





# SPEAKERS

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Megan often speaks at national conferences on such topics as compliance, employment law, and managing risk. She also coaches leaders in these organizations to achieve strategic objectives and obtain optimal performance from staff.

# TABLE OF CONTENTS

## Conducting Title IX Investigations

	<u>Page</u>
I. INTRODUCTION.....	1
II. THE IMPORTANCE OF DEVELOPING EFFECTIVE INVESTIGATION SKILLS.....	3
III. YOUR INITIAL MEETING WITH THE PERSON RAISING THE ISSUE.....	9
IV. DECIDING IF A FORMAL INVESTIGATION IS NECESSARY.....	23
V. INVESTIGATING DIFFERENT KINDS OF ISSUES.....	29
VI. ORGANIZING AND PLANNING THE INVESTIGATION.....	33
VII. INTERIM ACTIONS.....	39
VIII. PREPARING FOR AND CONDUCTING AN EFFECTIVE INVESTIGATION.....	47
IX. REACHING A CONCLUSION.....	77
X. MAKING A RECOMMENDATION.....	81
XI. DOCUMENTATION RETENTION.....	76
XII. ATTORNEY CLIENT PRIVILEGE.....	79
XIII. SUMMARY CHECKLIST.....	83
XIV. CASE STUDY.....	89

NOTE: The information provided in this training material is intended to assist you in performing investigations for your institution. Included is a list of some of the possible steps that can be taken. The steps actually taken or not taken will depend on the characteristics and issues involved in the investigation being conducted.



# INTRODUCTION

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Course Objectives

# INTRODUCTION

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## Legal Standards of Proof

### Legal Standards of Proof

™ Beyond a reasonable doubt

™ Clear and convincing evidence

™ Preponderance of the evidence



# The Importance Of Developing Effective Investigation Skills



# THE IMPORTANCE OF DEVELOPING EFFECTIVE INVESTIGATION SKILLS

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## Conducting Title IX Investigations

- I. Introduction And Overview  
The Importance of Developing Effective Investigation Skills

In order to comply with Title IX Clery/Campus

# THE IMPORTANCE OF DEVELOPING EFFECTIVE INVESTIGATION SKILLS

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## Conducting Title IX Investigations

The standard that Office for Civil Rights (OCR), the federal agency that enforces

# THE IMPORTANCE OF DEVELOPING EFFECTIVE INVESTIGATION SKILLS

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## Conducting Title IX Investigations

Clery/Campus SaVE does not establish a standard of proof but instead requires that students be informed of the standard of proof that will be heard. The difference in the requirements between Title IX and Clery/Campus SaVE does not authorize institutions to ignore the requirements of either. As a result, OCR expects institutions to notify students and others that they will use a preponderance of the evidence standard in deciding if sexual misconduct occurred.

Sometimes investigators worry that if they are not certain what occurred, they cannot reach a conclusion or make a recommendation. In fact, in most instances, investigators (and decision makers) will not be absolutely certain. However, an investigator who is reluctant or unwilling to make a recommendation or reach a conclusion unless the investigator is 100% certain is using a higher standard and is not following the requirement to reach conclusions based on a preponderance of the evidence standard.

### 3. Negligent Investigation Claims

As noted earlier, when an individual challenges an institution's decision to terminate a student for alleged misconduct under a contract or statutory theory, the quality of the institution's investigation and the duty owed to the individual under state law will determine whether the institution could have liability. In general, the investigator's duty is likely to be to the institution, which would preclude those investigating from challenging its quality. However, because of the statutory duties created by Title IX and Campus SaVE, it is possible the investigator could have some duty to the parties, especially the complaining student. If a court concludes the institution had a duty to one of the parties, it is likely that a court would consider, on a case by case basis whether there was reasonable grounds to support the institution's decision. In evaluating the investigation, a court might consider if the investigator demonstrated deliberate indifference in conducting the investigation rather than whether the court would have investigated the manner in the same way. Thus, even if an individual can Tc(rather) The 7/17/2015 4:05:30 PM

# THE IMPORTANCE OF DEVELOPING EFFECTIVE INVESTIGATION SKILLS

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## Conducting Title IX Investigations

maintain that an institution has a qualified privilege to make statements about individuals in the workplace if the statements are made: (1) in good faith; (2) on a subject in which the party communicating the information has an interest; and (3) to individuals having a corresponding interest. If these elements are established, the individual cannot prevail merely by showing that the statements were actually false; rather, the individual must show that the institution or investigating individuals made the statements regarding the misconduct **with malice**— knowledge or reckless disregard as to the truth or falsity of the statements. While the malice standard uses different terminology

# The Initial Meeting With The Person Raising The Issue





# THE INITIAL MEETING

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## Purpose & Objective

### Initial Meeting: Purpose & Objective

- z Identifying all issues
- z Gathering all material facts
- z Determining if formal or informal investigation is needed
- z Instilling confidence in the system and you

When an individual initiates a discussion with you regarding an issue he or she is concerned about, it is critical that you respond properly. After ascertaining the general nature of the issue, **MAKE SURE THE INDIVIDUAL FEELS COMFORTABLE THAT YOU CAN BE OBJECTIVE IN ADDRESSING THE ISSUE.**

### Is the person

# THE INITIAL MEETING

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## Purpose & Objective

issue that needs attention. An internal investigation can result from these situations as well.

### Gathering The Evidence

At this point, you are

# THE INITIAL MEETING

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## Before Concluding the Interview

**What should you do before concluding the interview?**

- z Thank the person raising the issue for doing so.
- z Inform the person raising the issue that the institution does not permit any retaliation or reprisal due to a legitimate issue having been raised.
- z Advise the individual that in the event there is a need to undertake an investigation, he or she will be apprised of this fact and will be told who will be conducting the investigation.
- z Tell the individual that you will limit the

# THE INITIAL MEETING

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## Prior To Starting An Investigation

### Discuss with the Title IX Coordinator the following:

- ◁ Whether the issue(s) raised merit an investigation;
- ◁ Whether or not your legal counsel should be contacted to discuss the possibility of protecting all or part of the investigation under the Attorney Client Privilege; and
- ◁ Which documents the Title IX Coordinator would like to review prior to being finalized or sent to the individuals involved in the investigation.

## Two Critical Documents To Generate After Initial Interview

### INDIVIDUAL GENERATED DOCUMENTATION

- ◁ Encourage the individual raising the issue to write down his or her side of the story in order to:
  - ' avoid misunderstandings and
  - ' ensure that you correctly understand all of the facts and issues raised

### INSTITUTION GENERATED DOCUMENTATION

- ◁ An "issue confirmation" memo serves to:
  - ' memorialize all issues and facts raised
  - ' avoid misunderstandings and to confirm with the individual his or her story and facts

# THE INITIAL MEETING

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# THE INITIAL MEETING

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Institution  
Generated  
Documentation  
Checklist

Issue Confirmation Memo

# THE INITIAL MEETING

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Writing Sample

CONFIDENTIAL

Date:

THE



# THE INITIAL

# THE INITIAL MEETING

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## Documentation

### Confidentiality

- z Information necessary for people to conduct the investigation or to take any action as a result of the investigation; and
- z Information to be shared during the investigation in order to obtain more information.

If a person needs to know one piece of information in a document, share only that information rather than disclose the whole document.

z Remember: FERPA may require disclosure of a student's education records to that student.

### Documentation Provided in Confidence

Individuals have a right to privacy. Institutions, however, have an obligation to investigate and resolve certain claims. These competing rights and obligations must be weighed and balanced to determine what and how much information will be shared.

# THE INITIAL MEETING

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## Understanding the Role of the Title IX Coordinator

### Understanding The Role of the Title IX Coordinator In The Investigation Process

- ™ The Title IX Coordinator's primary responsibility is to see to it that things get done fairly and effectively and in compliance with Title IX.



# Deciding If A Formal Investigation Is Needed



# DECIDING

# DECIDING IF A FORMAL INVESTIGATION IS NECESSARY

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## When is a formal investigation necessary?

Do you need to obtain the help of anyone having special expertise in order to reach a conclusion?

- ™ Your in house or outside legal counsel?  
e.g., is a local, state, or federal law involved?
- ™ Campus Safety?

If you need more information that can come only from interviewing additional sources, the issue raised by the individual will probably not be susceptible to an informal resolution. Issues that lend themselves to informal resolution include those that stem from a misunderstanding of the institution's policies or guidelines, or receipt of misinformation by an individual. These kinds of issues usually can be resolved immediately between the Title IX Coordinator and the individual.

However, when it is necessary to speak to other people and/or to review documents in order to reach a conclusion or resolve a problem, you will probably need to initiate an internal investigation.

An investigation, by definition, is the collection of facts from sources other than the person raising an issue in order to help you reach a conclusion. Thus, if you can readily and easily resolve an issue with an individual "on the spot" or with very little effort, an investigation usually is not warranted. If you need additional information that will require the involvement of other sources, an investigation likely is necessary.



## DETERMINING IF



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# INVESTIGATING DIFFERENT KINDS OF ISSUES

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## Identifying Special Considerations with Regard to Varying Kinds of Issues

### Key Considerations

- ™ What are the **issues** the individual is raising?
- ™ What are the institution's **obligations** (legal and organizational) with respect to these issues?
- ™ Are there **others** inside or outside the institution with whom you should **consult** to resolve these issues?

### Understanding Your Responsibility With Regard To Various Issues That Merit An Internal Investigation

Obviously, different issues are handled differently. The nature of an issue determines how it is handled. As a result, before initiating an internal investigation, you must fully understand the nature of the issue and any **SPECIAL** obligations the institution may have with respect to the issue.

**BEFORE** you initiate an investigation, specifically **identify** what the individual is complaining about (i.e., sexual harassment, stalking, sexual assault, discriminatory application of an institution policy based on sex, etc.) and then determine **what** your obligation is with respect to resolving this issue, and **who** else in the institution is necessary to assist you in resolving the issue. Only after you have determined the answers to these questions are you ready to begin planning your investigation.

# INVESTIGATING DIFFERENT KINDS OF ISSUES

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## Sexual Harassment Investigations

### Sexual Harassment Investigations

As you know, sexual harassment issues involve special consideration. Your institution has a responsibility to investigate all allegations of sexual harassment. Once the institution knew or should have known that sexual harassment is/was occurring, it has the legal obligation to do everything

# Organizing And Planning The Investigation







# ORGANIZING AND PLANNING THE INVESTIGATION

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Choosing An

# ORGANIZING AND PLANNING THE INVESTIGATION

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## Planning the Interviews

### Deciding Who Should Be Interviewed

- ™ The individual filing the complaint
- ™ The individual who is the subject of the complaint
- ™ Percipient witnesses
- ™ Anyone with relevant information
- ™ Authors of relevant documents
- ™ People who the **accuser** has asked you to interview
- ™ People who the **accused** has asked you to interview

### Deciding The Order Of Your Interviewees

- ™ Is



# Interim Actions



# INTERIM ACTIONS

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## Key Considerations

After completing your initial interview with the person raising the issue,





# INTERIM ACTIONS

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## Notice of Administrative Leave

to this matter and that you have not already provided, please provide it immediately.”

“This is a confidential investigation. You must not discuss this investigation with any person who does not have a legitimate need to know this information. If you have any questions or concerns about this requirement at any time, please feel free to discuss it further with me.”

<sup>TM</sup> Explain how coordinating the individual's return to the institution will be handled, i.e.:

"Your advisor will call you on Monday to discuss whether or not you should come in on Tuesday."

# INTERIM ACTIONS

## Writing Sample

**CONFIDENTIAL**

Date: December 10, 2014

To: Elaine Smith

From: Jessica Lee  
Title IX Coordinator

Re: Administrative Leave Notification

As we discussed, the institution is investigating concerns that you may have violated our policies. Pending the outcome of this investigation, you have been placed on administrative leave, with full pay and benefits.

As I informed you, I will be the person investigating these concerns.

We also discussed what you can expect as I conduct the investigation. I will review the information and documentation you provide to me. As appropriate, I will consult with other individuals and managers to assist in addressing and resolving the issues. And I will strive to keep you informed of the progress of this investigation.

I want to emphasize some of our expectations of you during this investigation. If you have any questions or concerns about any of these expectations, or about any part of this investigation, please contact me immediately. The expectations for you include the following:

- ◁ You are expected to cooperate fully throughout the investigation, and be completely honest in answering questions and providing information to the institution.

# INTERIM ACTIONS

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Writing Sample



# Preparing For And Conducting An Effective Investigation





# DOCUMENTATION

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## Notes

**Be Sensitive To The Fact That Being Interviewed As Part Of An Investigation Can Be Quite Stressful For The Interviewee**

Generally, the person conducting the investigation is aware of the big picture. You know what it is you are investigating. You have access to all of the information that the investigation uncovers. You know the part that each interviewee is playing in the investigation. You know why the interviewee is being interviewed and the allegations.

Usually, the interviewee does not have all the facts you do. He or she, therefore, may be uncomfortable and may ask or say:

- ™ Am I being investigated?
- ™ What are you really investigating?
- ™ How will you use the information you are given?
- ™ Is it confidential?
- ™ Will I get into trouble if I don't talk with you?
- ™ Can I have someone with me?





# DOCUMENTATION

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## Notes

### **Stress That No Conclusion Has Been Reached**

All too often, an individual feels that, although you are purporting to conduct an investigation, you already have made up your mind and are merely “going through the motions” in order to give the appearance of fairness. Communicate to the individual that no conclusion has been reached.

# DOCUMENTATION

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## Notes

### Protect The Integrity Of The Investigation

In order to protect the integrity of the investigation, the information you receive from witnesses or others absolutely must be accurate and truthful. The following steps will assist in this endeavor:

- ™ Explain to the interviewee the seriousness of the investigation.
- ™ Explain the importance of receiving accurate/truthful information.
- ™ Explain that you do not want speculation or opinion. You want to know what the person knows first hand.
- ™ Explain that the investigation is confidential but not secret. Explain how information is shared.
- ™ Explain that attempting to influence the outcome of the investigation by discussing it with others will undermine our efforts to have a neutral investigation and could call the interviewee's credibility into question.



# DOCUMENTATION

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## Notes

**Notes**

Notes should record only the facts, giving a

# MEETING WITH THE ACCUSED

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# MEETING WITH THE ACCUSED

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## Effective Questioning

Knowing how to ask questions is the heart of doing an effective investigation.

Knowing how to ask questions can be learned. Keep these points in mind:

- ™ Effective questioning begins before your first interview.
- ™ Before you formulate your questions, be sure you understand the policy or guideline that forms the basis of the issue or that will be critical in reaching a resolution of the issue.
- ™ Understand what facts are necessary for you to reach any conclusion or make any resolution.

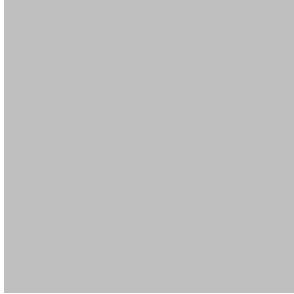
Determine what written documents will probably be available to assist you in reaching a conclusion or at least in shedding light on certain facts.

ask questions in

# MEETING WITH THE ACCUSED

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Effective Questioning





# MEETING WITH THE ACCUSED

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# INTERVIEWING WITNESSES

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# INTERVIEWING WITNESSES

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## Closing The Interview

Develop a standard “close” to an interview. This should include:

- z Asking the interviewee if there is anyone else he or she thinks you should talk to who would have information that might assist you in reaching a resolution.
- z Reviewing the interviewee’s answers with him or her before closing the interview so that you agree on what was said.
- z Instructing the person that if he or she remembers additional information after the interview, he or she should give you these additional facts. Stress that everyone forgets things from time to time.
- z Telling the person that if he or she has or learns of additional documents, he or she should provide those to you.
- z Re-emphasizing the confidentiality of the investigation.
- z Answering any questions the person may have.
- z Explaining what will happen with regard to the investigation from this point on. (In most cases, it would be appropriate to share only the broad outlines of future activity, e.g., “I will be speaking to other people in order to conclude my investigation.”)

# ASSESSING CREDIBILITY

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## Assessing A Person's Credibility

As soon as the interviewee leaves the room, make some notes that will help you assess his or her credibility later on. Factors that may help assess credibility are quickly forgotten. Run through the following checklist as soon after the interview as possible:

## Demeanor

- ™ What was the interviewee's demeanor/"body language?" (e.g., nervous, obviously uncomfortable, sweating, uneasy tone of voice)?
- ™ But be aware that racial/cultural issues could play a factor in demeanor. Similarly, those who have experienced trauma such as sexual assault may react differently than you might expect.
- ™ How did he or she react to the allegations (e.g., argumentative, defensive, hostile)?
- ™ Does this person inspire confidence in the listener – i.e., does he or she make an overall credible impression?
- ™ You need a **baseline** for comparison. How does the interviewee's demeanor compare to the way he/she "normally" acts?

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# ASSESSING C

## Corroborating Evidence

- TM Did the interviewee make any admissions during the interview? For example, “the only reason I thought it was OK was because she was flirting with me.”
- TM Did the person specifically deny anything?
- TM Are there supporting percipient witnesses? Were they credible?
- TM Was the person’s version of the facts different from anyone else’s?









# REACHING A CONCLUSION

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When analyzing facts, don't throw basic life experiences to the wind. You will have to apply your skills of logic in order to reach a conclusion. Unless the subject of an investigation makes admissions that make your job easy, you will frequently have to view the relevant facts against the foundation of your experience.

**REMEMBER: DON'T BE  
AFRAID TO BE WRONG!**

# REACHING A CONCLUSION

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IN DETERMINING WHAT ACTUALLY HAPPENED, EXAMINE THE OBJECTIVE FACTS IN ORDER TO REACH A LOGICAL CONCLUSION

## Timeliness

™ Did the person raising the issue raise it in a timely manner? If not, why not?

™ Why was the issue raised now?

## Pattern and Practice

™ Did similar things happen in the past that were not raised? Why?

## Motivation

™ What motivation would the person raising the issue have to fabricate facts?

## Truthfulness

™ What motivation would the person who is the subject of the investigation have for denying the incident(s)?

™ Did either the person raising the issue or the person being investigated say anything at any point that you subsequently found to be untrue?


# Making a Recommendation



# MAKING A RECOMMENDATION

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## Issues to Review



**Issues To  
Review**

After analyzing the facts you have gathered during your investigation and after reaching a

# MAKING A RECOMMENDATION

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Writing Sample

# MAKING A RECOMMENDATION

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## Writing Sample

**Application Of  
Institution  
Guidelines Or  
Policies**

This section should refer to the specific code provisions or Title IX standards violated.

**Key Factual  
Findings Of The  
Investigation**

This section would include the key facts on which you based your final

# MAKING A RECOMMENDATION

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Writing Sample

Key Factual  
Findings



# MAKING A RECOMMENDATION

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Writing Sample

# Document Retention



# DOCUMENT RETENTION

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## Final Investigation File

During an investigation, a variety of documentation may be produced or collected. At the conclusion of the investigation, a Final Investigation File may be assembled. The Final Investigation File consists of what needs to be kept for the institution record. The actual contents of any given file will vary, depending on the particular circumstances. The file will show the key steps that were taken to investigate and respond to the issue(s) raised. The file should include only the documents that are consistent with your institution's student record retention policy:

## File Contents

Only final copies of documents should be placed

# Attorney Client Privilege



# ATTORNEY CLIENT PRIVILEGE

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# DOCUMENT RETENTION

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How to Use the  
Attorney Client  
Privilege

Consult your legal counsel. He or she will advise you,  
when appropriate, as to **to do**



# SUMMARY CHECKLIST



# SUMMARY CHECKLIST

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# SUMMARY



# SUMMARY CHECKLIST

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F. Were there conflicting statements made?

G. Was the interviewee's explanation plausible?

**IX. MAKING A**

# CASE STUDY





# CASE STUDY

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by the compliment and decides to stay outside with Blake. Blake pours her another glass of Fireball and they begin kissing on the deck.

Subsequently, Jaeden wakes up in a room that she doesn't recognize. Her clothes are off and she has semen on her stomach and pubic hair. Blake is passed out next to her. She doesn't remember what happened or how she got to this room. She looks for her phone and texts Maddy "where are you???" Maddy responds "OMG where are you? I tried to take you home but you were wasted and wanted to stay with Blake." Jaeden quickly gets dressed and leaves the off campus house. While walking, she texts Maddy "I need to find you." Maddy responds that she is in their room. When Jaeden returns to the room, she tells Maddy what just happened. Maddy is immediately upset and wants to tell the RA. Jaeden doesn't want anyone to know. She doesn't remember what happened and she doesn't want to get Blake in trouble. She tells Maddy that she had a lot to drink and that she is probably to blame as well. Maddy agrees to keep it a secret because she knows that Jaeden lacks self confidence and has very religious parents so Maddy doesn't want her to feel uncomfortable.

The next day, Maddy, who has had trouble sleeping since Jaeden told her what happened, told Ethan about what Jaeden told her. Ethan looks upset and says that Blake is known for being kind of sketchy around drunk girls. He said he thought Jaeden knew that and didn't care because it seemed like she was having fun with him. Maddy asks what Ethan means about Blake being sketchy and Ethan tells Maddy a story about a freshman swim team member that Blake got drunk and had sex with earlier that semester. Maddy decides she has to tell the RA about what happened to Jaeden. The next night, Maddy tells the RA about Jaeden and then convinces Jaeden that she has to tell the RA. During the conversation with the RA, no mention of the freshman female swimmer was made. The RA has come to you (in your role at the College).

What questions should be asked (see below) Blake (see below) / 11/15/17 11:45:10 -80

# CASE STUDY

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## CASE STUDY, PART TWO: DETERMINING WHETHER AN INVESTIGATION SHOULD GO FORWARD

The Title IX Coordinator receives the information and emails Jaeden to set up a meeting for Monday. Jaeden doesn't respond. The Title IX Coordinator finally convinces Jaeden to meet later that week. Jaeden gives a brief overview of the night and says that she does not want to bring a complaint or go to law enforcement because she was drunk too and she doesn't want to get Blake in trouble. She is clearly embarrassed and does not want to talk about it. She asks the College to respect her request for confidentiality. The Title IX Coordinator is unable to get any details from Jaeden.

The Title IX Coordinator checks and is unaware of any other complaints or disciplinary proceedings against Blake or the men's swim team or members of the house where this occurred.

What else should the Title IX Coordinator do to determine whether to go forward with an investigation?

If the investigation goes forward, what should Jaeden be told? When?

Are any interim actions necessary? Which ones would you recommend?

When determining whether to go forward, the Title IX Coordinator checks Twitter, Instagram and Facebook. There is an Instagram photo of Blake from Saturday night from what proceedings you A

# CASE STUDY

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## CASE STUDY, PART THREE: GATHERING INFORMATION FROM THIRD PARTIES

By this time, the Title IX Coordinator has determined that an investigation should go forward. You have been designated as the investigator and received all of the information that the Title IX Coordinator had gathered. No formal complaint has been filed and there is nothing in writing from Jaeden. The Title IX Coordinator informs Blake you are investigating concerns that Blake may be responsible for one or more sexual assaults.

Who should you talk to?

What order?

What do you disclose to third parties when talking to them?

What information do you need from each of the witnesses?

How do you control group dynamics? I.e. the men's swim team gets together and takes a united stand for Blake.

How do you mitigate retaliation and information sharing?

While conducting the investigation, you learn the identity of the freshman swimmer, Casey, who may have had a similar problem with Blake.

What do you do?

What can you disclose to this person?

# CASE STUDY

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## CASE STUDY, PART FOUR: MEETING WITH THE RESPONDENT

Blake's attorney has called you several times and demanded to see the formal written complaint against his client pursuant to FERPA. The attorney also demands any notes that reference his client that have been created during the course of the investigation. The attorney indicates that his client will not meet with you due to the potential for criminal implications resulting from his testimony.

What are your obligations?

How can you incentivize Blake to meet with you?

After a lengthy round of negotiations, Blake and his attorney agree to meet with you. At this time, you have information from all involved College personnel, and you have spoken to Maddy, Ethan, other members of the swim

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# CASE STUDY

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## CASE STUDY, PART FIVE: EVALUATION OF THE SITUATION