

Session 3

As NOT Seen on TV

The Pivotal Role of the Investigation and the Investigators

Notice of Allegations

Notice of Allegations

- Written and sent to both parties
- Describes the alleged policy violation and sufficient facts to allow for a meaningful response/defense
- Names of the parties (if known) – no anonymous complaints
- Date and location (if known) of the alleged incident
- Describes the grievance procedures (attach a copy of the entire policy)
- States the Respondent is presumed not responsible

Notice of Allegations

- Determination of responsibility is only made at the end
- Right to an advisor of their choice (may be an attorney)
- Right to inspect and review evidence
- Prohibition against false statements and false information
- Informal resolution options, if available
- Amend as needed in the future
- Other helpful inclusions
 - Name and contact information of the investigators
 - Retaliation provision

Title IX Case and Investigative Process



Investigators

Investigators

- Neutral fact finder
- Free from bias or conflicts of interest
- Independent and Professional
- Diligent, exercising due care
- Appropriately trained and experienced
- Can be the TIXC or internal or external
- Best to work in pairs if possible
- Consider an Independence Statement

Investigative Plan

- Investigators and TIXC collaborate
- Opportunity to think and plan
- Forward thinking, green document
- Allegations from the Formal Complaint
- Applicable policy or statutory violations
- Elements of proof needed/met for each violation

Investigative Plan

- Key issues/challenges anticipated
- Documentary and other evidence to be acquired and anticipated date of receipt
- Preliminary witness interview plan and other critical investigative steps
- Estimated time and resources for completion

Investigative Plan

Evidence Collection

Evidence Collection

- Interviews – parties, witnesses, process, experts
- Internal Records – class schedules, surveillance videos, fob activity, police reports, emails, class assignments
- Public Information – social media posts, FOIA, news media
- Information from Individuals – text messages, private emails, pictures, audio recordings
- Be careful about certain kinds of evidence – child pornography
- Keep records of evidence requests and responses

Evidence Collection

- All relevant evidence – any tendency to make a fact in question **more or less likely** – inculpatory and exculpatory
- Directly related evidence
- Medical and mental health records – must have voluntary, written consent
- Privileged communications – attorneys, pastors, counselors
- Rape Shield – Prior sexual history of the Complainant is not relevant evidence, Except:
 - To prove that someone else is the perpetrator
 - To prove consent between the Respondent and Complainant

While investigating a rape, the Respondent admits that he and the Complainant had sex on the day in question but maintains that it was consensual. He wants you to interview the Complainant's past boyfriends because he saw on social media that she was kissing one of them two days before the alleged rape.

Interview the old boyfriends?

Investigative Interviews

The Role of Advisors

- The party may choose any Advisor
- Create an Advisor Expectation document
- Advisors do not answer investigator's questions
- The party may confer with Advisors
- Attorneys as Advisors – not representation
- Advisors are allowed at any meeting or proceeding
- For Live Hearing, Advisors are required to ask questions

Investigative Interviews

Interview Purpose

- Generate admissible evidence that may establish or support charges for actionable violations
- Confirm, explain, or supplement allegations or complaints
- Determine what a witness heard or observed, or otherwise has knowledge of regarding the conduct at issue
- Assist in identifying or explaining documentary or physical evidence
- Provide a forum for subjects to admit to misconduct
- Identify or generate leads for other evidence, witnesses, or subjects, or new subjects for investigation

- Provide adequate notice – written, date, time, location, participants, and purpose
- Consider using interview advisements
- Allow Advisors to be present
- Best practice is to have two investigators
- Prepare an interview outline beforehand
- Take notes – do not add opinions or extraneous observations

Interview Outlines

- Prepare beforehand
- Both investigators and TIXC
- The roadmap for the interview
- Determine what topics to discuss and in what order – begin with general, open-ended and move to specific
- Determine what documents, if any, to use
- Create a timeline if multiple actions, time, or dates are involved
- Begin with background questions
- Don't be constrained by the outline

Investigative Interviews - Setting

- In-Person v Virtual
- Recorded or not recorded – remember to tell participants
- Location of the interview
- Layout of the room
- Desk or no desk; type of chairs; lighting; colors; wall decor
- Think – Conversation; Not – Interrogation
- Food, drinks, or snacks can be helpful
- The setting should put the interviewee at ease and facilitate talking

Investigative Interviews - Questioning

- Consider the best technique for each circumstance
- The Funnel Technique is best for early stages of an investigation
- Establish credibility, trust, and rapport
- Be professional, respectful, calm, and conversational
- Be Christlike throughout the process
- Acknowledge the discomfort or unease involved and give a brief overview of the subject matter
- The quality of the questions directly affects the quality of the information obtained

Interview Questioning

Ask open-ended questions

Ask single questions, not compound

Don't interrupt

Be flexible

Ask follow-up questions

Don't argue

Close out each subject

Clarify ambiguous answers/slang

Who, what, where, when, why, and how

Ending the Interview

- Is there anything else you would like to state on the record?
- Is there anyone else that you think I should talk to?
- Do you know of any other information or evidence that would be relevant to our investigation?
- Are there any other questions I should have asked you?
- Invitation to contact the investigator with any additional information

Investigative Interview Reports

- Critical component of the investigation (tells the story)
- Documents adherence to legal obligations
- Documents who participated in the interview
- Identifies any exhibits
- Summarizes information that the interviewee provides
- Describes the tone and context of the interview

Interview Report Purpose

Interview Report – Elements

- Preliminary Information
 - Interviewer Names
 - Parties Present – names and identity
 - Location
 - Date
 - Time
 - Advisements

On September 12, 2022, at 1:00 p.m., Title IX Investigators John Smith and Jane Smythe interviewed student Margaret Carter in person in Smith 324. Carter was accompanied by Brandon Jones who was acting as her advisor. There were no other individuals present. At the beginning of the interview, Smith read aloud the interview advisements to Carter, which she acknowledged orally. In summary, Carter stated the following.

Interview Report – Elements

- Not a verbatim transcript – summary
- Include basic, background information
- Information provided by the interviewee
- Essence and the tone of the interview
- Summary of the interview, not just the information
- Contains facts: who, what, where, when, why, and how

Interview Report – Elements

- The interviewee's opinions when relevant
- The participation of others (attorney, advisor, parent)
- References to exhibits
- Verbatim statements, words, phrases
 - Use quotation marks
 - Only for critical information
 - Must be completely accurate

Barnes denied having sex with Carter.

When the Title IX Office asked Barnes if he had sex with Carter in the car, Barnes paused and then stated, "What would happen to me if I said that I did?" Barnes then requested a break to confer with his advisor. After the break, Barnes denied having sex with Carter.

Writing Style

- Narrative Format – straightforward and concise
- Third person
- Objective and unbiased
- Chronological, thematic, or topical
- Active voice
- Generally, not necessary to write, "_____ stated..."
- Generally, the questions do not need to be reported
- Clarity over creativity

Things to Avoid

Awkward grammar

Excessively long sentences

Too many pronouns

Conclusions

Subjective opinions

Slang, abbreviations, colloquialisms

Informal language

First names

Misspellings, poor grammar, inaccuracies

Title IX Case and Investigative Process



Evidence Review

- Prior to completing the investigative report:
 - Equal opportunity to inspect and review
 - Directly related evidence (including evidence the institution does not intend to rely on)
 - Inculpatory and exculpatory evidence
 - Electronic or hard copy to party and advisors
 - At least 10 days to submit a written response
 - Investigators must consider any response

Final Investigative Report

Final Investigative Report

- The culmination of the investigation
- Fairly summarizes relevant evidence
- Use a template
- Send to each party and advisors
- At least 10 days before a Live Hearing
- Electronic or hard copy
- Review and written response

- Who is the audience for the report?
- Allegations, relevant Policy sections, and background on the parties
- Factual and procedural timelines
- Analysis
 - Credibility – not a judgment on credibility but an analysis of the evidence pertaining to credibility
 - Disputed and undisputed facts
 - No conclusions on responsibility
 - Recommendations?

Final Investigative Report

Keep Records!

All evidence and acquisition reports

Interview reports

Final investigative reports

Communication with parties, witnesses, and advisors