



**2013 ATIXA TITLE IX INVESTIGATOR TRAINING SCHOOL**  
**South Dakota State University**  
**August 2013**

**Presented by:**  
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[www.atixa.org](http://www.atixa.org)

# About the Presenter

2

## □ Education

- B.A. – History – Brigham Young University
- J.D. – J. Reuben Clark Law School at BYU
- Ed.D. – Peabody College at Vanderbilt University

## □ Work

- Senior Executive Vice President – The NCHERM Group, LLC
- Associate Executive Director of ATIXA
- Former Assistant Dean at Vanderbilt University
- A past President of the Association for Student Conduct Administration (ASCA) – 2011-2012

# Day 1 Agenda

3

- Investigation Overview
- Title IX Coordinator Role
- What Governs Sexual Harassment Responses?
- Understanding Policy Framework
- Significant Concepts: Notice & Reporting
- Civil Rights Investigation and Grievance Model: An Overview
- Investigative Model
- Post-Investigation

# 4

## Investigation Overview

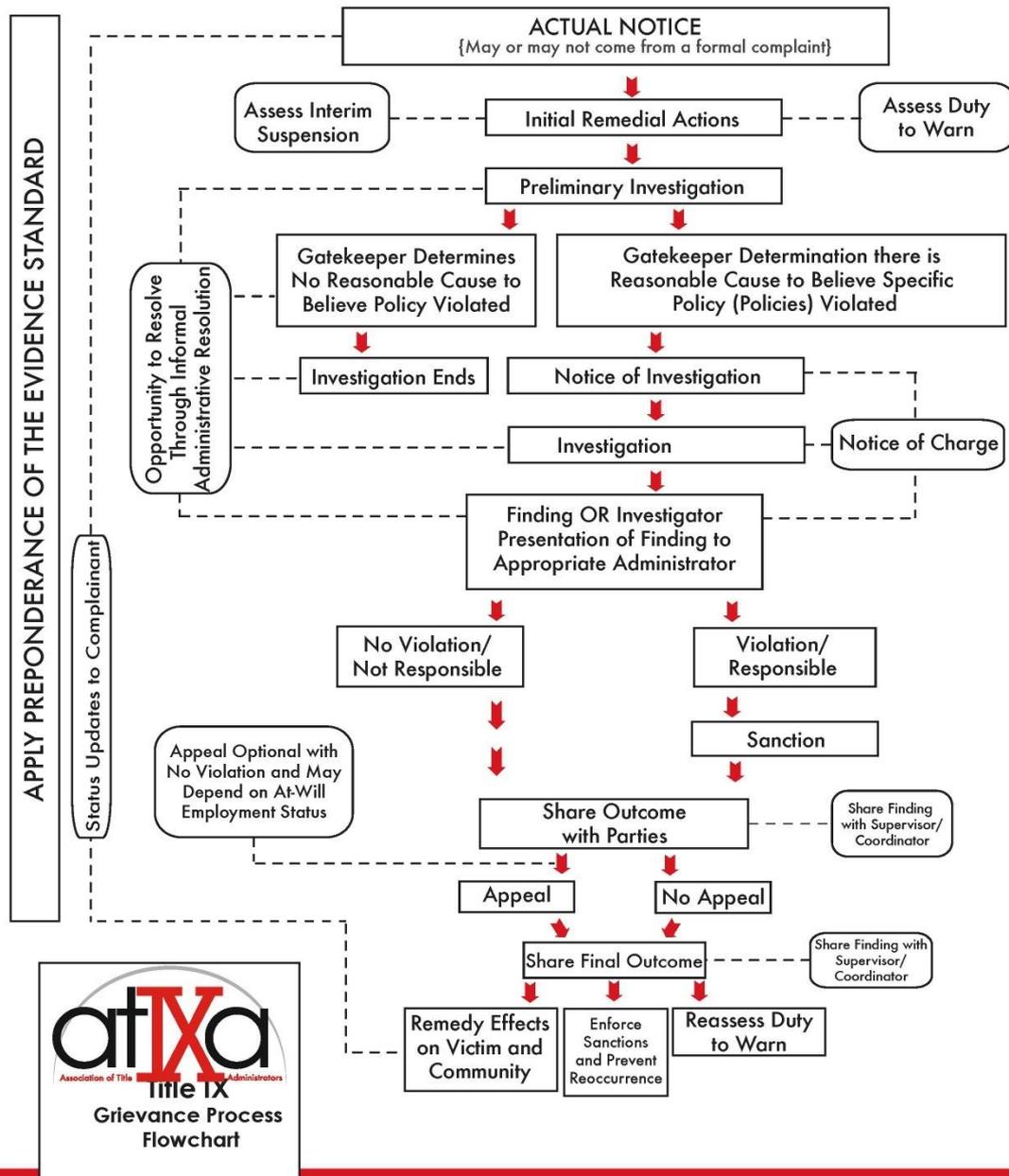
Traditional Hearing-based Model

Civil Rights Investigation Model

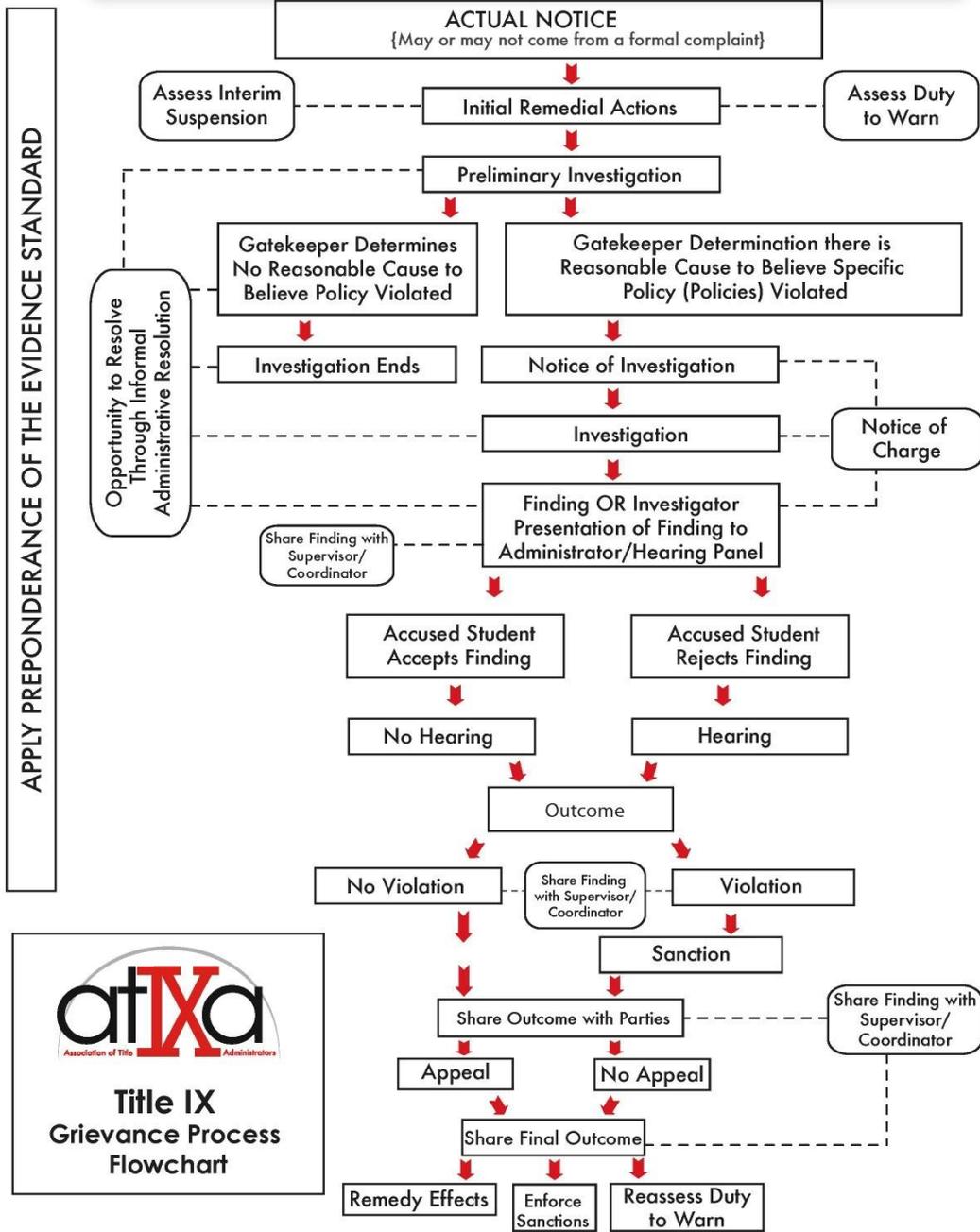
10 Steps of an Investigation

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

# CIVIL RIGHTS INVESTIGATION MODEL



# TRADITIONAL STUDENT CONDUCT/HEARING PANEL MODEL



# Investigation in Ten Steps

8

1. Complaint or Notice
2. Preliminary Investigation (initial strategy)
3. Gatekeeper Determination
4. Charge
5. Strategize Investigation
6. Formal Comprehensive Investigation
7. Witness Interviews
8. Evidence Gathering
9. Analysis
10. Finding

## **The Role of the Title IX Officer in the Investigation Process**

# Supervisor Of The Investigation Structure

10

- The Title IX Officer is responsible for:
  - ▣ The appointment of investigators
  - ▣ Conducting or providing training for investigators, hearing boards & appeals officers
  - ▣ Supervision of investigators and investigations
  - ▣ Strategizing investigations
  - ▣ Assurance of initial remedial actions
  - ▣ Timeline compliance
  - ▣ Communication and coordination of investigation teams
  - ▣ Providing institutional memory to investigators
  - ▣ Recordkeeping of all activities

# Supervisor Of Investigation Process

11

- The Title IX Officer or designee is responsible for:
  - Notice of investigation
  - Gatekeeping
  - Determining extent of investigation
  - Notice of charge
  - Notice of hearing
  - Notice of outcome
  - Duty to warn
  - Assurance of remedies
  - Recordkeeping of all activities

12

# What Governs Sexual Harassment Responses?

# Campus Legal Standards Regarding Sexual Misconduct

13

- **UNDERSTANDING THE LEGAL LANDSCAPE:**
  - College Policy
    - Should reflect the law & college culture
  - Title VII
    - Employment law
    - Compliance overseen by EEOC
  - Title IX
    - OCR creates Guidelines & provides oversight
  - Caselaw
  - Clery Act
    - “Campus Sexual Assault Victims Bill of Rights”
    - VAWA Reauthorization – Campus SaVE Act

# Title VII

*“Prohibits discrimination in the terms, conditions or privileges of employment on the basis of an employee’s sex, race, ethnicity or religion”*

- **The statute also prohibits retaliation against employees who engage in activities opposing unlawful discrimination**

42 U.S.C. § 2000e-3(a)

Title VII of the Civil Rights Act of 1964

# Title IX

*“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.”*

Title IX of the Education Amendments of 1972  
Implementing Regulations at:  
20 U.S.C. § 1681 & 34 C.F.R. Part 106

# Intersection of Title VII and Title IX

16

- Title IX consciously modeled on Title VI of the Civil Rights Act of 1964 and borrowed heavily from Title VII
- 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 as well as students
- Title VII only applies in employment situations
- Individuals can use both statutes to pursue the same violations

# Title IX

- Title IX of the Education Amendments of 1972 is a federal law intended to end sex discrimination in all areas of education
  - ▣ Applies to non-discrimination based on gender to all recipients of federal funds, both public and private institutions
  - ▣ Applies to issues of program equity, such as in athletics, and also to sexual harassment and sexual assault
- In addition to the implementing regulations of the law, guidelines are provided by U.S. Department of Education, Office of Civil Rights:

**[www2.ed.gov/about/offices/list/ocr/docs/shguide.html](http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html)**

# Title IX Essential Compliance Elements

18

- Once a “responsible employee” has either actual or constructive notice of sexual harassment/sexual misconduct, the school must:
  1. Take immediate and appropriate steps to investigate what occurred
  2. Take prompt and effective action to:
    - Stop the harassment
    - Remedy the effects
    - Prevent the recurrence

NOTE: This is regardless of whether or not the victim makes a complaint or asks the school to take action.

# Caselaw:

## Deliberate Indifference

19

- Understand legal framework (Franklin v. Gwinnett, 1982; Gebser, 1998; Davis, 1999)
- Failure to act on actual notice makes institution party to discrimination
- Imposes liability when a school official with authority to take corrective action fails to respond, or is deliberately indifferent
  - ▣ Justice O' Connor: Liability for actions “clearly unreasonable in light of the known circumstances”

# Civil Law Suits v. Administrative Action & Title IX

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## Law Suit

- ❑ **File in Federal Court**
- ❑ **Monetary damages, injunction**
- ❑ **Requires:**
  - ❑ Actual Notice
  - ❑ Employee with authority to take action
  - ❑ Deliberate Indifference

## Administrative Action

- ❑ **Initiated by OCR**
- ❑ **Voluntary compliance or findings**
- ❑ **Requires:**
  - ❑ Actual OR Constructive Notice (“knew or should have known”)
  - ❑ Investigate – End harassment – Remedy Impact – Prevent recurrence

# Clery Act

- **The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act** or **Clery Act**, passed in 1990 is a federal statute codified at 20 U.S.C. § 1092(f)
- The Act requires colleges who receive federal aid, to report campus crime information for all students and employees, and submit crime statistics to the Dept. of Ed.
- In 1992, the United States Congress enacted the "Campus Sexual Assault Victims' Bill of Rights"
- This amendment was developed to "combat the re-victimization of rape survivors at college campuses across the country who found that many image conscious schools were more concerned about protecting their image than seeing justice done."

# Essential Elements of Clery Act

## “Sexual Assault Victims Bill of Rights”

22

- A statement about the institution’s programs to prevent sexual assault and procedures to follow when a sex offense occurs
- A description of educational programs to promote the awareness of rape, acquaintance rape and other forcible and non-forcible sex offenses
- Procedures students should follow if a sex offense occurs, including procedures about who should be contacted, the importance of preserving evidence for the proof of a criminal offense and to whom the offense should be reported.

# Essential Elements of Clery Act

## “Sexual Assault Victims Bill of Rights”

23

- Information about a student’s option to notify appropriate law enforcement authorities and that institutional personnel will assist in notifying the authorities
- Notification of on and off-campus counseling or other services for victims of sex offenses
- Notification that the institution will change a victim’s academic and living situation after report of a sex offense

# Essential Elements of Clery Act

## “Sexual Assault Victims Bill of Rights”

24

- Procedures for campus disciplinary action in cases of an alleged sex offense
- Sanctions the institution may impose following a final determination of an institutional disciplinary proceeding for a sex offense
- Statement that the accuser and accused are entitled to the same opportunities to have others present during a disciplinary proceeding
- A statement that both the accuser and the accused must be informed of the outcome of any institutional disciplinary proceedings involving a sex offense

# VAWA Reauthorization Updates to the Clery Act

25

- ❑ Signed into law on March 7, 2013
  - ❑ Rulemaking underway: Additional guidance and regulations to follow
- ❑ Effective date of the law remains TBD
  - ❑ 2014 Annual Security Report (ASR) must reflect new law
- ❑ “Gender Identity” added as new Hate Crime category
- ❑ Three new hate crimes added to the Annual Security Report
  - ❑ Domestic Violence, Dating Violence, Stalking
- ❑ Prohibits retaliation

# VAWA Reauthorization Updates to the Clery Act

26

- Primary prevention and awareness programs for all incoming students and new employees containing:
  - State’s “definition of consent in reference to sexual activity”
  - Definitions of and statements prohibiting:
    - Domestic violence, dating violence, sexual assault, stalking
  - Options for Bystander Intervention
- Institutions must engage in “**ongoing** prevention and awareness **campaigns** for students and faculty” pertaining to
  - “Education programs to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking...” (8)(B)(i)

# VAWA Reauthorization Updates to the Clery Act

27

- Institutional disciplinary procedures shall “provide a prompt, fair and impartial investigation and resolution”
  - Accuser and accused are entitled to the **same opportunities** to have a support person/advisor of their choice at **any** proceeding or related meeting
  - The accuser and accused must be simultaneously informed in writing of:
    - The outcome...that arises from an allegation of domestic violence, dating violence, sexual assault or stalking
    - The institution’s procedures for appeal
    - Any change to the results that occurs prior to the time that such results become final
    - When such results become final

# VAWA Reauthorization Updates to the Clery Act

28

- Victims should receive written information regarding:
  - Procedures victims of DV, DV, SA, S should follow
  - Interim measures (Academic, Living, Transportation, Work)
  - Services available on and off-campus (counseling, advocacy, health)
  - Reporting options (campus police, local police, student conduct, HR, etc.)
  - Protection options (Order of Protection, No contact orders, etc.)
- Annual Training for those involved in disciplinary proceedings (investigators, hearing officers, appellate officers) on:
  - Domestic Violence, Dating Violence, Sexual Assault, Stalking
  - How to conduct an investigation “that protects the safety of victims and promotes accountability”
  - How to conduct a **“hearing process** that protects the safety of victims and **promotes accountability”**

# Understanding Policy Framework

Three types of sexual harassment:

Hostile Environment

Quid Pro Quo

Retaliatory Harassment

# Sexual Harassment

30

Sexual Harassment is:

- Unwelcome, sex or gender-based verbal or physical conduct that is
- Sufficiently severe, persistent or pervasive such that it
  - Unreasonably interferes with, limits or deprives someone of employment access, benefits or opportunities, and/or the ability to participate in or benefit from the university's educational program and/or activities, and is...
  - Based on power differentials (quid pro quo), the creation of a hostile environment, or retaliation

# Hostile Environment

31

- Any situation in which there is:
  - harassing conduct based on sex or gender
    - that is severe and
    - pervasive or persistent
    - and objectively offensive
  - such that it alters the conditions of education or employment
  - from both a subjective (the alleged victim's) and an objective (reasonable person's) viewpoint

# Totality of the Circumstances to Consider for Hostile Environment

32

- ❑ The frequency (persistent or pervasive), nature and severity of the conduct
- ❑ Whether the conduct was physically threatening
- ❑ Whether the conduct was humiliating
- ❑ The effect on the alleged victim's mental or emotional state
- ❑ Whether the conduct was directed at more than one person
- ❑ Whether the conduct unreasonably interfered with the alleged victim's educational or work performance
- ❑ Whether the statement is an utterance of an epithet which is offensive, or offends by discourtesy or rudeness
- ❑ Whether the speech or conduct deserves the protections of academic freedom or the 1<sup>st</sup> Amendment protection

# *Quid Pro Quo* Sexual Harassment

33

- Exists when there are:
  - Unwelcome sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; and
  - Submission to or rejection of such conduct results in adverse educational or employment action

# Retaliatory Harassment

34

- Is any adverse employment or educational action taken against a person because of the person's participation in a complaint or investigation of discrimination or sexual misconduct
- Also includes retaliation against the victim by the accused or by the accused friends or others who are sympathetic to the accused
- Also can include retaliation directed toward a 3<sup>rd</sup> party because of their participation in a grievance process or for supporting a grievant

# Sexual Misconduct

## Policy definitions

Non-consensual sexual contact

Non-consensual sexual intercourse

Sexual Exploitation

Stalking

Bullying & Cyberbullying

Other violations

# Non-consensual Sexual Contact

36

## **Non-Consensual Sexual Contact is:**

- ❑ Any intentional sexual touching
- ❑ However slight
- ❑ With any object
- ❑ By one person upon another person
- ❑ That is without consent and/or by force

# Sexual Contact Defined

37

## **Sexual Contact includes:**

Intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts;

**OR**

any other intentional bodily contact of a sexual manner

# Non-Consensual Sexual Intercourse

38

## Non-Consensual Sexual Intercourse is:

- Any sexual intercourse
- However slight
- With any object
- By one person upon another person
- That is without consent and/or by force

# Intercourse Defined

39

## **Non-Consensual Sexual Intercourse includes:**

Vaginal penetration by a penis, object, tongue or finger, anal penetration by a penis, object, tongue, or finger, and oral copulation (mouth to genital contact or genital to mouth contact), no matter how slight the penetration or contact

# Sexual Exploitation

- Occurs when a person takes non-consensual or abusive sexual advantage of another for his/her own advantage or benefit, or to benefit or advantage anyone other than the one being exploited (and that behavior does not otherwise constitute one of other sexual misconduct offenses.)  
Examples of sexual exploitation include, but are not limited to...

# Sexual Exploitation (Cont.' d)

41

- ❑ Invasion of sexual privacy
- ❑ Prostituting another person
- ❑ Non-consensual recording or broadcast of sexual activity
- ❑ Going beyond the boundaries of consent (such as letting someone hide in the closet to watch you having consensual sex)
- ❑ Engaging in voyeurism
- ❑ Knowingly exposing another to an STD or HIV
- ❑ Exposing one's genitals in non-consensual circumstances; inducing another to expose their genitals
- ❑ Sexually-based stalking, bullying and cyber-bullying may also be forms of sexual exploitation

# Stalking

- Model policy language: Stalking is a course of conduct directed at a specific person that is unwelcome and would cause a reasonable person to feel fear
- May be a series of legal actions, but campus policy is not required to mirror criminal standards in most jurisdictions
- Can be a form of sexual harassment, too

# Bullying & Cyber-bullying

43

- Bullying and cyberbullying are repeated and/or severe aggressive behaviors that intimidate or intentionally harm or control another person physically or emotionally [and are not protected by freedom of expression]
- It often includes comments about race, color, national origin, sex, sexual orientation or disability
- It often involves an imbalance of power, aggression, and a negative repeated behavior
- Falls within Title IX when gender-based

# Relationship Violence

44

- Violence between those in an intimate relationship to each other
- Other terms include interpersonal violence, domestic violence, intimate partner violence
- Always involves another Code violation
- If based on gender/sex would fall within Title IX

# Other Misconduct Offenses That May Require Title IX Based Response

45

- ❑ Threatening or causing physical harm, *extreme* verbal abuse, or other conduct which threatens or endangers the health or safety of any person based on that persons sex
- ❑ Discrimination, defined as actions that deprive other members of the community of educational or employment access, benefits or opportunities on the basis of gender;
- ❑ Intimidation, defined as implied threats or acts that cause an unreasonable fear of harm in another
- ❑ Any rule violated on the basis of the victim's sex/gender, which is severe enough to cause a discriminatory effect

# Scenario Discussion

# Sexual Misconduct Scenario

47

- A student tells her RA that she was raped by a student athlete at an off campus party. She identified the perpetrator by name. The student demands that the RA not tell anyone. The RA does tell the coach who benches the student athlete for two games but does not give the female students name
- Have Title IX requirements been fulfilled?
- Identify the issues posed here.

# Sexual Misconduct Scenario

48

- A professor learns from one of his students that the student observed a female student being sexually assaulted at an off campus party over the weekend. The professor does not know the female student. He tells the reporting student that the female student should go to the Dean of Student's Office or Counseling center if she needs assistance.
- Has the professor fulfilled Title IX obligations?
- What should be the next steps?

# Significant Concepts: Notice & Reporting

Notice – Actual & Constructive

Reporting – Responsible Employee

# When Do You Investigate?

50

- Receive Notice
  - ▣ Actual Notice or Constructive Notice
- How do rumors, gossip, online postings, etc. fit in?
- Once notice exists, the duty to investigate is absolute
  - ▣ Small “i” preliminary
  - ▣ Big “I” comprehensive investigation
- What does victim consent language in DCL mean?

# Notice Standard

- OCR applies both an “actual notice” standard as well as a “constructive notice” standard that is broader than the notice standard used by the courts – which is “actual notice”
- This brings under its ambit all complaints about which the university - through a “responsible employee” - knew, or should have known
- The OCR standard of “knew or should have known” is more favorable to complainants than the “actual knowledge” standard used to determine civil liability

# “Responsible Employee”

52

- A responsible employee under Title IX includes any employee who:
  - ▣ Has the authority to take action to redress the harassment,
  - ▣ Has the duty to report harassment or other types of misconduct to appropriate officials, OR
  - ▣ Is someone a student could reasonably believe has this authority or responsibility

# Examples of Actual Notice

53

- ❑ Individual files a Title IX grievance
- ❑ Individual notifies the Title IX Coordinator or other responsible employee
- ❑ Individual complains to campus police or security official
- ❑ Staff member witnesses harassment
- ❑ Indirect notice from sources such as flyers posted on campus, media, online postings, video

# Examples of Constructive Notice

54

- In some cases, the pervasiveness of the harassment may be enough to conclude that the college should have known of the hostile environment – where harassment is widespread, openly visible, or well known to students and/or staff.
- In other cases, OCR can conclude the institution should have known of incidents of harassment from a report to an employee who had a reporting duty to a supervisor, but:
  - Failed to uphold that duty, or
  - Based on a complainant's reasonable understanding of the apparent authority of the person to whom the report was made, though that employee in fact lacked actual authority as a mandated reporter.

# Notice & Employee Obligations

55

- ❑ OCR requires that a college or university may be held accountable for harassment of students (even by other students) if any person perceived to be a responsible school employee was put on notice and took no corrective action
- ❑ This is different from the standard applied by the courts, which imposes liability when a school official with authority to take corrective action fails to respond, or is deliberately indifferent

# Responsible Employee and Reporting Obligations

56

- A responsible employee includes any employee who:
  - Has the authority to take action to redress the harassment,
  - Has the duty to report harassment or other types of misconduct to appropriate officials,
  - Someone a student could reasonably believe has this authority or responsibility.
- Institutions must ensure that employees are trained regarding their obligation to report harassment to appropriate administrators.

# Training For Responsible Employee

57

Colleges and universities should ensure that employees are trained so that:

- Those with authority to address harassment know how to respond appropriately
- Other responsible employees know that they are obligated to report harassment to appropriate officials
- Essential Topics for training
  - ▣ Knowledge of institutional and community resources
  - ▣ Information regarding reporting
    - Who to report to
    - What to report

# Civil Rights Investigation and Grievance Model: An Overview

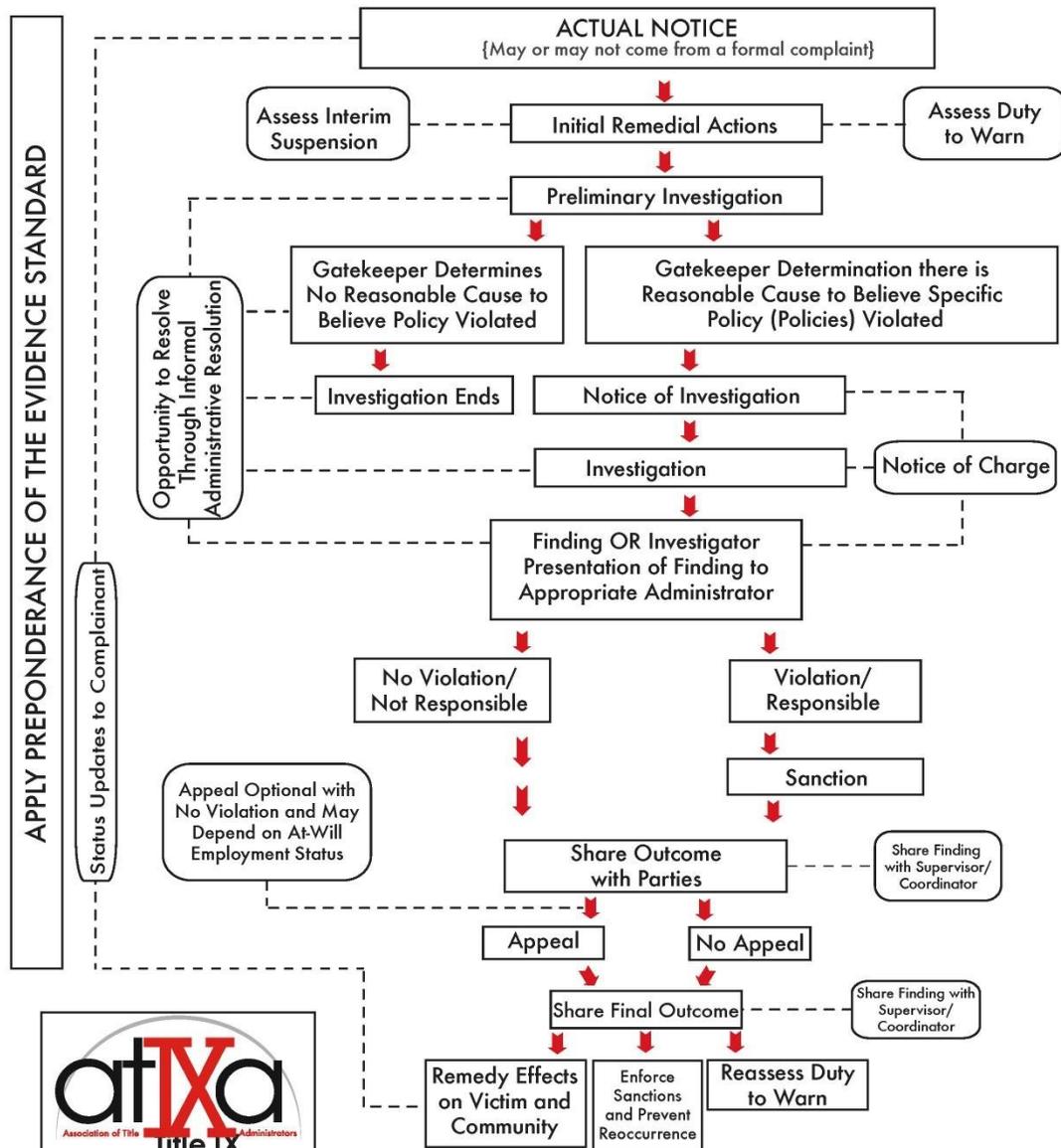
Why apply civil rights investigation model?

Coordinating multiple procedures

Who should investigate?

Timelines

# CIVIL RIGHTS INVESTIGATION MODEL



# Why Apply Investigation Model?

60

- Sex/gender based misconduct is not only a campus behavioral violation, but also a violation of federal civil rights laws
- Requires Title IX response
- Civil Rights Investigation Model most effective for victim-based violations
  - ▣ Campus conduct process involves passive receipt of information
  - ▣ Investigation process involves strategic information gathering, comprehensive investigation, credibility information
- Investigation model can stand alone or be grafted onto and/or integrated into existing procedures

# Ten Steps

61

1. Complaint or Notice
2. Preliminary Investigation (initial strategy)
3. Gatekeeper Determination
4. Charge
5. Strategize Investigation
6. Formal Comprehensive Investigation
7. Witness Interviews
8. Evidence Gathering
9. Analysis
10. Finding

# Coordinating Multiple Procedures

62

- Institutions frequently have more than one complaint process that can potentially be applicable if sexual misconduct occurs, for example:
  - ▣ Sexual harassment procedures
  - ▣ General student grievance procedure
  - ▣ Student discipline process
  - ▣ Faculty discipline process
  - ▣ Grade appeal process
  - ▣ Employee grievance procedures
  - ▣ Collective bargaining agreements
- If multiple procedures are invoked, coordinate to ensure prompt and equitable results

# Civil Rights Investigation Model and Student Conduct Model

63

- How does this model alter the current student conduct model used to address sexual assaults, stalking, intimate partner violence etc.?
  - ▣ No direct applicability to victimless violations
  - ▣ An active gathering of information by the investigator or investigators; not intended to “build a case”
  - ▣ Does not impact the implementation of alternative dispute resolution approaches
  - ▣ Characterized by an intentional effort to equalize procedural and support mechanisms
  - ▣ Typically provide a right of appeal for all parties to the complaint, not just the accused person

# The Shift in Focus in Addressing Misconduct

64

- Dean Wormer (1950's)
- Dixon v. Alabama (1961)
- “Campus Sexual Assault Bill of Rights” (1992)
- Dear Colleague Letter (2011)

# Is a Hearing Necessary?

65

- ❑ Only if your policy insists on using the traditional student conduct process or adversarial hearing model
- ❑ Determine if there is a better way to do equity through equity.
- ❑ In our experience, a well-conducted civil rights investigation results in an accepted finding (no hearing) in between 70%-80% of cases
- ❑ Hearings can still occur, when necessary, and in a more limited, less adversarial, more efficient fashion

# How is Investigation Different in HR than in Student Conduct?

66

- ❑ Role of FERPA, Employee/Faculty Handbook/Collective Bargaining Agreement impacts process
- ❑ Issues of First Amendment protections
- ❑ State Public Records Laws
- ❑ At-will v. property interest

# Who Should Investigate?

67

- Investigations of sex discrimination must be impartial, thorough and reliable
  - ▣ Title IX Coordinator
  - ▣ Standing panel of investigators
  - ▣ Human resources or student services
  - ▣ Administrators, faculty
  - ▣ One investigator or two
  - ▣ Outside investigator or legal counsel
  - ▣ Coordinating investigation in multiple processes

# Should There Be More Than One Investigator?

68

No specific requirement, but:

- ❑ Investigation must be prompt, thorough and impartial
- ❑ Investigator must collect the maximum amount of relevant information available to make a determination
- ❑ A pool of investigators may help to ensure that your investigation meets these requirements

# Team Investigations

69

- Other benefits:
  - ▣ Who investigates may be strategic to each specific case
  - ▣ Ability to brainstorm investigation steps and lines of questioning with co-investigators, co-facilitate interviews
  - ▣ Flexibility if there is any conflict with investigators and parties

# Role of Campus Law Enforcement in Civil Rights Investigations?

70

- Can Campus Law Enforcement 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 and do not relieve the school of its duty to respond promptly and effectively
- Establish MOUs with campus police and other local enforcement and update annually
  - The power of the table top exercise

# Timelines

- Ensure that all steps in the investigation are conducted according to the timelines in the institution's policy
- 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
- Document unavoidable delays
- Notice of extensions

# ATIXA Recommended Timeline

72

- Notice of Grievance to Title IX Coordinator (clock starts ticking!)
- Title IX eligibility determined (within 2 business days)
- Assignment to investigation team (within 4 business days)
- Notice of investigation (varies according to investigation strategy)
- Investigation (within 10-14 business days)
- Shared outcome of investigation (within 1-3 business days)
- Gatekeeping (ongoing)
- Notice of charge (within 2 business days of of investigation conclusion or during investigation as appropriate)
- Notice of hearing (within 2 business days of investigation conclusion)

# Recommended Timeline cont.

73

- Hearing (within 5 business days of notice of hearing)
- Notice of outcome (within 2 business days)
- Appeal (within 3-5 business days)
- Notice of appeal (within 1 business day)
- Notice of final determination (within 7 business days)
- Notice of implementation of remedies/sanctions (no later than 60 +/- days)
  - ▣ Sanctions or responsive actions are implemented immediately unless the appropriate administrator stays their implementation in extraordinary circumstances, pending the outcome of the appeal



# ATIXA Sample Investigations Timeline [Civil Rights Investigation Model]

[DAYS] 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30

Gatekeeping

Remedies

Notice

Title IX Eligibility Determined

Assignment to Team

Notice of Investigation

Investigation [1-14 Days]

Outcome of Investigation [Within 1-3 Business Days]

Notice of Charge [Within 1-2 Business Days]

Investigator Renders Findings

Sanction [Within 1-2 Days of Finding]

Notice of Outcome [Within 2 Days of Finding]

Appeal [Within 3-5 Days Following Notice of Outcome]

Notice of Final Resolution [Within 1-2 Days]



# ATIXA Sample Investigations Timeline [with Hearing Panel]

[DAYS] 1 2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26 27 28 29 30

Gatekeeping

Remedies

Notice

Title IX Eligibility Determined

Assignment to Team

Notice of Investigation

Investigation [1-14 Days]

Outcome of Investigation [Within 1-3 Business Days]

Notice of Charge [Within 1-2 Business Days]

Notice of Hearing [Within 2 Business Days of Investigation Conclusion]

Hearing [Within 5 Days of Notice of Hearing]

Sanction

Notice of Outcome & Sanction [Within 2 Days of Hearing Conclusion]

Appeal [Within 3-5 Days Following Notice of Outcome]

Notice of Final Resolution [Within 1-2 Days]

# Outside Investigation/Investigation Support Resources

76

- When do you outsource investigations?
- Is it a good risk management practice?
  - Use an outside investigator when you are investigating your internal “investigation”
    - Trained investigator from your institution
    - Contracted investigator from outside the institution
  - Not cost effective to use outside investigator every time
  - Outside investigator does not know institutional process, past practice, culture, and politics
- Readily seek legal counsel (institution or outside) for guidance when needed

# Informal And Formal Resolution Process

77

- OCR endorses and encourages informal resolution, and we believe it is a best practice, as long as it is voluntary
- Some minor incidents can be resolved through confrontation and/or intervention
- More significant discrimination can also be resolved informally, by a process in which the accused individual accepts responsibility, and/or by some forms of ADR or conflict resolution.
  - ▣ Mediation not appropriate for sexual assault

78

# Scenario Discussion

# Sexual Misconduct Scenario

79

- A group of male students sits in front of the library in the nice weather and calls out ratings to female students as they pass by. One female student avoids having to pass by them and misses appointments at the writing center as a result.
- Title IX related?
- How would we address this?

# Strategy is Key

- The investigation team, in consultation with their supervisors, and/or the Title IX Coordinator strategizes the entire investigation. This includes:
  - ▣ What Policy(s) elements may have been violated?
  - ▣ What are the undisputed facts? Which ones are significant to the investigation?
  - ▣ What are the facts in dispute? Which ones are significant to the investigation?
  - ▣ Who do you need to interview?
  - ▣ What should be the order of the interviews

# Other Elements to Consider in Strategy

81

- What are the key issues involved?
  - ▣ What additional strategies do you need to address key issues?
- What additional documentary evidence will be important to the investigation?
- Discuss your *Methodology* for this case (what approach will you use?)
- Timeline (within 30-60 days will vary by case)

# Preliminary Investigation

## Critical Considerations

82

- This is an initial inquiry to determine if a comprehensive investigation is desired or necessary
- Checking background, obvious patterns, indicia of predatory, violent, or threatening behavior
- How much involvement does victim want?
- Can we remedy informally or without discipline?
- Give victim as much control as possible in the process

# Preliminary Investigation Determinations

83

- Determine if there is reasonable cause to charge the accused individual, and what policy violations should be alleged as part of the complaint
- Establish a preliminary timeline for the investigation
- Investigate all complaints to determine:
  - ▣ The extent of the harassment
  - ▣ The acuity of the threat it represents to members of the community
  - ▣ What might be necessary to put an end to it

# What is the Gatekeeping Function and Why is it Essential?

84

- The Gatekeeper of the process determines the extent and development of the investigation, moving it from preliminary to full investigation and identifying timing for charges and strategy development
- Whether your goal is equity, due process, essential fairness, equal dignity, it is unfair for an accused individual to be dragged through a process without substantiating evidence

# Gatekeeping Throughout the Process

85

- As the investigation unfolds, the investigators should determine if there is reasonable cause to believe that policy has been violated.
- If that threshold is reached, the investigators should communicate with the Coordinator to ensure a formal charge ensues.
- If investigation cannot produce sufficient evidence of reasonable cause, the investigation should end prior to the issuance of the formal charge, and no hearing should be held.

# Formal Comprehensive Investigation

86

- Commence a thorough, reliable and impartial investigation
- Determine the strategy for the investigation
  - ▣ Witness interviews
  - ▣ Evidence gathering
  - ▣ Intended timeframe to complete the investigation
  - ▣ Finding
  - ▣ Presentation of finding
- Complete the investigation promptly, and without unreasonable deviation from the timeline

# Strategize When to Interview Parties and Witnesses

87

- 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
- Strategize notifying the accused of the complaint
  - ▣ Immediately upon receipt of the formal complaint
  - ▣ In other circumstances, interviewing witnesses and accumulating evidence first may be the best practice

# Sequestering Witnesses and Other Considerations

88

- ❑ Sequester witnesses and questioning sessions as necessary to reduce chances of fabrication and collusion
- ❑ Be conscientious of strategic interviewing opportunities
- ❑ Arrange for a witness to give information and be questioned in such a way as to protect privacy of the parties involved

# Evidence Gathering

89

- Engage in the active accumulation of evidence
  - ▣ Direct evidence
  - ▣ Circumstantial evidence
  - ▣ Documentary evidence
  - ▣ Second hand “hearsay” evidence
- Document receipt of information and other materials as it is obtained in the course of the investigation
- Be thorough in your examination of factual, circumstantial and hearsay evidence, and ensure that all evidence has been examined, and all leads exhausted

# Charge

- Prepare and deliver the notice of investigation (and possibly notice of charges, if appropriate) on the basis of the initial investigation
  - ▣ Notice of Investigation should be shared verbally and sent in writing to Respondent
  - ▣ Notice of charge(s) of alleged violation(s) of student conduct code or institutional policy should also be shared with the Complainant

# What is the Appropriate Standard of Proof?

91

- Different Standards: What do they mean?  
Why do they exist?
  - Beyond a reasonable doubt
  - Clear and convincing
  - **Preponderance of the evidence**
- Use language the community understands
  - 50.1% (50% plus a feather)
  - “More likely than not”
  - The “tipped scale”

# Post-Investigation

How is a decision rendered?

Sanctioning and Remedies

Appeals

# How is a Decision Rendered?

93

- Variations in role of decision process:
  - ▣ Investigator presents findings to accused individual
  - ▣ Investigator recommends to supervisor or hearing panel
  - ▣ Investigator only presents investigation report without findings

# If the Investigator Makes a Finding

- Review the institutional policies that apply
- Parse the policy
- List the evidence and what it shows (relevance)
- Assess credibility of evidence and witness statements as factual, opinion-based, or circumstantial
- Make a determination, based on the preponderance of the evidence, whether a policy violation is more likely than not
- Cite concretely the reasons for this conclusion in a written report
- Refer the complaint and findings to the appropriate administrator for implementation, sanctioning and/or hearing

# What Happens Next?

95

- Administrator accepts or rejects finding, makes determination subject to appeal
- Or, hearing is held, subject to appeal
- Or, investigator presents findings:
  - Accused individual accepts
    - Recommended finding implemented
      - Not appealable
    - May recommend sanctions or sanctions by administrator
      - If rejected, hearing on sanctions
      - Appeal

# What Role Does the Investigator Play in an Eventual Hearing?

96

- ❑ The investigator is the key witness at any hearing
- ❑ The investigation report is admitted as evidence
- ❑ Other witnesses can be called, or the investigators may summarize their testimony instead
- ❑ The investigator can attest to credibility, call attention to discrepancies, and arrange for expert sources of information, as needed
- ❑ The investigator's finding may be introduced but is not binding on the hearing body

# Sanctioning

- Title IX and Case Law Requires:
  - Bring an end to the discriminatory conduct
  - Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct
  - Restore the victim as best you can to his/her pre-deprivation status
- Real clash with the typically educational and developmental sanctions of student conduct processes
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose. They are intended to protect the victim and the community

# Post-Finding Actions

98

- Investigation alone is not sufficient to overcome a deliberate indifference claim
- Must be a nexus between the sanctions and the discriminatory conduct which led to the sanction(s)
- What is appropriate?
  - ▣ Separation/expulsion
  - ▣ Suspension
  - ▣ Lesser sanctions
- Engage in strategic education and training requirements
- Conduct a risk assessment audit and mitigation process

# Other Considerations

- ❑ Ensure remedies are not clearly unreasonable in light of the known circumstances
- ❑ Avoid undue delays
- ❑ Take immediate steps to protect complainants even before the final outcome of investigations (no contact orders, etc.)
- ❑ Ensure that remedies are equitable
- ❑ Consider restorative justice as part of your remedial process
- ❑ Monitor for retaliation and respond immediately to allegations
- ❑ Regularly review policies, procedures, and practices to ensure they are in accordance with best practices, state and federal case law

# DCL Guidance on Appropriate Remedies

*\* Not an Exhaustive List*

100

- Providing an escort
- Ensuring that the complainant and alleged perpetrator do not attend the same classes
- Relocating to a different residence hall
- Providing counseling services
- Providing medical services
- Providing academic support services, such as tutoring
- Arranging for the complainant to re-take a course/withdraw from a class without penalty
- Reviewing any disciplinary actions taken against the complainant to see if there is a causal connection between the harassment and the misconduct and adverse action
- Campus wide training and education initiatives

# The Appeals Process

101

- Equitable
- One level of appeal
- Short window to appeal
- Grounds for Appeal
- Committee versus individual determination
- Deference
- Remand

# Sharing of Outcomes

102

- Title IX requires institutions to apprise complainants of the status of investigations, findings, sanctions (or remedial actions) AND THE RATIONALE THEREFOR
  - ▣ Provide this information in writing and place no conditions on receiving or sharing it
- FERPA and the Clery Act are considered the primary sources of legal provisions for victim notification
  - ▣ Clery disclosure of sexual assault outcomes/sanctions
  - ▣ FERPA re-disclosure restrictions lifted in 2008
  - ▣ FERPA cannot be construed to conflict with or prevent compliance with Title IX

103

# DAY 2

# Day 2 Agenda

104

- An Analytic for Sexual Misconduct Allegations
- Interviewing & Questioning Skills
- Analytic for Sexual Misconduct
- Evaluation of Evidence
- Decision-Making Skills
- Note Taking, Record Keeping
- Report Writing
- Retaliation

# An Analytic for Sexual Misconduct Allegations

## **Understanding**

## **The Force – Incapacity – Consent Construct**

# Overview of the Three Questions

1. Was force used by the accused individual to obtain sexual access?
2. Did the accused individual know, or should s/he have known that the alleged victim was incapacitated (alcohol, other drugs, asleep, etc.)?
3. What clear words or actions by the complainant gave the accused individual permission for the specific sexual activity that took place?

# Force

107

- Was force used by the accused individual to obtain sexual access?
- There are four types of force to consider:
  - Physical violence -- hitting, restraint, pushing, kicking, etc.
  - Threats -- anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
  - Intimidation -- an implied threat that menaces and/or causes reasonable fear
  - Coercion – the application of an unreasonable amount of pressure for sexual access.
    - Consider:
      - Frequency
      - Intensity
      - Isolation
      - Duration
- Because consent must be voluntary (an act of free will), consent cannot be obtained through any type of force

# Incapacity

- First, was the alleged victim incapacitated at the time of sex?
  - ▣ Could s/he make rational, reasonable decisions?
  - ▣ Could s/he appreciate the situation and address it consciously such that any consent was informed
    - knowing who, what, when, where, why and how
- Second, did the accused individual know of the incapacity (fact)?
- Or, should the accused individual have known from all the circumstances (reasonable person)?

# Incapacity

109

- What was the form of incapacity?
  - Alcohol or Other Drugs
    - Not impaired, not under the influence, not drunk, but incapacitated
    - Administered voluntarily or without victim's knowledge
    - Rape drugs
  - Mental/cognitive impairment
  - Injury
  - Sleep

# Incapacity

110

- Incapacitation is a determination that will be made after the incident in light of all the facts available
- Assessing incapacitation is very fact dependent
- Blackouts are frequent issues
  - ▣ Blackout = incapacitation
  - ▣ Blackout = no working (form of short term) memory, thus unable to understand who, what, when, where, why or how
  - ▣ Partial blackout must be assessed as well
- What if the accused individual was drunk too?

# Incapacity

111

- If the alleged victim was not incapacitated, move on to the 3<sup>rd</sup> question.
- If the alleged victim was incapacitated, but:
  - ▣ The accused individual did not know it = policy not violated
  - ▣ The accused individual should not have known it = policy not violated. Move on to 3<sup>rd</sup> question.
- If the alleged victim was incapacitated, and:
  - ▣ The accused individual knew it = policy violation. Sanction.
  - ▣ The accused individual should have known it = policy violation. You are done. Sanction accordingly.

# Consent

- Question 3 is the Consent question: What clear words or actions by the complainant gave the accused individual permission for the specific sexual activity that took place?
- Equity demands a “pure” consent-based policy, defining what consent is rather than defining it by what it is not (force, resistance, against someone’s will, unwanted, someone unable to consent, etc.)

# Consent Is...

- ❑ Informed (knowing)
- ❑ Voluntary (freely given)
- ❑ Active (not passive)
- ❑ Clear words or actions
- ❑ Indicates permission to engage in mutually agreed upon (sexual) activity

# Rules to Remember

- ❑ No means no, but nothing also means no.  
Silence and passivity do not equal permission
- ❑ To be valid, consent must be given prior to or contemporaneously with the sexual activity
- ❑ Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated by the person withdrawing it

115

# Case Study

# Todd & Amy

116

- ❑ What Policy(s) elements may have been violated?
- ❑ What are the undisputed facts? Which ones are significant to the investigation?
- ❑ What are the facts in dispute? Which ones are significant to the investigation?
- ❑ Who do you want to interview?
- ❑ Order of interviews
- ❑ What other information do you need?
- ❑ Do you need to interview an expert witness?

117

# Interviewing & Questioning Skills

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

# Establish Pre-Interview Ground Rules

119

- Can subject record?
- Who will attend?
  - Advisors
  - Attorneys
  - Roommates, Parents, etc.
- Explain how will records be kept
- Review FERPA/confidentiality issues

# Demeanor of Investigator

120

- ❑ Work to establish a baseline of relaxed conversation
- ❑ Establish a rapport before asking questions
- ❑ Maintain good eye contact (“listen” with your eyes and your ears)
- ❑ Listen carefully to the answers to your question
  - ❑ Avoid writing while they are talking, if possible
  - ❑ Do not be thinking about your next question while they are talking
- ❑ Ask questions in a straightforward, non-accusatory manner

# Setting up Reasonable Expectations

121

- People who conduct investigations with skill rest secure in the knowledge that all the people involved including the witnesses were treated objectively and fairly
- Be sure the complainant and the accused individual understand the 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 accused individual to ask questions
- Keep the alleged victim in the loop as to exactly when notice will be given to the accused individual

# Framework for the Interview

122

- Set the tone:
  - ▣ Thank them
  - ▣ Review your role as a neutral fact-finder
  - ▣ Put them at ease - ask about them without being phony
  - ▣ Acknowledge their hesitation
  - ▣ Review retaliation against a witness
  - ▣ Review immunity
  - ▣ Review confidentiality
  - ▣ Review expectation of truthfulness

# Interview Overview

123

- General Interview Skills:
  - ▣ Interviews should be conducted in a neutral, quiet and private setting with a minimal or no likelihood of interruptions
  - ▣ Outline your interview questions but be flexible
  - ▣ Explain process, your role as a neutral fact finder, and privacy protections and limitations
  - ▣ Plan the order of interviews; may be beneficial to interview Respondent last
  - ▣ Nod affirmatively to keep witness talking

# Interview Overview

- ❑ Discuss thoroughness and the need for completeness; make sure parties don't leave facts out because they are afraid of getting into trouble
- ❑ Create comfort with language and sensitive subjects
- ❑ Ascertain the individual's relation to the other parties in the case
- ❑ Document whether the individual is cooperative or resistant
- ❑ Be professional: gather the facts, make no judgments, make no statements about the parties

# Interview Overview

125

- ❑ Pay attention to alcohol / drug consumption and timing of consumption
- ❑ Be cognizant of the difference between what was “heard” (rumor) and what was “witnessed” (facts)
- ❑ Ask who else you should talk to and ask for any relevant documentation (i.e. texts, emails)
- ❑ Let parties know you may need to follow up with them as the investigation progresses
- ❑ Recommend that the parties and witnesses not discuss the investigation
- ❑ Discuss non-retaliation
- ❑ Obtain FERPA releases

# Questioning Guidelines

126

- Take the complaint from start to finish through a process of broad to narrow questions and issues that need to be addressed
- Engage in a matching process
  - ▣ Ask questions about the allegations and 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

# General Questioning Skills

127

- What are the goals of questioning?
  - Learn the facts
  - Establish a timeline
  - Understand each party's perception
    - Of the event and of the process
  - Gather enough information to determine facts and their relative importance
  - Try to learn the what is more likely than not what happened (is that the truth?)

# General Questioning Skills

128

- Seek to discover:
  - ▣ Relevant facts about what happened during the incident
  - ▣ Any related events
  - ▣ Facts necessary to establish the timeline
  - ▣ Background information about the situation, the parties, the witnesses
- Use your questions to elicit details, eliminate vagueness, fill in the gaps where information seems to be missing

# Questioning Guidelines

129

- Have a purpose for asking every question
- Be sure to ask a question, not make a speech
- Be on the lookout for “cued” responses or rehearsed or memorized answers
- Don’t ask compound questions (always watch for the “or)
- Don’t be accusing or argumentative
- Don’t make questions too long or confusing
- Don’t suggest an answer in your question

# Good Cop, Bad Cop?

130

- Understand the goals of an “interview” versus “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
- Is the person comfortable that you will handle the investigation fairly and objectively?
  - ▣ Team or peer led investigations can help create a rapport much easier

# Play An Open Hand Or Close To The Vest?

131

- ❑ 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
- ❑ Explore only those facts that are relevant to the issue at hand
- ❑ Start with broad questions then move to narrow, more pointed questions
- ❑ Can be difficult for the accused individual to respond effectively to broad-based or abstract allegations and can diminish trust and hurt rapport building

# Challenging/Difficult Witnesses

132

- 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 and follow up

# Challenging/Difficult Witnesses

133

- 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 appropriate, appeal to their humanity
  - ▣ Advance preparation will help when open-ended questions don't work

# Standards for Interviewing The Complainant and the Accused

134

- 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
  - Good to have them give full story without asking questions, then drill down on details
- Ask whom they spoke to and told about the incident
- Ask about outcry witnesses and possible documentation such as blogs or journal

# Interviewing The Complainant

135

- Find out if their academics and/or work have been affected
- Ask how this has affected them emotionally and /or physically
- Advise that the complaint will be discussed with the respondent and witnesses
- Discuss other reporting options and on- and off-campus victim services

# Interviewing The Complainant

136

- ❑ Discuss counseling options if they are not already connected
- ❑ Discuss non-retaliation and intermediary steps such as no contact orders and class changes and give examples of retaliation, and to whom it should be reported immediately
- ❑ Let the complainant know next steps and when they will hear from you, and that they can contact you anytime with questions or any problems that arise

# The Reluctant Complainant

137

- When an alleged victim/survivor is reluctant to make a formal complaint, or returns to withdraw a formal complaint, Investigators should honor that request and determine the reason for reconsideration
- Those reasons that involve the investigation or hearing process should be addressed by the Investigator. Those that involve other issues should be addressed by their support person
- A comprehensive investigation and/or resolution should not automatically involve the alleged victim, as it may be conducted without his or her involvement, if sufficient independent evidence allows

# The Reluctant Complainant

138

- The complainant should be notified as to their options:
  - ▣ That the process will still be available to them, regardless of how long they wait
  - ▣ That the institution will support them in any way it can (housing, classes, no contacts, etc.). Engage in ways to limit the effect of the behavior on the complainant
  - ▣ That, if information is brought to the attention of the of the institution that may involve a threat to the community, the office may be forced to proceed with an investigation, but that the victim will be notified of this process

# Confidentiality for Complainant

139

- The college or university should explain to the complainant that:
  - ▣ Its responsive action may be limited based on the level of privacy requested by complainant
  - ▣ It cannot guarantee privacy if doing so would jeopardize the safety of the complainant or others
- Emphasize that only those with a need to know will be informed
  - ▣ Train those who will be informed about confidentiality expectations

# Privacy Considerations

140

- If the complainant does not want his/her name used you still must evaluate their request in the context of your responsibility to provide a safe and non-discriminatory for all members of the community

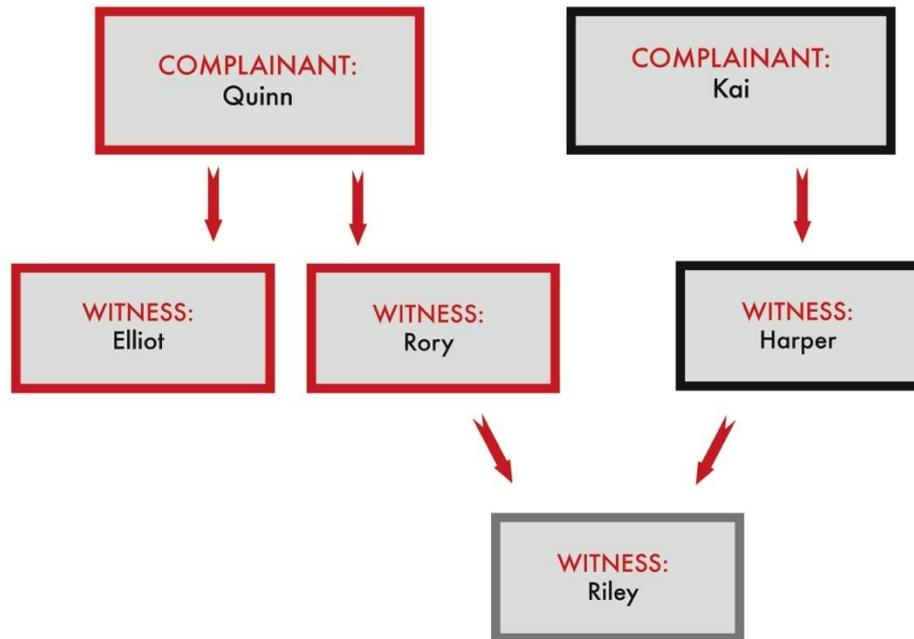
# Witness Lists And Flowcharts

141

- Witness lists and flowcharts are important
  - ▣ Identify the role/involvement of the witness and his/her relation to other parties
  - ▣ Specify how the witness was identified (referred by a party or on your own)
  - ▣ Keep track of statements / compare accounts as between witnesses
  - ▣ Document your outreach attempts
  - ▣ Quickly locate how to contact a witness
- Timeline of incident also very helpful



## Flowchart of Witnesses



# Anticipate Common Witnesses Questions

143

- 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 or lawyer present during the interview
- Anticipating these questions and/or covering them in advance can help ensure that you get complete truthfulness

# Witness Interviews

144

- ❑ 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 accused
- ❑ Determine when you are going to question the accused

# Interviewing Witnesses (cont.)

145

- Ask if they have been contacted already by one of the parties
- Ask if they have made any previous statements, such as to private investigators
- Ask if there is anything you should know that was not been covered or if there is anyone else they think that should be contacted
- Discuss non-retaliation and give examples of it as some people only see it as threats
- Discuss privacy; execute FERPA release
- Ask all interviewees to contact you if they remember anything else or want to add to their interview

# Provide Information to those Interviewed

146

- Each party that you interview should receive:
  - ▣ A copy of the policies alleged to have been violated
  - ▣ A copy of the procedures that will be used to resolve the complaint, including the rights that extend to the parties
  - ▣ A FERPA statement/acknowledgement
- Consider providing parties copies of your non-retaliation provision.

# Incident Timeline

147

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

# “Confidentiality” Of The Process

148

- Privacy of the parties’ and witnesses’ names and the allegations should be maintained to the greatest extent possible
- Best practice not to furnish the respondent with a copy of the complaint without redaction or summarizing
  - Why?
- What advice do we give a victim who wants to “share” his/her story?

# “Due Process” and Fundamental Fairness for All Parties

149

- Regular and consistent handling of complaints
- Fairness in the treatment of the complainant and respondent
- Equity throughout the process in both procedures and outcomes
- Infusing the process with humanity and respect for the participants

# Focus On Remedies

150

- Throughout process
  - ▣ Investigation
  - ▣ Stop behavior (are we rehab facilities?)
  - ▣ Remediate impact (often not sanction-based)
  - ▣ Prevent re-occurrence
    - Consider the effect of “educational” sanctions. 2<sup>nd</sup> victim is both Title IX and negligence concern
    - Consider what educational/training needs to be implemented, changed, etc.

151

# Case Study Discussion

## The Case of Anne

# Case Study Discussion

## The Case of Anne

- ❑ Discuss your preliminary investigation approach
- ❑ What is the role of campus law enforcement?
- ❑ What do you need to know to determine to go forward with the investigation?
- ❑ What do you need to know to determine if there should be conduct charges?
- ❑ Would this be a Title IX based violation?

# Evaluation of Evidence and Decision-Making Skills

# Understanding Evidence

154

- Formal rules of evidence do not apply. If the information is considered relevant to prove or disprove a fact at issue, it should be admitted. If credible, it should be considered
  - ▣ Evidence is any kind of information presented with the intent to prove what took place
  - ▣ Certain types of evidence may be relevant to the credibility of the witness, but not to the charges
- Consider if drugs or alcohol played a role
  - ▣ If so, do you know what you need to know about the role of alcohol on behavior? Timing? Incapacitation?
  - ▣ Look for evidence of prior planning

# Understanding Evidence

155

- You may assign weight to evidence based on:
  - ▣ Direct or testimonial evidence (personal observation or experience)
  - ▣ Documentary evidence (supportive writings or documents)
  - ▣ Real evidence (physical object)
  - ▣ Circumstantial evidence (not eyewitness – but compelling)
  - ▣ Hearsay evidence (statement made outside the hearing but presented as important information)
  - ▣ Character evidence (generally not relevant or acceptable)
  - ▣ Past record (should only be presented prior to sanctioning unless it relates to significant pattern of behavior that would impact “more likely than not” determination)
  - ▣ Impact statements (should only be reviewed after a finding)

# Prior Acts as Evidence

156

- ❑ Previous conduct violations by the accused individual are not generally admissible in due process proceedings
- ❑ They are essential (and legally required) considerations in any civil rights investigation
- ❑ Must be considered as evidence of finding, not just of sanction
- ❑ Previous good faith allegations, convictions and campus findings must be considered
- ❑ The entire continuum of violence may establish pattern

# Credibility

- “To assess credibility is to assess the extent to which you can rely on a witnesses’ testimony to be accurate and helpful in your understanding of the case”
  - ▣ Credible is not synonymous with truthful
  - ▣ Memory errors do not necessarily destroy a witness’ credibility, nor does some evasion or misleading
  - ▣ Refrain from focusing on irrelevant inaccuracies and inconsistencies
- Pay attention to the following factors...

# Factors to Consider for Credibility

158

- Demeanor
  - ▣ Nonverbal language
  - ▣ Demeanor issues should be your cue to ask more questions
- Non-cooperation
  - ▣ Look for short, abrupt answers or refusal to answer
  - ▣ OK to ask, “you seem reluctant to answer these questions - can you tell me why?”
- Logic/Consistency
  - ▣ Ask “Does this make sense?”
- Corroborating evidence

# Making Credibility Determinations

159

- ❑ Look at consistency of story – substance and chronology of statements
- ❑ Consider inherent plausibility of all information given
- ❑ Look for the amount of detail (facts) provided. Factual detail should be assessed against general allegations, accusations, excuses or denials that have no supporting detail
- ❑ Pay attention to non-verbal behavior, but don't read too much into it. This isn't "Lie to Me"

# Analyzing the Information

160

- Examine only actions that have a direct relation to the situation under review or a pattern of incidents
- Explore motivation, attitude and behavior of complainant, accused and witnesses
- Apply relevant standards:
  - Force, Consent, Incapacity
  - Unwelcomeness; reasonable person; discriminatory effect
- Analyze the broadest, most serious violations first and make a determination of each and every violation alleged, element by element

# Analyzing the Information

161

- Assessing each answer: for each piece of information you have as a result of your analysis and matching your need to assess its evidentiary value. Measure with the following questions:
  - \*\* Is the question answered with fact(s)?
  - \*\* Is the question answered with opinion(s)?
  - \*\* Is the question answered with circumstantial evidence?
- Withhold judgment until all evidence has been considered

162

# Scenario Discussion

# Sexual Misconduct Scenario

163

- A student worker in your office shows you 45 text messages that her boyfriend sent her last night while she was at the library. He wanted to make sure he knew where she was. The final few messages threaten physical violence.
- Is this a Title IX matter?
- Does your policy address this?
- Should you contact campus police?
- What would be the appropriate steps to take?

# Sexual Misconduct Scenario

164

- The Dean of the Business School receives an e-mail from a male student complaining that a female faculty member is making inappropriate flirtations comments in class. The student requests confidentiality because he is concerned about retaliation by the faculty member. Subsequently during a department meeting the Dean advises all faculty to watch their behavior that may be deemed inappropriate.
- Does this fall under Title IX?
- Did the Dean fulfill the obligations?

165

# Note-Taking, Recordkeeping and Report Writing

# What Kinds Of Notes Should Be Kept?

166

- ❑ Assemble an investigative file and keep it in a secure location, or use your data base
- ❑ Keep a timeline of the steps in the process, including dates of all meetings and interviews.
- ❑ Interviews - notes vs. recording
- ❑ Interviews - hand written vs. computer
- ❑ Interviewee verification
- ❑ Records of all contacts including e-mail and phone calls with all parties

# Note-Taking

167

- Taking notes may slow down the interview in a good way- may help detect deception
- Use pre-prepared numbered questions as a framework, but be flexible
- Note-taking should occur throughout the entire interview, not just when the accused individual makes a pertinent disclosure or an “incriminating”
- Documentation is critical: you are creating the record of the complaint
- Remember that a student has the right to inspect their education record under FERPA

# Note-Taking

- Notes should be complete and detailed
  - ▣ Important for assessing credibility
  - ▣ Decision may turn on small details
- Where possible, include verbatim statements on critical issues – use their words, not yours
- Keep notes on what is told to the complainant, respondent and witnesses
- Summarize perceptions of credibility, honesty, etc. if relevant

# Note-Taking

- ❑ Remember that “Sole possession” FERPA exception is very limited
- ❑ Date all records and include who was present at any meetings; number pages
- ❑ Review your notes before the interview concludes
- ❑ Clarify anything you are unclear about
- ❑ Document any refusal to answer, evasion or refusal to participate
- ❑ Capture key quotes
- ❑ Review and finalize notes immediately upon completion of interview

# The Investigation Report

170

- Helpful to have a “skeleton” outline of what report will include
- The report should:
  - ▣ Detail the allegations and how they were brought forward
  - ▣ Explain the role of the parties and witnesses, and any relations between them
  - ▣ Summarize information collected
  - ▣ Address evidence collected (direct, circumstantial, documentary, expert)

# How Important is the Creation of an Investigation Report?

171

- The investigation report is the one comprehensive document summarizing the investigation, including:
  - Results of interviews with parties and witnesses
  - Results of interviews with experts
  - Summary of other information collected, i.e. information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of text, email and social networking messages, etc.
- Provides Conclusions and Findings

# Elements of an Investigation Report

172

- Case Identification Information
  - ▣ Case number, investigator(s), date of notice, date assigned to investigator, date investigation closed
- Source of Initial Complaint/Allegation
  - ▣ Name of complainant, name and contact information of alleged victim, and status; record same for accused individual
- Details from initial report/complaint
  - ▣ Nature of incident
  - ▣ How report was received (security incident report, hotline, face-to-face, web form, etc.)

# Elements of an Investigation Report (cont.)

173

- Document the purpose (scope) of the investigation
  - ▣ This section must paint a clear picture of the investigation for the person reading the report
  - ▣ Identify clearly which policies are in play
- Document each of the tasks assigned and actions taken throughout the investigation particularly if there are multiple investigators
- Index all documentation supportive of the complaint
  - ▣ research, notes, medical records, police reports, prior complaints, etc.

# Elements of an Investigation Report (cont.)

174

- Investigation Interview
  - Name/title of the interviewer(s)
  - Name of the person interviewed and his/her role in the investigation complainant, accused individual, witness, etc.
  - Names of any other people who sat in on the interview and their role
  - Location of the interview
  - Interview date
  - Detailed notes of interview
- Incident Log
- Finding and Action Taken

# Elements of the Investigation Report (cont.)

175

- Assess weight, relevance and credibility of information gathered
- Assess credibility of parties
- Explain unsuccessful attempts to collect information and/or interview witnesses
- Highlight key factual findings for each allegation
- The report should reference or contain all policies and procedures currently applicable

176

# Investigating Retaliation Claims

# Retaliation

## Basic Legal Principles

177

- The Title IX regulations prohibit recipients from intimidating, coercing or retaliating against individuals because they engage in activities protected by Title IX
- Protected activity under Title IX:
  - ▣ Reporting sex discrimination, including sexual harassment and assault
  - ▣ Filing a discrimination complaint
  - ▣ Assisting someone in reporting discrimination or filing a complaint
  - ▣ Participating in any manner in an investigation of discrimination, for example as a witness
  - ▣ Protesting any form of sex discrimination (including, e.g., lack of equity in athletics)

# Investigating Retaliation Claims

## Keys To Understanding

178

- Establishing retaliation, unlike establishing sexual harassment, requires proving motive – the intent to retaliate
- Since someone's intention is rarely displayed openly, the legal framework is about whether a retaliatory motive can be inferred from the evidence
- Gathering details of what occurred is critical

# Preliminary Elements of a Retaliation Claim

179

The following elements establish an *inference of retaliation*:

- Did the complainant engage in protected activity?
  - ▣ Usually straightforward
  - ▣ Unless there is a question of reasonableness of belief or manner
- Was the complainant subsequently subjected to adverse action?
- Do the circumstances suggest a connection between the protected activity and adverse action?
  - ▣ Did the individual accused of retaliation know about the activity?
  - ▣ How soon after the protected activity did the adverse action occur?
- If these three elements are not shown, the claim fails

# Retaliation and Adverse Action

180

- Common definition of adverse action:
  - ▣ Significantly disadvantages or restricts the complainant as to his or her status as a student or employee, or his or her ability to gain the benefits or opportunities of the program, or
  - ▣ Precluded from his or her discrimination claims, or
  - ▣ Reasonably acted or could act as a deterrent to further protected activity
  - ▣ The U.S. Supreme Court and the federal courts have defined adverse action very broadly

# Investigating Retaliation Claims: Rebutting the Inference

181

- What is the stated non-retaliatory reason for the adverse action?
  - ▣ Is the explanation for the action legitimate on its face?
- Is there evidence that the stated legitimate reason is a pretext?
  - ▣ This is the heart of the case – is the explanation the true reason?
- The preponderance of the evidence must establish that the adverse action was motivated by retaliation

# Investigating Retaliation Claims: Is The Explanation Legitimate?

182

Factors to consider:

- The explanation makes sense
- The action was consistent with established policy or practice
- No adverse action was taken against others who engaged in protected activity
- Complainant was treated the same as other individuals

# Investigating Retaliation Claims: Is There Evidence Of Pretext?

183

Factors to consider:

- ❑ The explanation given is not credible
- ❑ Other actions by the same individual are inconsistent with the explanation
- ❑ The explanation is not consistent with past policy or practice
- ❑ There is evidence of other individuals treated differently in similar situations

184

# Case Study Time!

185

# Dencie & Will

# Strategy for Case Study

186

- ❑ What Policy(s) elements may have been violated?
- ❑ What are the undisputed facts? Which ones are significant to the investigation?
- ❑ What are the facts in dispute? Which ones are significant to the investigation?
- ❑ Who do you want to interview?
  - ❑ Order of interviews
- ❑ What other information do you need?
- ❑ Do you need to interview an expert witness?
- ❑ What questions do you want to ask Dencie?
- ❑ What questions do you want to ask Will?
- ❑ What questions do you need to ask from witnesses?

187

# Courtney & Shawn

# Courtney & Shawn

188

- How does this case involve Title IX?
- What issues of jurisdiction arise?
- Given the pending criminal prosecution, how should you address this situation?
- From the perspective of an institutional response, what went wrong in this situation?
- Who should be interviewed in the course of the institution's investigation?

# Courtney & Shawn (cont.)

189

- What responsibility (if any) does the institution have to investigate the first two incidents?
- How would you best address the way the coaches handled the previous two incidents?
- What interim remedies would you provide?
- What long-term remedies appear to be appropriate in this situation?
- Who else at the institution do you need to inform of the situation? Who do you keep apprised of progress?

# THANK YOU!

190

## QUESTIONS?

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