

A View From Off-Campus: Ten Observations from External Title IX Investigators

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Agenda

- Observations about the Overall Process
- Observations about the Investigation
- Observations about Report Writing

Overall Process

- Observation #1: Your policy matters
- Observation #2: Follow your procedures
- Observation #3: No perfect investigative model

Observation #1: Your Policy Matters

- Different definitions of misconduct/consent
- These differences matter and can impact the determination regarding violation of policy
- Three general types of language regarding misconduct/consent
 - Sexual conduct without a “yes” is prohibited
 - Sexual conduct without mutual agreement is prohibited
 - Sexual harassment is prohibited

Observation #1: Your Policy Matters (cont'd)

- Someone may be found in violation under one type of policy but not the other. Consider the following (very abbreviated) scenario:

Two students (Steve and Mary) meet at a party, talk at the party, and discuss going back to Steve's room to "hook up." An hour or so later, they go back to Steve's room. Once they get there, Mary gets on Steve's bed. Steve starts kissing Mary. Steve takes Mary's shirt and bra off and fondles her breasts. Mary does not say anything during this interaction. She leaves after about 15 minutes. When she gets back to her room, she texts Steve, "Had a great time but not looking for anything serious. L&R." Three days later, she files a complaint against Steve based on his taking off her shirt and fondling her breasts.

Observation #1: Your Policy Matters (cont'd)

- Making determinations under each policy:
 - **“Yes” Policy:** Factors external investigators examine are fairly limited. Was there a “yes”?
 - **Mutual Agreement Policy:** External investigators examine Mary’s words and actions specific to taking off Mary’s shirt and fondling Mary’s breasts.
 - **General Sexual Harassment Policy:** External investigators examine whether conduct was unwelcome and whether the conduct interferes with or limits Mary’s ability to participate in or benefit from education and/or work programs and/or activities.
 - Consider this “hostile environment” language carefully. Is stating, interfering with “academic performance” the same as above?

Observation #2: Follow Your Procedures

- Complaints filed with OCR and court cases often focus in part on whether schools followed their procedures.
- Not following procedures can lead to a finding of systemic compliance concerns by OCR or contract claims (in addition to others) in court.
- Exceptions may seem to make sense at the time, but may cause concerns later.

Observation #3: No Perfect Investigative Model

- Different types of models (not the entire universe):
 - Full Investigator Model
 - Investigator Plus Full Hearing Model
 - Investigator Plus Panel Model

Observation #3: No Perfect Investigative Model (cont'd)

- Full Investigator Model
 - Investigator investigates
 - Investigator writes report with narrative and analysis, including determination
 - Administrator/panel reviews determination
 - Administrator/panel decides sanction
 - Multiple pros and cons

Observation #3: No Perfect Investigative Model (cont'd)

- Investigator Plus Hearing Model
 - Investigator investigates
 - Investigator writes report with narrative and analysis (content of analysis varies by school)
 - School conducts full hearing with hearing panel, investigator, and parties
 - Hearing panel makes determination and decides sanction
 - Multiple variations of this model
 - Multiple pros and cons

Observation #3: No Perfect Investigative Model (cont'd)

- Investigator Plus Panel Model
 - Investigator investigates
 - Investigator writes report with narrative and partial analysis (but does not make determination)
 - No hearing but panel reviews documentation, makes determination, and decides sanction
 - Multiple pros and cons

The Investigation

- Observation #4: Have a plan, not a "cookie cutter" approach to the investigation
- Observation #5: Details and context are key; do not avoid tough questions and probe for specificity
- Observation #6: Avoid assumptions and a premature desire to have solved the puzzle

Observation #4: Have a Plan, Not A Cookie Cutter Approach

- Clarify **scope**; draft initial **witness list**
- Consider **time**, **place**, and **order**, of interviews
- Should the interviews be **recorded**?
- Will you want to **visit the site** of the incident?

Observation #4: Have a Plan, Not A Cookie Cutter Approach (Interviews)

- Explain **investigator role**
- Initial remarks (**policy reminders, time**)
- Set the **tone**
- **Listen** and **follow up**
- **Hearsay** and **opinion** are **leads**

Observation #4: Have a Plan, Not A Cookie Cutter Approach (Interviews - cont'd)

- Make sure to ask for the **basis for** the observation.
- **Do not express judgment.**
- Press for **detail** regarding the alleged conduct.
- **Ask for an explanation** if something (or a word)does not make sense.

Observation #5: Details and Context Are Key (Parties' Follow-Up Interviews)

- Each party's second interview is typically **stressful**. Prepare yourself and the party for this.
- Tell each party **exactly** what the other party has alleged about the event.
- Make sure the party has an **opportunity to respond**.

Observation #5: Details and Context Are Key (Trauma Informed Interviews)

- What does “trauma informed” mean?
- When is this relevant?
- What to be wary of in this area (*hint: you still have to ask the hard questions*)

Observation #5: Details and Context Are Key (The Alcohol Factor)

- Reassure witness of “no judgment” for alcohol use/abuse
- Ask for details that will enable you to determine relative level of intoxication (of any party or witness who was drinking alcohol)
- Consider other ways by which to corroborate facts if all witnesses were intoxicated

Observation #6: Avoid Assumptions and Premature Closure (**Anxious Moments**)

What to do if you:

- Get into a conversation about the **party's sexual history** with someone other than the other party
- Ask the complainant (or witness) **what she/he/they were wearing**
- **Forget to ask** a party or a witness something that you should have asked

Observation #6: Avoid Assumptions and Premature Closure (Credibility)

- Be aware of **demeanor** (but it is **overrated**)
- Focus on **consistency, coherence, plausibility**
- If it is not “ringing true,” keep the witness talking
- Ask the witness if he/she/they are able to point **to corroborating evidence**
- Explain what is confusing or implausible to you

Observation #6: Avoid Assumptions and Premature Closure (Evidentiary Materials)

- Make sure to **ask witnesses** for documents, notes, photos, emails, texts, Facebook messages and any other record they have of relevant communications.
- Determine whether there are **surveillance tapes or card swipe records** of any kind.
- If it is a sexual assault, obtain a **release** from the complainant/survivor for **medical information**.
- Consider whether you need to obtain **other releases** (e.g., to obtain records from another academic institution, a therapist's statement, etc.).

Observations About Report Writing

- Observation #7: Be flexible about format
- Observation #8: Include information about process and rationales for evidence included/excluded
- Observation #9: Quality and fairness are more important than speed

Format—What Does the Adjudicator Need?

- Several models:
 - Facts only
 - Facts plus credibility
 - Facts, credibility, and analysis of whether a policy violation occurred

Format- What Does the Adjudicator Need?

- Observation #7: Formats—Be Flexible!
 - Facts—two basic alternatives:
 - Straight summary of witness interviews
 - Pros: easy to find who said what; works in less factually complex cases
 - Cons: statements of multiple people about one fact are difficult to find

Format—What Does the Adjudicator Need?

- Facts--two basic alternatives (continued):
 - Chronological narrative with facts from all sources interwoven
 - Pros: presents a clear, cohesive narrative that facilitates fact and credibility determinations
 - Cons: more subject to accusations of bias; time-consuming
 - Best for factually complex cases, e.g., numerous witnesses, multiple events, long term relationships

Format—What Does the Adjudicator Need?

- Some schools require disputed/undisputed facts section
 - Difficult when there are many facts that one party could not be aware of or that are neutral; effective when many facts are undisputed
 - Regardless of whether it's required, there should always be some discussion of which material facts are disputed

Format—What Does the Adjudicator Need?

▫ Analysis

- Organize by charge and element of charge, e.g., Sexual Assault, with two subparagraphs: whether sexual act occurred; and whether there was consent
- Draw on facts in the narrative to determine the sufficiency of evidence on each element (can use spreadsheet to help)
- Explain rationale for findings on disputed material facts

Format—What Does the Adjudicator Need?

- Sample Analysis:
 - Sexual Assault
 - A. The Policy defines sexual assault as “penetration, however slight, of any orifice by means of a body part or object without consent.”
 - B. Sexual intercourse. The parties do not dispute that vaginal sexual intercourse occurred.

Format—What Does the Adjudicator Need?

- C. Consent. A stated that she did not consent to sexual intercourse with B. B stated A gave explicit consent by saying, “Yes,” when he asked if she wanted to have sex. A’s statement that she did not consent was corroborated by the text message she sent to C shortly after the encounter, in which she said, “I just got raped.” A denied giving explicit consent, and B’s statement that A gave explicit consent was not corroborated by any other source. Therefore, I find it more likely than not that A did not consent to sexual intercourse with B.
- D. Conclusion. B’s penetration of A’s vagina without her consent constitutes sexual assault in violation of the Policy.

Contents of the Report

- Observation #8: Include information about the process and rationales for inclusion/exclusion of evidence.
 - Names of witnesses interviewed (and those who declined)
 - Documents sought (and those refused), reviewed, and considered
 - Exculpatory evidence

Contents of the Report

Observation #8 (cont'd)

- Explanations of evidence not considered, witnesses not interviewed, and delays in investigation
- Exhibits—of any and all documents that will help the adjudicator decide a disputed fact
- Excerpts of relevant policy sections

Contents of Report Continued

Observation #8 (cont'd)

- Evidence relevant to motive or bias of witness (e.g., relationships)
- Analysis of credibility – inconsistent statements, corroboration, admissions against interest, demeanor observations
- Analysis (when required) of facts as they apply to policy—by element
- Appendix with true names of all students interviewed—use anonymous identifiers in the report

Sharing the Report

Observation #9: Weigh quality and fairness against speed

- Allow parties to review at least their own statement and correct errors
- Anonymizing student names in report allows distribution of full report (with or without exhibits) to parties, with or without analysis of responsibility
- Short response period allows students to provide additional evidence or witness names

Observation #10: Repercussions from Investigations Are a Fact of Life

- Schools face OCR complaints and lawsuits regardless of how thorough or fair their investigations are.
- Follow Title IX guidance, your policy, your procedures, and the evidence.