essential

- Effective investigations are not just about questioning but active listening.
- Active listening skills:
  - Attending/acknowledging: Face the person being interviewed, maintain eye contact and nod as appropriate
    - **Avoid looking around the room or fidget**
  - Restating: Respond to the other person's basic verbal message by repeating the phrase you would like clarified
    - **Do not change the subject**
  - Probing: Question the speaker in a supportive way. When requesting more information or to clear up confusion wait for speaker to pause to ask clarifying, open-ended questions
    - **Do not interrogate or challenge the speaker**
  - Summarizing/synthesizing: Bring together feeling and experiences by repeating back what you heard briefly and accurately, or paraphrase
    - **Do not elaborate or expand on what the speaker is saying**

## **Active Listening is Essential (cont'd.)**

- **Supportive:** Show warmth and caring in one's own individual way paying attention to facial expressions, gestures, posture, and other non-verbal cues
  - **Do not judge the speaker. Do not begin rehearsing your response or next question (in your head) while the speaker is speaking**
- **Checking perceptions:** Find out if interpretations are valid and accurate by checking accuracy with phrases such as, "I think that you are saying...."
  - **Do not make assumptions or jump to conclusions**
- **Being quiet:** give the person time to think as well as to talk by waiting
  - **Silence is golden**
  - **Do not fill pauses; let the speaker set the pace**
- **Keep an open mind about what you are hearing; try to picture what the speaker is saying**
  - **Do not assume you know what the speaker is trying to communicate without listening**
- **Listen for what is NOT said**

## **Nuts & Bolts**

- Primarily use open-ended questions (see Sample Questions)
- Close-end questions on limited basis
  - Get confirmation to prior answer
  - End of interview to pin down key points
- Sensitive Topics
  - Preface “This may be hard to talk about”
    - If ask poor question – fix it
- Make note of nonverbal behavior
  - General demeanor – appear evasive, argumentative, hostile or open, honest

## **Nuts & Bolts** (cont'd.)

- Pay attention to details
  - Where was witness located – could s/he see or hear what they report?
  - Who as using alcohol drugs, how much, anyone impaired, knowledge of past use?
  - Do other details corroborate basic story?
  - If a contradiction exists, do not guess at reasons for why – Ask!
    - Hold a second interview if needed.
  - Is there evidence of a motive or incentive to exaggerate, distort or lie?
  - Has this person lied before?
    - Is it related to this situation?



## Nuts & Bolts (cont'd.)

- Ask for documents, texts, photos
- Is there anyone else who should be interviewed and what to expect to learn?
- Identify relationships between parties and witnesses or between witnesses
- Ask if witness has been contacted by party, advisor or another witness
  - What discussed?
  - Encouraged or asked to say or avoid items?
  - Ask to see texts and phone
- Never accuse of lying
- Avoid arguments
- Ask if there is anything else I should know or have not asked

*-going to take a break, just collecting facts*

## **Nuts & Bolts** (cont'd.)

- Ask interviewee if s/he has any questions
  - Make careful note of what questions are asked
- Take short recess to confer with colleague
  - See if other questions. Review and develop summary key points to be discussed with interviewee for confirmation
- Ask any follow-up questions
- • Have note-taker summarize key points of interview and ask for confirmation and clarification
- Invite supplementation if something later comes to mind
- Remind about confidentiality/nonretaliation
- Ask if will testify at Hearing and confirm contact information

## Interviewing Parties

- Explore all details of events – before, during and after (Checklist Handout)
- Surrounding details – seemingly insignificant facts that may have greater import
- Explore sensory details, as well as behavioral changes and responses

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## **Sensitivity to Complainants**

- Remember:
  - The Title IX Coordinator (and likely others) will have already reviewed the process, so do not belabor these issues
  - Acknowledge the difficulty of going through the process, and that the story may have been told before, possibly several times
  - Do not avoid important questions because they are difficult
    - If you think it will be helpful, explain why you are asking the question
  - Use an open and conversational communication style
  - Embrace the uncomfortable and the silence while:
    - the party considers the question
    - see if other investigator has additional questions on a certain topic before moving on
  - Offer to take breaks or to reschedule if it appears the Complainant is overwhelmed

## **Interviewing the Complainant**

- Be human – show empathy
- Do not make assumptions about Complainant's fragility or vulnerability
- Be transparent on how information will be used
- Allow enough time for a thorough explanation of all issues
- Ask for a full account, including who the Complainant has spoken to and what was said
- Recognize that trauma can have impact on memory
- Ask about witnesses and possible documentation, such as a journal or diary

## **Interviewing the Complainant** (cont'd.)

- Ask about relevant physical evidence (e.g., texts, emails, etc.) and collect any identified
- Ask about impact on academics and emotional and physical health
  - Opportunity to address available on- and off-campus services and interim measures
- Discuss retaliation and how the College will respond
  - Make clear that any acts of retaliation will be considered when deciding the outcome of the complaint



## **Interviewing the Respondent**

- Be human – show empathy
- Allow sufficient time for thorough exploration of the issues
- Acknowledge the difficulty of going through the process
- Ask for a full account, including to whom Respondent spoke and what was said
- Ask detailed questions about the allegations
- Leave no question unanswered
- Assess the level of detail Respondent can provide
- Ask about witnesses with relevant information

## **Interviewing the Respondent** (cont'd.)

- Ask about relevant physical evidence (texts, emails, etc.) and collect any identified
- Ask about possible motivation for the complaint
- \* Ask about impact on academics and emotional and physical health
  - Opportunity to address available on- and off- campus services and interim measures
- Discuss retaliation and how the institution will respond
  - Make clear that any acts of retaliation will be considered when deciding the outcome of the complaint and whenever necessary



## **Medical Information**

- Accept the information
- Ask for what purpose the party is providing the information
- Consult with the Title IX Coordinator before asking substantive questions; OCR previously advised institutions to assess the need for expert guidance in understanding and interpreting this type of information
  - “If the investigation includes forensic evidence, it may be helpful for a school to consult with local or campus law enforcement or a forensic expert to ensure that the evidence is correctly interpreted by school officials.” OCR Q&A, F-1 at p. 32

## **Medical Information** (cont'd.)

- If provided voluntarily by the Complainant, it may be shared with the Respondent, possibly with redactions
- Must balance between full and complete information of the parties and privacy
  - It is a case-by-case analysis

## **Prior Sexual History**

- In general, prior consensual relationships between the parties will be admissible
  - Mere fact of a current or previous consensual dating or sexual relationship between the two does not itself imply consent or preclude a finding of sexual violence
- Investigators should approach this topic carefully in both their investigation planning and investigation interviews
- Investigators should notify the Title IX Coordinator that the information was presented during the interview
- Investigator(s) should not ask questions about the Complainant sexual history of anyone other than the Respondent

## **When There are No Witnesses**

- Consider the following as you proceed with the parties' interviews:
  - The investigator should make detailed note of the demeanor of Complainant and Respondent and all non-verbal behavior
  - Convey to the parties how important it is to provide all information
    - A complaint or response replete with factual detail will be assessed against blanket accusations or denials that do not have any supporting detail
  - Review the substance, timeline, and chronology provided to identify and nail down any gaps or internal inconsistency
  - Search for attendant details and behavior before and after the incident by both parties

## **When There are No Witnesses (cont'd.)**

- Develop questions to evaluate and uncover the following:
  - Inherit plausibility of any explanations given
  - Has the Complainant told anyone else of the alleged harassment?
  - Is there a pattern of similar complaints made by others?
- Follow up on any admissions of behavior and/or re-examine denials in a subsequent interview
- Explore logical inconsistencies

## **When There are No Witnesses** (cont'd.)

- Consider other attendant details such as:
  - Respondent's size in relation to Complainant
  - Location of incident (consider isolation of Complainant) or person reporting the incident
  - Any change in Complainant's demeanor, personality or routine after the incident
    - e.g., roommate noticed that Complainant began wearing baggy clothes and stopped attending class regularly

## **When There are No Witnesses** (cont'd.)

- If you are faced with an inherent implausibility or inconsistency, ask for help in understanding.
  - “If I told you what you just told me, would you believe me?”
  - “You said X, and then Y – can you help me understand how those are consistent responses?”

## **Title IX Investigative Report**

- The College policy contemplates the preparation of a detailed written report of events (the "Investigative Report"). The format of the report should provide a sufficient summary of the activities undertaken to demonstrate its thoroughness, impartiality and fairness. The Report itself will also include as exhibits timelines, witness statements, documents and physical evidence collected.
  - A sample Investigative Report is provided.



# Questions ?