

SEXUAL MISCONDUCT INVESTIGATIONS

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Summary of Investigator's Role

e.

MUST:

- Understand parties' rights
- Understand University policy
- Conduct a thorough, fair and impartial investigation
- Communicate with the parties
- Conduct interviews of parties and witnesses
- Engage in fact-finding
- Assess Credibility
- Recommend findings as to responsibility and sanctions
- Prepare draft and final investigative report
- Serve as a witness in a hearing if Panel so chooses

CAN:

- Use discretion in determining relevant witnesses to interview and evidence to consider

CANNOT:

- Allow bias to affect interviews and determinations
- Maintain or create a conflict of interest with involved parties or witnesses



Scenario

Chris and Page, both singers in the University's choir, dated for a few years before Page ended the relationship last summer. Since the break-up, Chris has become frustrated because, although Chris expressed a desire to maintain a platonic friendship with Page, Page has cut off all contact – blocking social media access, rejecting phone calls, and ignoring text messages. Chris has shared with friends a concern about not being able to reach Page. Chris worries that Page may be drinking or using marijuana excessively, and Chris has asked mutual friends on social media to share their information about Page's well-being. Chris also reached out to Page several times to communicate information about career opportunities Chris thinks might be advantageous for Page. Chris believes Page's attitude about maintaining their friendship is "old-fashioned."



Page's Complaint

“I believe that Chris is stalking me. I have told Chris repeatedly I need to be left alone in order to move on, but Chris will not be deterred. I have skipped choir rehearsals to avoid running into Chris, but Chris has asked our friends about me and I am tired of hearing about it. Please help.”



What are you “investigating”?

- What type of misconduct is alleged?

- What facts will the allegations require you to establish?



Stalking

- A course of conduct
- On the basis of sex
- Directed at a specific person
- Would cause a reasonable person to fear for the person's safety or the safety of others; OR
- Causes the person to suffer substantial emotional distress.



“Course of Conduct”

- Two or more acts, including, but not limited to,
 - acts in which the respondent directly, indirectly, or through third parties, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
 - by any action, method, device, or means



“Reasonable Person”

- An objective standard, not focused simply on whether the complainant was fearful or distressed
- “Reasonable person” = a person with identity similar to the complainant, under circumstances similar to the complainant’s



“Substantial Emotional Distress”

- Substantial emotional distress means significant mental suffering or anguish
- Not necessary to have sought medical or other professional treatment or counseling



Back to Title IX . . .

- Was the complainant effectively denied participation in or the benefits of any educational program or activity as a result of the alleged conduct?



Investigation

- Objective evaluation
 - Prejudgment of facts
 - Conflict of interest
 - Bias



Types of Bias

- Confirmation bias
- Availability bias
- Stereotyping
- Implicit bias



Investigation

- Relevant evidence
- Direct vs. circumstantial evidence
- Inculpatory and exculpatory evidence
- Privileged information



Investigation

- Parties
- Witnesses
- Documents
- Electronic/Video
- Other?



How to Interview Witnesses to Elicit Complete and Reliable Information

- Ask open-ended questions
- Promote accuracy
- Develop rapport
- Start with general, move to specific
- Build on information obtained during the investigation



Investigative Game Plan

- Develop a plan
- Agree on the plan
- Identify and rule out bias



Evaluating the Evidence

- Preponderance of the evidence
 - Relevance of evidence
 - Credibility of evidence
 - Weight of evidence



Preponderance of Evidence

- University has the burden of proof
- Applies to individual facts and each allegation
- More likely than not
- Consider all witnesses and evidence, regardless of who produced them



More Likely Than Not





How Much Evidence or Confirmation do You Need to Resolve a Factual Issue?

- No set amount of evidence required
- Case-by-case basis
- Quality of evidence more important than quantity



Quantity of Evidence?

- Evidence
- Corroborating evidence
- All available evidence?



Evaluating Witness Credibility

- the opportunity and ability of the witness to see or hear or know the things the witness describes;
- the quality of the witness' understanding and memory;
- the witness' manner while being interviewed;
- whether the witness has an interest in the outcome of the complaint or any motive, bias, or prejudice



Evaluating Witness Credibility, cont'd

- whether the witness is contradicted by anything the witness said or wrote before the interview or by other evidence;
- how reasonable the witness' statements are when considered in light of other evidence; and
- any other factors that bear on believability.



Preparing the Report

- Assemble all relevant evidence
- Determine whether relevant, credible evidence, both inculpatory and exculpatory, suggests that the misconduct alleged is more probable than not
- Draft report that summarizes the evidence and presents the investigators' non-binding recommendation as to finding of responsibility and sanction, if applicable



Preparing the Report

- Report should explain investigative process
 - Witnesses interviewed vs. not, and why
 - Relevant evidence vs. not, and why
 - Rationale for credibility determinations
 - Application of elements of misconduct alleged to evidence gathered



Draft Investigation Report

- Must be presented to the parties before finalized
- Parties have 10 days to review and offer written response
- Parties may share ONLY with advisors and/or parent/guardian/official familial designee
 - Under FERPA, students over 18 or beyond high school “own” the privacy rights to their educational information.



Final Report

- Should demonstrate that institution took the allegation seriously and responded appropriately
- Should put decision-makers in the best position to understand the relevant evidence and the investigators' analysis, and the basis for their recommendation
- Should be guided by the expectation that the report could be an exhibit in an external complaint or subsequent litigation