

# Title IX Investigator Training

43<sup>RD</sup> ANNUAL NATIONAL CONFERENCE ON LAW AND HIGHER EDUCATION

CLEARWATER BEACH, 2022

# Welcome & Introductions

- Dr. Jennifer Hammat, Dean of Students, University of Southern Indiana, [jhammat@usi.edu](mailto:jhammat@usi.edu)
- Debbie Osgood, Partner, Hogan Marren Babbo & Rose, LTD, [dlo@hmbr.com](mailto:dlo@hmbr.com)
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# Not Legal Advice

- As a reminder, this session is not intended to serve as legal advice for you or any case you may be working at your institution. We are providing you with tips, efficiencies, and best practices for the investigative process. Should you need a legal opinion, we recommend you seek out your university counsel or obtain private counsel for legal matters.

# Reference

- Unless otherwise noted, source: Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020)(final rule) (online at <https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf>).
- Much of the content for these slides were constructed for the NASPA Student Affairs Administrators in Higher Education - Title IX Training Certificate program, in conjunction with Peter and Jennifer Lake, Jake Sapp, and Melissa Carleton.  
<https://www.naspa.org/events/title-ix-certificate-program-fall-2021-cohort-1>



# Session Norms

- Be respectful
- Afford all attendees the opportunity to speak
- Breaks in the morning and afternoon
- Silence your phones
- Take what you need for your individual institution based on culture, type, and control
- Thoughtful participation is welcomed- hypothetical scenarios allowed
- The Parking Lot

# Goals and Outcomes

- Legal Issues/court cases since the 2020 guidance was provided
- Learn effective investigative practices for fact-finding and report generation
- Understand the various resolution and adjudication processes for Title IX cases
- Connect with colleagues about best practices in the Title IX investigation process

# Legal Issues

# Legal Issues

- What's happening at the Dept. of Education?
- Court cases to discuss
- State laws/decisions
- How does this impact your day to day?

# What's Happening at the Dept. of Education?

- 50th Anniversary of Title IX: June 23<sup>rd</sup>
- Office for Civil Rights (OCR) Assistant Secretary Catherine Llamon: confirmed October 2021
- Title IX Enforcement Pending OCR Title IX Cases (PSE):
  - Total: 925
  - Sexual violence cases: 146
- Title IX Religious Exemption (Brigham Young University)

# What's Happening at the Dept. of Education?

## Title IX Requirements

- August 14, 2020: Revised Title IX regulations go into effect
- June 22, 2021: *Bostock* clarification – Dept. interprets Title IX's prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity
- July 2021: OCR issues "Questions and Answers on the Title IX Regulations on Sexual Harassment" (on OCR's website)
- Déjà vu - Anticipated April 2022: Notice of Proposed Rulemaking to Amend the Title IX regulations be consistent with priorities of the Biden Administration



# What's Happening at the Dept. of Education?

OCR Letter of Findings and Resolution Agreement: University of Massachusetts (August 2021)

- Compliance review – evaluated under pre-2020 Title IX regulations
- The big three:
  1. Notice of nondiscrimination
  2. Title IX Coordinator
  3. Prompt and equitable grievance process
- +Websites
- +Tracking Reports
- +Training

# Court Cases to Discuss

Keep in mind – bases for appeal under new regulations:

- Procedural irregularity that affected the outcome of the matter,
- Newly discovered evidence that could affect the outcome of the matter, and/or
- Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter

# Court Cases to Discuss: Major legal theories

## Complainants

- Deliberate indifference
- Negligence

## Respondents

- Due process
- Gender bias
- Other procedural challenges

# Court Cases to Discuss

## Exclusionary Rule

- 1<sup>st</sup> Circuit – invalidates prohibition against considering statements not subject to cross-examination.
- August 2021 OCR Letter:  
A decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.

# Court Cases to Discuss/Rulings of Impact

## Deliberate Indifference

*Foster v. University of Michigan* (6<sup>th</sup> Circuit 2020)

Foster presented the University with five complaints of misconduct by the harasser. Each time, the University adopted escalating measures proportionate to the misconduct.

# Court Cases to Discuss/Rulings of Impact

## Gender Bias

*Doe v. Regents of the University of Minnesota* (8<sup>th</sup> Cir. 2021)

- Reversing dismissal of Title IX claims because plaintiffs stated plausible claims that university discriminated against them on basis of sex during misconduct investigation and disciplinary proceedings
- Support:
  - External pressures from campus community and federal government
  - Comments from University officials
  - Historical facts – previous finding of discrimination



# Court Cases to Discuss/Rulings of Impact

## Gender Bias

*Rossley v. Drake University* (8<sup>th</sup> Cir. 2020)

- Less categorical – examine “whether the alleged facts, if true, raise a plausible inference that the university discriminated against [the plaintiff] [on the basis of sex.”
- Respondent’s support:
  1. Procedural flaws in investigation, hearing and appeals process
  2. “Victim-centered” approach punishes male respondents
  3. Gender-specific data of students accused of sexual misconduct reveals gender bias
  4. Dept.’s policy guidance pressured the university “to protect victims at the cost of erring against accused male students”

# Court Cases to Discuss/Rulings of Impact

## Third Parties

*Haller v. Millersville University* (3<sup>rd</sup> Cir. Jan. 2022)

- Student murdered in dorm room by nonstudent boyfriend
- University had adequate notice it could be liable under Title IX for its deliberate indifference to sexual harassment perpetrated by student guest

# State laws/decisions

- Laws to prohibit discrimination on the basis of sexual orientation or gender identity
- Laws relating to participation of transgender students in athletics

# How Does This Impact Your Day to Day?

- Revise policy to drop exclusionary rule
- Review policy to determine if it sufficiently covers discrimination on the basis of sexual identity and transgender status
- Document! Document! Document! – in the report and case file
- Make sure your website is consistent with your *current* policies
- Escalating responses to further harassment
- No gender bias in training or investigation/resolution process

# Assumptions

# Assumptions

- You already have an updated policy of record that has been updated at least once since the 2020 language was published
- You have done your designations of campus officials
- You have practiced the process revisions you made in a mock investigation or hearing already
- Perhaps you have already had an investigation/hearing?
- You have met with counsel about these changes
- You have had your entire team do annual trainings (2 or 3 by now)
- You have published those trainings on your website



# Policy Inclusions

# What should your policy include?

- Definitions (consent, sexual harassment) in particular
- Scope of the policy
- Concurrent investigations with law enforcement statement
- Dismissal of complaints statement

# Offenses to be included

- i. Sexual harassment
- ii. Sexual assault
  - 1. Non-consensual sexual contact, and
  - 2. Non-consensual sexual intercourse
- iii. Domestic violence
- iv. Dating violence
- v. Sexual exploitation
- vi. Stalking
- vii. Retaliation
- viii. Intimidation

# Sexual Harassment (three-pronged test)

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

Emphasis added

# Consent

*[T]he Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault.*

*Id.* at 30125.

You should be well-versed on the definition of consent contained within your specific campus policies. Address specific issues of consent related to the new definition of sexual harassment.

# Consent

- The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient's educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies.

Id. at 30124.



# Consent

- The third prong of the § 106.30 definition of sexual harassment includes “sexual assault” as used in the Clery Act, 20 U.S.C. 1092(f)(6)(A)(v), which, in turn, refers to the FBI’s Uniform Crime Reporting Program (FBI UCR) and includes forcible and nonforcible sex offenses such as rape, fondling, and statutory rape which contain elements of “without the consent of the victim.”

Id. at 30124.

# Elements to consider

- consent is a voluntary agreement to engage in sexual activity;
- someone who is incapacitated cannot consent;
- (such as due to the use of drugs or alcohol, when a person is asleep or unconscious, or because of an intellectual or other disability that prevents the student from having the capacity to give consent)
- past consent does not imply future consent;
- silence or an absence of resistance does not imply consent;
- consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another;
- consent can be withdrawn at any time; and
- coercion, force, or threat of either invalidates consent.

# Scope of policy

- *A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. . . . **“education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.***

- §106.44(a) *General response to sexual harassment (emphasis added)*

# Example of a “scope of policy”

- This policy applies to ABC University students, employees, and third-parties located within the United States both on and off campus, as well as in the digital realm. Off-campus coverage of this policy is limited to incidents that occur on employee-led trips, at internship or service-learning sites, and college-owned properties (including buildings operated by Registered Student Organizations), or in any context where the University exercised substantial control over both alleged harassers and the context in which the alleged harassment occurred.
  - Provided by Jennifer Lake and NASPA certification program

# Concurrent Law Enforcement activity

- *Further, subject to the requirements in § 106.45 such as that evidence sent to the parties for inspection and review must be directly related to the allegations under investigation, and that a grievance process must provide for objective evaluation of all relevant evidence, inculpatory and exculpatory, nothing in the final regulations precludes a recipient from using evidence obtained from law enforcement in a § 106.45 grievance process. § 106.45(b)(5)(vi) (specifying that the evidence directly related to the allegations may have been gathered by the recipient “from a party or other source” which could include evidence obtained by the recipient from law enforcement) (emphasis added); § 106.45(b)(1)(ii).*

- Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at [www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf](http://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf)) at 30099 n.466

# Police investigations

- *The 2001 Guidance takes a similar position: "In some instances, a complainant may allege harassing conduct that constitutes both sex discrimination and possible criminal conduct. **Police investigations or reports may be useful in terms of fact gathering.** However, because legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively."*
  - *Id.* at 30099 n. 467 (emphasis added).

# Interconnectedness

- “[T]he recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.”
- The Department notes that recipients retain the flexibility to employ supportive measures in response to allegations of conduct that does not fall under Title IX’s purview, as well as to investigate such conduct under the recipient’s own code of conduct at the recipient’s discretion.
  - Id. at 30289 (emphasis added).

# Interconnectedness (continued)

- [E]ven if alleged sexual harassment did not occur in the recipient's education program or activity, dismissal of a formal complaint for Title IX purposes does not preclude the recipient from addressing that alleged sexual harassment under the recipient's own code of conduct. Recipients may also choose to provide supportive measures to any complainant, regardless of whether the alleged sexual harassment is covered under Title IX.

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Id. at 3093 (emphasis added)



# Code of Conduct Considerations

- What will you call things referred to the Conduct office that do not rise to the level of Sexual Harassment? Sexual Misconduct? Conduct of a Sexual Nature not Rising to Title IX?
- For this Code item are there any “other” carryovers from the Title IX grievance process besides the Support Measures? Role of advisor? Time frames?
- Does this warrant a panel hearing (if you have those) or Administrative Hearing?
- Would you outsource these referrals? Advantages/disadvantages?

# Code of Conduct Considerations

- Does this part of the Code also include definitions on your campus not captured in the new regulations? (sexual exploitation)(intimidation)
- If you include sexual assaults not required in Title IX, do you detail that in your Title IX policy and your Code of Conduct? (cross-reference them)
- Same for outside program or activity.
- Can students serve on the boards that hear these cases (why or why not?)

# Dismissal of complaint statement

- § 106.45(b)(3)(i)
- (3) Dismissal of a formal complaint—
- (i) The recipient must investigate the allegations in a formal complaint. If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.

# Dismissal of complaint statement

- § 106.45(b)(3)(ii)
- (ii) The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

# Dismissal of complaint statement

- § 106.45(b)(3)(iii)
- (iii) Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

# Pre-Investigation

# Pre-Investigation

- Written Notice to Parties
- Presumption of Non-Responsibility
- What has happened so far?
- Prepare your questions before the interview

# Written Notification to Parties

- Before you conduct an interview with the Respondent, you must provide them time to prepare.
- Notice of the school's grievance process
- The opportunity, if any, to engage in an informal resolution process
- Key details of the alleged sexual harassment
  - Who was involved in the incident
  - Date and time of the incident, if known
  - Location, if known
  - The alleged misconduct that constitutes sexual harassment



# Written Notice (continued)

- A statement that the respondent is presumed not responsible at the outset of the process and can only be found responsible after the grievance concludes
- A statement that the parties are entitled to an advisor of their choice
- A statement that the parties can request to inspect and review certain evidence
- Any conduct rules, if they exist, that prohibit providing knowingly false information or statements during the grievance process

# Presumption of non-responsibility

*A recipient's grievance process must—*

***Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.***

§ 106.45(b)(1)(iv)(emphasis added).

- Question #36—Respondent should be presumed not responsible but that doesn't mean a complainant should be presumed to be lying.
  - *Schools that have relied on this presumption to decline services to a complainant or to make assumptions about a complainant's credibility have done so in error.* Dept. of Education, Office for Civil Rights, *Questions and Answers on the Title IX Regulations on Sexual Harassment* (July 2021), at 20.

# What has happened so far?

- A formal complaint has been received (and signed).
- An initial meeting with the Title IX Coordinator has happened to provide support measures.
- A notice of investigation has gone out to both parties.
- The case has been assigned to you (the investigator) or as the Title IX Coordinator, you are the investigator, or you have outsourced the investigation.
- The investigator has read the formal complaint.
- Which route for investigations has your school opted for?
- Investigations with or without credibility assessments?

# Prepare your questions before interview

- Read the Formal Complaint
  - Write out the questions you have about the report on first read.
- Read the Formal Complaint again.
  - What additional questions do you have about the incident narrative.
  - Who is identified in the Formal Complaint you feel you need to interview.
  - What questions do you have for those individuals?
- Have all of these typed out ahead of the first interview.
- Revise and update with additional questions and witnesses as you go.
- Create a question bank – this will help in the long run

Investigation

# Investigation

- Think about the investigative report
- How to start an interview
- Remember your role
- Follow up questions
- Clarifications
- Sense and Feel questions
- A word about trauma
- Meet the students where they are
- What evidence do they want reviewed?
- Types of Evidence
- A word on Credibility Assessments
- Regarding Title IX Investigators
- Purpose of Investigation
- Universe of Evidence
- Universe to Relevant
- Relevance
- Rape Shield Laws
- Advisors
- Burden of Gathering Evidence

# Regarding Title IX Investigators

- Campuses are no longer permitted to have a “single” or “pure” investigator model under Title IX.
- A separate decision-maker (or panel of decision-makers) must make a final determination of responsibility.
- This has been a shift in the function of the investigator on some campuses.
- What, then, is the scope of the investigative report? Purpose? Tone? Format?
- Will the investigator become a witness in the hearing or play other roles?

# Purpose of Investigation:

- Gather all relevant information regarding an allegation of sexual harassment.
- Interview all relevant parties
- Collect and organize relevant evidence
- Write a **detailed** investigative report with timeline
- Old things:
- Credibility Assessments?
- Weighing Evidence?
- Make recommendations for interim measures or accommodations?
- Findings of Responsibility?



# Think about the investigative report

- As you go into the investigation, think about the investigative report you will be writing. If you have ever sat in on a hearing or participated in a round table exercise – for training as a decision maker – poorly written reports – or poorly documented interviews are the worst.
- You want to make sure you consider the “universe of evidence” that is available and try to contain what all that could be – and locate documentation where possible.
- If text messages, phone calls, photos, emails are involved – seek those documents. Always ask to see the original thread as well as any printed documents that are provided.

# Remember your Role

- You are NOT a party's lawyer, advisor, counselor, parent, or friend
- You ARE an investigator and a facilitator
- You ARE free from bias
- You ARE free from prejudice
- You ARE interested in finding out fact about the incident
- You ARE interested in the truth

# Remember Your Role

- Being Impartial ≠ Being a Robot
- You can be a neutral fact-finder and still show empathy and kindness.
- Investigation spaces should be judgment free zones
- All Title IX personnel should serve in their roles impartially. All Title IX personnel should avoid the prejudgment of facts, prejudice, conflicts of interest, bias, and sex stereotypes

# How to start an interview

- Introduce yourself
- Is small talk appropriate? Build rapport. Establish baseline responses\*
- Explain your role
- Explain you will be note/taking/recording the interview for notes
- Ask interviewee to share their recollections of the incident.
- Do not interrupt the narrative
- Let them talk until they are done
- Follow up questions later

# Follow up questions

- When seeking clarification after the party's initial recollection of the event, try to ask questions that build confidence and put them at ease.
- "You said you left the party around 1am, is that correct?"
- "You said you recalled having three cups of 'red solo cup' punch, is that right?"
- If they are describing a location, it might be helpful to ask them to sketch out the room for you (if it is a residence hall, you should have those schematics on your computer to pull up/print out).

# Clarifications

- When asking harder questions about the order of events, or specifics about the conversation or activities, you may run into a series of “I don’t know” or “I can’t remember” statements. That’s ok.
- Reassure the party it’s ok that they cannot remember or don’t know.
- You can move to another question or kind of questioning.
- If you hit a memory gap, ask them some sensory questions to see if it triggers any memories. Often there are memories they cannot access unless you ask the question from a different lens.

# A word about trauma

- Anyone you speak with about alleged sexual harassment (complainant, respondent, or witnesses) could have experienced or still be experiencing trauma as a result of the alleged situation.
- Be cognizant that talking to you may be very difficult for the parties.
- Remember to document their experience with as little interruption as possible. Follow-up questions should be limited.
- Ideally, you want the party being interviewed to do most of the speaking.

Modified from: Russell Strand, Frontline Training Conference, 2018

# Sense and Feel Questions

- “Can you draw what you experienced?”
- “What were you feeling when XYZ occurred?”
- “What did you smell?”
- “Can you show me?”
- “Tell me more about that.”
- “What did you hear?”
- “Tell me about his/her eyes.”
- “What can you not forget?”

• Source: Russell Strand, Frontline Training Conference, 2018



# Meet the student where they are:

- Baseline knowledge =
- How to evaluate risk
- Factors to consider in decision-making
- Medically accurate knowledge of sex, reproduction, sexual health
- Ability to navigate interpersonal relationships
- Communication skills
- Conflict resolution skills
- Emotional intelligence
- Not all students know the same thing about the same things

# Burden of Gathering Evidence

- [I]t is the recipient's burden to impartially gather evidence and present it so that the decision-maker can determine whether the recipient (not either party) has shown that the weight of the evidence reaches or falls short of the standard of evidence selected by the recipient for making determinations.
  - *Id.* at 30292 (emphasis added).

# Types of Evidence

## VERBAL

- Interviews with:
- Parties
- Witnesses
- Others with relevant information

## PHYSICAL

- Images (photos and videos)
- Text messages (entire thread)
- Screen shots
- Documents
- E-mails (entire thread)
- Security footage
- Medical records

# What evidence do they want reviewed?

- Inculpatory evidence
- Exculpatory evidence
- Relevant to the allegations
- Rape shield law protections
- Witnesses to interview
- If they know of others with similar experiences
- Character testimony is permitted
- They may not know what they have to be reviewed. Ask questions about evidence...

# “Universe of Evidence”

- [T]he universe of evidence given to the parties for inspection and review under § 106.45(b)(5)(vi) must consist of all evidence directly related to the allegations; determinations as to whether evidence is “relevant” are made when finalizing the investigative report, pursuant to § 106.45(b)(5)(vii) (requiring creation of an investigative report that “fairly summarizes all relevant evidence”).

- *Id.* at 30248 n.1021 (emphasis added).

# Relevance

- [R]elevance is the sole gatekeeper evidentiary rule in the final regulations, but decision-makers retain discretion regarding the weight or credibility to assign to particular evidence. Further, for the reasons discussed above, while the final regulations do not address “hearsay evidence” as such, § 106.45(b)(6)(i) does preclude a decision-maker from relying on statements of a party or witness who has not submitted to cross-examination at the live hearing.

Id. at 30354.

- The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.

Id. at 30247 n. 1018.

# From the Universe to Relevant

- “[D]irectly related” may sometimes encompass a broader universe of evidence than evidence that is “relevant.” *Id.* at 30304.
- Non-treatment records and information, such as a party’s financial or sexual history, must be directly related to the allegations at issue in order to be reviewed by the other party under § 106.45(b)(5)(vi), and all evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be “relevant” such that evidence about a complainant’s sexual predisposition would never be included in the investigative report and evidence about a complainant’s prior sexual behavior would only be included if it meets one of the two narrow exceptions stated in § 106.45(b)(6)(i)-(ii) . . . *Id.* at 30304.

# Rape Shield Language

- [T]he rape shield language in § 106.45(b)(6)(i)-(ii) bars questions or evidence about a complainant's sexual predisposition (with no exceptions) and about a complainant's prior sexual behavior subject to two exceptions:
  - 1) if offered to prove that someone other than the respondent committed the alleged sexual harassment, or
  - 2) if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove consent.
- *Id.* at 30336 n.1308 (emphasis added).



# A word on credibility assessments:

- Cross purpose. The purpose of the hearing is to determine credibility of all the parties and all the evidence. If the investigator does this, one could later assert bias against the investigator for making their assessment of the parties and/or the evidence.
- Time. Investigations that accept information, gather documents, and statements, and provide a relevance review of said documents would make for an effective summary of the investigative materials presented for the hearing officer to sort through.
- Repetition. Anything anyone says to you, they will have to say again at the hearing and be subject to cross-examination, or it won't be considered.

# Advisors

- Advisor of party's choice
- Could be a parent, friend, an attorney, an employee of the college
- Could even be a witness in the investigation
- Schools cannot require a particular type of advisor, nor can they require an advisor to have a specific type of training
- Schools may provide resources to advisors to better understand the process
- Schools may implement limits for participation by advisors in meetings and rules of decorum for hearings as long as they are applied equally

# Investigative Report Sections to Consider

# Sections to consider

- Background
- Jurisdiction
- Scope of the Investigation (the TIMELINE)
- Relevant Policies
- Investigation Summary
- Analysis
- Summary of Analysis
- Credibility Assessment
- Relevant Evidence
- Conclusion or Recommendations
- One Size Does Not Fit All

# Background

- I. BACKGROUND AND REPORTED CONDUCT
- Summary of allegation goes here. Identify the names of the CP and RP here and the Investigator. [One paragraph summary].

# Jurisdiction

- II. JURISDICTION

- This office (the name of your office) houses the Title IX Office which has campus-wide responsibility for investigating alleged violations of the “name of your” Sexual Harassment Policy. This office responds to claims of harassment (including sexual assault), stalking, dating violence, domestic violence, and retaliation brought forward by students, employees or third parties.

# Scope of the Investigation

- III. SCOPE OF THE INVESTIGATION
- [This is the timeline and details pertinent to the case. It is the record of when it was reported. If a No Contact Order was issued. When parties were notified, interviewed, submitted evidence, asked for additional parties to be interviewed, and if they rescheduled or didn't respond.
- This is the accounting for the time it took for the investigation. It will match what is in the file, (in emails and in phone logs).
- When did you send out documents/correspondence? (1-2 paragraphs).]

# Scope (continued)

- Parties interviewed:
- Receipt of signed Complaint, February 5, 2021
- Notice of Investigation sent to parties, February 6, 2021
- Complainant Name, in-person interviews on February 7, 2021
- Respondent Name, in-person interview on February 8, 2021
- Witness 1 Name, in-person interview on February 9, 2021
- Witness 2 Name, in-person interview on February 10, 2021
- Witness 3 Name, in-person interview on February 11, 2021
- Witness 4 Name, in-person interview on February 12, 2021



# Scope (continued)

- Documentary evidence acquired:
- Written statement of Complainant Name, dated February 5, 2021
- Text message correspondence between CP Name and Witness 1 Name (received February 21, 2021)
- Text message correspondence between CP Name and Witness 2 Name (received February 21, 2021)
- Text message correspondence between Witness 2 Name and Witness 3 Name (received February 18, 2021)
- Video shared by Witness 4, February 20, 2021
- Photographs shared by Witness 3 and Witness 4, February 21, 2021

# Relevant Policies\*\*

- IV. RELEVANT POLICY AND LAW PROHIBITING SEXUAL HARASSMENT (INCLUDING SEXUAL ASSAULT) AND RETALIATION
- This is straight from your policy. What are the relevant policy prohibitions you have published with regard to sexual harassment (the definitions and why it is being investigated).
- In this new format, this section could be optional, we included it to make the investigative report complete.\*\*

# Investigation Summary

- V. INVESTIGATION SUMMARY
- A. Statement Summary of the Parties
  - Complainant:
  - Respondent:
- B. Documentary Evidence:
  - Below is the list of the documentary evidence reviewed for this report:
  - Documentation and investigative files obtained by the Title IX Investigator;
  - The written statement provided by the COMPLAINANT and evidence;
  - The written statement provided by the RESPONDENT and evidence; and
  - University policies.

# Analysis (this could be relevance or credibility)\*\*

- VI. ANALYSIS
- A. Standard of Evidence: Preponderance of the Evidence
- Findings in this investigative report are based on a “preponderance of the evidence” standard. In other words, after reviewing all of the evidence, including the relative credibility of the parties and their statements during interviews, whether it is more likely than not that the conduct occurred as alleged. If the conduct did occur as alleged, then an analysis is completed to determine whether the conduct violated University policy. (Please note: the report’s findings do not reach conclusions whether the alleged conduct violated state or federal laws, but instead address whether the University’s policies were violated).

# Analysis (continued)

- B. Fact Finding
  - a) A list of the facts discovered during the investigation
  - b) A summary of the facts/details agreed and disagreed upon by the CP and RP
  - c) This is the nuts and bolts of what happened

# Summary of the Analysis \*\*

- C. Summary of the Analysis
- In the instant case... (This is the narrative of the information learned, from all parties, in a summary presentation of what was learned, and the analysis applied to that factual information)
- [If Affirmative Consent is in Question:] if something like this is in your policy...
- In evaluating Affirmative Consent in cases of alleged incapacitation, the University asks two questions:
  - 1) Did the person initiating sexual activity know that the other party was incapacitated? If not,
  - 2) Should a sober, reasonable person in the same situation have known that the other party was incapacitated?
- If the answer to the first question is "YES," Affirmative Consent was absent, and the conduct is likely a violation of this policy.

# Credibility Assessment\*\*

- D. Credibility Assessment
- According to the Equal Employment Opportunity Commission's Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors dated June 18, 1999:
- If there are conflicting versions of relevant events, the employer will have to weigh each party's credibility. Credibility assessments can be critical in determining whether the alleged harassment in fact occurred. Factors to consider include:

# Credibility Assessment (cont.)

- Inherent plausibility: Is the testimony believable on its face? Does it make sense?
- Demeanor: Did the person seem to be telling the truth or lying?
- Motive to falsify: Did the person have a reason to lie?
- Past record: Did the alleged harasser have a history of similar behavior in the past?



## Credibility Assessment (continued)\*\*

- Motive to falsify: Did the person have a reason to lie?
- Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

## Credibility Assessment (continued)\*\*

- Past record: Did the alleged harasser have a history of similar behavior in the past?
- None of the above factors are determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

# Credibility Assessment\*\*

- These factors will now be assessed for the purposes of this investigation.
- The Complainant...
- The Respondent...
- The Witnesses...

# Relevant Evidence

- List of the evidence provided
- Summary of whether determined to be relevant or not
- Can break this out by inculpatory and exculpatory
- One party may provide more than the other
- Make sure you assign who provided the evidence in the summary of evidence (and the dates received in the timeline of events – evidence is often sent after interviews with the investigator).

# Conclusion and/or Recommendations\*\*

- VII. CONCLUSION
- The investigator finds that the relevant evidence supports a possible violation(s) of the University's Sexual Harassment policy. This report will be forwarded to the decision-maker. OR
- The investigator finds the relevant evidence does not support a possible violation(s) of the University's Sexual Harassment policy. This report will be forwarded to the decision-maker.

# Conclusion and/or Recommendations\*\*

- VII. RECOMMENDATIONS
- As a Title IX matter, the University has the authority to evaluate the allegations and make findings as applied to students and employees for disciplinary purposes. The investigator recommends that the Respondent should go through the live hearing process for possible violations of the University Sexual Harassment Policy. In similarly situated cases of this nature, a common outcome has been Suspension from the University. OR
- As a Title IX matter, the University has the authority to evaluate the allegations and make findings as applied to students and employees for disciplinary purposes. The investigator does not recommend the Respondent should go through the live hearing process for possible violations of the University Sexual Harassment Policy.

# One size does not fit all

- Draft up a template that works for your school
- Draft it together
- Have counsel review it
- Have students review it
- Have academics review it
- You want this template to be the blueprint all investigator use
- Modify as you need. Keep it simple.

# Questions?

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