Overall learning outcomes

1. Developing tools to be a neutral, fair, and professional investigator
2. Developing and asking questions effectively
3. Managing interviews
4. Writing thorough and effective reports

Caveats

- Each school has different policies and each school structures investigations differently. You should always follow the expectations of those responsible for Title IX on your campus.
- This training does not constitute not legal advice.

Agenda

1. Introduction
   - Presenter, slide
2. Attitude & skills
   - Decision-makers and influencers
3. Setting it up
   - Policy, process

Design & Action

Questions

Section 1

Introduction
Introduction: Learning Outcomes

- Value of a thorough and well-written report

Key Takeaways

1. Treat all parties fairly, neutrally, and with professionalism
2. Manage bias
3. Have the courage to act, say, and do what is ethical, professional, and appropriate
4. Be prepared and thorough; know the elements of the applicable definitions
5. Develop relevant and probative questions
6. Gather detail and be patient
7. Write a clear, detailed, neutral report that allows the parties’ experiences to be heard

Why do we need fair and thorough investigations?

- Obtain as much relevant information as possible to assist with a determination of policy violation
- Ensure that all parties are fully heard from; shows parties that their experience is being treated with respect and taken seriously
- Gives confidence to community that the institution is addressing the matter
- Essential part of compliance and due process

There is rarely a “smoking gun,” admission, or video.

- Was there a recording, and does it show what people say?
- Did people not go admitting it?
- Difference in memory
- It didn’t happen

What are We Doing? Filling Information Buckets

Example: Harassment (simple version)

1. Conduct of a sexual nature
2. Unwelcome
3. Severe, persistent, or pervasive
4. Such that it denies an opportunity or benefit of the university

Focusing on Facts

- Gives the investigation greater credibility
- Avoids bias and assumptions
- Results in greater detail and information
Whom is the report for?

Formal Complaint under New Title IX Regulations
document filed by a complainant or signed by the TIIC
1. alleging sexual harassment against a respondent,
2. about conduct within its educational program or activity,
3. requesting initiation of the school’s grievance procedures, and
4. filed by a complainant at a time when they are participating or attempting to participate in the school’s education program or activity.

school’s education program or activity
locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Title IX Says...

- “A recipient’s treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX.”
  106.45(a)

Attitudes and Skills: Learning Outcomes

1. Identifying investigator skills and capabilities
2. Addressing impact of myths and bias
3. Understanding the relevance of skills, capabilities, myths, and bias impact in investigations
Ultimate Investigator Skills
- Courageous; ethical
- Open-minded, non-judgmental
- Curious
- Fair, neutral, and impartial
- Focused on detail, accuracy, and precision
- Self-aware, composed
- Compliance-focused

Respect for the Parties' Experience
- This is someone's experience and it matters.

Be Prepared
- Personal views stay home
- People will share experiences that are deeply personal, private, and sensitive
- You may hear something you did not expect

Demeanor
Constraints for both parties and witnesses

Required under the new Title IX regs: presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process

Myths and Biases - What are Some?
- Myths about sexual assault, dating violence, sexual harassment, discrimination, harassment...etc.
- Myths/biases about complainants and respondents
- Myths and expectations about human behavior
- Myths/biases about witnesses, advisors, lawyers, etc.
- Implicit Bias
- Affinity Bias
- Confirmation Bias
- Halo/ Hornes
- Myths and biases based on identity
No Sex Stereotyping

"It is impossible," Justice Gorsuch wrote, "to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

June 15, 2020

Trauma

- What is it?
- Who gets it?
- How does it impact an investigation?
- How do we use it appropriately?

Keep in Mind How Your Report Will be Used: Preponderance of the Evidence

- More likely than not
- "50 and a feather"

That someone did do a certain act.

What Happens Next?
Where does bias impact the process and how?

Exercise
EXAMPLE: Consent Breakdown
We must be precise with this definition. Why?

- Communication
- of a decision:
  - Conscious
  - Faintly made
  - by each participant

106.30 Definitions
Sexual Harassment

- An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unlawful sexual conduct
- Unlawful conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity
- Sexual assault, as defined in 21 USC 1409(3)(G)(a), dating violence as defined in 24 USC 12271(a)(10), domestic violence as defined in 24 USC 12271(a)(30), or stalking as defined in 24 USC 12271(a)(30)

Focusing In

- “The reasonable person standard appropriately takes into account whether a reasonable person, in the position of the particular complainant, would find the conduct offensive.”

Quotes from Title IX commentary is unofficial version. USA

Sexual Assault (UCR definition)

- The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

Domestic Violence

- Includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, a person with whom the victim shares a child in common, by a person similarly situated to a spouse or intimate partner, by a person similarly situated to a spouse or intimate partner, by a person similarly situated to a spouse or intimate partner, by a person similarly situated to a spouse or intimate partner, by a person similarly situated to a spouse or intimate partner.

Dating Violence

- Violence committed by a person—
  - who is or has been in a social relationship of a romantic or intimate nature with the victim; AND
  - where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - (i)The length of the relationship.
  - (ii)The type of relationship.
  - (iii)The frequency of interaction between the persons involved in the relationship.
Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
  - (A) fear for his or her safety or the safety of others; or
  - (B) suffer substantial emotional distress

Exercise

School Policy

Eye Out For: Other Types Prohibited Forms of Discrimination and Harassment

Check your policy and other applicable laws.

- Race
- Religion
- National origin
- Age
- Disability
- Pregnancy and parenting

Disparate Treatment vs. Disparate Impact

- Treating someone differently based on identity
- Having a policy or practice that causes members of a protected class to be treated differently
- How do you know if someone has been treated differently than others?

Defenses... How do you address?

- Academic freedom
- Decision not made because of gender (made for other, non-discriminatory reason)
- Did not treat someone differently because they treat everyone that way
- First amendment
- Essential job function or technical requirement
Relevance - Title IX

Investigators must create an investigative report that fairly summarizes relevant evidence.

Hearing officers must also focus on relevance.

Relevant and Probative? Yes.

Relevance

- the tendency of a given item of evidence to prove or disprove one of the elements of the case, or to have probative value to make one of the elements of the case likelier or not.

Probative

- "tending to prove." Probative evidence "seeks the truth." Tends to prove the proposition for which it is proffered.

What Witnesses Should be Interviewed?

Title IX Quiz: relevant or permissible?

- Questions and evidence about complainant’s sexual predisposition or prior sexual behavior
- Questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege
- Expert witnesses

Title IX Says...

- Provide equal opportunity to present witnesses, including fact and expert witnesses, and other in/exculpatory evidence
- Do not restrict either party to discuss the allegations or gather and present RELEVANT evidence
- Provide parties same opportunity to have others present (advisor of choice) and not limit their choice or presence of the advisor in any meeting or grievance proceeding, BUT schools may establish restrictions regarding the extent to which the advisor may participate in the proceedings

Title IX also says...

- Provide parties who are invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time to prepare to participate.
Write Initial Questions: Who, what, when, where, why, how, how many...

- What are the buckets that I need to fill with information?
- What are questions for severe? Pervasive?
- What are questions for unwelcome or consent?

Avoid Questions with Defined Terms

- Why?

Exercise

In the Room

- Location of room
- Think about seating
- Phones
- Be organized
- Take and allow breaks as necessary
- Housekeeping speech up front and at end
- Professional attire and hygiene
- Communication throughout
- Notetaking

Credibility Determinations

The EDC recommends using the following information to assess credibility:

- Plausibility. Is the witness’s version of the facts believable? Does it make sense?
- Demeanor. Does the witness seem to be telling the truth?
- Motive. Does the person have a reason to lie?
- Corroboration. Are there documents or other witnesses that support the witness’s version of events?
- Past record. Does the alleged wrongdoer have a past record of inappropriate conduct? Is appropriate?
Information Gathering for Title IX Compliance

1. Complaint
2. Notice of Investigation
3. Investigation Report
4. Notice of Outcome

The Report includes:
- Fact cover sheet
- Material steps
- Introduction
- Background
- Narrative
- Consistency
- Conclusion/Determination

Narrative Questions: Be Patient and Follow a System

- Broad: Open-ended, get the story, allowing party to be fully heard
- Specific: Utilize focusing questions to get more information
- Directed: Go right to heart of issue if it hasn’t been covered already, confirm dates and facts

How do you ask for information without leading?
Ongoing notice requirement under new Title IX regs: if the school decides to investigate allegations not included in the original notice, it must provide notice of the additional allegations.

- Why does this matter?

- Texts, emails, videos from parties
- Videos from campus police
- Card swipes

- Evidence that shows someone was at their desk (alibi)
- Receipts, phone calls, attendance records
- In-culpatory AND Ex-culpatory
Steps in the Process- Title IX

- Interviews
- Information gathering
- Sharing evidence with parties and advisors for review and comment
- Any next steps necessitated by review and comment
- Write report
- Share report with parties and advisors for review and comment
- Finalize report
- Hearing

Learning Outcomes

- Purpose of a report
- Organization of a report
- Language and tone

Writing a Good Report is Hard Work

The better you understand definitions, stream details, and organize your information, the easier it will be.

Purpose of a Report

- To provide gathered facts in a neutral, clear, and digestible format
- So that the reader of the report can understand the incident in detail from all relevant perspectives with all relevant evidence according to necessary ELEMENTS
- So that the reader of the report can easily identify relevant information necessary to make a determination of existence of ELEMENTS necessary to satisfy burden of proof
The Report Includes

- Fact cover sheet
- Material steps
- Introduction (what happened prior to report)
- Background (who are the parties and connection to the school, how the complaint meets Title IX requirements)
- Narrative
- Consistency
- Conclusion/Determination

Write clearly

- Short sentences.
- Well-organized paragraphs
- Consistency of language and structure
- If you have not gathered information evenly or with detail, it will show in the report
- Use of quotations

Exercise

Questions?