

# SEXUAL MISCONDUCT INVESTIGATIONS

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HOW TO ANALYZE THE EVIDENCE AND WRITE THE INVESTIGATION REPORT

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# PROGRAM SCHEDULE - I

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- Review of the Fundamentals (JCD) (9:00-9:30)
- Small Groups (Review Complaint, Identify Policies, Material Fact Areas) (9:30-9:45)
- Collective Debrief (9:45-10:00)
- Small Groups (Investigation Plan – Witnesses (order), Evidence) (10:00-10:20)
- Collective Debrief (10:20-10:40)
- Complainant's Interview (Role Play) (10:40-11:00)

# PROGRAM SCHEDULE - II

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- Small Groups (Debrief Complainant's interview and impact on plan) (11:00-11:20)
- Break (11:20-11:35)
- Collective Debrief (11:35-12:00)
- Respondent's Interview Summary and Small Group Discussion (12:00-12:20)
- Witness Interview Summaries and Small Group Discussion (12:20-12:40)
- Collective Debrief (12:45-1:15)
- Lunch Break (1:15-2:00)
- Organizing and analyzing the evidence in the report (JCD) (2:00-2:30)
- Small Groups (Develop Findings and Rationales) (2:30-3:00)

# PROGRAM SCHEDULE - III

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- Collective Debrief (3:00-3:30)
- Additional Report Writing Tips (JCD) (3:30-3:45)
- Optional Q&A

# INVESTIGATION FUNDAMENTALS

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- Prompt
- Thorough
- Neutral

# DOCUMENTATION AND ORGANIZATION

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- Draft an investigation plan.
- Document your process (all attempts to interview witnesses and gather evidence).
- Document the reason for any delay(s).
- Maintain an organized file (transfer items sent via email to a folder; create PDFs of significant emails, etc.)

# OBJECTIVES OF THE INVESTIGATION

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- Identify and gather the relevant evidence
- Interact with the parties and witnesses in a respectful and attentive manner
- Analyze the evidence in a neutral and thorough way
- Draft a report that presents the evidence clearly and accurately
- Support all “findings” and “conclusions” with a detailed explanation of their bases

# WHAT ARE YOU **NOT** DOING?

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- Even after you have gathered all the evidence and given it careful thought, you may feel as though you do not completely understand what transpired between the parties.
- **Your responsibility is to determine whether the weight of the evidence supports the Complainant's allegations, not to determine exactly what happened.**



# AND ALWAYS REMEMBER....

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- Just because the evidence may not support a finding that the alleged misconduct occurred DOES NOT mean that the conduct did not occur or that it did not traumatize the Complainant.
- The investigator should not invalidate the experience or perspective of either party. The evidence should remain the focus.

# THE INVESTIGATION REPORT – FUNDAMENTALS I

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Start with an introductory section that sets out:

- who the parties are;
- when/how Complainant filed the complaint (or complaint came to be filed)
- what the gist of the complaint is (and where the reader can access the complaint document);
- what specific policy sections are implicated (and where the reader can find access to those);
- when/how the Respondent received notice;
- date of appointment of investigator (you may want to include statement re: conflict check)

# THE INVESTIGATION REPORT – FUNDAMENTALS 2

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Include a section that describes your process:

- Interviews conducted (and attempted)
- Tangible evidence (electronic, documents, photos, etc.)

# THE INVESTIGATION REPORT – FUNDAMENTALS 3

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The bulk of the investigation report is the Summary of Relevant Evidence.

This summary should accomplish the following:

- identify any undisputed material facts
- set out each party's account with respect to each material disputed fact
- set out any witness account or document that pertains to each material disputed fact
- **IF THE INVESTIGATOR HAS BEEN DIRECTED TO DO SO**, set out the Investigator's finding with respect to each material disputed fact and the evidentiary basis for that finding.

# THE INVESTIGATION REPORT – FUNDAMENTALS 4

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- Make sure you understand, as the investigator, whether you are expected to include findings re: disputed facts and/or recommendations re: policy violations in your report.
- Under Title IX, the investigator must not be the ultimate decision-maker as to whether a policy violation occurred. The investigator may make a recommendation as to whether there was a violation if the school directs the investigator to do so.
- If the sexual misconduct or discrimination/harassment falls outside the scope of Title IX, that law does not prohibit the investigator from making findings and determining policy violations.

# SMALL GROUP ACTIVITY (15 MINUTES)

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**Review the Complaint – assume you have also had an intake meeting that did not provide further details.**

**Which policies are implicated by the Complaint (what potential violations occurred?)**

**What are the material facts on which you will be focusing in this investigation? (Note – this is not a question about how you will elicit them, but rather what information you want to gather.)**



# COLLECTIVE DEBRIEF (15 MINUTES)

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# POLICIES IMPLICATED BY COMPLAINT

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- EO, Diversity and AA Plan (State Universities); Policy on AA, EO and Diversity (Community Colleges); UMASS Policy
- Sexual assault (consider rape, fondling, sodomy, sexual harassment) and read definitions carefully
  - Review the policy's definition of consent (must be informed, voluntary, freely and actively given and can be withdrawn at any time; prior relationship and/or consent does not imply present consent)
- Stalking
- Dating Violence?



# SMALL GROUP ACTIVITY (20 MINUTES)

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**Prepare your investigation plan.**

**Identify whom you will interview, as well as the order in which you will seek to do these interviews.**

**Identify other sources of relevant evidence.**



# COLLECTIVE DEBRIEF (20 MINUTES)

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# COMPLAINANT'S INITIAL INTERVIEW (20 MINUTES)

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# SMALL GROUP ACTIVITY (20 MINUTES)

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Complainant's interview:

- Did the Complainant's statements cause you to amend your investigation plan in any way?
- Did the Complainant's statements alter your thinking about what policies are implicated?
- Comments on particular questions and/or responses during the interview?
- Follow up questions?

# COLLECTIVE DEBRIEF (25 MINUTES)

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# RESPONDENT'S INTERVIEW (SMALL GROUP DISCUSSION – 20 MINUTES)

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Read Respondent's interview summary.

- What are the undisputed material facts?
- What material acts are in dispute?
- What follow up questions do you have?

# WITNESS INTERVIEWS (SMALL GROUP DISCUSSION – 20 MINUTES)

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Read each witness interview summary.

- What relevant information does this witness provide?
- What does this witness corroborate, if anything?
- Would you have asked some follow up questions on certain points?

# COLLECTIVE DEBRIEF (30 MINUTES)

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# ORGANIZING AND ANALYZING THE EVIDENCE – I

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- Get organized. Make sure you have followed up on any potential documents (texts, emails, photos that parties or witnesses have promised – or that you have requested from any source). Document your attempts to interview witnesses and obtain information – even if you received no response.
- Consider the timeline of events – where does the relevant period start? You will want to include enough background and context in the investigation report to orient the reader, but you do not want to include irrelevant details.

# ORGANIZING AND ANALYZING THE EVIDENCE – 2

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Divide the timeline into sections. For example:

The Parties' Interactions Prior to January 2019

The Parties' Interactions January 2019 – July 4, 2019

The Alleged Sexual Assault on July 5, 2019

The Parties' Interactions July 6, 2019-December 30, 2019

The Alleged Sexual Assault on December 31, 2019-January 1, 2020

The Parties' Actions and Interactions After January 1, 2020

# ORGANIZING AND ANALYZING THE EVIDENCE – 3

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The Summary of Relevant Evidence will contain these sections – and the sections may have subsections, if those would help focus and clarify the evidence. For example:

“The Parties’ Actions and Interactions After January 1, 2020” might have sub-sections:

The Complainant’s Conversation with Witness 4

The Parties’ Meeting on January 3, 2020

The Respondent’s Departure from the College

# ORGANIZING AND ANALYZING THE EVIDENCE – 4

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Once you have the timeline divided into relevant sections, organize the information in each section to reflect:

- Material undisputed facts
- Complainant's Account
- Respondent's Account
- Relevant Witness Accounts

Remember to only include in each of these sub-sections what the party or witness said about that particular period of time or event.



# ORGANIZING AND ANALYZING THE EVIDENCE – 5

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IF YOU ARE DIRECTED TO MAKE FINDINGS OF FACT, THESE WILL FOLLOW THE EVIDENCE SECTIONS AND DRAW FROM THEM.

- Entitle the Summary of Relevant Evidence, “Summary of Relevant Evidence and Investigator’s Findings.”
- Include a paragraph at the beginning of this section setting out the relevant standard of proof (ponderance of the evidence) and briefly explaining it.
- Place your findings at the end of each evidence section and explain the bases for them.

# FINDINGS DESCRIBE WHAT EVIDENCE SUPPORTS A DETERMINATION THAT THE ALLEGED FACTS OCCURRED

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For example, if a student alleges non-Title IX sexual harassment, you need to make findings as to whether the facts necessary to show sexual harassment under the policy occurred, and you need to explain how you arrived at those findings:

- Was the conduct sexual or gender-based?
- Was the conduct unwelcome?
- Was the conduct severe, pervasive and objectively offensive?
- Did the conduct interfere with the complainant's ability to participate in educational programs?

It is this work that is your analysis of the evidence.

# CREDIBILITY

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If you are making Findings, you are considering credibility. Credibility determinations should rest on the following:

- Was the party or witness (reasonably) consistent in his/her/their accounts (to you, witnesses, others)?
- Was the account detailed (but be careful to consider possible impact of trauma)
- Was the account corroborated or contradicted by other evidence?
- Was the account plausible?
- Did the party or witness have any motive to fabricate his/her/their account (other than a motive not to be found responsible)?

# FOR EXAMPLE

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The Investigator finds it more likely than not that the Respondent made unwelcome comments of a sexual nature to the Complainant on multiple occasions between April 5-June 30, 2022. This finding is based on the following subsidiary findings:

- The Complainant produced contemporaneous texts (dated April 5, 2022, May 16, 2022, June 2, 2022, and June 30, 2022) to the Respondent, in which she accused him of saying “gross” and “inappropriate” “things” to her and asked him to “stop harassing her;”
- The Respondent could not recall when he made comments to the Complainant but admitted that he might have said some “flirty things” to her;



# EXAMPLE CONT'D

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- Emily (a witness) stated that on May 17, 2022, the Complainant told her that she was “sick and tired” of the way the Respondent had been staring and winking at her in class every week, and that she couldn’t concentrate on what the professor was saying;
- The Respondent’s roommate Yves stated that the Respondent said he was going to keep “trying to get with” the Complainant because he believed she was sexually attracted to him; and
- The Complainant provided a detailed description of how she took lengthy measures to avoid running into the Respondent on campus; these were corroborated by her roommate, Olivia.

# SMALL GROUP ACTIVITY (30 MINUTES)

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Organize and analyze the evidence in the Brianna Wilson/Alex Ryder investigation.

# COLLECTIVE DEBRIEF (30 MINUTES)

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# REPORT WRITING TIPS – I

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- Focus on clarity, not creativity.
- Use names more than pronouns. Use “Complainant” and “Respondent.”
- When you do use pronouns get them right (so make sure to ask).
- Be consistent in references to witnesses (initials, last names, titles, etc.)
- Avoid the use of adjectives unless they are in quotes.
- Use quotation marks if you are quoting a party or witness.
- Indicate where an exhibit corroborates a point a party or witness makes – you can do this with a footnote.

# REPORT WRITING TIPS – 2

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Always remember what your objectives are:

- Be clear and accurate in your communication of the relevant evidence. Avoid irrelevant content.
- Explain the bases for any findings you make.
- Do not invalidate any party's perspective; speak in terms of what the evidence does or does not support.

# AND LASTLY....

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Proof your report at least once.

If you have someone else who can do this, all the better!

# OPTIONAL Q & A

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