Protect all parties when investigating gender-based violations

Mishandling complaints of sexual assault or discrimination could land your institution in legal trouble. The Association of Title IX Administrators advocates for the use of a civil rights investigation model when it comes to such incidents on campus. The model can help reduce the likelihood of litigation down the line because it takes into account the rights of the accuser and the accused equally.

Brett A. Sokolow, an attorney who serves as the executive director of ATIXA and managing partner of NCHERM, a law and consulting firm specializing in higher education risk management, recently explained how the model works during a webinar.

“If you look across our entire society, you will find that just about every entity but colleges and universities uses a form of civil rights investigation procedures, so we really are the anomaly,” he said.

Federal case law has established that students must be given due process rights prior to being disciplined. But too often, such cases devolve into episodes of he said/she said. That can further traumatize the victim or victimize a wrongly accused individual. The civil rights model ensures the rights of the accusing and accused party are roughly in balance.

“It’s not about creating parity but equity,” Sokolow explained. “If we do something for one person, why not do it for the other?”

The model doesn’t replace a criminal investigation for campus law enforcement departments. But it can replace the conduct code violation investigation for campus security departments who are involved in that task. Traditionally, those investigations are of an adversarial nature and can do more harm than good.

Create pool of trained investigators

To start, you will need a pool of trained investigators. It might seem obvious to choose members of your campus safety department since investigation is what your unit does. However, because this is not a criminal investigation, investigators could come from almost any campus department, from human resources to student affairs to academic units, he said.

In fact, if yours is a law enforcement unit, it might be best if investigators aren’t from your unit, because that makes it clear that the criminal investigation, if there is one, is completely separate from the conduct code violation investigation.

And victims often choose not to report gender-based incidents to law enforcement while still reporting it to another part of the institution as a conduct code violation.

“If I shove a law enforcement officer in there, it can be off-putting to the reporting student,” he said.

Plus, criminal investigations treat parties as the perpetrator and victim, reinforcing ideas that one must be punished and the other protected.

“They [campus safety officers] can be trained to conduct civil rights investigations, but they must be well trained to ensure there are no conflicts of interest as law enforcement also investigates whether any laws were broken,” he said.

Often, the Title IX coordinator is tasked with investigating gender-based complaints. While this person is in a good position to supervise civil rights investigations, he shouldn’t be an investigator, because then there’s no objective evaluation of his performance as an investigator.

Sokolow suggested naming deputy coordinators from various campus units to serve as investigators. That way, one person isn’t getting overwhelmed with work. A minimum of six investigators is ideal so you have three teams of two available at any given time.

Pairing investigators is helpful because they can bounce ideas off each other. And when there are many witnesses to interview, a single investigator may not be able to get to all of them in a timely way. When interviewing individuals, one investigator can do the questioning while another focuses on note-taking.

Plus, there may be times when investigators will find themselves conflicted and unable to be impartial, so it may be necessary to pass the case on to another two-person team or replace one person of a team. And when grievances are lodged against investigators, you’ll need to have some alternates ready to step in.

Providing investigators with training on the model is critical. They must understand that the goal is to gather the information needed to determine whether a conduct code violation occurred, but without violating anyone’s civil rights or causing trauma.

Establish nonadversarial investigation process

When an incident is reported, a team should be appointed to conduct a preliminary investigation. You want investigators who will be able to develop a rapport with the parties involved. So if a complaint is lodged against a student-athlete, an investigator from the athletics department may be in the best position to talk to the students and get the necessary information.

The investigators should report back to whoever is supervising the investigation about their strategy. While they talk to witnesses and look at any evidence, the coordinator should consider relevant background and patterns. The civil rights model allows for the “use of former incidents to inform current investigations at the findings phase, not just the sanctions phase,” he said.
Civil rights investigation model may prevent legal trouble

Postsecondary institutions sometimes adhere to policies and procedures that don't adequately protect students involved in gender-related incidents, whether they are the alleged victims or perpetrators. And various institutions recently came under fire for that.

For example, when University of Southern California student Tucker Lee was raped several years ago, she said that administrators “ignorance and indifference” made things worse. Unsatisfied with the process and outcome, she filed a complaint with the U.S. Department of Education this past spring. Meanwhile, students and former students of three other institutions filed similar claims earlier this year.

Could the civil rights model have prevented that? Perhaps. Many of the reasons those complaints were filed are expressly addressed by the CR model because it:

- **Makes fairness for all a priority.** This model ensures that neither the accuser nor accused's civil rights are trampled on during the investigation and hearing process.
- **Calls for interviewing individuals separately.** That way, they're not simply arguing with each other in a he said/she said tirade. That can muddle up the facts and retraumatize the victim or a wrongly accused perpetrator.
- **Allows for information to be collected before students are charged.** That means innocent students aren't traumatized with false allegations and evidence can be collected before any cover-up is attempted.
- **Can make hearings unnecessary.** The individuals involved in an incident don't have to face one another, which can be traumatizing. And they don't have to call witnesses to defend them or make their cases. And if a hearing is necessary, the investigators can serve as the key witnesses to clarify the information in their report, avoiding emotional confrontations between the involved parties.

Rather than immediately charging a student with a violation and then allowing him to defend himself, the CR model puts off charges in favor of information collection. Investigators may end up interviewing the accused individual last, and only after they've found there's reason to do so. If a preliminary investigation shows that the facts don't point to him as the perpetrator, there's no reason to traumatize him by involving him.

At that point, investigators would explain to the alleged victim why they're ending their inquiry there. That way, she doesn't feel like her complaint was simply swept under the rug.

The model also doesn't draw the victim into the investigation process unless she wants to participate, and unless it's determined that her participation is necessary to keep the campus community safe (e.g., the alleged code violator might victimize other students).

After that preliminary inquiry, investigators may need to delve deeper. They should establish a timeline of events and flow charts that make it easy to see how people are connected or what led to what.

**Use written report as evidence**

Once they have interviewed all parties, examined all the evidence, and consulted with experts, investigators should provide their findings in a written report. That report should summarize all interviews conducted and evidence discovered. It's a good idea to send copies of interview summaries to anyone interviewed so they can sign off, verifying that their comments were adequately summarized. Those signed copies should go in the final report.

Use the report as the complaint. If it finds the alleged code violator guilty, allow him to review the report and its findings in full. Then you can say to him, “We have found you in violation of our code based on the information you just saw.”

With all the evidence laid out before him, it's likeliest that the student will admit guilt. So a resolution can be reached without the victim and perpetrator ever facing off in a formal hearing. All that's left at that point is sanctioning the student. The investigators might propose a sanction or remedy, or they may refer the student to the institution's existing sanction model. Because the student has already admitted his guilt, only the sanction becomes appealable at that point.

If the student found in violation accepts certain parts of the investigators' findings but rejects others, then a standard grievance process can take over, dealing only with what's being contested.

If he rejects all findings, a hearing may become necessary. However, the purpose of the hearing will simply be to determine why the institution shouldn't adopt the findings of the report. And because the investigators have spoken to all the involved parties and processed evidence, they become the key witnesses, reducing the need for the accused and accuser to face off.

“Funneling information through investigators is less adversarial and traumatizing,” Sokolow said.

Contact Brett A. Sokolow at Brett@atixa.org. ATIXA’s sexual misconduct model policy is available at http://atixa.org/documents/ATIXAModelPolicy_000.pdf.