

5 Reminders for a Proper Investigation

The value of a proper investigation can't be overstated. A good investigation will:

1. Provide important safeguards to the parties' right to procedural fairness (due process)
2. Results in a solid investigation that will allow for a decision made based on the preponderance of the evidence (more likely than not)
3. Support the potential imposition of discipline (and any subsequent challenge to such discipline)

5 Reminders

1. Procedural Fairness (this is due process)

Good investigations are bound by principles of procedural fairness and entails an obligation to investigate the circumstances before making determinations of responsibility and imposing sanctions. Under the new Title IX regulations, the investigators do not make determinations of culpability or recommend/impose sanctions. This is primarily done to provide for a fair and unbiased investigation.

Every effective investigation must embrace four overarching principles:

- a. Neutrality.** Investigators must not have a personal stake in the outcome of the investigation or pre-judge the issue.
- b. Fairness.** Investigators have a duty to conduct investigations in a fair and impartial manner. "Fairness" depends on the circumstances of each investigation, but at a minimum, all parties involved must have the opportunity to provide all relevant information and to have the investigator consider it.
- c. Thoroughness.** Uncover all information necessary to make the proper decision and to ensure that conclusions are supported.
- d. Timeliness.** Act promptly to avoid further acts of wrongdoing.

2. Framework (this is part of setting the scope)

Implementing a systematic investigation framework helps ensure the overarching investigation principles are respected and the investigation is properly conducted. Setting the framework for the investigation requires a review of the:

- a. Objective.** Ensure you are clear about the investigation's objective from the outset—did the allegation take place? ← Keep it tight. This will guide your work

and reduces the likelihood the investigation will deteriorate into a fishing expedition and avoid wasted time and resources.

b. Scope. Determine the scope of the investigation early (see objective above). Limited to factual findings only. Don't go looking for other possible policy violations.

c. Timing. Over time, memories fade and documents are lost: start and complete the investigation as soon as possible. Don't let time pass!

3. Preliminary issues

The investigator should address any preliminary issues before embarking on the investigation interviews. These preliminary issues include:

a. Assessment. Assess the complaint by considering its nature, who's involved, and what policies come into play. This should be outlined in the Notice of Allegations letter—this is your guide. Follow it.

b. Witness Concerns. Often, one or more witnesses is reluctant to participate in an investigation. Make sure you are prepared to talk through these concerns and to direct them to the Title IX Coordinator for assistance.

c. Disclosure. Individuals involved are entitled to differing degrees of disclosure before they are interviewed. Consider the levels of disclosure, including notification letters.

d. Privacy. There is a difference between privacy and confidentiality. Make sure you know the difference and can explain it to your interviewees.

4. Interviews

The interviews are often the most crucial stage of the investigation because the investigator typically obtains most of their information here, and has the opportunity to gather all of the evidence related to the allegations.

Advance preparation is key to an interview that yields useful and credible evidence to aid in the investigation:

a. Who. Decide who to interview. Initially, the interviewees might be limited to the Complainant and the Respondent; others the investigator must interview typically becomes apparent after the initial interviews with the parties. The main factor determining who the investigator needs to interview is whether the person has information relevant to the objective of the investigation—to determine if the

allegations have merit. There's no requirement to interview everyone the parties put forward. Be smart in determining who will be interviewed.

b. When. It's common to interview the Complainant first, followed by the Respondent and then the witnesses put forth, and lastly any required follow-up interviews. But the investigator should remain flexible when deciding the order; the facts or concerns that witnesses might try to falsely corroborate each other's stories might suggest a different order.

c. What. Before the interview, prepare questions based on the understanding of the incident. Generally, the interview should start with "open-ended" questions (ones that don't suggest an answer) to the interviewee to give them the opportunity to provide their own account of the incident and possibly provide new information of which the investigator may not be aware when preparing the questions. Inevitably, the witness's answers will lead to additional clarification questions. It's important that the investigator seek very specific details with respect to times, dates, locations, individuals involved, and other witnesses.

d. Two investigator model: Two people together should interview each witness to allow better note-taking and to give the employer two witnesses to testify about the interviews if there's a subsequent hearing.

e. Preliminary Matters. At the beginning of each interview, the investigator should:

1. explain they are neutral fact-finders;
2. explain they are seeking relevant information the interviewee might have;
3. advise they are looking for facts, not personal opinion;
4. describe the nature of the complaint, providing only those details necessary to make the interview meaningful;
5. remind the interviewee of the importance of providing honest and accurate responses; and
6. explain the prohibition against retaliation.

f. Note-taking. Record the date, time and the names of the interviewee and anyone else present at the interview. All interview notes might be admissible in any future proceeding related to the complaint, so make all notes and records on the assumption they will be disclosed in the future: they must be credible, comprehensive and comprehensible and avoid any comments or notes that could be construed as prejudging the issue.

g. When meeting with the Complainant. Obtain a clear understanding of their view of what happened before, during and after the incident(s) and whether there were any witnesses (and who they are).

h. When meeting with the Respondent. Assure the subject that the investigation does not presume their guilt. Disclose the complainant's allegations and any material facts or evidence gathered during the investigation.

i. When meeting with witnesses. Advise witnesses about their impartial role in an investigation and provide enough information so the witness can comment on the incidents they may have observed, while limiting information that would reveal names and identities of those involved, if at all possible.

j. Take Stock. Assess the credibility of each witness during or immediately after the interview, noting divergences in the evidence and filling in any gaps to the greatest extent possible. This is when the investigator should determine whether they require any follow-up or additional interviews and schedule and conduct them accordingly.

5. Finalize the Investigation

Complete the investigation – conduct all necessary interviews and obtain all relevant documents – as soon as possible. Compile the investigative notes and work with the Title IX Coordinator to prepare the documents for the first inspection of and review of evidence.