

TITLE IX INVESTIGATOR TRAINING

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Presenter:

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TRAINING OBJECTIVES

To understand the responsibilities of the Title IX investigator and how to effectively carry out those responsibilities in compliance with the Title IX regulations.



TIX INVESTIGATOR RESPONSIBILITIES

- Fair and unbiased investigation
- Collection and preservation of evidence
- Understanding of relevant and irrelevant evidence
- Understanding of prohibited and permitted use of evidence of complainant's prior sexual history
- Understanding of use of confidential records
- Provision of evidence to the parties
- Preparation of draft report summarizing relevant evidence
- Provision of draft report to parties for comment
- Preparation of final report



ELEMENTS OF A FAIR AND UNBIASED INVESTIGATION

- Exercise caution not to apply generalizations or assumptions
- Check self for bias or conflicts of interest
- Make efforts to obtain all reasonably available information
- Avoid questions with judgmental tone
- Ask Complainant and Respondent for names and contact info of any witnesses/individuals they believe can provide relevant information
- Interview those individuals and any others who may have info
- Collect physical evidence
- Summarize evidence in a factual, nonjudgmental manner

NO CONFLICT OF INTEREST OR BIAS

Any person designated as an investigator must have **no conflicts of interest or bias** for or against either complainants or respondents generally or an individual complainant or respondent. Final Rule §106.45(b)(1)(iii)

Impartial/no prejudgment of allegation

Purpose: To minimize premature judgment of the facts related to the allegation throughout the Title IX process.

WHAT IS CONFLICT OF INTEREST OR BIAS?

- Considering an individual's status as a complainant or a respondent as a negative or positive
- Harboring a bias for or against an individual complainant or respondent
- Applying sex stereotypes as a factor in consideration of the Title IX allegation

Examples of Conflict of Interest of Bias

- All complaints of sexual assault by a female against a male are true and the complainant should be believed over the respondent
- Stereotypical notions of male and female behavior
- Reliance on statistical evidence to support credibility of one party over the other
- Prior relationship with party that materially affects ability to remain impartial

IMPLICIT BIAS

Subconscious assumptions, stereotypes and unintentional actions towards others based on factors such as physical appearance, sexual orientation, gender expression or identity, race, religion, gender, age, disability, national origin, socioeconomic status, etc.

Unconsciously affects your understanding, decisions and actions regarding certain types of people

Can be positive or negative in nature

EXAMPLES OF IMPLICIT BIAS

Unconsciously:

- Viewing an attractive, athletic, academically successful student as more likely to be telling the truth than an unattractive, unathletic, struggling student. (“Halo” effect)
- Viewing a witness of your race as more credible than a witness of a different race.
- Prejudging someone based on their status as a complainant or respondent

CHECK YOURSELF FOR IMPLICIT BIAS

The Implicit Association Test was developed by university researchers in the late 1990s. It evaluates response times for associations that are either consistent or inconsistent with common socio-cultural stereotypes and helps to identify areas of implicit bias.

The test can be accessed at :

<https://implicit.harvard.edu/implicit/takeatest.htm>

WHAT STANDARD GOVERNS A CONFLICT OF INTEREST OR BIAS CHALLENGE?

Objective Standard: Whether a reasonable person would believe bias exists.

Fact specific determination

Complaining party must demonstrate that the conflict of interest or bias materially affected the outcome of the process.

A WORD ON “TRAUMA INFORMED” APPROACH

A trauma informed training or approach to investigation is not mandated under the TIX regs-- concerns over actual or appearance of bias

“...challenging- to apply [“trauma informed”] practices in a truly nonbiased manner.” Preamble p. 842

Being sensitive to the trauma a party may have experienced does not violate the regs as long as it does not cause loss of impartiality, prejudgment of facts at issue or demonstrate bias for or against either party

SCOPE OF THE INVESTIGATION

“...a thorough search for relevant facts and evidence pertaining to a particular case” – gather available evidence

DOE recognizes lack of subpoena power and impact on comprehensiveness of investigation

Must be completed under “designated, reasonably prompt time frames”

MCCS- 60 business days to completion of draft report

PRESERVATION OF EVIDENCE

Examples:

Security Camera Videos

Text Messages

Social Media Communication

Email Messages

Phone Messages

Photographs

Records

- Inquire of parties and witnesses about the different possible types of physical evidence, obtain copies, and keep track of who provided each piece of evidence.
- Obtain available evidence as soon as possible

IDENTIFY AND INTERVIEW WITNESSES

Ask parties for names of individuals who can provide information regarding the allegation

Conduct witness interviews and make same inquiry

Follow up with witnesses and parties as needed based on information provided

FOR ALL PARTIES AND WITNESSES

Provide written notice of date, time and location of interview

Maintain info and include whether party/witness was accompanied at interview

If accompanied, direct questions to party/witnesses and require answers from party/witness.

SEEK EXTERNAL RECORDS

In addition to records in possession of College, identify and request any records created by an outside entity, such as the local police department.

If Complainant sought medical treatment or counseling -no obligation to waive the privilege and provide records



ADDITIONAL ALLEGATIONS? DUTY TO PROVIDE NOTICE

If additional allegations are raised during the investigation, the College has an obligation to inform the subject of the allegations, whether the Complainant or the Respondent.

DO NOT investigate new allegations until the requisite notice has been provided to the party by the Title IX Coordinator.

TIX JURISDICTION REQUIREMENTS

Keep in mind the TIX jurisdiction requirements throughout investigation:

- Would the alleged conduct constitute sexual harassment under the Title IX sexual harassment definitions, if proved? (Use MCCS Policy 202 and Procedure 202.2 for applicable TIX definitions.)
- Was the alleged conduct against a person not in the United States?
- Was the alleged conduct against a person participating, or attempting to participate, in an MCCS educational program or activity?
- Was the alleged conduct at an MCCS location, during an MCCS activity or program, and did MCCS have substantial control over both the respondent and the context?

TIX JURISDICTION CONTD

Contact TIX Coordinator if determine that one or more jurisdiction requirements not met

TIXC has mandatory obligation to dismiss complaint

Allegation can be referred to procedure for non-TIX conduct handling, if appropriate

“DIRECT THREAT” TO PHYSICAL SAFETY CONCERNS

If at any point in the investigation you have concerns that a respondent may pose a direct threat to the physical safety of any student or other individual on campus, report that concern to the Title IX Coordinator immediately, or to campus security if the threat is imminent.

PRE-HEARING REVIEW PROCESS

- Opportunity for Parties to Review any Relevant Evidence Directly Related to the Allegations, Gathered During Investigation
- Sharing of Draft Investigative Report with Parties Prior to Finalizing

REVIEW OF RELEVANT EVIDENCE

Both parties have at least 10 days to review “any” inculpatory and exculpatory relevant information “directly related to the allegations raised in a formal complaint,” gathered by the investigator. 106.45(b)(5)(vi)

MCCS – 10 business days

Any response to evidence must be submitted in writing by end of ten day period, which investigator will consider before finalizing report.

REVIEW OF EVIDENCE CONTD

The evidence must be made available to the parties and their advisors, either in hard copy or electronically.

No further dissemination allowed, other than in legal proceedings.

Any additional evidence that the parties would like the investigator to consider must be submitted by the end of the ten day period.

WHAT INFORMATION MUST BE SHARED?

- Evidence directly related to the allegations, even if not relied on in reaching a determination
- **“Directly Related”- Undefined in regs. Use common meaning- All evidence that directly relates to the allegations under investigation. Broad scope.**
- Only “relevant” information can be included in the report, therefore, parties can argue in their written response to the evidence the relevance or irrelevance of the evidence provided.

WHAT IS “RELEVANT” EVIDENCE?

Federal Rule of Evidence 401: Test for Relevant Evidence

- (a) Has a tendency to make a fact more or less probable than it would be without the evidence; and

- (b) The fact is of consequence in determining the action

RELEVANCE FURTHER EXPLAINED

The evidence must tend to prove or disprove a material fact at issue in the investigation.

The evidence only has to make a material fact more or less probable than it would be without the evidence.

The evidence does not need to make a major impact on the fact at issue. Decision Maker decides how much weight to give to the evidence.

IRRELEVANT EVIDENCE

Evidence that exceeds the scope of the investigation and is not necessary to prove the fact in question.

REDACTIONS AND THE PRIVILEGE LOG

Evidence may be redacted and not provided to the parties/advisors, if it is:

- 1) not directly related to the allegations; or
- 2) otherwise barred from use because of a legally recognized and unwaived privilege
106.45(b)(5)(i)

Create a log for information that is redacted or otherwise not provided, and share with the parties/advisors. They can argue relevance in written comments.

NO INTRUSION ON LEGALLY-RECOGNIZED PRIVILEGES

Do not use information or records protected by a legally recognized privilege **UNLESS** the person holding the privilege has voluntarily waived the privilege in writing.

EXAMPLES OF EVIDENCE SUBJECT TO UNWAIVED LEGAL PRIVILEGE

- Medical and Mental Health Treatment Records
- Attorney -client
- **“Rape Shield” prohibition on Prior Sexual History of Complainant with two exceptions:**
 1. Specific incidents of the Complainant’s prior sexual behavior with the Respondent offered for purpose of proving consent;
 2. Evidence of Complainant’s sexual history to prove someone other than the Respondent committed the alleged act

MORE ON RAPE SHIELD PROTECTIONS

Complainant's prior sexual history is considered irrelevant and may not be used for any purpose other than as permitted under the two exceptions.

FERPA and TITLE IX

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

Sharing of Draft Investigative Report

May be submitted in hard copy or electronically; no further dissemination other than in legal proceeding

Ten business days for parties and advisors to review and submit written comments on draft- same period as evidence review

Investigator's discretion to revise report in consideration of submitted comments/evidence.

THE INVESTIGATIVE REPORT

Requirement: Fairly summarize relevant evidence

Purpose: To convey relevant information about the allegations to parties, their advisors, the Title IX Coordinator and the Decision Maker

Provided to parties and advisors at least 10 business days prior to live hearing

WHAT GOES INTO THE INVESTIGATIVE REPORT?

Executive Summary/Introduction

Allegations(s)

Parties and affiliation with College

Jurisdiction requirements met

Complainant/ Respondent/ Witness Interview
Summaries

Evidence- Description of each piece and relevance

Summary of Relevant Information



WHAT DOES NOT GO INTO THE REPORT?

- Information regarding Complainant's prior sexual history, with the two exceptions
- Information/evidence for which privilege not voluntarily waived in writing
- Irrelevant information
- **No credibility determinations**
- **No finding of responsibility**

MCCS INVESTIGATIVE REPORT CHECKLIST/TEMPLATE

DRAFTING THE REPORT SUMMARY

Straightforward recitation of the evidence (interviews, non-privileged records and physical evidence) relevant to the allegation(s).

Include relevant inculpatory and exculpatory evidence

Proceed element by element of the alleged misconduct

Example- sexual assault allegation

1. Evidence relevant to nature of the alleged conduct
2. Evidence relevant to issue of consent

FINAL INVESTIGATIVE REPORT

At discretion of investigator, incorporates information provided by parties/advisors in response to review of report

Final version provided to Title IX Coordinator, along with all evidence directly related to the allegations, redaction log if any, and any written comments to the evidence and draft report submitted by the parties/advisors.

Investigator role complete.

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