



K-12 CIVIL RIGHTS INVESTIGATOR TRAINING & CERTIFICATION LEVEL ONE COURSE

November 5, 12, & 19, 2020

LEVEL 1 INVESTIGATIONS TRAINING



Part 1

- I. Overview of Title IX
- II. Legal Basis for Title IX Liability
 - i. Foundational Caselaw
 - ii. Due Process Overview
- III. Title IX Coordinator Oversight
- IV. Overview of Investigation & Grievance Process Model
- V. Notice/Complaint
- VI. Initial Assessment
 - i. Supportive Measures
- VII. Beginning the Investigation
 - i. Investigation Timeline
 - ii. Formal and Informal Processes
 - iii. Investigation Strategy
- VIII. Formal Comprehensive Investigation
 - i. Strategizing Interviews
 - ii. Evidence Gathering

LEVEL 1 INVESTIGATIONS TRAINING



Part II

- I. Investigation Details
 - i. Evidence Collection
 - ii. Interview Scheduling & Preparation
- II. Questioning
 - i. Goals of Questioning
 - ii. Types of Questions
- III. Interview Skills
 - i. Demeanor
 - ii. Process
 - iii. Feedback
 - iv. Interviewing the Parties
- IV. Trauma-Informed Interviewing Practices
- V. Challenging Witnesses
 - i. Difficult
 - ii. Lying
 - iii. Resistant/Quiet
- VI. Helpful Investigation Documents
- VII. Investigation Report
 - i. Standard of Proof
 - ii. Review of Relevant Evidence
 - iii. Referral to Decision-Maker
- VIII. Investigator Role in Appeals?

OVERVIEW OF TITLE IX

- Text of the Law
- The IX Commandments
- Equality v. Equity

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."

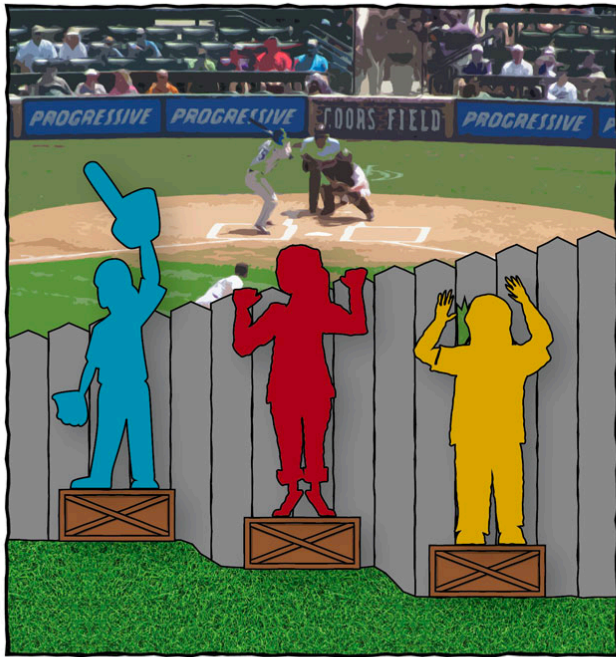


THE IX COMMANDMENTS

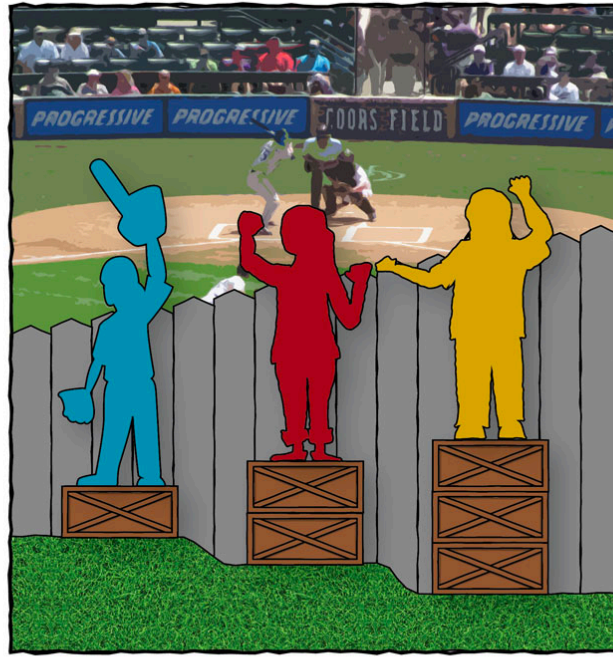


Thorough	Reliable	Impartial	Investigation
Prompt	Effective	Equitable	Process
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	Remedies

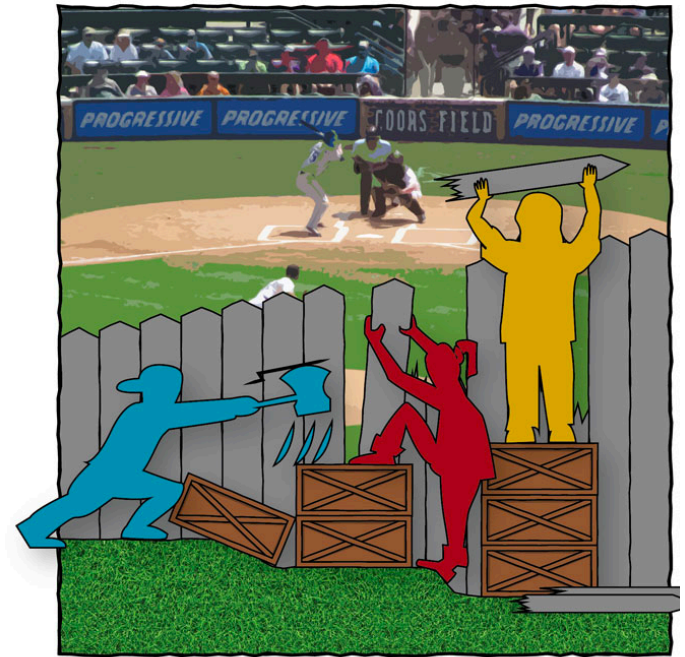
EQUITY DEFINED



EQUALITY



EQUITY



JUSTICE

LEGAL BASIS FOR TITLE IX LIABILITY

- Significant Cases
- Intersection of Title VII and Title IX
- Title IX and VII Inter-Related Investigations
- Due Process



GEBSER v. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



- Case involved teacher/student sexual harassment.
- Supreme Court created high standard that students must meet to prevail on a sexual harassment claim against recipients when an employee/student consensual relationship is basis of claim.
- Court said you cannot recover monetary damages against the school **unless** the behavior has been reported to someone with power to alter the situation ("actual notice") and **"deliberate indifference"** has been demonstrated by the school.

GEBSER v. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



- Three-part standard:
 1. An official of the educational institution must have had "actual notice" of harassment;
 2. The official must have authority to "institute corrective measures" to resolve the harassment problem; AND
 3. The official must have "failed to adequately respond" to the harassment and, in failing to respond, must have acted with "deliberate indifference."

DAVIS v. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- Prolonged pattern of student/student sexual harassment of a fifth-grade girl by a classmate.
- Parents complained to three teachers and principal.
- The school took no action until the boy was charged with, and pled guilty to, sexual battery.
- Filed Title IX action, alleging that persistent harassment and deliberate indifference resulted in her inability to attend school and participate in activities.

DAVIS v. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- Finding in favor of Davis, the Supreme Court applied same standards to find the institution liable for damages as in the *Gebser* case:
 - The institution must have “actual notice” of the harassment; and the institution must have responded to the harassment with “deliberate indifference.” Additionally, court held:
 - Harassment must be “severe, pervasive, and objectively offensive,” and the indifference “systemic,” to the extent that the victim is deprived of educational opportunities or services.
 - Justice O’Connor added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is “clearly unreasonable in light of the known circumstances.”

INTERSECTION OF TITLE VII AND TITLE IX



- Title IX consciously modeled on Title VI of the Civil Rights Act of 1964 and borrowed heavily from Title VII.
- Courts generally apply standards established under Title VII for guidance in how to establish a Title IX violation.
- Title IX prohibits against sex-based discrimination to the full range of activities related to the recruitment, evaluation, classification, payment, assignment, retention, or treatment of employees.
- Individuals can use both statutes to pursue the same violations.
- OCR's 2020 Regs. create extensive due process protections for at-will employees accused of misconduct.



TITLE IX AND TITLE VII INVESTIGATIONS



- Consider:
 - Role of district/school equity/AA/EOP officer.
 - Human resources/teachers.
 - Coordinator of school/campus conduct.
 - Athletics.
 - Public safety/SRO/Law enforcement.
- Oversight of deputy coordinators/investigators.
- Effect of OCR's 2020 Regs. definition of sexual harassment.
- Coordination of remedies in student/employee and employee/student grievance processes.
- What happens when employee is a student or student is an employee?

DUE PROCESS: CURRENT ISSUES



- Due Process is at the heart of OCR's 2020 regulations.
 - Applies to both public and private recipients, which is a shift in legal paradigm
 - Standard of Proof
 - Requirements for "Emergency Removal"
 - Detailed Notice of Allegations/Investigation
 - Providing Inv. Report and Evidence for Review/Response
 - Live Hearing with Cross-Examination Mandatory for Higher Ed; optional for K-12
 - Advisor Involvement (including possibly attorneys)
 - Bias by Investigators, Hearing Officers, Appellate Officers
 - Training: Biased Training; Insufficient Training, Transparency

TITLE IX COORDINATOR OVERSIGHT

-
- Role of the Title IX Coordinator in the Investigation Process
 - Supervisor of the Investigation Structure
 - Supervisor of the Investigation Process
 - Trainer for Investigators

THE TITLE IX TEAM



- Title IX Coordinator (TIXC)
- Deputy Coordinator(s)
- Investigator(s)
- Decision-maker(s)
- Appellate Decision-maker(s)
- Advisors

TIXC AS SUPERVISOR OF THE INVESTIGATION STRUCTURE



- The Title IX Coordinator is responsible for:
 - The appointment/engagement of investigators.
 - Training investigators, decision-makers, and appeals officers.
 - Supervision of investigators and investigations.
 - Helping investigators develop investigation strategy.
 - Coordinating supportive measures.
 - Timeline compliance.
 - Communication and coordination of investigation teams.
 - Providing institutional memory to investigators.
 - Retaining a record of all activities.
 - **May be an investigator but may not be a decision-maker.**
 - May serve as the hearing facilitator if no substantive role (if applicable).

TIXC AS SUPERVISOR OF THE INVESTIGATION PROCESS



- The Title IX Coordinator or designee is responsible for:
 - Documenting complaint.
 - Initial assessment.
 - Determining extent/footing/nature of investigation.
 - Notice of allegations and investigation.
 - Notice of hearing.
 - Reviewing/transmitting the written determination of the decision-maker.
 - Coordinating any duty to warn.
 - Assurance of supportive measures/remedies.
 - Recordkeeping of all activities.

TRAINING AREAS FOR INVESTIGATORS - OCR 2020 REGS.



- The definition of sexual harassment
- The scope of the recipient's education program or activity
- How to conduct an investigation and grievance process, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Understanding "relevant evidence" in order to create an investigation report that fairly summarizes all relevant evidence

BIAS – OCR 2020 REGS.



The Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process must not:

- Have a conflict of interest or bias for or against Complainants or Respondents generally or
- For or against an individual Complainant or Respondent.
- Let's explore both bias and conflict of interest. What do these mean?

Bias and conflict of interest by investigators that impact the outcome are grounds for appeal.

REQUIRED POLICY DEFINITIONS

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- Sexual Harassment
 - Sexual Assault
 - Domestic Violence
 - Dating Violence
 - Stalking



Policies

REQUIRED DEFINITIONS – OCR 2020 REGS.

- 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)

SEXUAL ASSAULT: SEX OFFENSES, FORCIBLE



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

- **Forcible 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 the consent of the Complainant.
- **Forcible Sodomy:** Oral or anal sexual intercourse with 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.

SEXUAL ASSAULT: SEX OFFENSES, FORCIBLE (CONTD.)



- **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: SEX OFFENSES, NONFORCIBLE— NONFORCIBLE SEXUAL INTERCOURSE



- **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].
- 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 be current or former spouses or have an intimate relationship.

STALKING

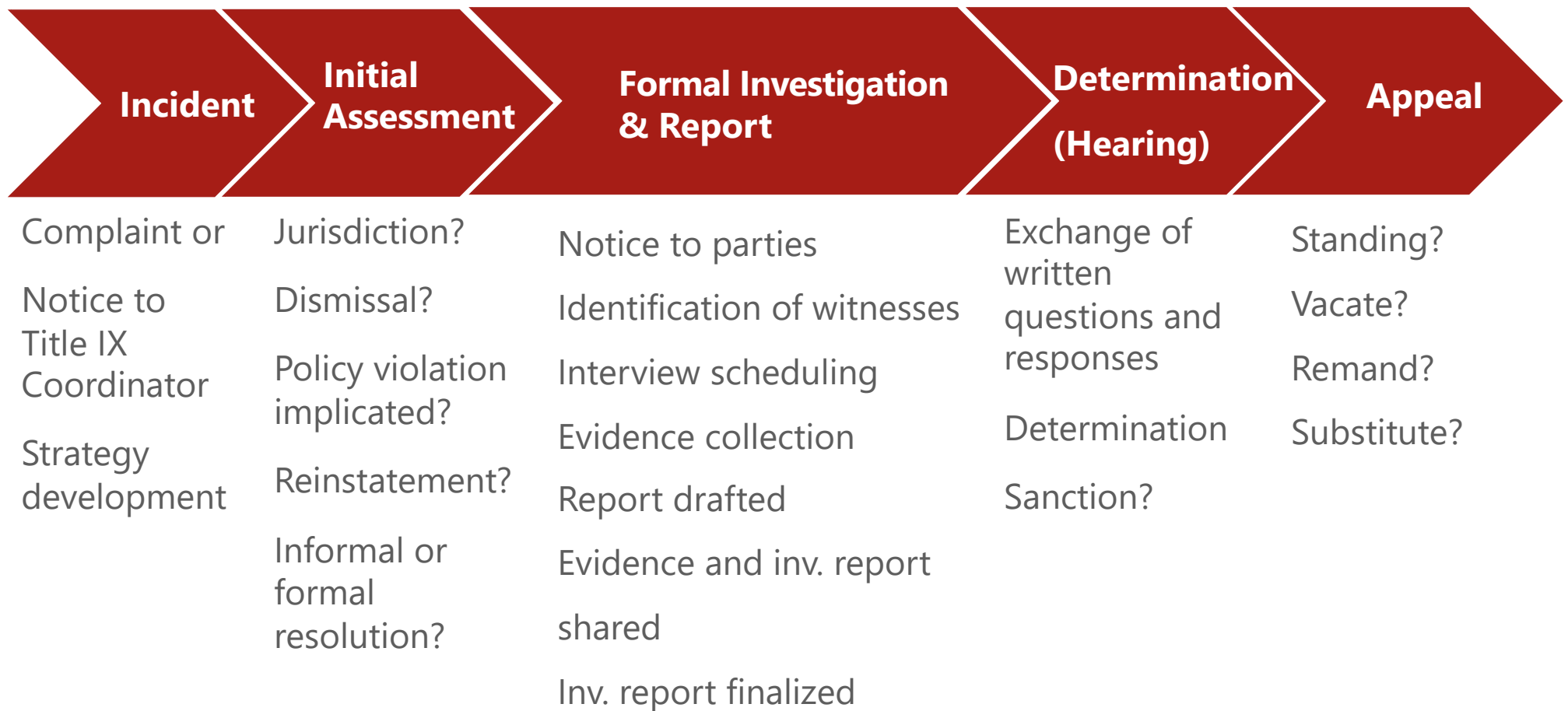


- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
 - Fear for the person’s safety or the safety of others; or
 - Suffer substantial emotional distress.
- For the purposes of this definition –
 - Course of conduct means two or more acts, including, 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.
 - 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.
- But, Regs insist this definition not be interpreted to violate First Amendment.

INVESTIGATION AND GRIEVANCE PROCESS MODEL: AN OVERVIEW

- The Process & Ten Steps
- Jurisdiction
- Who Should Investigate?
- Confidentiality & Privacy

THE PROCESS



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

CIVIL RIGHTS INVESTIGATION MODEL AND STUDENT CONDUCT MODEL



- How does this model alter the current student conduct model?
 - An active gathering of information by the investigator or investigators; not intended to “build a case.”
 - Does not impact the implementation of informal or alternative dispute resolution approaches.
 - Characterized by an intentional effort to enhance due process protections for the parties and make procedural and support mechanisms equitable.
 - Provides a right of appeal for all parties to the report, not just the Respondent.

NOTICE TO THE RECIPIENT

- Actual Knowledge/ Notice
- Formal Complaint
- When Do You Investigate?
- Who Should Investigate?

Actual Knowledge

- Notice of sexual harassment or allegations
- In an education program or activity
- Against a person in the US
- To an **“Official With Authority”**:
 - a Title IX Coordinator;
 - any official with authority to institute corrective measures on behalf of a college or university; or
 - **any employee of an elementary or secondary school (includes district employees)**

What is required after **Actual Knowledge**?

- A prompt response that is not deliberately indifferent
 - Outreach to Complainant
 - Optional supportive measures
 - Take wishes of Complainant into account
 - Information about how to file a “formal complaint”

Formal Complaint

- Document or electronic submission requesting an investigation
- Filed by Complainant (or parents/guardian) or signed by TIX Coordinator
- Alleging Sexual Harassment
- Complainant must be participating or attempting to participate in the recipient's education program or activity
- Initiates mandatory grievance process (investigation and hearing)

WHEN DO YOU INVESTIGATE?



- Upon receipt of a formal complaint, investigation is required
- What about misconduct that is open and obvious to Employees?
- What about rumors, gossip, social media, etc.?
 - Discretionary, but often recommended
 - OCR may not think these create an obligation for formal action, but will courts agree?
- Anonymous reports?

WHO SHOULD INVESTIGATE?



- Investigations of sexual harassment must be impartial, thorough, and reliable.
 - Title IX Coordinator?
 - Standing panel of investigators?
 - Human resources or student services?
 - Administrators/Staff?
 - Teachers?
 - Coaches?
 - Outside/External investigator?
 - NOT Legal Counsel
 - **Well-trained**

SHOULD THERE BE MORE THAN ONE INVESTIGATOR?



No specific requirement, but:

- Investigation must be prompt, thorough, and impartial.
- Investigator must collect the maximum amount of relevant information available to help decision-maker make a determination.
- A pool of investigators may help to ensure that your investigation meets these requirements.
- ATIXA prefers a team investigator approach when possible, but recognizes reality.
- Always have alternates available in case of recusal, illness, etc.

- Other benefits:
 - Who is chosen to investigate may be strategic to each specific case.
 - Gain ability to brainstorm investigation steps and lines of questioning with co-investigators, and to co-facilitate interviews.
 - Flexibility if there is any conflict with investigators and parties.
 - Sharing the heavy lift of required documentation and recordkeeping.

INVESTIGATION TEAM PROCESS OVERVIEW



- The investigation team, in consultation with their supervisors, and/or the Title IX Coordinator, strategizes the entire investigation, including methodology, order, timeline, goals, obstacles, etc.
- Interview all witnesses.
- Gather and assesses all available evidence.
- Write a report.
- Provide report to the parties for review, then edit as needed and provide final report and investigation file to:
 - Coordinator, who then shares with the decision-maker(s).
 - Parties and advisors.

INITIAL ASSESSMENT

- Initial Assessment
- Supportive Measures

INITIAL ASSESSMENT IN SUMMARY



- Has there been a formal complaint?
- Does the TIXC need to sign/initiate a formal complaint?
- Does the alleged conduct meet the required definitions?
- Does jurisdiction exist?
- Can/should recipient remedy informally or without discipline?
- Mandatory/Discretionary dismissal considerations.
- If dismissed, should an alternate policy/process begin?



If proceeding under Title IX:

- Establish basis of investigation:
 - Incident or pattern, and/or climate/culture.
- Establish a preliminary timeline for the investigation.
- If no formal action, document how recipient's response not deliberately indifferent.
- Responding to anonymous reports:
 - Determine if a trend or pattern may be apparent.
 - Can you identify parties?
 - Duty to attempt some form of remedial response, even to an anonymous report.

SUPPORTIVE MEASURES



- Throughout process:
 - Provided to complainant and respondent
 - Non-disciplinary, non-punitive
 - Individualized
 - Restore or preserve equal access
 - Without unreasonably burdening other party
 - Protect safety of parties or environment, or deter sexual harassment
- *NOTE: Remember to remedy on behalf of community, not just parties.*

COMMON SUPPORTIVE MEASURES



- Referral to counseling, medical and/or other health services.
- Referral to the Employee Assistance Program.
- Visa and immigration assistance.
- Student financial aid counseling.
- Education to the community or community subgroup.
- Altering school housing situation.
- Altering work arrangements for employees or student-employees.
- Safety planning.
- Providing safety escorts.

COMMON SUPPORTIVE MEASURES



- Providing transportation accommodations.
- Implementing contact limitations (no contact orders) between the parties.
- Academic support, extensions of deadlines, or other course-related adjustments.
- Trespass, Persona Non Grata, or Be on the Lookout (BOLO) orders.
- Timely warnings.
- Class schedule modifications, withdrawals, or leaves of absence.
- Increased security and monitoring of certain areas of school.
- Etc.

INFORMAL RESOLUTION



OCR endorses and encourages informal resolution, and we believe it is a worthy practice, when voluntary.

- Following formal complaint.
- Allowed at any time prior to a final determination at discretion of TIXC.
- Must received voluntary, written consent of the parties and their parent/guardian.
- OCR regs preclude informal resolution of allegations that an employee harassed a student.

BEGINNING THE INVESTIGATION

- Timeframes for Resolution
- Notice to the Parties
- Role of Law Enforcement
- Formal Comprehensive Investigation
- Rights of the Parties
- Advisor of Choice
- Strategizing the Investigation



“REASONABLY PROMPT” TIMEFRAMES FOR GRIEVANCE PROCESS



- 20+ days to resolution given procedural requirements in the new regulations
 - No set requirement in the regs, other than to have “reasonably prompt timeframes” for the conclusion of the process designated in your procedures.
 - Timeline starts from notice, not from the incident itself.
 - Goal is to avoid undue delay.
 - Document delays

- Ensure that all steps in the investigation are conducted according to the timelines in the recipient's procedures.
 - Procedures should provide some flexibility at the discretion of the TIXC.
- Parties and witnesses should be interviewed as soon as possible:
 - So that recollections are as fresh and accurate as possible.
 - To secure necessary remedies as soon as possible.
 - But not before Notice of Allegations/Investigation is sent.
- Provide notice of extensions.

TEMPORARY DELAYS / EXTENSIONS



- For good cause
 - Absence of a party
 - Absence of a party's advisor
 - Concurrent law enforcement activity
 - Language assistance
 - Accommodation of disabilities
- What about breaks? Injunctions?
- Provide written notice of delays and extensions to all parties.

NOTICE TO THE PARTIES - OCR 2020 REGS

Upon receipt of a formal complaint, a recipient must provide written notice to the parties who are known:

- Notice of the grievance process, including any informal resolution process, the standard of evidence
- Notice of the allegations with sufficient time to prepare a response before any initial interview and sufficient details known at the time, including:
 - Identities of the parties involved in the incident, if known
 - Detailed description of conduct
 - Date and location, if known

NOTICE TO THE PARTIES - OCR 2020 REGS (CONTD.)



- Respondent is presumed not responsible and a determination regarding responsibility is made at the conclusion of the grievance process
- Parties may have an advisor of their choice, who may be an attorney
- Parties may inspect and review evidence prior to the completion of the investigation report
- Any provision from code of conduct that prohibits knowingly making false statements or knowingly submitting false information (if any)
- Update notice if additional allegations will be added/investigated


ROLE OF LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS



- Law enforcement investigation does not relieve the school of its duty to respond promptly and effectively.
- Can district/school law enforcement (or public safety) be the Title IX investigatory arm? Should it be?
 - Legal standards for criminal investigations are different.
 - Police investigations or reports may not be determinative of whether harassment occurred under Title IX.
 - Conflict-of-interest for sworn officers.
 - Add value by supporting recipient's investigation efforts.

FORMAL COMPREHENSIVE INVESTIGATION



- 
- A large, stylized red letter 'I' is positioned on the left side of the slide, serving as a decorative element for the list.
- Commence a thorough, reliable, impartial, prompt and fair investigation.
 - Determine the strategy for the investigation.
 - Witness interviews.
 - Evidence gathering.
 - Intended timeframe to complete the investigation.
 - Evidence review.
 - Report writing and review.
 - Complete the investigation promptly, and without unreasonable deviation from the timeline.

RIGHTS OF THE PARTIES DURING THE INVESTIGATION, OCR 2020 REGS



- Right to present witnesses, including fact and expert witnesses
- Right to present inculpatory and exculpatory evidence
- Right to discuss the allegations under investigation without restriction
- Right to gather and present relevant evidence without restriction
- Right to be accompanied to any related meeting or proceeding by advisor of their choice, who may be, but is not required to be, an attorney
- Right to written notice of the date, time, location, participants, and purpose of investigative interviews or other meetings, with sufficient time to prepare
- Right to inspect and review evidence and draft inv. report before finalized

ADVISOR OF CHOICE



- Parties have the right to have an advisor of their choice to assist them throughout the process, to include attending any meetings and interviews
- Advisor of choice may be anyone, including attorney
- Advisor of choice is in addition to the students' parent/guardian
- May restrict participation of advisors equally
- No requirement for K-12 to provide an advisor for the parties
- No requirement to train advisors

STRATEGIZE THE INVESTIGATION



- Common questions to consider:
 - Whom to interview?
 - When/In what order?
 - What information/evidence can be obtained?
 - How do we maximize the quantity/quality of evidence?
 - How and when do we notify witnesses?
 - Who needs to be aware of the investigation?
 - When and how do we share evidence/information with the parties?

PREPARE FOR EACH INTERVIEW



- Outline your interview questions in advance but be flexible. If you need to deviate from your script and insert a logical follow-up question, be prepared to do so.
- Plan the order of interviews; may be beneficial to interview Respondent last.
- Most beneficial to conduct interviews in person, if conditions permit.
- Interviews should be conducted in a neutral, quiet, and private setting with no or minimal likelihood of interruptions.

WHEN TO INTERVIEW PARTIES AND WITNESSES



- Notifying the Respondent of the complaint:
 - “Upon receipt of formal complaint”
 - Any allowance for interviewing witnesses and accumulating evidence?
- Must provide parties with written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate

WITNESS INTERVIEWS



- Strategize contacting witnesses, ordering witness interviews, and preventing contact between witnesses, where necessary.
- Solicit a witness list from the Complainant.
- Solicit a witness list from the Respondent.
- Determine when you are going to question Respondent.
- **Suggested default order*:** Complainant → Complainant's witnesses → Neutral witnesses → Respondent's witnesses → Respondent → Any additional witnesses identified by Respondent → Round 2 → Round 3.

*Every case is different

INTERVIEW SCHEDULING



- Try to anticipate how long each interview will take (e.g. How many times will you interview the witness? How much time can the witness give you?). Schedule your interview slots accordingly.
- Back-to-back interviews should be avoided, if possible. Interviews often take longer than expected and may require you to reschedule interviews.
- Leave open an amount of time roughly equivalent to the length of the interview for post-interview teamwork, review of notes with your co-investigator, and to prepare for the next interview.

ESTABLISH PRE-INTERVIEW GROUND RULES



- Who will attend?
- How will records be kept? Recording? Access?
- Role of Advisors
- Difference between Advisor/Attorney role in interviews vs. in a hearing
 - For K-12 schools who may utilize hearing with cross-examination
- Involvement of Parents, Union Reps, Friends, etc.
- FERPA (students)/Employment records/confidentiality

SHARING INFORMATION WITH PARTIES AND WITNESSES DURING INVESTIGATION



- Decide how much information you will share in advance of each interview and have a rationale for what information will be shared and what will not be shared.
 - Remember that prior to a decision, the parties must have an opportunity to review all “directly-related” evidence.
 - You may be challenged on a decision not to share, so have a rationale
 - When in doubt, provide the parties with evidence

AND WITNESSES DURING INVESTIGATION



- Explore only those facts that are relevant to the issue at hand or that seem likely to lead to relevant evidence.
- Start with broad questions, then move to narrow, more pin-point questions.
- It can be difficult for the Respondent to respond effectively to broad-based or abstract allegations and can diminish trust and hurt rapport-building. Provide a detailed description of the allegations as necessary.

PROVIDING POLICY AND PROCEDURE COPIES



- Each party should receive a copy of:
 - The specific policies alleged to have been violated (not a link), including any sub-parts or sections.
 - The procedures that will be used to resolve the complaint, including the rights that extend to the parties (not a link).
- Consider providing parties with your non-retaliation provision/policy.
- Keep copies of the applicable policies and procedures in the investigation file.

INVESTIGATION DETAILS

- Philosophy of the Investigation
- Evidence and Evidence Gathering
- Evidence Collection and Issues of Concurrent Criminal Action
- Questioning

PHILOSOPHY OF THE INVESTIGATION



- The burden of proof and the burden of gathering evidence rest on the recipient, not the parties.
 - What does this really mean in practice?
- This empowers a presumption of innocence.
 - What does this presumption really mean?
- Affirmative consent standards do not shift this burden, but that is a common misunderstanding of how affirmative consent standards work.

EVIDENCE GATHERING



- Engage in the active accumulation of evidence.
- Timeliness.
- Document receipt of information and other materials as they are obtained in the course of the investigation.
- Verify/authenticate evidence.
- Be thorough in your examination of factual, circumstantial, and hearsay evidence, and ensure that all evidence has been examined, and all leads exhausted.



EVIDENCE



- **All** relevant evidence must be objectively evaluated and considered – inculpatory and exculpatory
- Credibility determinations may not be based on a person's status as a Complainant, Respondent, or witness
- Access to privileged information requires waiver/consent
- No restriction on parties discussing case or gathering evidence
- Equal opportunity to:
 - Present witnesses
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence which may be offered

RELEVANCE



- Evidence is generally considered *relevant* if it has value in proving or disproving a fact at issue
- Under the Title IX regulations, evidence of the Complainant's sexual behavior or predisposition is explicitly and categorically **not relevant** except for two limited exceptions:
 - Offered to prove that someone other than the Respondent committed the conduct alleged, or
 - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent

PRIVACY - OCR 2020 REGS.



- Additional permissions required for:
 - Records made or maintained by a
 - Physician
 - Psychiatrist
 - Psychologist
 - Questions or evidence that seek disclosure of information protected under a legally recognized privilege

EVIDENCE COLLECTION AND ISSUES OF CONCURRENT CRIMINAL ACTION



- Active accumulation of evidence.
- What if law enforcement is the sole source of evidence collection?
 - And they won't release the evidence to you?
 - Does it matter if they are local or the SRO/public safety?
- What if there is a pending criminal or civil case?
- What if a party or parents threaten to call a lawyer?
- What if a party files a lawsuit or complaint with OCR?

QUESTIONING

- Goals of Questioning
- Types of Questions
- Questioning Exercise

QUESTIONING



- What are the goals of questioning?
 - Learn the facts.
 - Establish a timeline.
 - Understand each party's perception:
 - Of the event and of the process.
 - Try to learn what is more likely than not to have happened
 - Three sides to every story (or more).
- NOT the goals of questioning...
 - Curiosity.
 - Chasing the rabbit into Wonderland.
- Know your role. You are not law enforcement or prosecutors. This is a neutral inquiry, not an interrogation or inquisition.

- To consider before asking questions:
 - What are the relevant issues?
 - What do I need to know?
 - Why do I need to know it?
 - What is the best way to ask the question?
 - Am I minimizing the re-traumatization potential for all parties?
 - Am I avoiding blaming or biased questions?
 - Am I the right person to ask this?

- Open-ended questions (tell us...who, what, how?)
- Closed-ended questions (Did you, were you?)
 - Use infrequently, but when needed to drill down on a specific issue.
- Careful with Compound Questions
 - I have two questions. First..., Second...
- Avoid asking Multiple Choice Questions
 - Were you a), b), c)
- Avoid gratuitous use of leading questions – (Isn't it the case that...?)

QUESTIONING



- Have a purpose for asking every question.
- Be sure to ask a question, not make a speech.
- Ask questions about the allegations and the evidence and the policy elements.
- Don't be accusatory or argumentative. You don't decide the allegations and should have no real stake in their outcome.
- Don't make questions too long or confusing.
- If you ask a bad or blaming question, take it back.
- If you say something inappropriate, apologize.

QUESTIONING



- Listen carefully and adapt follow-up questions.
- Avoid evaluative responses to a person's answers unless needed to establish rapport, draw someone out, or convey empathy.
 - E.g.: "that's too bad"; "I'm glad you said that"
- Do not moralize.
- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as "hooked up," "drunk," "sex," "fooled around," "had a few drinks," "was acting weird".
- Be cautious with questions that invite parties to second-guess their actions, as this may be perceived as blaming. The questions may be fair game, but it's all in how you ask them.

QUESTIONING EXERCISE



Please critique the following questions:

- How did your behavior impact others? The school community? Yourself?
- Explain what you hoped to accomplish through your actions.
- Why did you choose to drink so much if you knew it was risky?
- Did you sign the Honor Code at the beginning of the year?
- I have a couple of questions: First, do you know what incapacitated means?; Second, could you tell she was incapacitated?; and Third, why did you give her another drink when evidence from witnesses indicates she was already really drunk?

QUESTIONING EXERCISE



Please critique the following questions:

- What could you have done differently in this situation?
- What was the purpose of your behavior?
- How would you feel if others behaved the way you did?
- What would be the consequences to the community if everyone engaged in similar behavior?
- How might you react if this situation were to come up again?

INTERVIEWING SKILLS

- Demeanor of Investigator(s)
- Interview Skills
- Rapport Building
- Setting Up Reasonable Expectations
- Feedback to Witnesses
- Case Study

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

DEMEANOR OF INVESTIGATOR(S)



- Work to establish a baseline of relaxed conversation.
- Maintain good eye contact.
- Listen carefully to the answers to your questions.
 - Avoid writing while party/witness is talking, if possible.
 - Do not be thinking about your next question while party/witness is talking.
- Ask questions in a straightforward, non-accusatory manner.
- Nod affirmatively and use active listening skills to prompt or keep party/witness talking.

INTERVIEW SKILLS



- Explain process, your role as a neutral fact-finder, and applicable privacy protections and limitations.
- Discuss thoroughness and the need for completeness; make sure parties don't leave facts out (i.e. alcohol/drug use). Explain amnesty policy (if applicable).
- Create comfort with language and sensitive subjects.
- Establish rapport before questioning.
- Ascertain who the individual is and their relation to the other parties in the case.
- Document whether individual is cooperative or resistant.
- Be professional: gather the facts, make no judgments, and make no unnecessary statements about the parties.

INTERVIEW SKILLS



- Take the allegations from start to finish through a process of broad to narrow questions and issues that need to be addressed.
- Ask questions about the allegations, the evidence, and the policy elements.
- Focus on areas of conflicting evidence or gaps of information.
- Drill down on timelines and details.
- Don't leave a question or gap unanswered.
- Pay attention to alcohol/drug consumption and timing of consumption, if relevant.

INTERVIEW SKILLS



- Be cognizant of the difference between what is “believed” (conjecture) and what was “witnessed” (facts).
- Ask who else you should talk to and ask for any relevant documentation (i.e. texts, emails, etc.).
- Let parties/witnesses know you may need to follow up with them as the investigation progresses.
- Suggest that the parties consult their advisors before discussing the investigation with others, without placing restrictions on doing so.

RAPPORT BUILDING



- Dependent on age of the interviewees
- Understand the goals of an “interview” versus an “interrogation.”
 - An interview is a conversation designed to elicit information in a non-accusatory manner.
 - Shifting to an interrogation approach should not be done lightly; you cannot go back – not recommended.
- Is person comfortable that you will conduct the investigation fairly and objectively?
 - Team or peer-led investigations can help create a rapport much more easily.

SETTING UP REASONABLE EXPECTATIONS

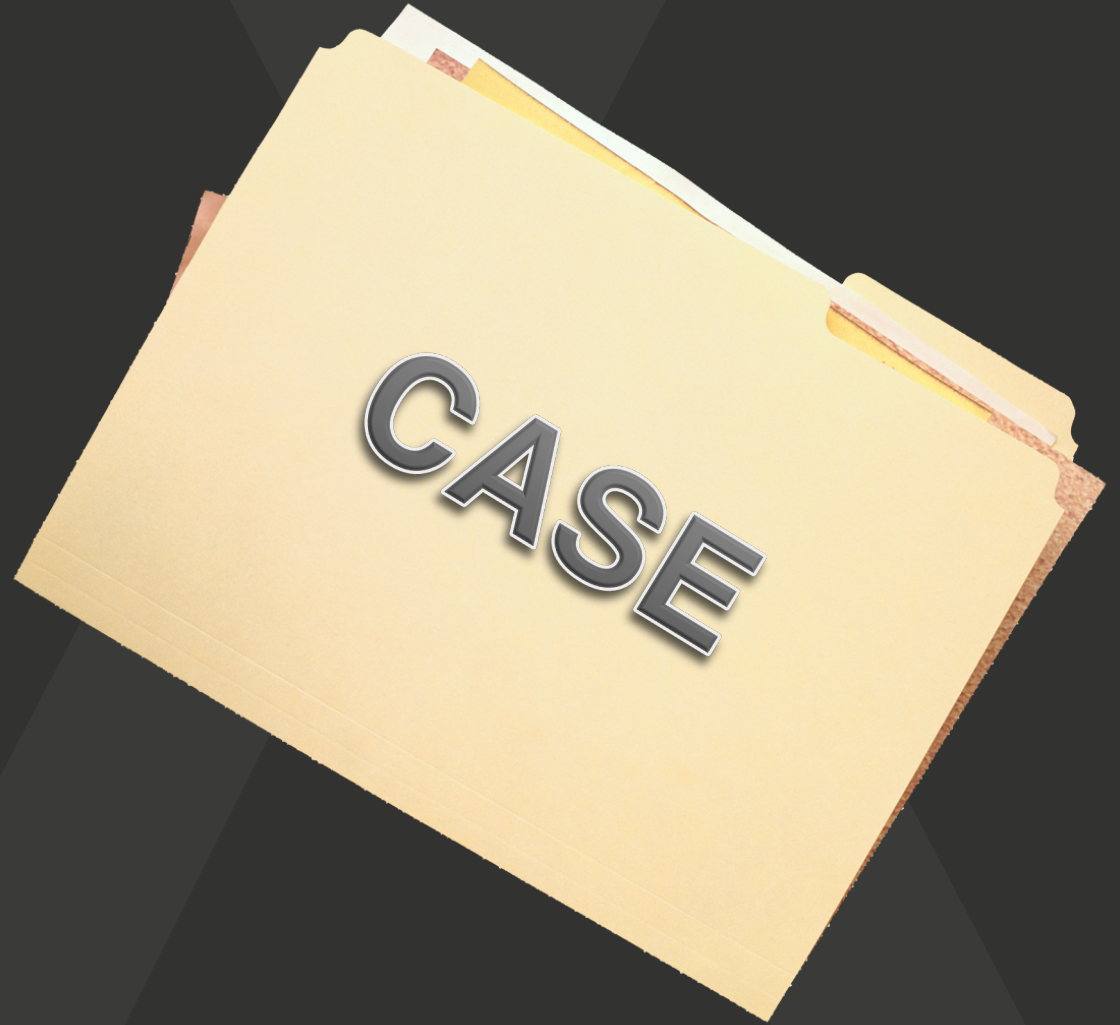
- People who conduct investigations with skill rest secure in the knowledge that all those involved, including witnesses, were treated objectively and fairly.
- Be sure Complainant and Respondent understand parameters of the policy, what it does and does not cover, how the process plays out, and what the process can and cannot accomplish.
- Provide ample opportunity for the Complainant and the Respondent to ask questions.
- Keep parties informed of steps in process.

FEEDBACK TO WITNESSES



- Witnesses may ask or say:
 - Am I being investigated?
 - What are you really investigating?
 - How will you use the information you are given?
 - Is it confidential?
 - Will I get into trouble by giving you this information?
 - I don't want to cooperate.
 - Do I need my parents/lawyer present during interview?
- Anticipating these questions and/or covering them in advance can help to ensure that you establish good rapport, which should help you get the truth.

CASE STUDY



CASE STUDY: IVAN & JUANITA



- Juanita Morales, a freshman member of the girls' soccer team, made a Title IX report directly to the Vice Principal.
- On the morning of October 11, her teammate, who was checking her email in the computer lab, yelled for Juanita to come look at something on the computer.
- Juanita saw an email sent from the boy's soccer team email address, boyssoccer@school.com, which said "Greetings new freshman, meet the girl next door."
- The email included a photo of Juanita's face photoshopped onto a naked body with huge breasts.

CASE STUDY: IVAN & JUANITA



- Everyone in the room knew it wasn't Juanita, but they all laughed anyways.
- Juanita ran from the room crying, embarrassed that others would think it was her.
- She immediately called Ivan, a member of the boys' soccer team, who she believed sent the email.
- Earlier in the year, Ivan asked her out several times, but she didn't like him.
- She found him really annoying, and while she knows it wasn't nice, she called him a total loser in front of his friends.
- She knows that he sent the email to hurt and embarrass her.

CASE STUDY: IVAN & JUANITA



You are beginning your formal investigation:

- **What are the potential policy violation(s)?**
- **How do you think about your strategy?**
- **What first steps would you employ?**
- **Who would you want to interview at this stage?**
- **What evidence you would want to look for?**

CASE STUDY: IVAN & JUANITA



- You decide to interview Ivan. Ivan believes Juanita is blowing the whole matter out of proportion.
- Ivan says Juanita “always flashes her breasts” at him and told him she wanted breast implants.
- He admits to creating the photo for a class project. He reports:
 - “It was only meant to be a joke. I never put her name on it, so what’s the big deal? This is a work of art that I created for my class, not a porn picture or anything. I only showed my artwork, which by the way is protected by the First Amendment, to a few of my teammates. I know my rights very well, since my dad is a lawyer. In fact, the First Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

CASE STUDY: IVAN & JUANITA



- Ivan showed the photo to a couple of teammates but did not send the email.
- The email account is for official team business. The coaches and captain executives have the password; the captain they have shared it broadly with all the seniors on the team.
- You decide to interview John Wang, assistant director of information technology.
- John was able to confirm that someone using the computer lab computer sent the picture from the boy's soccer team email account.

CASE STUDY: IVAN & JUANITA



- The picture was inserted into the email via a flash drive and he was unable to determine which student had logged in.
- John received Ivan's consent to inspect his laptop. The photo was on his hard drive, but was not sent out via email to anyone.
- He said that when he doesn't have his laptop with him, it is typically inside his locker. Ivan also told him that he hasn't given anyone else his laptop password.

CASE STUDY: IVAN & JUANITA



- **Who else might you interview?**
- **What other evidence do you want to gather?**
- **Do you think you have gathered enough evidence to begin drafting your investigation report?**

CASE STUDY: IVAN & JUANITA



- After you've shared the evidence you gathered with Ivan and Juanita and given them 10 days to review and respond, the following occurs:
 - Juanita's advisor tells you that he read what Ivan said in his interview about having created the photo for his art class and he knows Ivan is not telling the truth. The advisor said his daughter is in the same art class with Ivan and his daughter never had an assignment like that for class.
 - Ivan tells you that he has a new witness he wants you to interview. Ivan wants you to interview his friend Alan who will tell you that Juanita really is not bothered by the photo because she flashed her breasts at Ivan a few times before and told him that she wanted breast implants.
- **How do you respond to Juanita's advisor?**
- **How do you respond to Ivan?**

INTERVIEWING THE COMPLAINANT



- Acknowledge difficulty of reporting and thank them.
- Acknowledge that they may have told this story multiple times already.
- Explain why you are taking notes and/or ask for permission to record, if applicable.
- Provide a copy of your policies and procedures.
- Ask them to share a complete account of what occurred.
 - Have them give full narrative without asking questions, then drill down on details.
- Ask about outcry witnesses and possible documentation such as blogs or journals.
 - What will witnesses likely say/know?

INTERVIEWING THE COMPLAINANT



- Ask about those they spoke to and told about the incident.
- Ask what the Complainant's motivation is for reporting and what they hope to see as a result.
- Find out if their academics and/or work have been affected.
- Ask how this has affected them emotionally and/or physically.
- Advise that the allegations will be discussed with the Respondent and witnesses.
- Let the Complainant know next steps and when you will be in touch.

INTERVIEWING THE RESPONDENT



- Acknowledge difficulty of the situation and thank the Respondent for meeting with you.
- Provide a copy of your policies and procedures.
- Ask them to share a complete account of what occurred.
- Question the Respondent as to the allegations – ask a combination of open-ended and closed-ended questions.
- Get detailed – do not leave a question unanswered.
- Ask about witnesses and any other relevant information.
 - What will witnesses likely say/know?
- Ask about possible motivation for allegation(s).

INTERVIEWING THE RESPONDENT



- Provide support and resources throughout the process as needed.
 - Discuss counseling options and other supportive measures if they are not already connected.
- Discuss non-retaliation and any steps such as no-contact orders, housing moves, and emergency removals (if applicable).
- If emergency removal is employed, review the terms and provide a timeframe.
- Let the Respondent know next steps and when you will be in touch.
- Suggest that the Respondent consult their advisor before discussing the investigation with others, without placing restrictions on doing so.

INTERVIEWING WITNESSES



- It may be helpful to not label the allegations as “sexual misconduct” or “sexual harassment” but to describe the behavior, neutrally.
- Ascertain relation to the other parties in the matter.
- Address the need for complete truthfulness.
- Ask relevant questions.
- Ask for opinions.
- Ask if either party spoke about the incidents after they happened.
 - Did they see any change in behavior?

INTERVIEWING WITNESSES



- Ask if they have been contacted already by one of the parties.
- Ask if they have made any previous statements, such as to law enforcement.
- Ask if there is anything you should know that has not been covered or if there is anyone else they think should be contacted.
- Discuss non-retaliation and give examples.
- Discuss privacy and FERPA guidelines.
- Ask all interviewees to contact you if they remember anything else or want to add to their interview.

TRAUMA-INFORMED INTERVIEWING

-
- Considerations for Interviewing

IMPACT OF TRAUMA ON FUNCTIONING



THE BRAIN'S RESPONSE TO TRAUMA



In response to the anticipated trauma of sexual assault or other violence, hormones can be released into body that impact:

- Ability to react physically.
- Ability to think rationally.
- Ability to consolidate or group memories.

This is a neurobiological response, not a choice.

TRAUMA-INFORMED RESPONSE



- Promotes safety.
- Recognizes the possible impact of trauma on a cognitive, physical, psychological, emotional, and neurobiological level.
- Understands how trauma can impact someone's academics/work/social life.
- Recognizes the need for support/positive relationships.
- Honors choice with the goal of empowerment.
- Is respectful and considers boundaries and privacy.
- It does NOT mean that you cannot or do not question the credibility of the interviewee.

TRAUMA-INFORMED INTERVIEWING



- Prioritize developing rapport and building trust.
- Emphasize transparency and predictability.
- Physical aspects of interview (light, access, comfort, etc.).
- Be cognizant of why someone may have responded in a “counterintuitive” manner.
- Be mindful that recall is often difficult and slow following trauma.
- Use non-judgmental/non-blaming language.
- Avoid re-traumatization (but must still ask necessary questions).
- Use Cognitive Interviewing to aid recall (learn more about this in Level Two Certification).

TRAUMA-INFORMED INTERVIEWING



- Avoid:
 - Unsupportive responses
 - Taking control any more than you have to.
 - Escalating the situation.
 - Defining or labeling a party's experience.
 - Asking why questions (i.e. "Why did you . . . ?").
 - Verbalizing judgment in the moment.
 - Using trauma as a substitute for evidence or basis to assess credibility.
 - Trauma doesn't prove anything in terms of a policy violation

CHALLENGING WITNESSES

- Difficult Witnesses
- Lying Witnesses
- Resistant and/or Quiet Witnesses

DIFFICULT WITNESSES



- Set the tone:
 - Thank them.
 - Review your role as a neutral fact-finder.
 - Put them at ease – ask about them without being phony.
 - Acknowledge any hesitation/awkwardness as normal.
 - Review retaliation against a witness.
 - Review amnesty.
 - Review confidentiality.
 - Review expectation of truthfulness.

LYING WITNESSES



- In a non-accusatory way, explain how their statements don't "make sense."
- Allow opportunity for witness to restate.
- Try to gauge why they are lying – Fearful? Embarrassed? Protective? Try to address their motivation individually, with understanding.
- If they continue to lie, confront and explain the repercussions for lying in an investigation.
- Calmly bring them back to the questions.
- If needed, leave the door open for follow up.

RESISTANT AND QUIET WITNESSES



- Gauge their resistance or hesitation and try to address their motivation individually.
- Answer their questions about the process.
- Back up when needed.
- If they open up, be responsive.
- Explain expectations of the school and rationale for the duty to participate, if applicable.
- Advance preparation will help when open-ended questions don't work.

OTHER CONSIDERATIONS



- Consider carefully who should lead the interview.
- Ask open-ended questions first.
- Allow time.
- Use breaks.
- Remain calm and professional.
- If you ask a bad question, simply apologize, restate, correct, etc.
- Allow for flexibility.

HELPFUL INVESTIGATION DOCUMENTS

- Incident Timeline
- Post-interview Documents
- Witness Lists and Flowcharting

INCIDENT TIMELINE



- Discuss timeline of event/s with all parties/witnesses.
- Obtain as much detail as possible.
- What times can be established from phone calls, email, texts, and receipts.
- Identify any “gaps” and address them – may lead to information not previously shared.
- Timing highly relevant to alcohol/drug consumption.

INCIDENT TIMELINE



- Timing also highly relevant in cases involving physical evidence such as bruising, bite marks, etc.
- In stalking and/or verbal, online sexual harassment cases, times of communication between parties may be important.
- Establishing a reliable timeline useful when questioning witnesses such as bartenders and Uber/Lyft or cab drivers, and when searching for video footage.

THE TIME-SAVING FIVE DOCUMENTS YOU MAY WANT TO CREATE POST-INTERVIEW



1. Interview Transcript in Final Form (to be verified by interviewee).
2. Opinions & Perceptions.
3. Future Pointers Document.
 - New Witnesses.
 - New Evidence.
 - Future Questions to Ask.
 - Witnesses to Go Back to With New Information.
4. The “Drips” Document.
5. Bulleted Key Takeaways from the Interview.

WHAT TO DO WITH POST-INTERVIEW DOCUMENTS



- The interview transcripts go into the report, as appendices, and also into the file.
- The opinions and perceptions documents may or may not be retained, depending on the advice of counsel.
- The future pointers document is kept in the file, as a final checklist of investigation completeness.
- The drips documents are kept in the file or later destroyed, based on school policy.
- The bulleted takeaways are included in the report; no need to keep that document, but it can be kept in the file.
- OCR 2020 Regs. Records retention

DOCUMENTING SUGGESTED QUESTIONS



Questions suggested by parties should be documented and included as an appendix:

- Were they asked “as is”
- Were they re-phrased?
- Were they rejected?
- If rejected, why?

INVESTIGATION RECORDS AS SMOKING GUNS IN LITIGATION



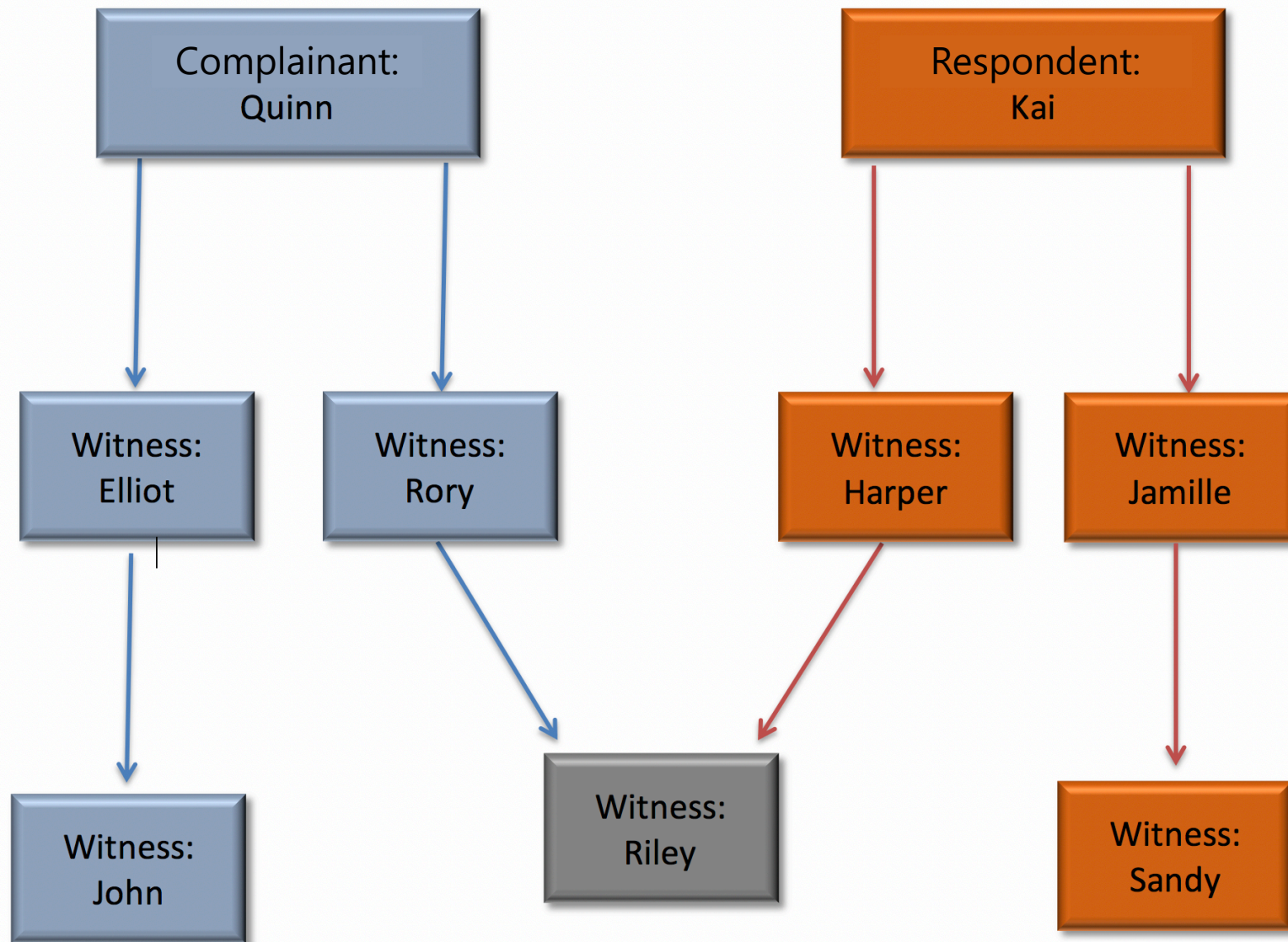
- “The File”:
 - The Respondent’s file.
 - The Complainant’s file.
 - The investigation file (including investigation report).
 - Personal case notes.
 - Witness education records.
- Subpoenas:
 - If you get one, call your general counsel!
- Understand the court process and your role in it. The documentation of your investigation is largely admissible in court, and you’re a witness to it.

WITNESS LIST AND FLOWCHARTING BEST PRACTICES



- Keep freshly updated list of your witnesses as you learn of them.
- Identify which parties or witnesses led you to other witnesses.
- Keep track of whether witnesses are neutral, loyal and biased, or loyal but objective. Include reasoning.
- In complex cases, use a flowchart to track witnesses the Complainant leads you to, the witnesses Respondent leads you to, and the witnesses who are neutral.
- Note in the flowchart where witnesses intersect in terms of relationships to each other and/or potential loyalties to parties.

WITNESS FLOWCHART SAMPLE



THE INVESTIGATION REPORT

- The Investigation Report
- Standard of Proof
- Review of Relevant Evidence
- Referral to Decision-Maker

THE INVESTIGATION REPORT



- The investigation report is the one comprehensive document summarizing the investigation, including:
 - Results of interviews with parties and witnesses.
 - Unbiased summary or compilation of other information collected
 - E.g.: copies of texts, emails, and social networking messages, information from law enforcement, medical exams, video surveillance and photographs, etc.

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 1 - OCR 2020 REGS.



Prior to the completion of the report...

- Evidence directly related to allegations must be sent
 - To each party and advisor
 - In electronic format or hard copy
 - Including evidence upon which the Recipient does not intend to rely
 - Including exculpatory and inculpatory evidence
 - Allow 10 days for written response
 - Consider response prior to completion of report
 - Make this evidence available at hearing (if any)

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 2 - OCR 2020 REGS.



At least **10 Days** Prior to Making a Determination Regarding Responsibility:

- The final Investigation Report summarizing relevant evidence must be sent:
 - To each party and advisor
 - In electronic format or hard copy
 - For the parties' review and written response
 - Best Practice: Provide the investigative report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties
- For K-12 schools with or without a hearing, this review is followed by exchange of relevant written and responses questions facilitated by a decision-maker.

THE INVESTIGATION REPORT



- Reference or contain all applicable policies and procedures
- Provide timeline of investigation steps
- Describe the allegations
- Describe and include evidence gathered, including statements and interviews
- Explain unsuccessful attempts to collect information and/or interview witnesses

THE INVESTIGATION REPORT – G.A.S.



- **G**ather evidence
 - Organize the evidence so it is useful to the decision-maker who applies the policy elements
- **A**ssess credibility of parties and witnesses without making ultimate conclusions
 - Point out areas of corroboration and issues that may bear on credibility
 - Assess evidence to determine what is relevant
- **S**ynthesize areas of agreement/areas that are disputed
 - Synthesis may also include an appendix of questions posed, questions rejected, and questions considered.

WHAT IS THE APPROPRIATE STANDARD OF PROOF?



- Different Standards: What do they mean? Why do they exist?
 - Beyond a reasonable doubt
 - Clear and convincing evidence (C&C)
 - Preponderance of the evidence (POTE)
- OCR allows recipients to choose between last two
- Must apply standard consistently to all “Title IX cases”
- ATIXA prefers POTE as the most equitable standard.
- If you use C&C, be able to clearly articulate and define it.
 - See: ATIXA Guide to Choosing Between Preponderance of the Evidence and Clear and Convincing Evidence

UNDERSTANDING EVIDENCE THRESHOLDS



EVIDENTIARY STANDARDS



MORE THAN FACT-GATHERING



- Review the District/school policies that apply.
- Follow G.A.S. model, meaning stop short of making a finding, making a recommendation, or doing anything that influences or usurps the independent role of the decision-maker.
- If you have an opinion on whether policy was violated, keep it to yourself.
- Refer report to the decision-maker (hearing optional for K-12 schools).

WHO RENDERS THE DETERMINATION?



- Decision process:
 - Investigator refers investigation report to decision-maker without determination.
 - Investigator \neq Decision-maker.
 - Coordinator \neq Decision-maker
- Importance of investigation report.
 - How much credibility assessment and analysis to include?
 - You want a balance; serve the content up on a silver platter, but you're just composing ingredients; the chef prepares the final dish.
 - Your opinion is not controlling, but you want to point the decision-maker toward decisive or corroborating evidence without telling them how to interpret it.

LIVE HEARING



- A live hearing, whether with a panel or an administrator, is required by OCR for higher ed.
 - **K-12: live hearing with cross-examination is optional.**
- Hearings facilitate the parties' ability to review all available evidence and ask questions of witnesses and each other.
- Can the hearing be waived?
- Investigators should be prepared to be subject to cross-examination at the hearing.
- Avoid off-line discussions of case with any of the decision-makers.

SANCTIONS & APPEALS

- Sanctions & Remedies
- Basic Overview of Appeals
- Finality of Determination
- Communicating Outcomes

SANCTIONS AND REMEDIES UPON DETERMINATION OF RESPONSIBILITY



- Disciplinary sanctions for Respondent.
- “Remedies” to Complainant
- Any sanction must be reasonable and proportionate to the severity of the behavior.
- The appeal may return a matter to investigators, or consult investigators on the appealability of certain elements of the file, report, or testimony.

THE APPEALS PROCESS



- Appeals are mandatory under OCR's 2020 Regs
- Equitable.
- Clearly communicated to parties.
- One level of appeal is best practice.
- Defined window of time to request appeal.
- Three clear grounds for appeal (though recipients may add others).
- Committee versus individual determination preferred.
- Deference to original hearing authority.
- Remand.

FINALITY OF DETERMINATION



- If an appeal is filed, the determination regarding responsibility becomes final on the date that the recipient provides the parties with the written determination of the results of the appeal.
- If an appeal is not filed, the determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely.

COMMUNICATING OUTCOMES



- OCR 2020 Regs. require recipients to apprise parties of the status of investigations, **determinations, sanctions** (or remedial actions) **and supporting rationale**.
 - Recipient provide this information in writing and place no conditions on receiving or sharing it.
- FERPA cannot be construed to conflict with or prevent compliance with Title IX.

QUESTIONS?



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