

# Investigation Techniques and Managing Bias

DARTMOUTH COLLEGE

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November 3, 2022

# What We Will Cover

- Policy and Process Refresher
- Role of Investigator and Evidentiary Considerations
- Managing Conflict of Interest and Bias
- Conducting the Investigation
- The Investigation Report
- Next Step: The Hearing
- Questions?



# Policy and Process Refresher

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- Title IX
- Violence Against Women Act (VAWA)
- Title VII/New Hampshire Law Against Discrimination
- Applicable Criminal Statutes
- NH HB 705
- Dartmouth Applicable Policies



# Dartmouth College Policies and Procedures

- Dartmouth College Policy on Sexual and Gender-Based Misconduct  
<https://policies.dartmouth.edu/policy/dartmouth-college-policy-sexual-and-gender-based-misconduct>
  - Dartmouth College Process for Resolving Reports Against Faculty:  
<https://policies.dartmouth.edu/policy/dartmouth-college-process-resolving-reports-against-faculty>
  - Dartmouth College Process for Resolving Reports Against Staff:  
<https://policies.dartmouth.edu/policy/dartmouth-college-process-resolving-reports-against-staff>
  - Dartmouth College Process for Resolving Reports Against Students:  
<https://policies.dartmouth.edu/policy/dartmouth-college-process-resolving-complaints-against-students>

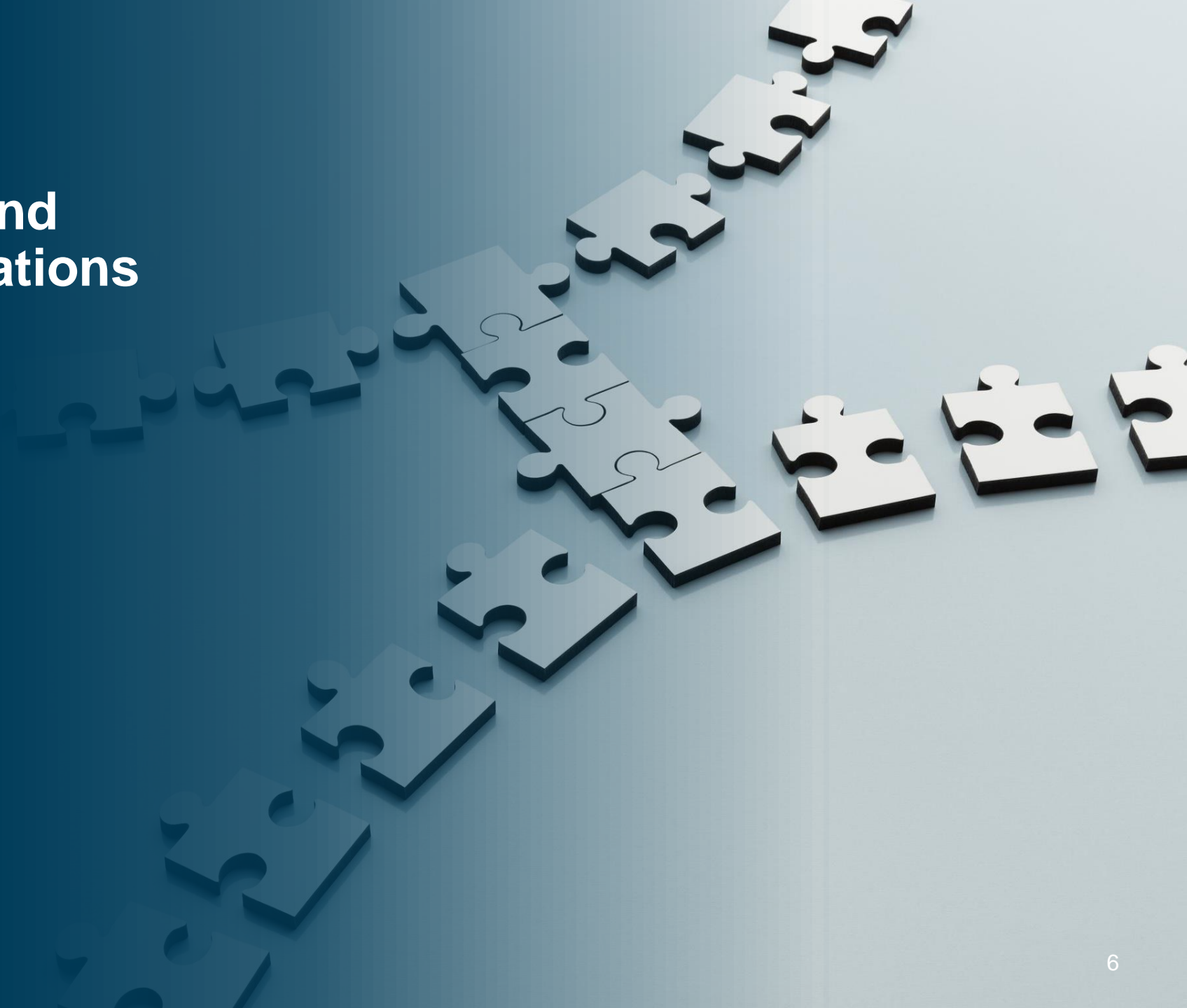
# Formal Complaints

- Formal complaint signed by the Complainant or Title IX Coordinator triggers investigation
- Opportunity for parties to challenge investigator assignment or conflict of interest/bias
- Detailed written notice must be provided to parties sufficiently in advance of interview
- Consolidation of “mixed allegation” complaints
- Amended complaints and amended Notice of Allegations
- Cross complaints



# Role of Investigator and Evidentiary Considerations

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# Role of the Investigator

- Burden on investigator, not parties to collect information
- Impartial, objective fact finder
- Does not go outside of prescribed role in the process
- Seeks to obtain both inculpatory and exculpatory information
- Provides equal opportunity for parties to present information, identify witnesses, suggest sources of evidence, provide clarification and respond to conflicting information
- Independently identifies relevant witnesses and evidence
- Follows facts, not assumptions
- Does not have a bias or conflict of interest
- Does not prejudge facts or gather evidence just to “confirm” theories
- Asks questions in a neutral, non-judgmental fashion
- Understands “relevance” and exceptions
- Collects evidence that is directly related to allegations and allows parties an opportunity to review/respond
- Drafts investigation report that fairly summarizes the relevant evidence – both inculpatory and exculpatory

# Understanding Relevance

- Investigator has discretion to determine the relevance of evidence received
- Evidence is relevant if it tends to make a material fact more or less probable than it would be without the evidence
- Relevant evidence includes both “inculpatory and exculpatory” evidence
- Evidence may be relevant even if it is sensitive, embarrassing or “prejudicial”
- Information that does not directly relate to the facts at issue, but instead pertains to the reputation, personality, qualities, or habits of an individual is character evidence and is not relevant to the determination of whether there is a policy violation

# Privileged/Health Records

- The Investigator should not access, consider, disclose, or otherwise use a party's records that are made or maintained by a health or mental health professional unless the investigator obtains voluntary, written consent to do so
- The Investigator should not seek information that is protected by a legally recognized privilege unless the party waives the privilege.

# Prior or Subsequent Conduct of the Respondent

- Prior or subsequent conduct of the Respondent may be considered in determining pattern, knowledge, intent, motive, or absence of mistake.
  - e.g., Pattern of conduct by Respondent even if no prior policy violation
- Must inform the parties in writing if deemed relevant/including in investigation report

## *Key Question?*

Was the conduct substantially similar to conduct at issue or indicative of pattern so distinctive/closely resembling allegations that it tends to prove material fact may be considered?

# “Rape Shield” Exclusion

- Evidence of Complainant's prior sexual behavior is not relevant unless:
  - Offered to prove that someone other than the Respondent committed the alleged misconduct or
  - Offered to prove consent from prior sexual behavior *between* the Complainant and Respondent
- For Example, prior sexual behavior may be relevant to explain:
  - Presence of a physical injury
  - Pattern of communication/behavior *between* parties regarding consent
- Prior sexual behavior is not relevant to explain general predisposition toward engaging in sexual activity
- Must inform the parties in writing if deemed relevant/including in the investigation report.

# Consent

- Consider prior/post relationship history to understand total context and how consent was communicated between parties
- Consider both verbal and nonverbal means of communication in determining whether consent was given to a particular sexual activity
- Look at sexual activity as a whole to understand total context
- There may be sufficient evidence of lack of consent in some acts, and not in others
- Consider objective circumstances of the sexual activity as well as the parties' subjective feelings about it
- Consider circumstances of decision to disclose/report

## *Key inquiry:*

*Would a reasonable person in the Respondent's position have understood that consent was given based on the Complainant's express words or actions?*

# Intoxication vs. Incapacitation

- Incapacitation is a state far beyond drunkenness or intoxication
- Signs of intoxication include, but are not limited to:
  - Slurred speech
  - Weaving or stumbling while walking
  - Impaired fine/gross motor skills
  - Exaggerated emotions
- Signs of incapacitation include but are not limited to:
  - Inability to speak coherently
  - Confusion of basic facts (day of week, birthdate, etc.)
  - Inability to walk unassisted
  - Unconsciousness

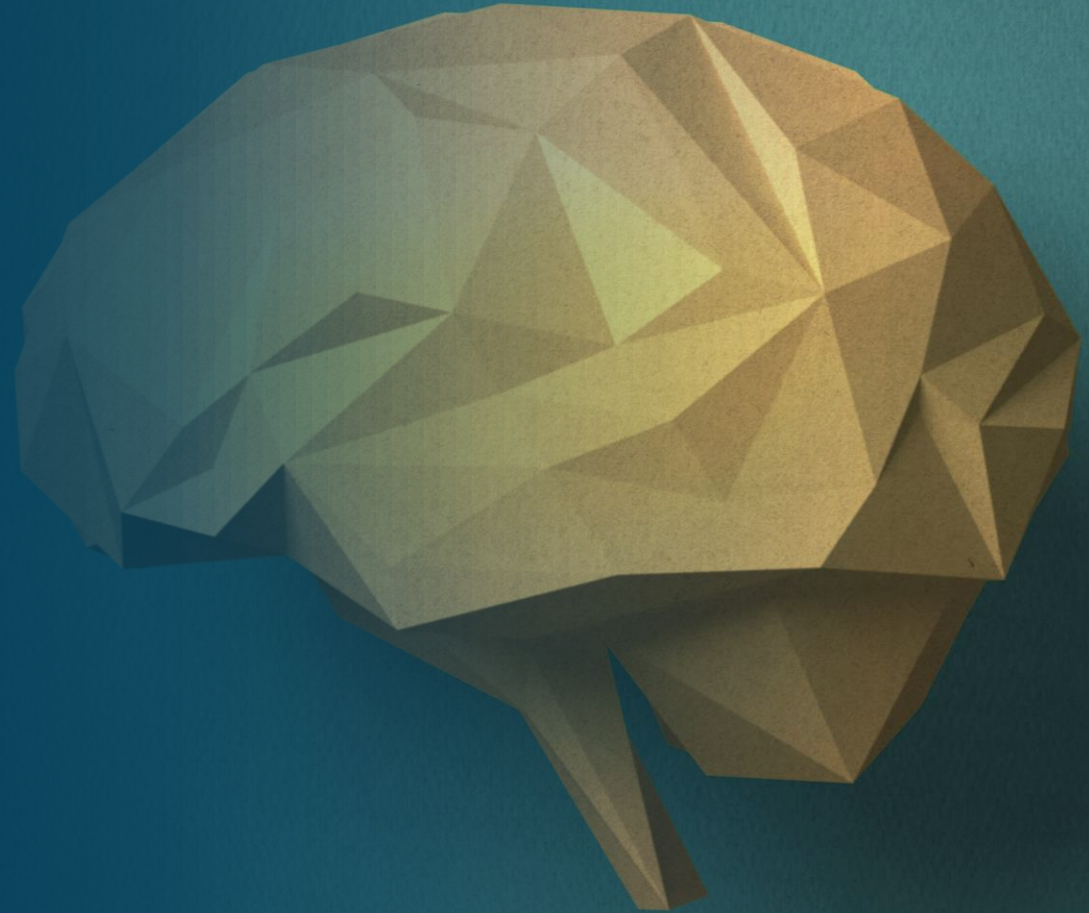
*Key Inquiry:*  
Whether Respondent knew/should have known that Complainant was incapacitated and *took advantage* of Complainant's incapacity to engage in sexual activity.

# Alcohol Consumption

- Alcohol can interfere with the creation of memory, but not necessarily render a person incapacitated
  - “Blackouts”
- Differing perceptions about alcohol consumption
- To determine intoxication v. incapacitation issues, investigators and adjudicators must seek/understand detailed information about:
  - Alcohol consumption
  - Food/water consumption
  - Tolerance levels
  - Observations by others, if possible
  - Other evidence of incapacity (texts, video, etc.)

# Managing Conflict of Interest/Bias

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# What is Bias?

Prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair.

# Conscious Bias

- **Everyone** has bias, whether conscious or unconscious – even toward ourselves

## What is conscious bias?

“In the case of explicit or conscious bias, the person is very clear about his or her feelings and attitudes, and related behaviors are conducted with intent. This type of bias is processed neurologically at a conscious level as declarative, semantic memory, and in words. Conscious bias in its extreme is characterized by overt negative behavior that can be expressed through physical and verbal harassment or through more subtle means such as exclusion.”

# Unconscious Bias

- The term “unconscious bias” or “implicit bias” refers to the impact unconscious cognitive responses have on decision making.
  - The concept of hidden biases that all individuals carry from a lifetime of experiences with social groups – age, gender, race, ethnicity, religion, social class, sexuality, disability status, or nationality.
- Our brains take in 11 million piece of information at any one point in time BUT can only process 40 pieces of information at any one point in time.
  - How our brains evolved for survival and to store information.
  - Our brains sometimes take cognitive shortcuts that can lead to unconscious or implicit bias, with serious consequences for how we perceive and act towards other people.
  - These mental shortcuts and fast decisions are often based on cultural stereotypes or past experiences.

# Unconscious Biases – We all have them.

<https://www.youtube.com/watch?v=0veDFGo666s>

# Types of Unconscious/Implicit Bias: Social Bias

**Social Biases:** discrimination for, or against, a person or group, or set of ideas or beliefs in a way that is prejudicial or unfair. Social Bias often involves consciously or unconsciously stereotyping others and behaving in a way that disadvantages a person or group and/or advantages another.

- **EXAMPLES:**
  - Ableism
  - Racism
  - Classism
  - Sexism
  - Ageism
  - Sizeism
  - Heterosexism
  - Rankism
  - Religious imperialism

# Types of Unconscious/Implicit Bias: Cognitive Bias

**Cognitive Biases:** repeated patterns of thinking that can lead to inaccurate or unreasonable conclusions.

- **EXAMPLES:**
  - Illusion of objectivity
  - Availability bias
  - Attribution bias
  - Anchoring bias
  - Confirmation bias
  - Affinity bias

# Types of Unconscious/Implicit Biases: Cognitive Biases

## TYPES OF UNCONSCIOUS BIAS



### Affinity Bias

Feeling a connection to those similar to us



### Perception Bias

Stereotypes and assumptions about different groups



### Halo Effect

Projecting positive qualities onto people without actually knowing them



### Confirmation Bias

Looking to confirm our own opinions and pre-existing ideas.

# Types of Unconscious/Implicit Biases: Cognitive Biases Continued

- **Illusion of Objectivity:** The tendency of people to see themselves as more impartial, more insightful, and less biased than others. Ultimately, this results in more bias (ex: being gender blind, color blind).
- **Availability Bias:** A cognitive bias in which decisions are based on an example, information, or recent experience that is readily available.
- **Attribution Bias:** Attribution bias occurs when someone tries to attribute reasons or motivations to the actions of others without concrete evidence to support such assumptions.
- **Anchoring Bias:** the tendency to jump at the first available piece of information and unconsciously use it to “anchor” the decision-making process, even when the information is incorrect or prejudiced. This can lead to skewed judgment and poor decision-making, especially when time is not taken to reason through options.

# Conflict of Interest or Bias within an Investigation and Adjudication Process

- Bias/conflict of interest is a grounds for appeal
  - Whether there is a conflict of interest or bias will be judged on an objective standard of whether a reasonable person would believe that conflict/bias exists
  - Being a University employee, being a particular gender, past advocacy work in the field of sexual violence and/or statistical outcomes do not necessarily establish bias or conflict of interest.
- Investigators and decision-makers should recuse themselves if they cannot be impartial
- Investigators/decision-makers must not pre-judge the facts or be biased in favor/against Complainants/Respondents generally or in a particular case
- Investigations/decisions must be based on evidence and the individual facts and circumstances presented, not stereotypes, generalizations, or assumptions

# How do We Conduct Unbiased Investigations and Adjudication Processes?

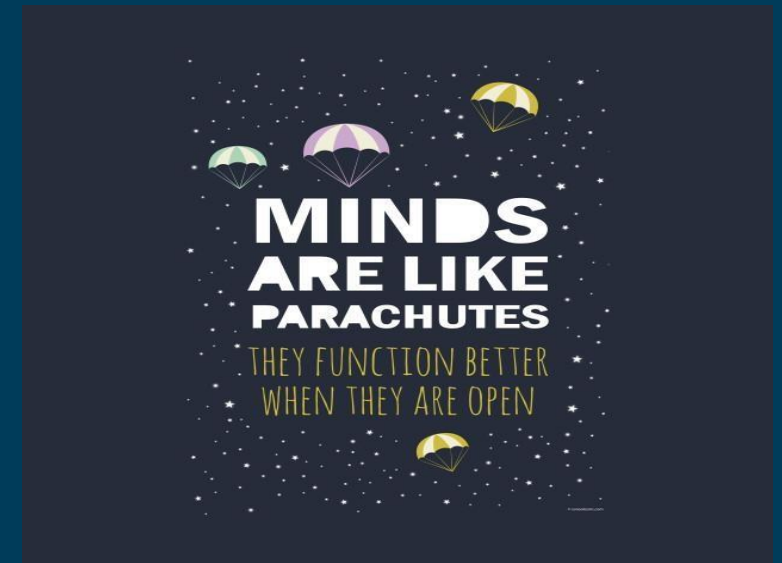
- Accept that we all have biases – conscious or unconscious and be open to recognizing your own
- Recognize that anyone (regardless of sex, gender identity or expression, sexual orientation, race, color, religions, national origin, age, disability status) can be a Complainant or Respondent
- Do not make assumptions – seek clarification and try to understand the parties' perspective



# How do We Conduct Unbiased Investigations and Adjudication Processes Continued?

- Use the parties/witnesses' words
- Use inclusive language in interviews, communications, and throughout investigation
- Consider plausible explanations for behaviors
- Seek insight from colleagues with diverse perspectives/backgrounds/identities

Remember...





# Conducting the Investigation

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# Investigation Planning

- Consider order and timing of interviews
- Consider schedules of participants
- Determine locations/format of interview
  - In person
  - Zoom
- Identify who will be present
  - Advisor of choice
- Provide written notice of interview date/time sufficiently in advance
- Recording of interviews

# Potential Sources of Evidence

- Campus police or security reports
- Local police reports/interviews
- Security videotapes
- Card swipe records
- Call logs
- Voicemails
- Photos/videos
- Social media posts – public/private (Instagram, Tinder, Snapchat, Facebook, TikTok, YikYak, etc.)
- Electronic communications
- Written or electronic statements
- Phone notes/apps (Venmo, Uber, Health tracking apps)
- Student/personnel records
- Receipts
- Health records – (e.g., SANE exam) with appropriate written consent
- Photos/sketches of location of alleged incident
- Site visits

# Potential Witnesses

- Both parties can identify (before, during and after interview)
- Investigator should also independently identify and vet
- Think broadly about potential witnesses:
  - May be affiliated/not affiliated with Dartmouth community
  - May have observed acts in question
  - May have knowledge of relationship between parties
  - May be able to provide contextual information
  - May be an outcry/disclosure witness
  - May be a “pattern” witness
- Expert witnesses are permitted
- Character witnesses are not permitted
- Name/information provided by witnesses will be shared with the parties at the conclusion of the investigation

# Outreach to Parties/Witnesses

- Title IX office will identify investigator in initial notice to parties
- Following five calendar days to object to investigator assignment, investigator reaches out to schedule interview with parties
- Title IX Office conducts initial outreach to witnesses to provide witness guide and introduce investigator
- Investigator schedules interviews/follow ups directly with parties (and advisors if applicable) and witnesses
- If a party/witness is non-responsive
  - Title IX Office may be able to assist
  - Consider other avenues of reaching individual
  - Attempt at least 3 outreaches before determining non-responsive
  - May need to be flexible about scheduling

# Basic Interviewing Techniques

- Introduction/process
- Acknowledge difficulty/no judgments formed
- “Are you feeling ready to get started? Any questions?”
- Pronouns – for purpose of investigation report
- Be compassionate in neutral manner
- Curious, non-judgmental tone
- Plan out questions, but let conversation evolve naturally
- Funnel approach to questioning (open ended to narrow)
- Avoid “leading” questions, paraphrasing, asking for character evidence or speculation
- Be comfortable with silence
- Establish a timeline/chronology
- Ask the difficult questions
- Get clarification to understand (not make assumptions), especially in relation to terms/phrases/acronyms
- Identify witnesses/corroborative evidence
- Ask: “Anything else?” Ask: “What questions do you have for the other party?”
- Provide opportunity for follow-up/ thank participant

# Complainant Interview

- What are you able to tell me about your experience?
- What are you able to tell me about sensory details?
  - Saw/heard/tasted/smelled/touched?
- What are you able to tell me about how that made you feel?
- What are you able to tell me about what your thought process was when....?
- Can you tell me more about...?
- What are you able to tell me about any specific moments that stand out in your mind?
- What are you able to tell me about your physical/emotional reactions when...?
- What are you able to tell me about impact on your life and behavior now compared to before? (e.g., eating, drinking, sleeping? Other routines?)

# Respondent Interview

- Follow same structure and approach to questioning as Complainant interview
- Allow Respondent to give statement in their own words, uninterrupted
- Seek exculpatory evidence, information and/or leads, other witnesses, etc.
- Ask Respondent to explain inconsistencies with known evidence and provide opportunity for Respondent to explain evidence disclosed by Complainant and witnesses
- Explore sensory and peripheral details disclosed by Complainant
- Explore motive, bias, interest
- Identify where there is agreement/dispute about what is alleged to have occurred

# How to Apply Trauma-Informed Investigation Training

- Gather information in investigations and adjudications in a non-judgmental manner
- Utilize trauma-informed interview techniques when questioning parties and witnesses
- Seek clarification from individuals about their specific behaviors instead of making assumptions or generalizing
- Consider any plausible explanations of behaviors with other evidence

# Explaining Difficult Questions

Investigator's Question . . .	What the Interviewee Hears . . .
Are those the clothes you were wearing when this happened?	The investigator thinks it's my fault because of what I was wearing.
Were you drinking or doing any drugs?	I am in trouble/to blame for alcohol and drug consumption.
Did they physically hurt you or threaten you with a weapon?	I knew the person and they didn't hurt me or use a weapon. The investigator thinks I consented.
Why didn't you tell anyone about what happened?	The investigator thinks I am lying because I didn't immediately tell someone/report.

# Witness Interviews

- During a witness interview, the Investigator will...
  - Give enough information to illicit relevant information but be circumspect about what is shared
  - Explore relationship to the parties and potential motive/biases
  - Ascertain the source of witness's knowledge
  - Follow the same open-ended approach with narrowed follow-up questions
  - Ask witnesses about parties' motives
  - Consider effect of witness tampering/interference

# Common Errors During Investigations

- Assuming the veracity of Complainant's or Respondent's account at the outset
- Drawing conclusions from evidence/testimony without allowing party/witness chance to explain
- Allowing confirmation bias to influence the direction of the investigation
- Allowing party or advisor to sway the decision or timeline
- Allowing advisor to take over an interview
- Not asking detailed/specific/difficult questions
- Not conducting thorough follow up/"reconciliation" interviews
- Exceeding the scope of the investigation/role (e.g., making credibility assessments)
- Failing to interview potential witnesses/follow up on available information
- Failing to verify/authenticate information



# The investigation Record and Report

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# Investigation Report Basics

- Three processes for resolving complaints, but same basic investigation Report Structure.
- Investigators **DO NOT**: Make credibility assessments or determinations of responsibility
- Investigators **DO**: Make determinations as to whether conduct alleged in the Formal Complaint falls within the Scope of the Policy and definitions of Prohibited Conduct

# Order of Operations

1. Investigation
2. Review of Information Gathered
3. Investigation Report Released

# Review of Information Gathered

- All parties and advisors must have equal opportunity to inspect and received evidence that is “directly related” to the allegations, including any evidence that the Investigator does not intend to rely on in the written investigation report prior to finalizing report
- Parties and advisors have 10 business days to inspect, review and respond to the evidence
- Parties may offer additional comment or feedback on the facts gathered, clarify information previously shared, suggest additional witnesses, suggest additional lines of questioning/inquiry or identify other relevant information or evidence
- Responses will be shared with other party/advisor
- Investigator will consider responses prior to completing the investigation report and conduct any additional investigation, as necessary

# Redactions of Evidence Record

- Investigators may redact information that is not directly related to the allegations or that is otherwise barred from use (e.g., legally recognized privilege)
- Department of Education warned against overbroad exclusion of evidence and cautions institutions to be “judicious” and “not redact more than is necessary”

## Key Takeaway

Only request information that is “directly related” to allegations and redact information that is subject to privilege/unrelated.

# Structure of the investigation Report: Brief Summary

- Date the Investigator was contacted
- Names of the parties
- Date Formal Complaint was filed
- Brief summary of what Complainant is alleging
- Brief summary of Respondent's response/account of events
- Applicable policy

# Structure of investigation Report: Procedural History

This section details the entire procedural history, including:

- When formal complaint was received
- General timeline of the investigation
- Significant delays and explanation (e.g., law enforcement hold)
- Parties'/Witnesses' cooperation or lack of participation
- Procedural rights (opportunity to pose questions, identify witnesses, review and respond to evidence record)

# Structure of investigation Report

- List all applicable sections of SMP and include full text of each section

Reminder:

These are the sections of the Policy that the decisionmaker will determine have or have not been violated, using the preponderance of evidence standard.

# Structure of the investigation Report: Information Considered during the Investigation

- Interviews Conducted
  - Witnesses' relationships to parties, length and format of interview, and who was present
- Documents or Other Information Received
  - Who provided
- Witnessed Proposed but Not Interviewed
  - Why they were not interviewed (e.g., did not want to participate, unresponsive, Investigator's discretion)

# Structure of Report: Factual Findings

- Chronological
- Timeline of parties' relationship through complaint
- Relevant and material facts
- Exculpatory and inculpatory evidence
- Verbatim quotes
- Include source
- Headings and bullet points
- Identify undisputed/disputed facts
- Isolate areas of consistency/inconsistency among interviews/evidence

# Structure of investigation Report: Factual Findings - Headings

- COMPLAINANT and RESPONDENT'S prior relationship, including intimate/sexual encounters if relevant.
- COMPLAINANT and RESPONDENT's interactions leading up to incident
- COMPLAINANT and RESPONDENT'S communications leading up to the incident (including electronic evidence)
- Witnesses' observations of COMPLAINANT and RESPONDENT'S relationship and interactions leading up to the incident
- COMPLAINANT and RESPONDENT'S description of the incident (likely in dispute)

# Structure of investigation Report: Factual Findings – Headings continued

- COMPLAINANT and RESPONDENT'S post-incident behavior
- COMPLAINANT and RESPONDENT'S post-incident interactions/communications
- COMPLAINTANT and RESPONDENT'S communications with witnesses about the incident
- Circumstances of disclosures/reporting
- Impact/other subsequent events of relevance

# Example – Disputed Facts

# Example – Undisputed Facts

# Structure of investigation Report: Whether Respondent's Alleged Conduct Falls within the Scope of the SMP

- The investigation report will include a determination by the investigator as to whether the conduct alleged in the Formal Complaint falls within the scope of the Policy and the definitions of Prohibited Conduct
- Investigator will determine whether the conduct alleged, if substantiated, would constitute Prohibited Conduct
- This is not a determination of responsibility, nor does it involve a determination about the credibility of the information gathered; those decisions are reserved for the Hearing Panel
- Rather, this evaluation accepts all facts presented by Complainant as true to determine the format of the hearing and the potential policy violations implicated at the hearing

# Final Appendix

- Includes all relevant evidence/documentation/transcripts
- Cited throughout Investigation Report
- May not include evidence that is:
  - Subject to Rape Shield privilege
  - Irrelevant/Character

# The Next Step in the Process: The Hearing

## The Investigator's role in the Hearing...

- The Investigator may be called to answer questions about the investigation itself, actual findings, the report, etc.
- The Hearing Panel or parties' advisors may ask questions of the Investigator

# Questions?

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