

INVESTIGATOR TRAINING

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TRAINING OBJECTIVES

To know and understand the different phases of an investigation and to know and understand the MCCS policies and procedures under which an investigation may take place.

MCCS POLICIES AND PROCEDURES

Policy 201 – Non-Discrimination

Procedure 201.1/202.1

Policy 202 – Sexual Harassment, Sexual Assault

Procedure 202.2

Policy 501 – Student Code of Conduct

PROCEDURE 202.2

Provides for the process followed for most sexual harassment, misconduct, assault cases.

Title IX Coordinator follows, provides to parties.

PROCEDURE 202.2 STEPS

- **Report**
- **Formal Complaint**
 - **Jurisdictional Analysis**
- **Informal Resolution**
- **Investigation**
- **Live Hearing**
- **Appeal**

ELEMENTS OF AN INVESTIGATION

- Prepare an investigation plan
- Develop the facts
 - Interview complainant
 - Interview respondent
 - Collect evidence
 - Manage witnesses
 - Reinterview parties as necessary
- Draft the report
- Submit final report

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
- Preparation of draft report summarizing relevant evidence
- Provision of draft report to parties for comment, provision of evidence to the parties
- 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. C.F.R. §106.45(b)(1)(iii)

Impartial, and no prejudgment of allegation.

Purpose: To minimize premature judgment of the facts related to the allegation throughout the investigatory 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 allegation.

Examples of Conflict of Interest or Bias

- All complaints of sexual assault by a female against a male are true and the complainant should be believed over the respondent.
- 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.

This is a fact specific determination.

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

INVESTIGATION PLAN

- List the allegations that will be investigated;
- Determine whether the alleged perpetrator has been the subject of other complaints;
- Review the relevant policies that may have been violated;
- Create preliminary list of relevant documents/materials to obtain; and
- Create a timeline of the events that are alleged to have occurred.

SCOPE OF THE INVESTIGATION

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

DEVELOP THE FACTS

- Interview complainant
- Interview respondent
- Collect materials
- Manage witnesses
- Re-interview parties as necessary

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.

INTERVIEW PARTIES

- Ask thorough, open ended questions.
 - Who, what, where, when, how
 - Ask follow on questions, and clarifying questions
 - Ask the difficult questions
- Be non-judgmental.
- Make no assumptions.
- Have note-taker, if you can.

COLLECT EVIDENCE

Examples:

- Security Camera Videos
 - Text Messages
 - Social Media Communication
 - Email Messages
 - Phone Messages
 - Photographs
 - Records – electronic such as card swipes, computer log-ins, etc.
 - Room assignments, course schedules
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- 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.

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 – they are under no obligation to waive the privilege and provide records.

MANAGE 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.

MANAGE WITNESSES CON'T

- Be alert to globalizations – “Always” “Never” “Everyone” “No one.” Ask the follow up questions to get to the details.
- Be alert to embellishment – second or third hand information and opinions offered as facts. Again, delve deeper on the follow up questions.
- Be alert to someone with past grievances – a list of “wrongs” that are not directly related to the case.

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.

“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.

THE INVESTIGATIVE REPORT

Requirement: It must fairly summarize relevant evidence.

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

Draft Report: Provided to both parties and their advisors. They have 10 business days to respond. Incorporate anything parties provide into Final Report. Provide Final Report to TIX Coordinator, both parties and their advisors. They have 10 business days to respond. If the parties provide additional materials at that time, it goes as a separate document with cover letter to the Decision Maker, along with the report.

DRAFT REPORT REVIEW PROCESS

- Opportunity for parties to review any relevant evidence, gathered during the investigation, that is DIRECTLY RELATED to the allegations.
- Sharing of draft investigative report with parties prior to finalizing.

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 findings of fact**
- **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.

REVIEW OF RELEVANT EVIDENCE

Both parties have 10 business 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)

Any response to evidence must be submitted in writing by end of the 10 business day period, which investigator will incorporate before finalizing report.

REVIEW OF EVIDENCE CONT'D

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 business 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. This is a broad scope.**
- Only “relevant” information can be included in the report, therefore, parties can argue in their written response to the draft report 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. The parties 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.

RAPE SHIELD PROTECTIONS CON'T

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.

Investigator must include responses submitted from parties. Typically it is in a new section, noted that the materials/information were provided after the party reviewed the draft and evidence.

FINAL INVESTIGATIVE REPORT

Final version provided to the parties, their advisors, the 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.

- **Hypothetical**

Uri, age 19, alleges that Madly, age 24, invited her to a party in his off- campus apartment. She consumed vodka drinks with friends on campus and while at the party. Other students were at the party, including the friend she arrived with. Everyone left before she did, with the exception of Madly, who invited her, and one of his apartment mates, who is also a student. At 12:15am, Madly invited Uri into his bedroom.

- Thoughts?

- **Hypothetical**

After talking for a short period of time, they were both on the bed kissing, which was consensual. After time, Uri attempted to leave the room. Madly grabbed her by the waist and pulled her back onto the bed. When Uri said she wanted to leave, Madly told her she couldn't leave until he said she could. He then pushed her flat on the bed and held her arms over her head with one of his hands. She continued to say she wanted to leave, and he removed his pants and underwear and inserted himself into her. Uri gathered her belongings and left immediately afterwards, getting an Uber and returning to the res hall. She texted with her boyfriend and a friend about the incident. She went to the hospital the next morning and reported the incident to the police.

- Thoughts?

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