

TITLE IX TRAINING

Massachusetts Community Colleges

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DAN SCHORR, LLC

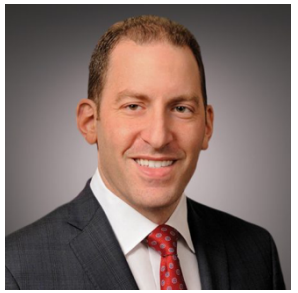
OUR SERVICES

- Title IX, Civil Rights, and Misconduct Investigations
- Decision Makers and Hearing Officers
- Policy and Program Reviews
- Trainings

DAN SCHORR

President

New York



Dan Schorr is a former criminal prosecutor and municipal inspector general with more than 20 years of legal and investigative experience. He manages a variety of complex assignments, including investigations into sexual misconduct, Civil Rights, and fraud allegations at educational institutions, corporations, and government entities. In additional to specializing in Title IX investigations, Dan assists higher education and K-12 schools by conducting policy and program reviews, training personnel on all aspects of Title IX and Civil Rights compliance, and serving in hearing officer and decision maker roles. Dan is a pre-approved Sexual Misconduct Investigator for the United Educators ProResponse Expert Services Benefit.

ALYSSA-RAE MCGINN

Vice President, Investigations

Boston



Alyssa-Rae McGinn has extensive experience leading a variety of complex investigations, with particular expertise in conducting investigations at educational institutions and corporations into allegations of sexual misconduct and identity-based harassment involving students, faculty, staff, and corporate leadership. Alyssa-Rae was previously a Senior Associate at Ankura, where she and Dan established the firm's Title IX and Civil Rights Investigations practice and grew it to assist institutions nationwide. Prior to Ankura, Alyssa-Rae was an Associate Director in Kroll's Business Investigations & Intelligence practice.

RELEVANT LAW

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 education program or activity receiving federal financial assistance.

VAWA AMENDMENTS TO CLERY ACT

- Institutions must have a policy statement that addresses the jurisdiction of security personnel
- Colleges and universities must provide data regarding incidents of sexual assault, dating violence, domestic violence, and stalking
- Institutions must have policies outlining the procedures they will follow after an incident of sexual assault, dating violence, domestic violence, or stalking, and identify rights and options available to survivors
- Institutions must put into place prevention programs that aim to stop sexual violence
- Gender identity and national origin must be categories of bias institutions reflect within their reported Clery statistics

POLICY ON AFFIRMATIVE ACTION, EQUAL OPPORTUNITY & DIVERSITY

DEFINITIONS

- **Discrimination:** An intentional or unintentional act which adversely affects employment and/or educational opportunities because of a person's membership in a protected class or association with a member(s) of a protected class.
  - May be disparate impact or disparate treatment
- **Discriminatory Harassment:** A form of unlawful discrimination including verbal and/or physical conduct based on legally protected characteristics and/or membership in a protected class that:
  - has the purpose or effect of creating an objectively intimidating, hostile or offensive work or educational environment;
  - has the purpose or effect of unreasonably interfering with an individual's work or learning performance; or
  - otherwise unreasonably adversely affects an individual's employment or educational opportunities.

Conduct constitutes hostile environment harassment when it:

- is targeted against an individual(s) on the basis of his or her membership in a protected class;
- is not welcomed by the individual(s); and
- is sufficiently severe or pervasive that it alters the conditions of education or employment and creates an environment that a reasonable person would find intimidating, hostile or offensive.

DEFINITIONS

- **Gender-Based Discrimination:** Unwelcome conduct of a nonsexual nature based on a student's actual or perceived sex, including conduct based on gender identity, gender expression, and nonconformity with gender stereotypes, where:
  - submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment or education; and/or
  - submission to, or rejection of, such conduct by an individual is used as a basis for academic or employment decisions affecting that individual; and/or
  - such conduct has the purpose or effect of substantially interfering with an individual's academic or professional performance or creating an intimidating, hostile, or offensive employment, educational, or living environment based on gender.
- **Retaliation:** Taking adverse employment or educational action against a person who files claims, complaints or charges under these procedures, or under applicable local, state or federal statute, who is suspected of having filed such claims, complaints or charges, who has assisted or participated in an investigation or resolution of such claims, complaints or charges, or who has protested practices alleged to be violative of the non-discrimination policy of the College, the BHE [Board of Higher Education], or local, state or federal regulation or statute.

TITLE IX DEFINITIONS

- Title IX regulations require higher education institutions to implement a policy and process addressing certain forms and instances of sexual harassment that occur in the College's education program or activity. **Title IX Sexual Harassment** is conduct on the basis of sex that satisfies one or more of the following:
  - A College employee conditioning the provision of an aid, benefit, or service on another employee's or student's participation in unwelcome sexual conduct ("quid pro quo" harassment by an employee); or
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to a College education program or activity; or
  - Any instance of sexual assault (as defined in the Cleary Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).
    - **Sexual Assault:** Rape, sodomy (oral or anal intercourse), sexual assault with an object, fondling, incest, and statutory rape
    - **Dating Violence:** Violence committed by a person who is or has been in a romantic or intimate relationship with the victim
    - **Domestic Violence:** Violence by a spouse, former spouse, intimate partner, person with whom the victim shares a child, person cohabitating with the victim as a spouse or intimate partner, or person in a role similar to a spouse
    - **Stalking:** Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their own safety or that of others or suffer substantial emotional distress

TITLE IX PROCESS

- Complainant contacts the Title IX Coordinator or designee and makes a **Formal** Title IX Complaint
- Within 5 days, respondent is noticed in writing about the complaint and may submit a written response within 5 days
- Informal resolution options are offered to the complainant (if allegations are not against an employee)
- An investigation is conducted within 15 days of respondent's written response, where practicable
- Within 10 days of the receipt of all evidence, the Title IX Coordinator or designee sends the evidence to the parties for review and written response
- Within 10 days of party responses to evidence, the Title IX Coordinator or designee prepares and delivers an investigative report to the parties
- Parties have 10 days to submit responses to the report
- Within 10 days, the Title IX Coordinator or designee delivers a final investigative report to the decision maker

TITLE IX PROCESS

- Within 10 days of the decision maker's receipt of the report, a hearing is held
- Title IX Coordinator or designee:
  - Schedules the hearing
  - Notifies the parties, advisors, and witnesses of the hearing
  - Provides the decision maker with appropriate materials
  - Coordinates videoconferencing as necessary
  - Secures a hearing location
  - Acts as liaison between parties and decision maker on procedural matters
- Decision maker conducts the hearing, including:
  - Decision maker summarizes the Hearing Policy
  - Title IX Coordinator or designee briefly states allegations and summarizes the investigative report
  - Advisors question parties and witnesses by presenting questions through the decision maker
  - Decision maker determines whether questions are relevant, and if so, directs party/witness to respond
  - Decision maker questions parties and witnesses
  - Decision maker informs parties that they will issue a decision within 10 days based on preponderance of the evidence
- Decision maker issues written decision to parties, who may appeal within 5 days

NON-TITLE IX DEFINITIONS

- Sexual harassment reports may fall outside the scope of Title IX requirements, in which case they will proceed through the existing Complaint Process using the Title IX definitions or the following definition.
- **Sexual Harassment:** Sexual advances, requests for sexual favors, and verbal or physical conduct of a sexual nature when:
  - submission to or rejection of such advances, requests or conduct is made either explicitly or implicitly a term or condition of employment or as a basis for employment or academic decisions; or
  - such advances, requests or conduct have the purpose or effect of unreasonably interfering with an individual's academic or work performance by creating an intimidating, hostile, humiliating or sexually offensive learning or working environment.

NON-TITLE IX PROCESS

- Complainant contacts the Title IX Coordinator or designee and makes a complaint
- Respondent is noticed in writing about the complaint and may submit a written response within 10 days
- Informal resolution options are offered to the complainant
- An investigation is conducted within 30 days of respondent's written response, where practicable, including:
  - Interviews with both parties, who may be accompanied by advisors of their choice
  - Analysis of the allegations and defenses presented
  - Consideration of relevant documents provided by parties and witnesses or otherwise obtained
- The investigator prepares a Report of Preliminary Findings, which is delivered to the parties
- Parties have 10 days to submit Rebuttal Statements
- Within 7 days, the investigator delivers a Report of Final Findings and Recommendations to the President's Designee, who issues a written decision to the parties within 10 days of receipt
- Each party may file an appeal with the President within 5 days of receiving the decision

INITIATING THE PROCESS

GENERAL GUIDANCE

- Be fair and objective
- Do not pre-judge
- Avoid conflicts of interest (including the *appearance* of a conflict)
- Maintain independence
- Stay professional
- Do not discuss opinions or conclusions
- Words matter
- Listen, listen, listen!
- Protect confidentiality
- Be prompt, but take the needed time
- Prevent retaliation
- Treat all parties equally

BEWARE OF BIAS

- Beware of sexual assault myths
  - There is not one way to respond to experiencing sexual assault
  - It is not unusual for a complainant to appear numb, detached, or unaffected; delay reporting; blame themselves; express denial, confusion, or fear; minimize their experience; recant some or all of the allegations made; or interact with the respondent after the alleged incident(s)
- Recognize the privilege and power positions you bring into the room
- Assess where you might have unconscious bias toward or against someone
- Be aware of stereotypes
- Cannot evaluate through "that wouldn't bother me"
- Be aware that your social media can be cited as evidence of bias

UNDERSTANDING CONSENT

- Mutual and voluntary
- Affirmative
- Revocable
- Past consent does not imply current/future consent
- Consent to certain acts does not imply consent to other acts
- Power dynamics
- Age of consent
- Forcible compulsion
- Threats – actual or implied
- Expressed lack of consent
- Incapacitation

AN ALLEGATION LANDS ON YOUR DESK…

- Listen carefully and with compassion
- Provide access to needed services
- Explain process, your role, and complainant's right to independently involve law enforcement
- Gather basic information: Who? What? When? Where? How?
- Identify an initial list of potential witnesses
- Identify steps needed to obtain evidence
- Understand context to the allegations, relationship between the parties, and motivation for coming forward
- Assure the complainant that you take the matter seriously
- Explain confidentiality
- Do not express opinions or comment on character of others
- How to handle an anonymous report

EVALUATE THE REPORT

- Search files of past reports or investigations
- Review school policy
- Determine whether an investigation is necessary
- If allegation involves potential child abuse, report to authorities in accordance with law **regardless of your determination of credibility**

NOTICING PARTIES

- New Title IX regulations require written notice be provided to parties when allegations will proceed to investigation
- Notice must include:
  - Detailed allegations, including date and location
  - Identities of parties involved
  - Statement that respondent is presumed not responsible and determination will be made at the end of the process
  - Opportunity to have an advisor of choice who may be an attorney
  - Opportunity to review evidence
  - Statement regarding prohibition on knowingly false statements or submitting false information
- Parties must be kept informed in writing throughout the process, with sufficient notice of all meetings, interviews, and hearings

INTERIM MEASURES

- Can implement any time during investigation when needed
- May include accommodations (scheduling, excused absences) or measures to ensure safety (no contact orders, interim suspension)
- Document justification for interim measures
- Do not undertake actions that may be perceived as punishment or unequal without documenting justification
- In Title IX matters, the respondent must be noticed and given an opportunity to challenge the decision

PLANNING THE INVESTIGATION

- Who will conduct the investigation?
- Scope of investigation
- Key fact issues
- Who needs to be interviewed?
- In what order?
- What evidence needs to be collected?
- Who needs to be notified?

COMPLAINANT WITHDRAWAL

- New regulations provide option for a complainant to withdraw from a formal complaint, at which time the Title IX Coordinator may dismiss the investigation or may continue to investigate
- However, even if the process continues without complainant, regulations require that if "a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility"
- Without a complainant, you must rely upon other evidence to "build" your case, which is often difficult

INITIAL MISTAKES

- Taking too long to respond to notice of a potential issue
- Acting too aloof, uncaring, or dismissive
- Overpromising
- Expressing judgments or opinions
- Explaining the process poorly or not at all
- Misrepresenting parties' rights
- Failing to offer needed services
- Gathering too little information
- Failing to inform appropriate administrators or authorities
- Discussing the matter with inappropriate people
- Not considering necessary interim measures
- Assigning inappropriate investigators (conflict of interest, bias, inexperience)
- **Failing to follow school policies and local, state, and federal law**

EXERCISE: INITIATION

You receive the following email from sophomore, Nick Brooks:

I've been avoiding writing this, but I want to let you know that last week, at a welcome party for Environmental Club, junior Ava Alexander grabbed my crotch area and butt a few times. She was laughing like it was a joke, but it made me feel really uncomfortable and seeing her around campus has been tough since then. I'm nervous because I know I have to see her again at the next club meeting. I don't want her to get kicked out of the club, especially since she's running for president, but I'm really anxious about it and it's been really difficult focusing on my classes. Can we meet to talk about this?

Nick Brooks

What are your next steps?

CONDUCTING INTERVIEWS

WHO TO INTERVIEW

- The complainant
- The respondent
- Anyone who was present for and observed a relevant incident
- Other witnesses with relevant information
- Outcry witnesses
- People with whom the respondent has spoken about alleged incidents
- People who you have been asked to interview

INTERVIEWING BASICS

- Ask questions to elicit detail
- Understand who, what, when, where, how
- "How do you know that?"
- Clarify facts and discrepancies
- Ask for relevant names, especially potential witnesses
- Ask for relevant documents
- Maintain confidentiality of past interviews

WHY MAY INTERVIEWEES BE RELUCTANT?

- **Mistrust** of the organization, the investigation process, the interviewers, or the system in general
- **Discomfort** with strangers/interviewers
- **Discomfort** with subject matter
- **Fear** of retaliation
- **Fear** of not being believed
- **Fear** of retraumatization
- **Fear** of getting in trouble
- Complainant may have reasons for being reluctant that are significant to analyzing their report:
    - Discomfort or trauma
    - Pressure not to report
    - Wanting to protect the respondent
    - Concern that their report will not meet violation threshold

BE TRANSPARENT

- Clearly introduce yourself and your role as an independent investigator
- Explain how you will be conducting a comprehensive, prompt, and fair investigation
- Be clear that you are there to listen to everything they have to say, review their evidence, and speak with their witnesses
- Do not make promises you cannot keep and keep your promises
- Set realistic timelines and keep them apprised of the process as it progresses
- State upfront that you may need to follow up with them or re-interview them
- Be clear about policies regarding activities such as drug/alcohol use

BE KIND

- Treat the interviewee with **respect**, **empathy**, and **kindness**
- Recognize that this is difficult for all involved
- Offer services/resources to both parties, as well as witnesses if needed
- Be open-minded and non-judgmental
- Remember that many cases are in gray areas, and most people are telling you some version of their truth
- Make your body language reflect your listening stance
- If an interviewee becomes confrontational, don't mirror their demeanor – keep calm, take a break, redirect
- ENSURE YOU ARE EQUALLY KIND TO ALL PARTICIPANTS

BE COMFORTABLE

- Be/act comfortable with sexual terms, behaviors, and choices
- In video interviews, be/act comfortable with videoconferencing
- If you are uncomfortable, they will be uncomfortable
- Allow them to speak in their own language (crude language, etc.), but clarify
- If there is something that makes you uncomfortable:
  - Do research
  - Practice talking about it
  - Re-evaluate whether you are the right person for the interview
- Be aware of unconscious bias and the power positions & identities you bring into the room

HAVE A REAL CONVERSATION

- Bring your real personality into the interview and engage in a conversation: **listen** and **respond**
- Don't be afraid to be personal
- Be true to your own style of speaking
- Be flexible and let the conversation take its natural course
- Guide the conversation, but let them set their own pace and tell their story in their way
- Utilize silence, especially when you ask hard questions

ASKING THE HARD QUESTIONS

- Wait to push back until they have finished telling their story
- **"Let's go back through that slowly:"** Return to parts of their story that require clarification or questions or that are disputed by physical evidence
- Wait to confront with adverse evidence – may make an interviewee less willing to continue talking
- When asking the hard questions:
  - Phrase your questions so that they are respectful of the story you've heard
  - Don't be accusatory
  - Explain the motivation for your question
- Let them know that as an investigator, you are trying to figure out what doesn't track and why

EXERCISE: INTERVIEWING

What steps should you take before interviewing Nick?

What information do you hope to obtain during the interview?

What interview challenges do you anticipate?

MOCK INTERVIEW

EXERCISE: INTERVIEWING

Freshman Jane Thompson reports to you that her professor has been acting inappropriately toward her. You interviewed Jane and she told you the following:

Since the beginning of the year, Dr. Becker been staring at my breasts sometimes, especially when I don't wear a bra. In October, I was talking to him before class when I got there early, and he told me, "You should really wear a bra because boys always have dirty things on their mind." A few weeks later, I saw him when I was waiting for a friend in the library, and he asked me if I had a boyfriend and said that he wanted to take a picture of me to show his son, who is my age. He also asked me how many guys I've had sex with. I kind-of laughed it off but felt really weird. Last week, he said that because I haven't been doing well in his class, he wanted me to come to him for extra help for the midterm, but when I asked if anyone else was going for extra help, he said that he wanted to tutor me one-on-one to make sure I get a good midterm grade. I said I had to be home right after class so he'd leave me alone, but I'm nervous around him now.

EXERCISE: INTERVIEWING

What steps should you take before interviewing Dr. Becker?

What information do you hope to obtain during the interview?

What interview challenges do you anticipate?

MOCK INTERVIEW

COLLECTING EVIDENCE

TWO TYPES OF EVIDENCE

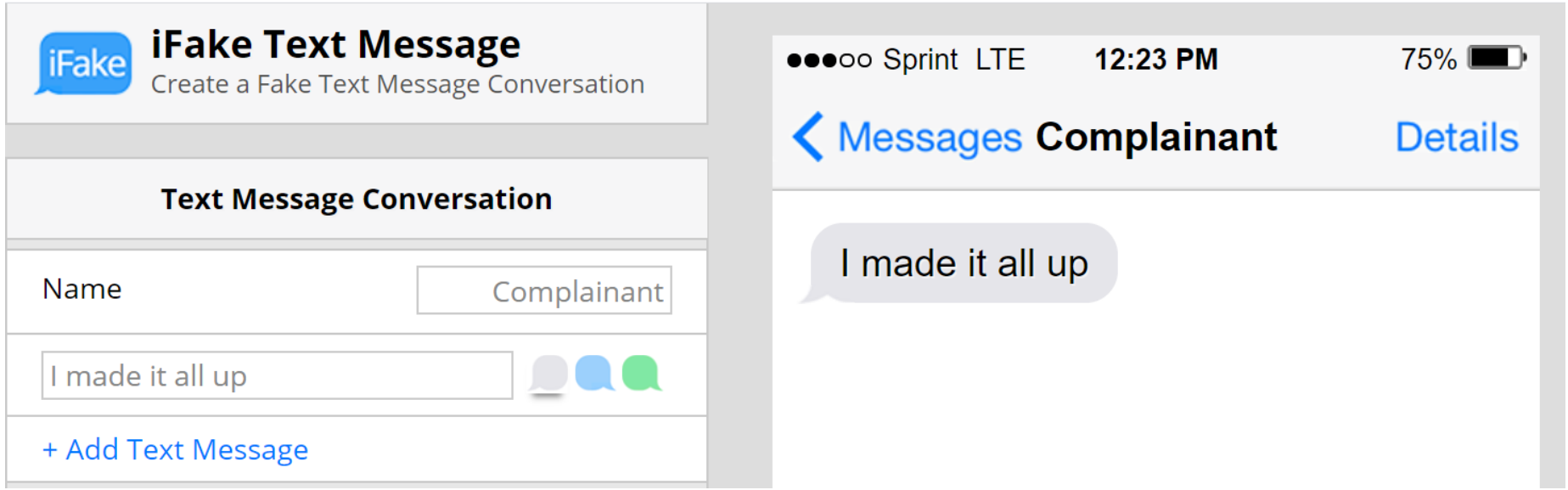
DIRECT vs. CIRCUMSTANTIAL

EVIDENCE EXAMPLES

- Text messages
- Social media
- Emails
- Memos or other documents
- Photographs
- Receipts
- Device logs
- Surveillance video
- Building access records
- WiFi connection records
- Other sources

OBTAINING EVIDENCE

- Instruct parties and witnesses to preserve evidence
- Go to the source and get primary documentation when possible
- Deleted items may still exist
- Be aware of fakes



ASSESSING CREDIBILITY

CREDIBILITY FACTORS

- Inherent plausibility and logic of story
- Consistency
- Demeanor
- Level of detail provided
    - Beware of the "categorical denial"
- Past record and pattern behavior
- Cross-corroboration
- Corroboration by evidence
- Not a moral judgment on honesty
- Evaluating credibility is a continuous process

EXERCISE: ASSESSING CREDIBILITY

Think about our interviews with Nick and Dr. Becker:

Did you believe Nick's account?

Why? What factors of his interview made him seem more or less credible?

Did you believe Dr. Becker's account?

Why? What factors of his interview made him seem more or less credible?

DOCUMENTING THE INVESTIGATION

DOCUMENT EVERYTHING

- Memorialize everything that happens in emails, notes, or interview summaries
- When communication happens via phone call or in person, note the content of the conversation

DOCUMENTING INTERVIEWS

- Convert interview notes into narrative summary of interview
- Include basic information: date, location, names of all in attendance
- Introductory language: indicate that summary is not verbatim
- Include summary of information and explanations provided to interviewee

Schorr and McGinn introduced themselves and explained that they had been hired by the College to independently investigate O'Reilly's complaint against Samuels. Schorr described the investigation process and explained the scope of confidentiality for the interview. Schorr stated that the parties to this investigation will see the final investigative report, which will include Smith's name and what is said in this interview.

Schorr informed Smith that she will have the opportunity to review this interview memorandum. Schorr stated that College policy prohibits any retaliation as a result of Smith's participation in this investigation and asked Smith to please communicate any potential retaliation to the investigators or the College.

DOCUMENTING INTERVIEWS

- Summary should reflect the narrative told by the interviewee
- Does not need to be in the order of the interview (can be chronological or in another logical order)
- All statements should be sourced, to the interviewee and to their source
    - Did they see this firsthand or did someone else tell them this information?
- Use fact-based, "dry" language; avoid "colorful" language
- Write in a formal, professional manner
- Use direct quotes where available and to add "color"
- Goal is to present the interviewee's voice from your objective perspective
- Well-written summaries allow you to pinpoint outstanding gaps and needed follow-up
- Summaries will become building blocks of investigative report

DOCUMENTING INTERVIEWS

Smith said that she knew Robertson and that he was "more a friend of [Johnson's]." She said in the first few weeks of the Fall 2019 semester, Robertson would come to the office and spend time talking with Johnson at her desk. Smith said that Johnson told her that she spent time with Robertson outside of work on several occasions, but they were "never that serious." Smith also stated that she was aware that Johnson and Robertson frequently communicated via text message during the day.

DOCUMENTING INTERVIEWS

Jones stated that during the party, he believed Hill "got some wrong signals" from McCall because Hill said to Jones, "This new girl Laura [McCall], she's pretty." Jones said that he determined from Hill's tone that "[Hill] was thinking, 'Maybe she likes me,' or something like that."

Jones stated that McCall is "very openly friendly," and that Hill "[took] it the wrong way and thought she wanted more." Jones said that he "saw [Hill] might've been thinking something would happen," but Jones knew that McCall "was just being polite."

EXERCISE: DOCUMENTING INTERVIEWS

What's wrong with these summaries?

- *Rodriguez said he couldn't see what was going on with Murphy and Novak, but Novak was always acting weird with people around campus. Murphy told him later that Novak had made inappropriate comments to him.*

- *Ibrahim said that Rossi touched her and her friends' boobs and butts.*

- *Persaud said that he asked Wilson not to mock him in front of the class. Persaud exclaimed, "I told her not to, but she did it anyway!"*

- *Miller said that prior to the incident involving Devi, he had sent an e-mail to Williams, in which he wrote about other incidents when Devi touched him inappropriately. He said that Devi touched his penis over his pants and that he was upset about this.*

BUILDING THE INVESTIGATIVE REPORT

- Scope: a clear description of the scope and procedural history of the investigation
- Executive Summary: bulleted high-level facts, findings, recommendations, and conclusions, but do not overgeneralize or misrepresent facts
- Summary of Evidence: relevant parts of interview summaries and other relevant evidence, synthesized to create one narrative that flows and highlights areas of corroboration and discrepancy
- Summary of Findings: overall summary of evidence and analysis of evidence, including credibility assessments, discussion of discrepancies, and comparison to policy
  - May also include conclusions or recommendations regarding finding of responsibility of respondent
  - Should continue writing style from prior sections – formal, objective, fact-based
  - Includes judgments, but **all judgments must be defensible and based in evidence and policy**
  - Avoid personal or moral judgments

SUMMARY OF EVIDENCE

Brown said that Leland tried to "create a negative narrative" about her and was "very forceful in doing so," and therefore if people at the College did not have the opportunity to get to know Brown themselves, they would have believed Leland's narrative. Roux said that Leland frequently complained to him about Brown. He said that Leland would make comments such as, "She's a liar," "You can't trust her," and "Don't trust her."

When asked whether she ever spoke negatively about Brown to Roux, including calling Brown a "liar," Leland stated that she spoke with Roux about her problems with Brown's performance but never used that specific language.

SUMMARY OF EVIDENCE

Mendel and Aguero both reported that they then entered a smaller stairwell, which Aguero described as "colder" than the first one. They both stated that Mendel sat on the stairs and Aguero stood by the door, which was closed.

Aguero reported that Mendel then asked her if she wanted to sit down and said, "I can make room," and she told him, "No, I'm going to go." Both parties reported that Mendel stood up and said, "I can warm you up." Aguero said that Mendel then started to touch her buttocks. Mendel also reported that he touched Aguero's buttocks.

Aguero explained, "I don't know, I just froze because I didn't know what to do." She said that she told Mendel, "Maybe we should go. I'm tired. You have a girlfriend." Aguero said that Mendel responded, "It's fine. She's not going to find out," and kept repeating this statement and touching her.

SUMMARY OF FINDINGS

Riley stated that he did not ask for or receive verbal consent to touch Hansen's breasts and vagina. He stated that he "felt" that he had consent based on several factors, including that Hansen had engaged in consensual kissing with Riley.

However, the College's policy states, "Consent to some sexual contact should not be presumed to be consent for other sexual activity." Therefore, Hansen's consenting to kissing, if this occurred, did not imply consent for other sexual touching.

SUMMARY OF FINDINGS

Jensen also alleged that because of Popa's negative opinion of Jensen and Popa's friendship with Li, Li was not supportive of Jensen's implementation of the new software system. Li stated that she was supportive of the new system and Jensen's other initiatives. The investigators found Li credible in this account based on the overall consistency in her narrative and cross-corroboration with other witnesses. Based on the available evidence and by a preponderance of the evidence standard, Li's actions did not constitute harassment, discrimination, or otherwise inappropriate behavior toward Jensen.

HEARINGS

WHO SHOULD BE PRESENT?

- Decision maker
- Title IX Coordinator
- Advisors
- Witnesses, parties, and investigator(s) for cross-examination by both parties' advisors and hearing officer(s)
- Parties do not have to be present for entire hearing
- Testimony and cross-examination can be conducted via video so parties remain separated

HEARING RULES

- Decision maker should meet with advisors in pre-hearing conference to clearly communicate procedural rules for hearing
- Hearing Policy:
  - Questions and evidence about complainant's prior sexual behavior are irrelevant unless needed to prove that someone else committed the alleged misconduct or to prove consent
  - If a party does not have an advisor, the College will provide a trained advisor
  - Only advisors may conduct cross examination
  - Live hearings will be conducted with parties in the same location, unless otherwise requested
  - Only relevant questions may be asked, as determined and explained by the decision maker before the party/witness answers the question
  - Formal rules of evidence in courtroom proceedings do not apply in the hearing
  - The hearing will be recorded and the recording retained by the College
  - Decision maker controls the hearing, maintains order, and makes necessary and final rulings

PREPARING FOR CROSS-EXAMINATION

- Explain the cross-examination process to parties and witnesses and what types of questions they might expect
- Cross-examination can be conducted via video so respondent is in a separate room
- Respondent cannot conduct cross-examination of complainant
- Advisors should prepare parties/witnesses to be truthful, complete, and non-combative in all answers, including with facts that may present witness in poor light
  - Advisors should conduct mock cross-examination, especially with parties

CONDUCTING CROSS-EXAMINATION

- Follow rules of the hearing and defer to the decision maker
- Understand your advisee's account
- Ask questions in order to elicit information that will help support your advisee's account and/or cast doubt on the other party's account
- Use the principles of "Asking the Hard Questions" when questioning a party or witness about uncomfortable or difficult subjects
- Do not exclude a question because it makes you uncomfortable to ask it
- Do not bully or become confrontational with a party or witness
- Be professional and diligent
- Listen for gaps or areas for follow-up questions

IDENTIFYING IRRELEVANT QUESTIONS

- The decision maker may prohibit certain types of questions from being asked of parties and witnesses. Some irrelevant types of questions might include:
  - Questions about a party or witness's sexual history
  - Questions about a party or witness's health, including mental health
  - Questions about other aspects of a party or witness's life that are not pertinent to the alleged conduct
  - Questions to establish character
  - Questions that make assumptions or improperly blame a complainant or witness for the alleged conduct
  - Questions that are phrased rudely or unkindly, or intended to bully a party or witness
  - Questions that ask the party or witness to speculate
  - Questions that the party or witness would not know the answer to
- Ultimately, the decision maker must decide question relevance based on the facts and circumstances of the matter

EXERCISE: CROSS-EXAMINATION

Think about the proceedings against Dr. Becker.

Imagine you are Dr. Becker's advisor at the hearing, and you are asking questions of Jane, the complainant. What kind of questions would you ask Jane?

Ensure that your questions are relevant, BUT properly and diligently explore topics needed to support Dr. Becker's account and defenses.

EVALUATING THE EVIDENCE

- Decision maker must consider the evidence presented in the investigative report and/or the hearing
- For hearings, do not consider any statements from a party or witness who was not cross-examined in making final determination
- Decision maker must not draw any inference about responsibility based solely on a party or witness's refusal to submit to cross-examination
- Evaluation of the evidence includes credibility assessment, analysis of discrepancies and corroboration, and comparison to policy
- **All judgments must be defensible and based in evidence and policy**
- Determine responsibility based on a preponderance of the evidence
- Determinations and reasoning must be documented in a letter or report

DETERMINING SANCTIONS

- Sanctions should be appropriate considering **severity** and **pervasiveness** of behavior
- May also consider complainant's requests regarding sanctions, as well as respondent's demonstration of accountability and remorse
- Sanctions must be defensible according to evidence and policy

FINAL CONSIDERATIONS

HOW DO SCHOOLS GET IN TROUBLE?

- Lack of promptness
- Displays of partiality or bias
- Inequitable treatment of parties
- Compromising confidentiality
- Poor planning
- Failure to thoroughly evaluate all relevant witnesses and evidence
- Offering opinions
- Overpromising
- Not consistently and equitably following policies and procedures
- Failure to maintain relevant documents and evidence
- Not including exculpatory information in the investigative report
- Failure to properly document and justify conclusions and actions
- Not consulting counsel when potential legal issues / litigation arise

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