

# TITLE IX INVESTIGATIONS

*Presented by:*

*Jessica H. Donahue Rhodes*  
*Title IX Coordinator*

Spring of 2023



# What is Title IX?

- ◇ Title IX of the Education Amendments of 1972 is a federal law that prohibits discrimination on the basis of sex in education programs or activities operated by recipients of federal financial assistance.
- ◇ Marshall University is a recipient of federal financial assistance.



# Proposed Amendments

- ◇ In June of 2022, Proposed Amendments to the Title IX Regulations were published
- ◇ Anticipated date of release for the new regulations was May of 2023
- ◇ Continue to follow current regulations, but know there could be a change



# The Law . . .

“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.”

MARSHALL UNIVERSITY



This Photo by

# Only 37 words in Title IX and the impact it has is profound.

- Regulations have a lot of language, but the basic law is only 37 words.



# Title IX Team

Title IX Team include:

- Title IX Coordinator (TIXC)
- Deputy Coordinators
- Title IX Investigator(s) (TIXI)
- Review Panel (the Decision-Maker)
- Informal Resolution Facilitator(s)
- Advisors



# TIXC is the Supervisor of the Investigation

TIXC is responsible for:

- Appointment/engagement of investigators
- Training Investigators and Review Panel (policy and appeal)
- Supervision of Investigators and investigations
- Helping investigators develop investigation strategy
- Coordinating supportive measures
- Timeline compliance
- Retaining records of all activities
- Can be an investigator, but not on Review Panel



# TIXC is the Supervisor of the Investigation

TIXC is responsible for:

- Documenting complaint
- Initial assessment
- Determining extent/footing/nature of investigation
- Notice of Investigation
- Notice of hearing
- Assurance of supportive measures/remedies
- Recordkeeping of all activities





# Steps of an Investigation

1. Receive Notice/Complaint
2. Initial Assessment and Jurisdictional Determination
3. Establish basis for investigation (Incident, Pattern, and/pr Culture/Climate)
4. Notice of Investigation
5. Establish investigation strategy
6. Formal comprehensive investigation
  - Witness interviews
  - Evidence gathering



# Steps of an Investigation

7. Draft Report
8. Meet with TIXC to review draft report and evidence
9. Provide report and all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
10. Complete final report
  - Synthesize and analyze relevant evidence
  - Send final report to TIXC who will send to parties for review and written response



# Cornerstone of resolution

- What happened?
- Who was affected?
- Stop and prevent
- Interim actions and supportive measures
- Scope, pattern, threats
- Documentation and recordkeeping
- "Not deliberately indifferent"



# Institutional purpose, but not to serve Institution

- Impartiality
- Transparency
- Equity
- Open and consistent communication
- Full and fair participation
- Published policy prohibitions
- Detailed procedures



# Broad Investigations

- Active identification and accumulation of evidence
- All relevant witnesses
- Evidence from all available sources
- Recommendations from parties
- Expert witnesses
- Prior substantially similar misconduct



# Investigation Process

- TIXI, with TIXC, strategizes the entire investigation, which includes timeline and goals
- Interview all witnesses
- Gather and assesses all available evidence
- Write a report
- Provide report to the parties for review, then edit as needed and provide final report and investigation file to TIXC



# Supportive Measures

- Provided to all parties throughout the process:
  - Non-disciplinary, non-punitive
  - Individualized
  - Restore or preserve equal access
  - Without unreasonably burdening other party
  - Protect safety of parties or environment, or deter sexual harassment
- Remedy on behalf of community, not just parties
- If supportive measures not provided, document why not



# Supportive Measure Examples

- Counseling and/or health Service referral
- Employee Assistance Program Referral
- Student financial aid Counseling
- Community education
- Altering housing assignment
- Safety planning
- Timely warnings
- Trespass orders
- Altering work arrangements for employees or student-employees
- Providing campus safety escorts
- Contact limitations (NCOs)
- Academic support, extensions of deadlines, or other course-related adjustments
- Increased security and monitoring of certain areas





**As an Investigator, you  
have no "side" other  
than the integrity of the  
process.**

MARSHALL UNIVERSITY



This Photo by

# What Does Title IX Cover?

Title IX prohibits:

1. **Sex Discrimination** or
2. **Sexual Harassment** (sexual harassment is unwelcome conduct of a sexual nature, including unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature)

MARSHALL UNIVERSITY



This Photo by

# Two Types of Sexual Harassment

## 1. Quid Pro Quo

- ▶ Employment or education decisions based on a request for sexual favors.
- ▶ “This for that.”



## 2. Hostile Environment

- ▶ Unwelcome conduct that
  - ▶ Unreasonably interferes with an employee’s ability to work or a student’s ability to learn,
- OR
- ▶ Creates an intimidating, hostile, or offensive work or learning environment



# Hostile Environment

Comes in the form of unwelcome conduct determined by a reasonable person to be **so severe and pervasive and objectively offensive (SPOO)** that it effectively denies a person equal access to an educational program or activity (i.e., hostile environment)

Could be comments made **to** the individual or **in the presence of** the individual



## Hostile Environment

"Reasonable person" goes to severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances ("in the shoes of the Complainant"), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced

Unwelcomeness is subjective and determined by the Complainant (except when Complainant is younger than the age of consent)

MARSHALL UNIVERSITY



## What is Severe?

- Physical conduct is more likely to be severe without the need for repetition
  - Sexual assault and many dating/domestic violence incidents are almost always sufficiently severe
  - Other physical conduct that does not meet sexual assault or dating/domestic violence definitions may rise to the level of "severe"
- Consider the circumstances (e.g., ability for Complainant to escape the harassment)
- Assess whether accompanied by threats or violence
- Assess whether there was a degree of embarrassment or humiliation



## What is Pervasive?

- Widespread
- Openly practiced; occurring in public spaces
- Well-known among students or employees – reputation of a department, person, etc.
- Frequency, intensity, and duration of the conduct
- Unreasonable interference with school or job
- A "gauntlet or sexual abuse"
- Incidents occurring in concert or with regularity are more likely to be considered pervasive
- Consider the specific circumstances and facts



## What is Objectively Offensive?

- Reasonable person standard in context
- "I know it when I see it . . ."
- Age and relationships of Complainant and Respondent
- Number of persons involved
- Frequency
- Severity
- Physically threatening
- Humiliating
- Intimidating
- Ridiculing
- Abusive





## Look at Totality of Circumstances

- Hostile environment analysis requires that you evaluate the "totality of the circumstances."
- In evaluating the totality of the circumstances, consider:
  - Frequency, nature, and severity of the conduct
  - Whether the conduct was physically threatening
  - Whether the conduct was humiliating
  - Identity of and relationship between the Respondent and the Complainant
  - Age and sex of the Respondent and the Complainant
  - Size of the school, location of the incidents, and context in which they occurred



## Look at Totality of Circumstances

- Totality of the circumstances to consider:
  - Effect on the Complainant's mental or emotional state
  - Whether the conduct was directed at more than one person
  - Whether the conduct unreasonably interfered with the Complainant's educational or work performance
  - Whether the statement was an utterance of an epithet which was offensive or offended by discourtesy or rudeness
  - Whether the speech or conduct deserves the protections of academic freedom or First Amendment protection
  - "Constellation of surrounding circumstances."

MARSHALL UNIVERSITY



This Photo by

## Examples of Sexual Harassment

(1) Direct or implied threats that submission to sexual advances will be a condition of advancement or promotion in any endeavor, including but not limited to employment, work status, promotion, or academic grades;

(2) Direct propositions of a Sexual nature;



MARSHALL UNIVERSITY



This Photo by

## Sexual Harassment (continued)

- (3) Unnecessary touching, hugging, or brushing against another person's body;
- (4) Sexually explicit statements, questions, bullying, or jokes; or
- (5) Remarks of a sexual nature about a person's clothing or body, sexual activity, sexual orientation, gender identity, or previous sexual experience.



## Sexual Misconduct

Any act of a sexual nature perpetrated against an individual without effective consent or when an individual is unable to freely give consent. Includes, but is not limited to:

- Attempted or completed intercourse or penetration (anal, oral, or vaginal), however slight, with any body part or any object, by one person upon another person, without effective Consent. This includes vaginal penetration by a penis, object, tongue or finger; anal penetration by a penis, object, tongue or finger; and oral copulation (mouth to genital contact or genital to mouth contact)
- Sexual touching (including disrobing or exposure), however, slight, with any body part or any object, by one person upon another person, without effective consent. This includes any contact with the breasts, buttocks, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts, which such touching would be reasonably and objectively offensive.



## Sexual Assault

An offense that meets the definition of rape, sodomy, sexual assault with an object, fondling, incest, or statutory rape. A sex offense is any act directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent.

- Rape means carnal knowledge of a person, without the consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
  - Happens regardless of age of victim if victim did not consent or if victim was incapable of giving consent. If victim was under the age of consent, it is statutory rape irrespective of whether the victim consented
  - Carnal knowledge is the act of an individual having sexual bodily connections, however slight, with another.
  - Where several offenders rape one person, each offender will be investigated, and information will be reported for each offender.



## Sexual Assault Continued

- Sodomy means oral or anal intercourse with another person, without the consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity
- Sexual Assault with an Object means using an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
  - An "object" or "instrument" is anything used by the offender other than the offender's genitalia, e.g., a finger, bottle, handgun, stick.

MARSHALL UNIVERSITY



This Photo by

## Sexual Assault Continued

- Fondling means touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- Incest means sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law in WV.
- Statutory Rape means sexual intercourse with a person who is under 16.

## Sexual Intimidation

- Sexual Intimidation means threatening to commit a sexual act upon another person, stalking, cyber-stalking, or engaging in indecent exposure





## Sexual Exploitation

Taking non-consensual, unjust or abusive sexual advantage of another, for one's own advantage or benefit; or to benefit or advantage anyone other than the one being exploited. Sexual exploitation encompasses a wide range of behaviors which may include, but are not limited to:

- Inducing incapacitation with the intent to rape or sexually assault a student or other individual;
- Non-consensual video or audio-recording of sexual activity;
- Allowing others to observe a personal act of consensual sex without knowledge or consent of the partner;
- Engaging in voyeurism;
- Knowingly transmitting a sexually transmitted disease, including HIV, to a student or other individual;
- Prostituting a student or other individual (e.g., personally gaining money, privilege, or power from the sexual activities of another individual)



## Domestic Violence

Felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the alleged victim, by a person with whom the alleged victim shares a child in common, by a person who is cohabitating with or who has cohabitated with the alleged victim as a spouse, by a person similarly situated to a spouse of the alleged victim under the domestic or family laws of WV, by any other person against an adult or youth victim who is protected from that person's acts under WV domestic or family violence laws.

- Spouse or intimate partner of the victim includes a person who is or has been in a social relationship of a romantic or intimate nature with the victim, as determined by the length of the relationship, the type of the relationship, and the frequency of interaction between the persons involved in the relationship.

MARSHALL UNIVERSITY



This Photo by

## Domestic Violence Continued

Also prohibited and means

- unlawfully and intentionally making physical contact of an insulting or provoking nature with one's family or household member(s);
- unlawfully and intentionally causing physical harm to one's family or household member(s);
- unlawfully attempting to commit a violent injury against one's family or household member(s); or
- unlawfully committing an act which place's family or household member(s) in reasonable apprehension of immediately receiving a violent injury.

Family or household members means persons who: 1) are or were married to each other; 2) are or were living together as spouse; 3) are or were sexual or intimate partners; 4) are or were dating: provided, that a casual acquaintance or ordinary fraternization between persons in a business or social context does not establish a dating relationship; 5) are or were residing together in the same household; 6) have a child in common regardless of whether they have ever married or lived together; or 7) have relationships such as parent, sibling, first cousins, etc.



## Dating Violence

Violence committed by a person:

- who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - the length of the relationship
  - the type of relationship; and
  - the frequency of interaction between the persons involved in the relationship.
- View of Complainant shall generally be controlling in determining whether such a relationship existed.
  - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - Dating violence does not include emotional abuse.



## Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- fear for the person's safety or the safety of others; or
- suffer substantial emotional distress.

"Course of conduct" means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property

"Reasonable person" means a reasonable person under similar circumstances and with similar identities to the victim.

"Substantial emotional distress" means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.



## Consent or Effective Consent

- Informed, freely and actively given, mutually understandable words or actions, which indicate a willingness to participate in mutually agreed upon sexual activity.
- In absence of mutually understandable words or actions it is the responsibility of the initiator, that is, the person who wants to engage in the specific sexual activity, to make sure that they have consent from their partner(s).
- Consent is mutually understandable when a reasonable person would consider the words or actions of the parties to have manifested a mutually understandable agreement between them to do the same act, in the same way, at the same time, with each other.
- Relying solely upon non-verbal communication can lead to miscommunication.
- It is important not to make assumptions.
- If confusion or ambiguity on the issue of consent arises anytime during the sexual interaction, it is important the initiator stop and verbally clarify the other individual's willingness to continue.



## Consent or Effective Consent Continued

- Consent may not be inferred from silence, passivity, or lack of active resistance alone.
- A current or previous dating or sexual relationship (or the existence of such a relationship with anyone else) may not, in itself, be taken to imply consent.
- Consent cannot be implied or inferred by attire, or from purchases made such as, the buying of dinner or the spending of money on a date.
- Consent to one type of sexual act may not, in itself, be taken to imply consent to another type of sexual act.
- Consent expires. Consent lasts for a reasonable time, depending on the circumstances.
- Consent to sexual activity may be withdrawn at any time, as long as the withdrawal is communicated clearly; upon clear communication, all sexual activity must cease.



## Consent or Effective Consent Continued

- Consent which is obtained by use of deception, fraud or force, whether that force is physical force, threats, intimidation, or coercion, is ineffective consent.
- Intimidation or coercion is determined by reference to the reasonable perception of a person found in the same or similar circumstances.
- Consent may never be given by:
  - Minors under the age of 16
  - Mentally disabled persons
  - Persons who are incapacitated as a result of alcohol or other drugs or who are unconscious or otherwise physically helpless.
  - Incapacitation means being in a state where a person lacks the capacity to appreciate the nature of given consent to participate in sexual activity.
- One may not engage in sexual activity with another whom one knows, or should reasonably have known, is incapacitated as a result of alcohol or other drugs.

MARSHALL UNIVERSITY



This Photo by



## Consent or Effective Consent Continued

- The use of alcohol or other drugs can have unintended consequences.
- Alcohol or other drugs can lower inhibitions and create an atmosphere of confusion over whether consent is freely and effectively given.
- The perspective of a reasonable person will be the basis for determining whether one should have known about the impact of the use of alcohol or drugs on another's ability to give consent.
- Being intoxicated or high does not diminish one's responsibility to obtain consent and is never an excuse for sexual misconduct.
- Forcible compulsion means
  - physical force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or
  - threat or intimidation, expressed or implied, placing a person in fear of immediate death or bodily injury to oneself or another person or in fear that oneself or another person will be kidnapped



# Retaliation

**Retaliation** = adverse action taken against an individual who, in good faith, exercises his or her rights under federal civil rights laws such as Title IX.

- Retaliation is strictly prohibited and will not be tolerated.
- Complainant, Respondent, or any witness.
- First Amendment speech is not retaliation.



## Overview of Investigation Before Starting

- The burden of proof and burden of gathering evidence rests with the school, not the parties
  - Recipient, not Respondent, must prove unwelcomeness or non-consent
- Title IX regs required presumption of Respondent being "not responsible."
- Equal opportunity to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
- Evidence collected by law enforcement or any other source
- Interview parties and witnesses as soon as possible to ensure recollections are as fresh and accurate as possible



## Timeframes to Conduct Investigation

- Marshall policy and procedures gives timeframe to complete investigation 60 calendar days from date of Notice of Investigation.
- Extensions are allowed with good cause
  - Good cause could be absence of a party, absence of a party's advisor, concurrent law enforcement activity, language assistance, or accommodation of disabilities
- Extension must be in writing and contain the rationale



## Informal Resolution

- Allowed at any time prior to a final determination at discretion of TIXC
- Voluntary written consent of the parties
- TIX Regs preclude informal resolution of allegations that an employee harassed a student



## Advisor

- Advisor can be anyone, including attorney, parent/guardian, friend or witness
- A University appointed advisor is appointed prior to investigation, but the parties can choose their own and the University appointed advisor will be relieved



## Managing Expectations

- TIX Cases usually end with one party not happy, but you can help to manage the parties' frustration.
- Treat everyone objectively and fairly.
- Provide ample opportunity for interviewee – especially Complainant and Respondent – to ask questions.
- Be sure Complainant and Respondent understand parameters of the policy, what it does and does not cover, how to process may play out, and what the process can and cannot accomplish through outcomes.

MARSHALL UNIVERSITY



This Photo by

## Explaining Roles

- Explanation of Investigator role
  - Neutral fact-finder
- Explanation of others' roles in the process
  - Review Panel
  - Appeal Officer
  - Advisors (for all parties)
- Whether you are recording and what will happen with the recording
- Expectations of the interviewee





## Process

- Incident
- Initial Assessment
- Formal Investigation & Report
- Hearing
- Appeal

### Standard of Evidence

- Preponderance of the Evidence
  - More likely than not
  - 50% plus a feather



## Strategy

- TIXC and TIXI strategizes throughout the entire investigation
  - What are the issues presented?
  - Are there undisputed facts?
    - Which ones are significant to the investigation?
  - Are there facts in dispute?
    - Which ones are significant to the investigation?
  - What policy(s) elements may have been violated?



## Strategy

Additional questions to consider

- Whom to interview?
- When/in what order?
- What information/evidence can be obtained?
- How do we maximize the quantity/quality of evidence?
- How and when do we notify witnesses?
- Who needs to be aware of the investigation?
- When and how do we share evidence/information with the parties?



## Other Strategy

- Strategize when to interview Complainant and Respondent
- What are the key issues involved?
  - What additional strategies do you need to address key issues?
- What additional documentary evidence will be important to the investigation?
- Discuss your methodology for this case (which approach will you use?)
- Timeline (within 30-60 days)



## Strategy Exercise

1. Read the intake report
2. Review institutional policies and procedures
3. Identify important items to clarify with TIXC
4. Identify facts central to the allegations
5. Develop an initial witness list
6. Plan initial interview order and schedule

### The Environment for Interviews

- Where will the interview be conducted? Via Teams?
- Make sure there is a neutral environment, minimize distractions, Sit in their chair, check lobby/waiting area for distractions and "hidden messages," and privacy



# Investigator

- Maintain professionalism, but balance with relaxed atmosphere
  - Attire
  - Demeanor
- Investigator is an extension of the environment
- Investigator neutrality is key but should be balanced with compassion
- Maintain good eye contact and comfortable, open body language
- Work to establish a baseline of relaxed conversation
- Maintain good eye contact
- Listen carefully to the answers to your questions
  - Avoid writing while party/witness is talking, if possible
  - Do not be thinking about your next question while party/witness is talking
- Ask questions in a straightforward, non-accusatory manner
- Nod affirmatively and use active listening skills to prompt or  
Keep party/witness talking



## Investigator Continued

Rapport is one of the best tools for gathering reliable information.

- A relaxed interviewee (not on guard) is more forthcoming, less scripted, more introspective, and thoughtful
- Reduce anxiety
- Eliminate antagonism
- Gain trust
- Use non-judgmental/non-blaming language
- Avoid re-traumatization, but still must ask necessary questions



## Interview

- Be sure Complainant and Respondent understand the parameters of the policy, what it does and does not cover, how the process works, and what the process can and cannot accomplish
- Discuss thoroughness and the need for completeness; make sure they don't leave facts out (i.e., alcohol/drug use). Explain amnesty policy, if applicable.
- Create comfort with language and sensitive subjects.
- Establish rapport before questioning.
- Document whether individual is cooperative or resistant.
- Be professional: gather the facts, make no judgments, and make no unnecessary statements about the parties





## Interview Continued

- Take their statement from start to finish through a process of broad to narrow questions and issues that need to be addressed.
- Ask questions about the allegations, the evidence, and the policy elements.
- Focus on areas of conflicting evidence or gaps of information.
- Drill down on timelines and details.
- Don't leave a question or gap unanswered.
- Pay attention to alcohol/drug consumption and timing of consumption, if relevant.
- Allow enough time
- Use breaks strategically
- Remain calm and professional



# Questioning

- Take the complaint from start to finish through a process of broad to narrow questions and issues that need to be addresses.
- Prepare an outline of your questions in advance
  - Ask questions about the allegations and the evidence and the policy elements
  - Focus on areas of conflicting evidence or gaps in information
  - Drill down on timelines and details
  - Review your questions before ending interview
- Acknowledge they may have told others what happened multiple times already and determine who that may be
- Ask if they or others they are aware of have written about this in any fashion:
  - Blog / Facebook / Twitter / Social Media / Writings / Texts / Videos



## Questioning Continued

- Pay attention to alcohol/drug consumption and timing of consumption
- Be cognizant of the difference between what was "heard" (rumor) and what was "witnessed" (facts)
- Ask who else you should talk to and ask for any relevant documentation (i.e., texts, emails)
- Discuss non-retaliation
- Discuss FERPA issues

During the interview, let them talk. Give them a starting point if they don't have one. Drill down details later. Interrupt for questions only when you must.



## At the End of Questioning

- What else do you think might be important for us to know?
- What other questions are there that you thought we might ask that we didn't?
- Ask who else you should talk to and ask for any relevant documentation (i.e., texts, emails, etc.)
- Is there anything you want me to ask the other party (or any witness)?
- If you have not ascertained this, try to determine what Complainant's motivation is for reporting and what Complainant hopes to see as a result, but be careful.



## Bias and Prejudice

### **Bias**

- A preference or tendency  
To like or dislike
- A cognitive process
- A thought process developed over time through repeated personal experience
- Implicit or explicit
- Formed from stereotypes, societal norms, cultural experience, expectations of the people around you

### **Prejudice**

- A preconceived opinion that is not based on fact, reason, or actual experience
- Can be classified as cognitive prejudice, affective prejudice and conative prejudice
- Can include injury or damage as a result of some judgment or action of another in disregard of one's legal rights



## Bias and Prejudice

- Gender Bias
  - Showing favoritism toward one gender identity/expression over another
- Racial Bias
  - Showing favoritism toward one race over another or associating negative traits toward one race over another
- Confirmation Bias
  - Interpreting ambiguous evidence to support one's own opinions or existing position
- Affinity Bias
  - The unconscious tendency to gravitate toward those who have similar identities to us



## Impact of Bias in Investigations

- Effects Investigator's perception of parties and witnesses
- Impacts the ability to build rapport, connect, and create safe/neutral spaces for all participants throughout the investigation
- Creates risk of flawed decision-making when collecting evidence and questioning participants
- Written materials become subjective and include biased language
- Presents moments for assumptions not based on evidence to be made during the investigation
- Increases opportunity for a party to successfully litigate
- Reticence to ask needed questions, pursue evidence, or

MARSHALL UNIVERSITY



This Photo by

## Impact of Prejudices in Investigations

- Creates tension within the investigation and the process
- Presents risk of discriminatory actions/behaviors toward parties
- Ability to stop, prevent, and remedy diminished
- Can create a hostile environment
- Threatens equal access to the institution's educational program, activity, or employment
- Problematic and damaging to institutional culture





## Bias and Prejudice Common Identities Impacted

- LGBTQIAA2SP+
- Gender identity/Expression
  - Example: Nonbinary identities
- Race
  - Example: BIPOC
- Ethnicity
  - Example: International students/employees
- Religion
  - Example: Muslim
- Athletes
- Fraternity and Sorority Members



# Conflicts of Interest

- Conflicts of interest create role confusion that can compromise impartiality and objectivity
- Types of conflicts:
  - Situational conflicts
    - Wearing too many hats in the process; making more than one substantive decision in the same matter
  - Positional conflicts
    - Divided loyalties; lack of independence
  - Legal counsel on Review Panel
  - Non-impartial Review Panel or Appeal Officer
- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest; the question is whether the knowledge/familiarity compromises objectively
- Previously disciplining a student or employee is often not a conflict of interest, inherently



## Recognizing Issues

- Self-recusal – if you have conflict or bias, speak up.
- TIXC provides oversight of investigation and hearing
  - Strategy meetings
  - Regular check-ins
  - Report review
  - Insulation against internal/external pressures
- Allow parties the opportunity to challenge Investigator and Review Panel
  - Replacement of personnel
  - Redo portions of grievance process
  - Anticipate questions about your credentials/bias at the hearing
  - When bias is disqualifying, fix it.
- Appeal process can address bias.



# Gather Evidence, Assess Credibility, & Synthesize the Information

## GATHER THE EVIDENCE

- Collect the evidence from all sources
- Organize it according to the investigation strategy and allegations
  - Chronology
  - Geography
  - Policy prohibitions
  - Alleged violations
- Summarize evidence in a written report



# Gather Evidence, Assess Credibility, & Synthesize the Information Cont.

## ASSESS CREDIBILITY

- Accuracy and reliability of information
- "Credible" is not synonymous with "truthful"
- Memory errors, evasion, misleading may impact
- Primary factors: corroboration and consistency
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility
- Trauma-informed approach should be consistent



# Gather Evidence, Assess Credibility, & Synthesize the Information Cont.

## COMMON ERRORS IN ASSESSING CREDIBILITY

- Misplaced emphasis on nonverbal indicators of deception such as nervousness/anxiety
- Misplaced emphasis on inconsistency of information provided by an interviewee
  - Research shows truthful memory recall includes the natural omission or subsequent recollection of details
- Confusion about memory
  - Stress and emotion may lead to enhancement of memory or to the disruption of encoding and retrieval processes
- Misplaced focus on the status of the parties
  - No scientific studies support the notion of neurobiological response differences between perpetrators and victims
- Bias in interviews
  - Presumptions of guilt can influence credibility assessments

MARSHALL UNIVERSITY



This Photo by

# Gather Evidence, Assess Credibility, & Synthesize the Information Cont.

## CREDIBILITY OVERVIEW

### Corroboration

- Aligned testimony and/or physical evidence.

### Inherent Plausibility

- "Does this make sense?"
- Be careful of bias influencing sense of "logical."

### Motive to Falsify

- Do they have a reason to lie?

### Past Record

- Is there a history of similar behavior?

### Demeanor

- Do they seem to be lying or telling the truth?



# Gather Evidence, Assess Credibility, & Synthesize the Information Cont.

## Corroborating Evidence

- Strongest indicator of credibility
- Independent, objective authentication
  - Party says they were in class, teacher confirms
  - Party describes text conversation, provides screenshots
- Corroboration of central vs. environmental facts
- Not simply alignment with friendly witnesses
- Can include contemporaneous witness accounts
  - More "separate" the witness, greater the credibility boost
- Outcry witnesses
  - Does what party said then line up with what they say now?
- Pay attention to allegiances
  - Friends, teammates, group membership
  - This can work both directions (ex. honest teammate)





# Gather Evidence, Assess Credibility, & Synthesize the Information Cont.

## Inherent Plausibility

- Does what the party described make sense?
  - Is it believable on its face?
- Is it believable on its face?
- "Plausibility" is a function of "likeliness"
  - Would a reasonable person in the same scenario do the same things?  
Why or why not?
  - Are there more likely alternatives based on the evidence?
- Is the party's statement consistent with the evidence?
- Is their physical location or proximity reasonable?
  - Could they have heard what they said they heard?
  - Were there other impediments? (darkness, obstructions)
- How good is their memory?
  - Temporal proximity based on age of allegations
  - "I think," "I'm pretty sure," "It would make sense"



# Gather Evidence, Assess Credibility, & Synthesize the Information Cont.

## Motive to Falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
  - Think academic or career implications
  - Personal or relationship consequences
- What if the allegations are false?
  - Other pressures on the Complainant – failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

MARSHALL UNIVERSITY



This Photo by

# Gather Evidence, Assess Credibility, & Synthesize the Information Cont.

## Past Record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
  - Marshall allows prior or subsequent conduct of Respondent to be considered in determining pattern, knowledge, intent, motive, or absence of mistake
  - Regardless of whether there has been a prior finding of a policy violation
  - Determination of relevance of pattern evidence will be based on an assessment of whether the previous or subsequent conduct was substantially similar to the conduct under investigation or indicates a pattern of similar prohibited conduct
  - Investigator determines relevance of this information and both parties will be informed if evidence of prior or subsequent conduct is deemed relevant
- Check record for past allegations
  - Even if found "not responsible," may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship



# Gather Evidence, Assess Credibility, & Synthesize the Information Cont.

## Demeanor

- Is the interviewee uncomfortable, uncooperative, resistant?
- Certain lines of questioning – agitated, argumentative
- Be careful
  - Humans are excellent at picking up non-verbal cues
  - Humans are terrible at spotting liars
- Look for indications of discomfort or resistance
- Make a note to dive deeper, discover source



# Gather Evidence, Assess Credibility, & Synthesize the Information Cont.

## SYNTHESIZE THE INFORMATION

- Examine only actions that have a direct relation to the situation under review or a pattern of incidents
- Narrow the scope to areas in dispute or disagreement between the parties
  - Contested and uncontested facts
- Use evidentiary and report review periods to clarify disputed facts
- Present evidence in report organized around facts relating to alleged policy violations
- Contested facts will form the bulk of the Review Panel's work in making a determination



## Record keeping

- Assemble an investigation file and keep in secure location
- Records of all contacts, including emails and phone calls with all parties
- Date all records and include who was present at any meetings
- Document any refusal to answer, evasion, or refusal to participate
  
- Prior to completion of the investigation report, all evidence related to the allegations must be provided to the parties and advisors
  - Parties have 10 days to review and submit written responses prior to finalizing investigation report
  - Based on that, release Draft Report at least 3 weeks prior to 60 day deadline to allow response time and any corrections



## Big Picture

- Sex-based discrimination and harassment is not permitted at Marshall University
- Once Marshall learns of the conduct, it is required to take action
- People who are targets of such misconduct have rights
- People who are accused of such conduct *also* have rights
- Marshall University strives to balance compliance with the law, and fairness to the people involved





Any Questions?

Additional concerns or requests?

Please contact

Marshall University  
Title IX Office

---

Jessica H. Donahue Rhodes, Esq  
Title IX Coordinator

