

TITLE IX
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Title IX ASAP Training ©

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Investigations Overview

<p>Investigation Fundamentals</p> <ul style="list-style-type: none"> ▪ Types of Sexual Violence ▪ Standard of Review for Sexual Violence Complaints ▪ Consent and Impact of Drugs/Alcohol ▪ Confidentiality ▪ Effects of Trauma ▪ Cultural and Gender Awareness 	<p>Performing Investigations</p> <ul style="list-style-type: none"> ▪ Conduct investigations ▪ Interview victims of sexual violence ▪ Determine credibility ▪ Evaluate evidence ▪ Reach a conclusion ▪ Write a final report ▪ Remedial actions
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Session 1 -- Introductory Terms

- Sexual Violence
- Investigation
- Burden of Proof
- Standards that Apply to Investigations

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Sexual Violence

<p>Sexual Harassment</p> <ul style="list-style-type: none"> ▪ Quid pro quo ▪ Hostile work environment ▪ Sexual violence 	<p>Sexual Violence</p> <ul style="list-style-type: none"> ▪ Sexual misconduct ▪ Sexual assault <ul style="list-style-type: none"> ▪ Rape ▪ Non-stranger rape ▪ Nonconsensual touching ▪ Domestic violence ▪ Dating violence ▪ Stalking
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Investigation Defined

- “[T]he term **investigation** refers to the process the school uses to resolve sexual violence complaints.”
 - OCR Q & A, April 2014.
- Fact-finding *and* decision-making process
 - Whether or not conduct occurred
 - If the conduct occurred, what actions the institution will take to end the sexual violence, eliminate the hostile environment and prevent its recurrence.

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Investigators

- Person who takes the initial report of an incident of violence
- Person who checks the records to determine if the respondent has been investigated previously
- Person who begins asking questions to other students/staff who may have relevant information
- Person who does a social media search to determine the relationship between complainant and respondent

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Goals for Investigation

“Adequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present ...evidence.”

- Gather **facts** so that the investigator can make a credible determination as to what happened in a given situation.
- Prompt, fair, and impartial investigation, including
 - Investigators trained and no bias;
 - Equal opportunity to have others present at ANY meeting;
 - Simultaneous, timely notice of meetings, hearings and appeal;
 - Completed in reasonable timeframe (60 days);
 - Adequate information used in formal or informal investigation; and
 - Culturally unbiased.

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Required Standard of Proof

- The greater weight of the **evidence** required in a civil (non-criminal) lawsuit for the trier of fact (jury or judge without a jury) to decide in favor of one side or the other. This **preponderance** is based on the more convincing **evidence** and its probable truth or accuracy, and not on the amount of **evidence**.

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Other Standards to Consider

- Admissibility of Evidence
 - Hearsay – report of another’s statement
 - Standard – consider all evidence that is material and relevant
- Eyewitnesses
 - Reliability issues
 - Selective attention
- Deliberate indifference
 - If investigation is later reviewed by a court
- Follow your process!

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Session 2 – Consent & Alcohol/Drug Impairment

- Define Consent
- Alcohol/Drug Impairment
 - Black out vs. Passed out vs. Memory Loss due to Trauma
- Common Reasons for Not Going Forward
- Myths and Misconceptions

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Consent

- Voluntary
- Freely given
- Consent to one act does not mean consent to other acts
- Can be withdrawn at any time
- Other standards – Affirmative consent

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Impact of Alcohol/Drugs on Consent

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graph LR; A[Alcohol/Drug Use] --> B[Impaired]; B --> C[Incapacitated  
Unable to consent];
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Common Reasons for NOT Bringing Charges

- I don't want to bring a formal charge. I just wanted you to know about the situation.
- I don't want my name used.
- I don't want this public.
- People won't believe me.
- My parents will be ashamed.
- I don't want to ruin anyone's life.
- It was my fault too.
- We have the same friends.

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Myths and Misconceptions

- If a person doesn't fight back or run away, it isn't rape.
- If a weapon wasn't used, it isn't rape.
- Women often falsely accuse men of rape.
- A person can avoid being raped as long as he or she follows some general rules, like dressing conservatively and staying at home.
- Someone who was drinking or drunk when sexually assaulted is at least partially to blame.
- Rapists normally have a history of psychological problems.

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Session 3 - Confidentiality

- Confidential resources on campus
 - Confidential, Privileged, Secret
- Complainant requests confidentiality
- Weighing analysis to determine whether to go forward with an investigation against request for confidentiality
- Considerations when moving forward

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Confidentiality


When a student is sexually assaulted, there should be someone the student can talk to in confidence – *White House Task Force Report*

- Make clear who can maintain confidence & who can't
- Limited instances when the request for confidentiality is not honored.
- Inform that institution's ability to act may be limited.
- Explain that institution has a strong policy prohibiting retaliation that will be strictly enforced.
- Balance duty to provide a safe and non-discriminatory environment with request.

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Confidentiality Continuum



The diagram illustrates a confidentiality continuum with three levels represented by colored shapes:

- Public**: A green diamond pointing downwards.
- Confidential**: A yellow square.
- Private/Secret**: A red diamond pointing upwards.

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Requests for Confidentiality

- If the complainant requests confidentiality or asks that the complaint not be pursued, **take all reasonable steps to investigate and respond to the complaint consistent with the request** for confidentiality or request not to pursue an investigation.
- If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, inform the complainant that the institution's ability to respond may be limited.

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Balancing Confidentiality Requests with Institution's Responsibility

- Increased risk that perpetrator will commit sexual or other misconduct, such as:
 - other sexual violence complaints;
 - perpetrator has a history of arrests or records indicating a history of violence;
 - perpetrator threatened further sexual or other violence
 - sexual violence was committed by multiple perpetrators.
- Sexual violence was perpetrated with a weapon;
- Victim is a minor;
- Other means to obtain relevant evidence of the sexual violence (e.g., security cameras or personnel, physical evidence);
- Pattern of perpetration (e.g., via illicit use of drugs or alcohol) at a given location or by a particular group.

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When Institution Must Act

- Assist the victim in accessing
 - victim advocacy, academic support, counseling, disability, health or mental health services, and legal assistance both on and off campus.
- Provide other security and support:
 - issuing a no-contact order, arranging a change of living or working arrangements or course schedules (including for the alleged perpetrator pending the outcome of an investigation) or adjustments for assignments or tests; and
- Inform the victim of the right to report a crime to campus or local law enforcement
 - provide the victim with assistance if the victim wishes to do so

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CASE STUDY PART 1

EVALUATING CONFIDENTIALITY REQUESTS

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Session 4 – Impact of Trauma

- Post Traumatic Stress Disorder
- Results of Trauma
 - Physical
 - Psychological
- Behaviors of Trauma Survivors
- Cultural and Religious Implications
- Gender Issues

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Statistics on Survivors of Sexual Assault

- 81% of women and 35% of men who've experienced rape, stalking or physical violence by an intimate partner report short or long term impacts such as PTSD.
- Only a small percentage of survivors report it.

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Post Traumatic Stress Disorder

<ul style="list-style-type: none"> ▪ Mental health condition triggered by a terrifying event (experiencing or witnessing). ▪ Symptoms may include: <ul style="list-style-type: none"> ▪ Reliving the memory - flashbacks, nightmares and severe anxiety, as well as uncontrollable thoughts about the event. ▪ Avoiding the memory – refusal to discuss 	<p>Other PTSD reaction</p> <ul style="list-style-type: none"> ▪ Feeling emotionally numb ▪ Lack of interest in activities ▪ Hopelessness about the future ▪ Memory problems ▪ Difficulty in close relationships ▪ Irritable, angry and aggressive ▪ Always being on guard for danger ▪ Overwhelming guilt or shame ▪ Self-destructive behavior ▪ Trouble concentrating ▪ Trouble sleeping ▪ Being easily startled or frightened
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Considerations When Interviewing Survivors

- Impact of trauma on memory.
- Shame, fear and blame.
- Disassociation.
- Alcohol and drug impairment.
- Difficult questions.

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Trauma Impact on Survivors

- Sexual assault survivors frequently experience negative and often long-term psychological and physical consequences following the event.
- Although many survivors report distinctive psychological post-rape responses such as heightened fear, avoidance, re-experiencing the traumatic event and anxious arousal, not all survivors will have these specific post-rape reactions.

American Prosecutors Research Center

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Trauma: Physical Impact

- Aches and pains (head, back, and/or stomach aches)
- Sudden sweating and/or heart palpitations (fluttering)
- Changes in sleep patterns, appetite, **interest in sex**
- Easily startled by noises or unexpected touch
- More susceptible to colds or illnesses
- **Increased use in alcohol or other drugs** and/or overeating

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Trauma: Psychological Impact

- Shock, disbelief, fear, anxiety, grief, disorientation, **denial**.
- Hyper-alertness or vigilance.
- Irritability, restlessness, outbursts of anger or rage, mood swings.
- Worrying, ruminating, flashbacks.
- Feelings of helplessness, panic, feeling out of control.
- Increased need to control everyday experiences.
- **Minimizing** the experience.
- Attempts to avoid anything associated with the trauma.
- Feelings of **detachment**.
- Concern with burdening others with problems.
- Emotional numbing or restricted range of feelings.
- Feelings of self-blame, guilt and/or **shame**.

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Cultural Issues in Sexual Misconduct

- Cultural norms may foster societal acceptance of sexual assault.
 - male honor, masculinity, and men's sexual entitlement
- In cultures emphasizing male dominance, physical strength and male honor, rape is more common.
- Community honor is frequently connected to the behavior of the women of the community.
 - honor is preserved when women are "pure"
- Cultural norms that devalue women can combine with norms that value male dominance and aggressiveness to create a subculture that sanctions sexual misconduct

http://www.stopvaw.org/sexual_assault_and_cultural_norms

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Impact of Cultural Issues on Investigations

- Language and culture may need to be accommodated.
 - Avoid shutdown due to culturally offensive or inappropriate approaches.
- Narrative style is influenced by culture.
 - Story-telling in a circular rather than linear.
- Subject-matter may be difficult.
- Explore cultural considerations of the potential victim prior to an interview.

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Religious Beliefs

Religious beliefs may influence and impact perception of events

Stigma may attach to sexual activity.

Many religions include teachings of male dominance and female chastity.

Some religious leaders may accept negative stereotypes around sexual assault and could result in victim-blaming behaviors.



<http://www.vawnet.org/applied-research-papers/print-document.php?id=411>

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Gender Implications

<p>Gender Stereotypes</p> <p>Gender Identity</p> <ul style="list-style-type: none"> Protected characteristic under Title IX 50% of transgender people experience harassment 25% of transgender people experience violence More likely to experience discrimination or harassment 	<p>Sexual Orientation</p> <ul style="list-style-type: none"> 1 in 8 lesbians report being raped Nearly 50% of bisexual women report being raped 4 in 10 gay men experience sexual violence Nearly 50% of bisexual men experienced sexual violence* "A violent attempt to oppress those who are challenging social norms around gender and sexuality." NSVRC
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Impact of Trauma, Culture, Religion, Gender on Investigations

- Trauma manifests itself in a variety of ways.
- Cultural and religious backgrounds should be considered and evaluated as to best approach prior to interviews.
- Gender stereotyping, identity, and orientation require attention and sensitivity throughout the process.

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Session 5 – Initiating Investigation

- Overview of Investigation
- Interview Techniques
- Meeting with Initial Reporter
 - Victim Resources
 - Interim Actions
- Complainant Interview Checklist

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Sequence of Investigation

STEP 1: Receive Complaint and Meet with Reporting Party

STEP 2: Outline Investigation

STEP 3: Interview Witnesses and Respondent and Gather Other Evidence

STEP 4: Assess Evidence

STEP 5: Reach Conclusions/Prepare Fact- Finding Report

STEP 6: Make Recommendations (if required).

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Effective Interview Techniques

- The most important objective of this initial interview is to GET THE FACTS!
- Proceed as your journalism teacher taught you - get the WHO, WHAT, WHERE, WHEN and WHY.
- Fire hose approach to gathering information.

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Questioning Techniques

- Broad to narrow questions
- Leading questions
- Tough questions
- Follow-up questions
- Avoid compound questions
- Committing interviewee to a story / chronology

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Note Taking Techniques

- Policy defines what notes must be maintained.
- Policy or practice may allow for recordings.
- Policy or practice may dictate whether witness summaries are necessary.

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Meeting with Complainant

- Explain who you are and your role.
- Describe the process .
- Explain the fact-finding efforts of the investigation.
- Discuss the anti-Retaliation provisions of policy.
- Fully explain confidentiality.
- *Establish credibility in the process and your role as an objective, neutral fact-finder.*

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Complainant Consent to Investigate

- Inform and obtain consent from the Complainant before beginning an investigation.
- If the Complainant requests confidentiality or asks that the complaint not be pursued, **take all reasonable steps to investigate and respond to the complaint consistent with the request** for confidentiality or request not to pursue an investigation.

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Responding to Request for Confidentiality

- If the Complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, inform that the institution's ability to respond may be limited.
- Tell the Complainant that Title IX prohibits retaliation, and that your institution will not only take steps to prevent retaliation but also take strong responsive action if it occurs

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Checklist for Concluding Interview (1 of 2)

- ✓ Thank the person raising the issue.
- ✓ Inform the person raising the issue that the institution does not permit any retaliation or reprisal due to a legitimate issue having been raised.
- ✓ Advise the Complainant that in the event there is a need to undertake an investigation, he or she will be apprised of this fact and will be told who will be conducting the investigation.
- ✓ Tell the Complainant that you will limit the disclosure of information to those people having a legitimate need to know.

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Checklist for Concluding Interview (2 of 2)

- ✓ Tell the Complainant that the person conducting the investigation will be getting back to him or her from time to time during the investigation and that his or her continued cooperation in the investigation will be necessary to reach a resolution.
- ✓ Let the Complainant know the institution will make any final determination regarding the best way to resolve the issue; however his/her input is valuable and will be considered.
- ✓ Express your commitment to resolving the matter in a timely manner.

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Third Party Reporters

- Reluctant complainant
- Notice of potential sexual misconduct complaint received through third-parties
- Unique challenges and concerns

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Additional Considerations

- Advisors
- Attorneys
- Parents

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Avoiding Retraumatization

- Avoid judgmental attitudes
- Recognize that events do not need to be extreme to be traumatic
- Concurrent crises can occur
- Provide for safety of complainant/victim
- Provide supportive relationships
- Make referrals to proper resources
 - Confidential, sexual assault organizations
- Empower victims of trauma and recognize resilience
- Provide clear guidance on process

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CASE STUDY PART 2

INTERVIEWING COMPLAINANT

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Session 6 – Outline the Investigation

- STEP 1: Receive Complaint and Meet with Reporting Party
- STEP 2: **Outline Investigation**
- STEP 3: Interview Witnesses and Respondent and Gather Other Evidence
- STEP 4: Assess Evidence
- STEP 5: Reach Conclusions/Prepare Fact- Finding Report
- STEP 6: Make Recommendations (if required).

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Session 6

- Organizing the overall structure of the investigation.
- Addressing considerations and challenges in process.
 - Unavailable and challenging witnesses

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Initial Considerations

- Timing
- Order of witnesses
- Timing of the interviews and the 60-day requirement
- Confidentiality and information-sharing

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Additional Considerations

- Group complainant/respondents
- Managing group dynamics
- Recognizing and reporting retaliation
- Unavailable and challenging witnesses

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Coordinating with Law Enforcement

- MOU may dictate interaction between campus and local law enforcement
- Delay to prevent compromising law enforcement investigation – active investigation

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CASE STUDY PART 3

ORGANIZING YOUR INVESTIGATION

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Session 6 – Outline the Investigation

STEP 1:	Receive Complaint and Meet with Reporting Party
STEP 2:	Outline Investigation
STEP 3:	Interview Witnesses and Respondent and Gather Other Evidence
STEP 4:	Assess Evidence
STEP 5:	Reach Conclusions/Prepare Fact- Finding Report
STEP 6:	Make Recommendations (if required).

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Initial Considerations

- Disclosure of allegations to witnesses and/or respondent
- Rights under institution policy
- Due process rights (State institutions)
 - Right to notice and hearing
 - “something more than the rudimentary procedures”
- Confidentiality

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Managing the Respondent’s Advisor

- Share institution policy and explain role of advisor
- Set group rules for interview
- Maintain control
- Compare criminal investigations:
 - Prosecutorial discretion
 - 6th Amendment right to counsel
 - 5th Amendment right against self-incrimination
 - 5th and 14th Amendments due process rights

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Meeting with Respondent

- Explore possible ill-motives
 - “Do you have any idea why he / she would make this up?”
 - “Have you had any conflicts or problems with him / her?”

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CASE STUDY PART 4

INTERVIEWING THE RESPONDENT

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Session 7 – Assess the Evidence

STEP 1: Receive Complaint and Meet with Reporting Party

STEP 2: Outline Investigation

STEP 3: Interview Witnesses and Respondent and Gather Other Evidence

STEP 4: Assess Evidence

STEP 5: Reach Conclusions/Prepare Fact- Finding Report

STEP 6: Make Recommendations (if required).

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Evaluating Evidence

- Focus on facts
- Establish timelines
- Examine outliers
- Conflicting testimony
- Coached testimony

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Tips on Evaluating Evidence

1. Keep an open mind until all evidence has been compiled.	6. Evaluate the credibility of witnesses.
2. Render a reasoned decision.	7. Draw reasonable inferences.
3. Consider only the evidence.	8. Apply the Preponderance of the Evidence standard.
4. Be reasonable and impartial.	9. Don't consider the potential impact of your decision when determining if charges have been proven.
5. Decide how much weight to give the evidence.	

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Assessing Credibility

- Demeanor
- Logic / consistency of story
- Corroborating evidence
 - Evidence that supports other evidence
- Circumstantial evidence
 - Collection of facts that, when considered together, can be used to infer a conclusion about something unknown

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Classifying Witnesses

- Non-cooperative witness
- Witness who loves the limelight
- Witness with an axe to grind

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Witness Credibility & Impact of Trauma

- Retelling may not follow a logical sequence
- Pushing for responses for specific facts may lead to less reliable data
- Examine what raw data is available
- Generally valid investigation techniques may not work with a trauma victim

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CASE STUDY PART 5

REACH A CONCLUSION AND OUTLINE FINAL REPORT

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Session 8 – Reach Conclusion, Prepare the Final Report, and Make Recommendations

STEP 1:	Receive Complaint and Meet with Reporting Party
STEP 2:	Outline Investigation
STEP 3:	Interview Witnesses and Respondent and Gather Other Evidence
STEP 4:	Assess Evidence
STEP 5:	Reach Conclusions/Prepare Fact-Finding Report
STEP 6:	Make Recommendations (if required).

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Session 8 Outline

- Analyzing the relevant evidence
- Preparing the fact-finding report
- Notification of findings
 - Parties
 - Witnesses
- Attorney-Client privilege
- Ongoing monitoring
- Title IX and FERPA

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Analyzing the Evidence

- What facts are not in dispute?
- What facts are in dispute?
- What undisputed facts are important?
- Do you need more information about anything?
- On which points are witnesses NOT credible and why?
- Who do you believe?
- What do you think probably happened?
- What do think probably happened between the parties?
- Was there a policy violation?
- How should you organize your report?

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Structure of Report

- Key elements of report
- Organization of report
- Analyzing the information
- Style, tone, and audience
- Resolving difficult issues
- Access to the report

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Organizing the Report (1 of 2)

1. Executive Summary
2. Procedural History
3. Applicable Policies & Procedures
4. Summary of Witness Allegations
5. Factual Findings
6. Conclusions
 - A. Policy Violation
 - B. State the conduct that was or was not the policy violation
7. Recommendations (if appropriate)

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Organizing the Report (2)

- Summary of witness allegations
 - What each party reported
 - Documents/evidence from each party
- Factual Findings
 - I think, using a preponderance of the evidence standard, that....
 - This was confirmed by....
 - Witness was credible when he/she reported because....
- Conclusion
 - Policy violation?
 - Which conduct?

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Notification of Parties

- Both parties must be notified **simultaneously, in writing** of:
 - (a) the result of the disciplinary proceeding;
 - (b) any appellate procedures available (both parties);
 - (c) any change to the result that may occur prior to the time that the result becomes final; and
 - (d) when the results become final.
- Note: OCR recommends only that the parties be provided the determination "concurrently."

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Title IX and FERPA

- Notice to complainant:
 - the finding;
 - any individual remedies offered or provided to the complainant;
 - any sanctions imposed on the perpetrator that directly relate to the complainant; and
 - other steps the school has taken to eliminate the hostile environment and prevent recurrence.
- Institutions may not require complainant to agree to nondisclosure agreement
- DOE - FERPA does not conflict with the Title IX

If there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.

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UNIT 10
ASAP

Attorney-Client Privilege

- Involvement of counsel does not immunize the records from discovery in a later litigation
- Strategic about involvement of attorney in investigation process
- Draft reports, attorney reviews and final report

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UNIT 10
ASAP

Ongoing Monitoring

- Outreach to parties
- Questions regarding interim/permanent actions and/or sanctions
- Maintaining records and data on parties

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UNIT 14
ASAP

Other Remedial Actions

- Training opportunities
- Adopting protocols to protect against dangerous situations
- Exploring bystander intervention
- Finding creative ways to provide prevention strategies to individuals at risk

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UNIT 14
ASAP

Day 2 Wrap-Up

- Sexual Violence and Standard of Review
- Consent, Confidentiality, Impact of Drugs/Alcohol
- Confidentiality
- Effects of Trauma, Cultural and Gender Awareness
- Conduct Investigations
 - Interviews, credibility, evaluating evidence, conclusion, and final report.
- Other remedial actions

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