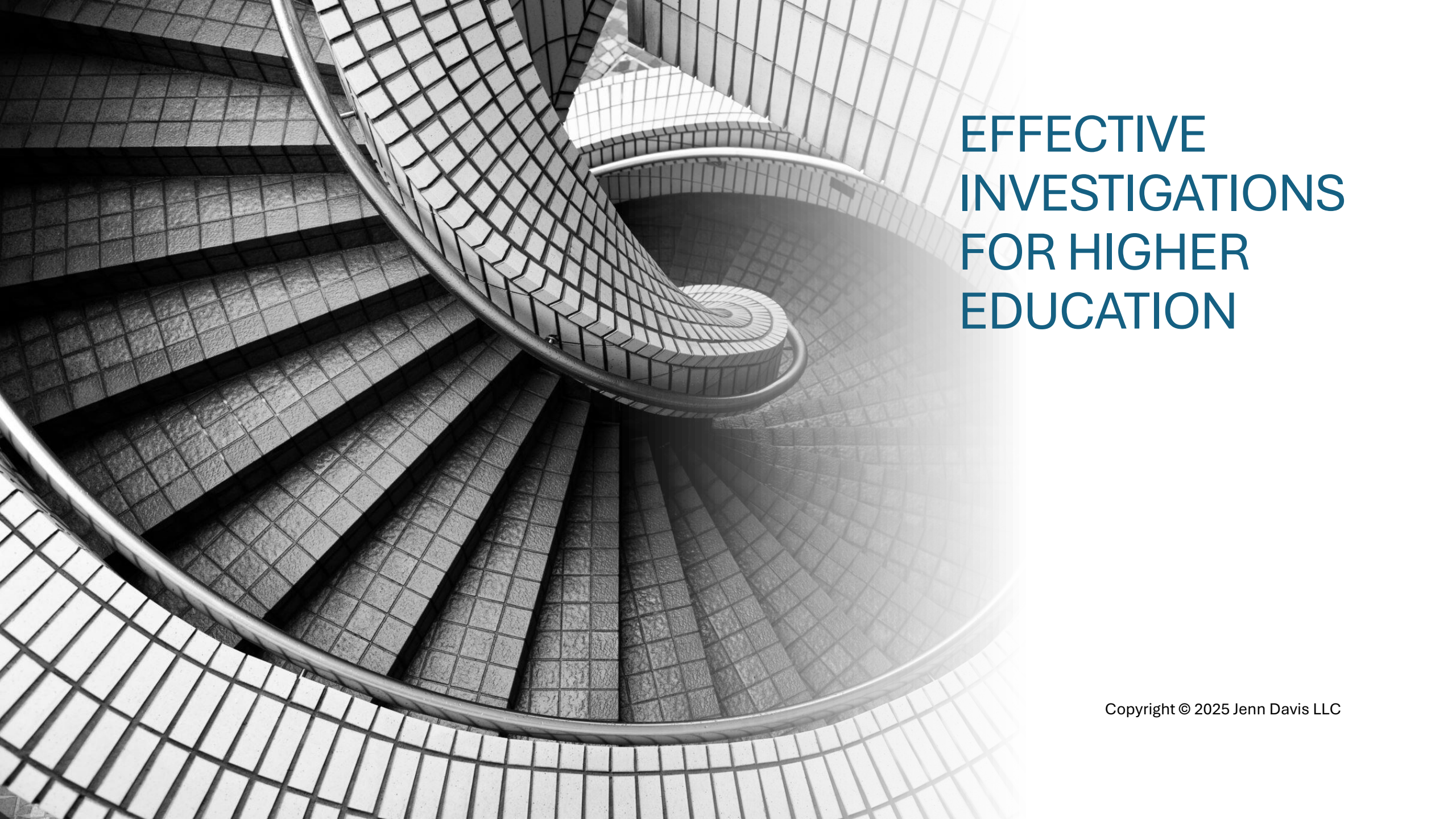




EFFECTIVE INVESTIGATIONS FOR HIGHER EDUCATION

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Objectives

- Understand how to conduct an effective investigation in the higher education context, with a focus on sexual misconduct investigations.
- Identify potential challenges to the efficacy of the investigation and ways to avoid or overcome them.
- Improve your ability to gather and organize the relevant evidence.

Components of an Effective Investigation

- Prompt
- Thorough
- Impartial
- Documented

Prompt

- Title IX regulations require “reasonable” promptness
- What does your policy say?
- What are the underlying principles (why is “prompt” important?)
 - *Minimize the loss or fading of evidence*
 - *Avoid undue stress on parties*
 - *Send message of professionalism and caring to the community*

When Delays Occur

- Identify the reason for the delay and address it.
- If the delay is justified, document it and be transparent with parties about it.
- If the delay is not justified, document that and keep things moving.

Thorough

- Identify the **scope** of the investigation (this may change as you investigate) and the **policies that contain relevant definitions**.
- Identify **all sources of potentially relevant evidence** (individuals to interview, documents (including emails, texts, messages, photos), surveillance video, body camera video/audio, card swipe data, items of relevance to the allegations, etc.)
- Determine whether you should visit the **scene of the incident** (never a bad idea).
- Conduct **thorough interviews**.

Scope

- The scope of an investigation is determined by the allegations in the complaint.
- The investigator will gather evidence that is relevant to those allegations.
- Be alert to “**scope creep**.” Just because a party or witness raises a new issue does not necessarily mean that the scope of the investigation will expand – but it might.

Applicable Policies

- Review the policies that the complaint implicates – these will be identified in the notice that the TIX Coordinator sends to the Respondent.
- **You need to know what policy violation has been alleged and the definitions that apply to provide the decision-maker with all the relevant evidence.**

For example....

- The complainant alleges that the respondent sexually assaulted her while she was incapacitated by alcohol and later stalked her by waiting outside her dorm room the next night.
- What policy language/definitions will you need to review to make sure that you ask the right questions and gather the relevant information?
- *Answer: definitions of sexual assault, consent, incapacitation, stalking.*

The Thorough Investigator

An investigator only has the capacity to be thorough if the investigator:

- *prepares for interviews and is not unduly rushed*
- *investigates with an open mind; operates without bias*
- *does not make assumptions based on facts not in evidence*
- *has a working understanding of the **neurobiology of trauma**, allowing the investigator to consider whether trauma is affecting the ability of a party or witness to provide evidence*

Note: this understanding of trauma does not mean the investigator should tend to believe a party who alleges they have been traumatized.

Relevant Evidence

- Information is “relevant” if it **tends to prove or disprove the allegations in the complaint.**
- The Title IX regulations state that certain information is ***per se irrelevant***:
 - *Information that is covered by a legal privilege (e.g., doctor-patient, attorney-client, social worker-patient, spouses)*
 - *Personal medical information*
 - *The Complainant’s sexual history or experience (with a couple of exceptions)*

All Sources of Potentially Relevant Evidence – 1

- Parties
- Individuals likely to have personal knowledge of relevant events (remember to think about who might fall into this category – do not rely on parties) – these will be the witnesses
- Communications (in any form) between the parties during the relevant period (consider how to define this period)
- Communications (in any form) between each party and third parties of relevance to the allegations
- Communications between third parties of relevance to the allegations

All Sources of Potentially Relevant Evidence – 2

- Photo and video evidence (including surveillance or body camera footage)
- Personal journals
- Tangible evidence (a shot glass, an item of clothing, etc.)
- Medical records (BUT MAKE SURE TO GET A WRITTEN WAIVER FROM THE PERSON TO WHOM THE MEDICAL INFORMATION BELONGS)
- Receipts or other documents/electronic information that will serve to establish or corroborate a timeline or other aspects of the allegations – e.g., Uber receipts, card swipes, bar tab, hotel bill, phone bill)
- *You may need to ask the party or witness to obtain these documents*

Thorough Interviews – 1

- Identify and address any interpreter needs or need for accommodations.
- Make sure that both you and the interviewee are not pressed for time and understand the expected length of the interview. Always tell the interviewee that this meeting does not have to be the only meeting or communication.
- Be aware and respectful of pronouns.
- Reassure the interviewee that you are interested in their observations as opposed to their opinions – but be careful not to sound dismissive.
- **BE PRESENT.** Distractability interferes with creating trust.

Thorough Interviews – 2

- Have an outline of questions prepared but don't be rigid about it – ask follow-up questions to get all the relevant details.
- You may start with some generic questions but customize each outline to the specific interviewee. Consider what you expect this person will know about and explore what other information they might have.
- Ask questions that are open and do not imply an answer; do not “cross-examine.” Ask the interviewee to clarify or to “say more.”
- Ask follow-up questions that express relevant interest not gratuitous curiosity – you are establishing trust.

Thorough Interviews – 3

- If the interviewee says something that does not make sense to you, do not express disbelief. Ask them to explain, clarify, etc.
- Make sure to ask each party to tell you about the nature of their relationship with the other party both before and after the alleged incident.
- Make sure to ask each party to describe their actions during the hours leading up to the incident and during the days after it.

Thorough Interviews – 4

- Make sure to get details about the time of day/night and the physical space (layout, lighting, etc.) in which an alleged incident occurred and ask whether any other person was present or might have seen or heard anything.
- If consent is at issue, ask the complainant questions to elicit any facts that will reflect a lack of consent. BE CAREFUL HERE – THE BURDEN IS NOT ON THE COMPLAINANT TO SHOW A LACK OF CONSENT.
- If consent is at issue, ask the respondent to tell you what indicia of consent were present.
- Ask the complainant to speak about the complainant's decision to file the complaint.

Thorough Interviews – 5

- Always ask each party and each witness if there is anything else they believe to be relevant to the investigation.
- Ask each interviewee if they are aware of individuals likely to have personal knowledge of relevant events and/or relevant materials.
- Confirm that each interviewee knows how to reach out to the Title IX Office if they have any questions or concerns in connection with the process.

Group Exercise

The Complainant's Interview (a closer look)

What are some thoughts, insights, challenges you have faced when gathering information from the Complainant?

Group Exercise

The Respondent's Interview (a closer look)

What are some thoughts, insights, challenges you have faced when gathering information from the Respondent?

Impartial

- Having a neutral and unbiased outlook; avoiding judgement
- Following the evidence rather than assumptions
- Treating parties equally in terms of the process (extensions, ability to consider and respond to evidence, etc.)
- Avoiding the appearance of partiality
- Basing any credibility assessments on objective factors such as consistency/inconsistency, corroboration, contradiction – not on demeanor or affect.

Integrity of the Investigation

When we refer to an investigation as having “integrity” we are saying that we can rely upon it. This reliance stems from the investigator having conducted the investigation in a prompt, thorough and impartial manner.

We also need...

Documentation

- Communications to and from investigator re: scope
- Investigation plan or roadmap – not essential but can be useful
- Communications re: any requests for extensions of time and responses to same
- Communications to and from parties and witnesses scheduling and attempting to schedule interviews
- Communications reflecting investigator's requests for evidence and responses to same
- Interview summaries (and/or audio recordings, depending on policy)

The Ultimate Documentation – The Investigation Report

- Description of procedural background and scope of investigation
- Description of investigator's process (interviews conducted (and attempted), evidence gathered and reviewed, etc.)
- Statement that the investigation has been conducted in accordance with the applicable policy in terms of timeframes, providing parties with equal opportunities to review and comment on evidence, etc.)
- Summary of the relevant evidence in the body of the report, with relevant materials submitted as exhibits and referenced in summary
- Possible credibility assessments
- Possible recommendations re: policy violation(s)

Q & A

THANK YOU!