

The New Title IX Final Regulations: What You Need To Know To Stay In Compliance Day 3

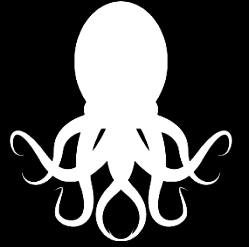
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Presenter

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Week 2 Program



BEVERLY V. BALIGAD

Day 3: (Today)

- A. Scope of Education
Program and Activities
- B. How to Conduct an
Investigation (Basic)

Day 4: (Tomorrow)

- A. Relevance & Sufficiency
- B. Credibility & Bias
- C. Conflict of Interest

***This presentation is for general informational purposes only; it is not intended to be legal advice. Participants should consult with their general counsel before implementing any changes.**

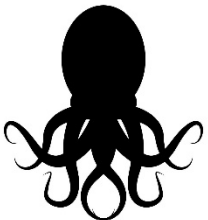


Day 3

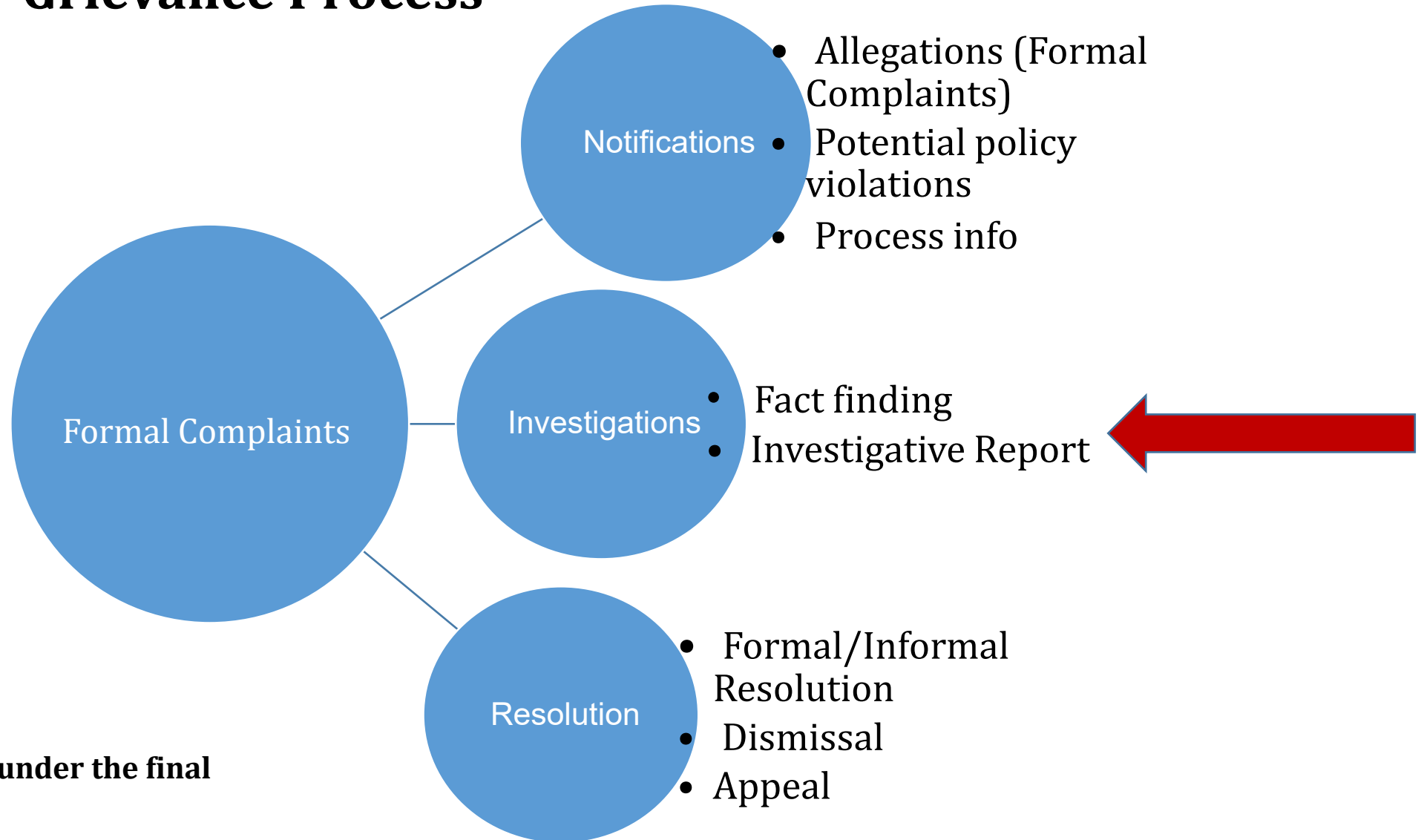
- A. Scope of the Educational Program and Activities
- B. How to Conduct An Investigation (Basic)

A. Scope of Educational Programs and Activities [34 CFR 106.44(a)]

- An institution with actual knowledge of sexual harassment in an education program or activity of the institution must not be deliberately indifferent (must promptly respond)
- “education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over: 1.) the respondent and 2.) and the contest in which the sexual harassment occurs
- May include buildings or student housing owned or controlled by the institution
- Institutions should train Title IX team members on special programs or control over areas or buildings not generally known

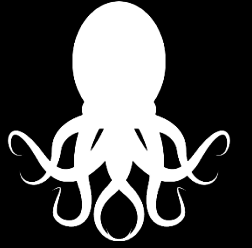


Review: The "Grievance Process"



***New requirements under the final Title IX Regulations**

Activity: WWYD?



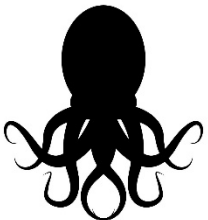
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You have been assigned to a case involving a type of sexual harassment referred to as “hostile environment.”

Out of the many things you should be doing (as the assigned investigator), what do you believe are the (2) most important things you would do first?

B. How to Conduct an Investigation (Basic)

- Investigations fall under the "grievance process" requirement.
- Previous Title IX Regulations required a "grievance process;" but never described how the process should look like
- Process must adhere to the new Title IX regs (as of August 14, 2020)
- Provides information regarding general requirements all institutions must have within their grievance process
- Process must be fair and equitable (for complainants and respondents)
- Describes expectations for investigations



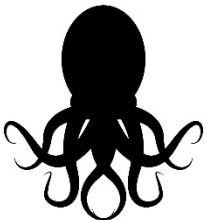


Investigations: Generally

- New regulation requirements continue “civil rights” investigation model
- Investigator training [*§106.45(b)(1)(3)*]
- Conflict of interest and bias [*§106.45(b)(1)(iii)*]
- “Not Responsible” Presumption [*§106.45(b)(1)(iv)*]
- Supplemental Notice [*§106.45(b)(2)(ii)*]
- Discretionary dismissal [*§106.45(b)(3)(ii)*]

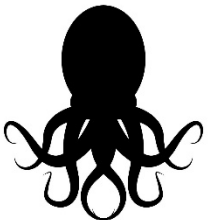
Investigations: Rights of Parties

- Focus is “equity” for both parties
- Advisor of choice [*§106.45(b)(3)(iv)*]
- Equal opportunity to present witnesses and offer information inculpatory and exculpatory info [*§106.45(b)(5)(ii)*]
- No gag orders on parties; ability to gather and present relevant information [*§106.45(b)(5)(iii)*]
- Legal privileges; waiver [*§106.45(b)(1)(x)*]
- Right to inspect, review, access and respond to information [*§106.45(b)(3)(vi)*]



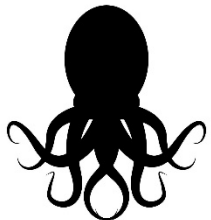
Investigations: Other Key Requirements

- “Relevance” will be key to evidence gathering process
- Burden of proof and gathering evidence [*§106.45(b)(5)(i)*]
- Medical records [*§106.45(b)(5)(i)*]
- Inclusion of inculpatory and exculpatory info [*§106.45(b)(5)(ii)*]



The Investigative Report [*§106.45(b)(3)(vii)*]

- Must fairly summarize relevant info
- Must be sent to both parties and advisors at least 10 days prior to scheduled hearing or time of determination regarding responsibility
- Must be in electronic format or hard copy
- Allows for both parties to review and/or provide written response to info presented
- Investigator's reports, and the way in which they conduct their investigations, are extremely important!

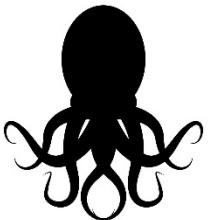


Civil Rights Investigation

- Investigator open to all information
- Should remain unbiased
- Distinction between a preliminary and a full-blown investigation
- Determines if college policy was violated
- “Preponderance of the evidence” (low standard) -51%

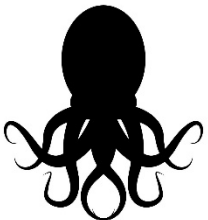
Criminal Investigation

- Investigator looking more specifically for evidence of guilt
- May appear somewhat biased (more building prosecutor's case)
- Determines if law was violated
- “Beyond a reasonable doubt” (high standard)



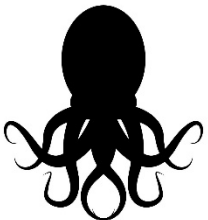
The Investigator's Role

- Remains fair and equitable during the entire process when dealing with both parties and all witnesses
- Gather "relevant" and "sufficient" information as they relate to the allegations and potential prohibited conduct
- Understand and analyze the institution's policy
- Write an investigative report that fairly summarizes relevant evidence
- **Investigative focus: "Whether more likely than not" an individual violated an institution's policies"**



Investigators Expectations and Requirements

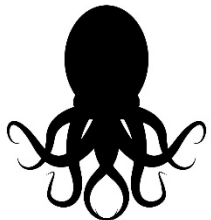
- Reasonable, not judgmental
- Empathetic, not gullible
- Comfortable asking extremely personal questions in a non-judgmental (yet appropriate) way (e.g., “Can you tell me if the respondent ejaculated while he was still inside of you?”)
- Understands (and respects) the rights of both parties
- Does not dictate the outcome of an investigation through coercive questioning and "selective" fact-finding
- Gathers facts as the witnesses present them; does not insert personal opinions and assumptions





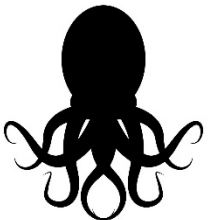
Investigators Expectations and Requirements (cont'd)

- Skilled and well-trained in civil rights investigations
- Detail-oriented
- Organized and flexible
- Appropriately identifies and deals with their own personal stereotypical thoughts and/or biases
- Good writing skills
- Able to analyze information according to the institution's policies and/or procedures
- Meets deadlines
- Understands “relevance” and “sufficiency”



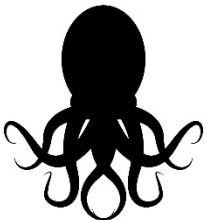
Basic Interviewing Techniques

- Atmosphere is important.
- Be very conversational, NEVER accusatory!
- Build rapport — ASAP!
- Schedule enough time for the interview.
- Be aware of “why” an interview is important before you interview a witness. (What information do you need from this witness?)



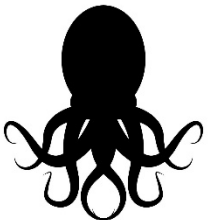
.Basic Interviewing Techniques cont'd

- Get “comfortable” discussing “uncomfortable” topics.
- Ask extremely detailed questions.
- Make sure the questions have a “reasonable” nexus to the policy violation and/or an issue of credibility.
- Make sure you record as many “direct quotes” from the witnesses as possible—you’ll need these for your report.
- Rephrase statements for clarification. (e.g., “I’m hearing you state that...is that a correct understanding?”)

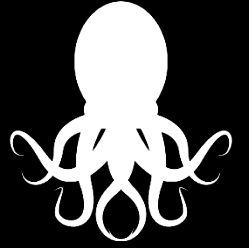


Types of Witnesses

- The “Talker”
- The “Reluctant” Witness
- The “Hostile” Witness
- The “I-Don’t-Know-What-You’re-Talking-About” Witness



Activity: How do you know?



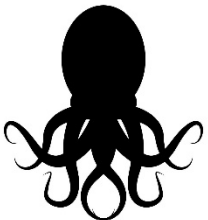
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If the case you were assigned involved the sexual harassment type “hostile environment,” what would you use as the basis for your investigation?

How would you force yourself to think about how to conduct the investigation? What would you do? How do you know when you are on the right track?

Understanding the Importance of an “Analysis”

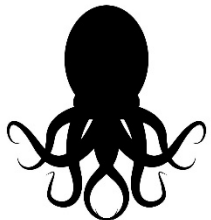
- Investigative reports must link the institutional policies/procedures to the facts
- Know "elements" of the alleged sexual harassment (What kinds of facts should the investigator focus on?).
- Assists the investigator in focusing on the right questions to ask
- Helps to show the "relevancy" of the facts that are presented, as they relate to the policy (also helps with showing the information collected is “sufficient”)
- Proper analysis helps to demonstrate the “reasonableness” of the investigation and supports the decision that a Decision Maker may make (“reasonable minds may differ”)





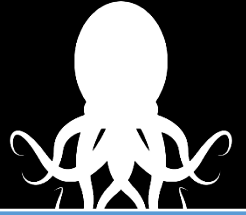
Anatomy of an “Analysis” Approach

- Make sure you use the correct institutional policy/policies or process(es)
- Based on the information contained in the formal complaint or notification of allegations, what potential type(s) of sexual harassment might you have? What makes you think that? (*e.g., "If it looks like a duck, waddles like a duck, and quacks like a duck, it **MIGHT** be a duck."*)
- How does the policy **define** the specific behavior?
- Break down the definition and list each “element.”





Activity: The Analysis



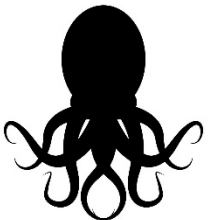
“Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the institution's education program or activity.”

Element	Supporting Facts	Interview Questions
1.		
2.		
3.		
4.		
5.		

Factual Analysis: The Importance



- Analysis is a methodical approach to dealing with potential policy violations.
- When the facts are insufficient to show a policy violation, there is no policy violation.
- When the quality/quantity of the facts appear equal (one party witness vs. one party witness), a credibility assessment may become extremely important. (Remember the Standard of Proof?)



The 5 Phases of Investigations

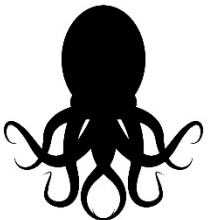
Phase I: Assignment; policy & process review

Phase II: Investigation planning

Phase III: Preparation and Execution of Interviews

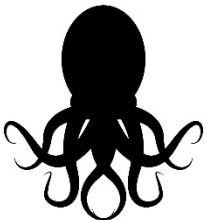
Phase IV: Reviewing Relevant Information Gathered;
Closing the Gaps; Follow-up

Phase V: Assembling & writing the report



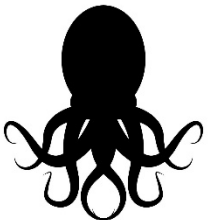
Some Thoughts

- This is just one example on how to prepare for an investigation.
- Different investigators will prepare differently.
- What works for one investigator may not work for another.
- When you fail to plan, plan to fail. Plan, plan, plan...
- Bottom line: you must prepare for the investigation. Never wing it!



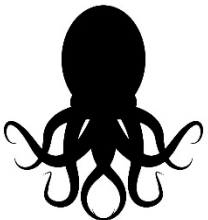
Phase I: Assignment, Policy & Process Review

- Review complaint/allegation
- Identify (and print) applicable policies and processes (T9 & non-T9)
- Gain an understanding of your investigative role & jurisdiction
- Meet with T9 Coordinator to discuss case (“Strat Session”); commence investigation



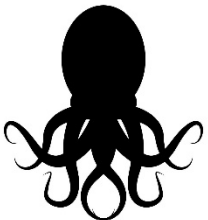
Phase II: Investigation Planning

- Keep an investigator's log - right from the start!
- Begin assembling the physical hard copy of the file (or placing an electronic version of the file somewhere on your laptop where it is encrypted & secured)
- Begin collecting and compiling available information (educational records; personnel records) on parties
- Prepare policy analysis (for each alleged policy; for each available witness). Input info supplied by the complainant.
- Create an event timeline (focusing on the allegations)
- Identify "first round" of witness.
- Based on the definition, what questions might you need to ask specific witnesses?



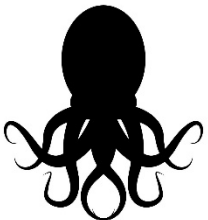
Phase III: Preparation and Execution of Interviews

- Prepare letter/email introducing investigator and their role
- Address logistics: schedule, room, set-up, etc.
- Prepare interview disclosures/Interview scripts (focus only on introductions; each witness may have different questions and focus)
- Pre-Interview considerations?
- Interviews: To record or not record?



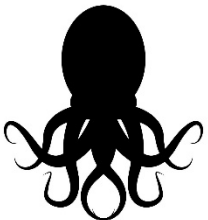
Pre-Interview Considerations: Mind the Details

- Where the interview takes place is important
- Seating arrangements (e.g., safety, adequate seating, placement, etc.)
- Necessary supplies (e.g., water, tissues, etc.)
- Private, confidential
- Reasonable accommodations for witness? (reader? interpreter?)
- Electronic recording (batteries)? Written documentation (paper, pens)?
- One or two investigators present? Roles?
- Anything else that should be considered before the interview occurs?



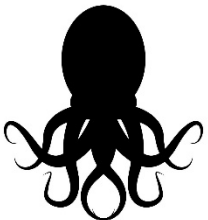
To Record or NOT Record?

- Be aware of State laws regarding the recording of conversations
- Some institutions do, some don't
- Should be mentioned somewhere; in your Code and/or Policy
- If it is written in a policy or process somewhere, the witnesses should be told in advance
- If it is not written in a policy or process, the investigator should get the permission of the witness before recording
- Recording (if a student) is subject to FERPA; for employees CBA's or personnel records policies/confidentiality

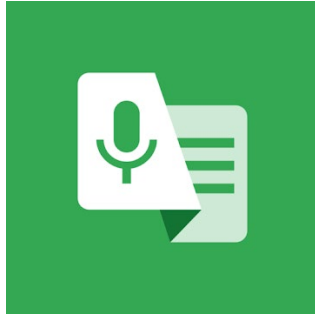


To Record or NOT Record? (cont'd)

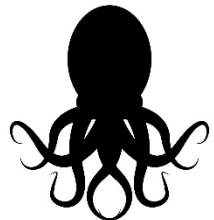
- Note-taking requires high level of accuracy (do “direct quotes”)
- A witness summary statement would be best if taking notes (investigator summarizes, writes, then provides statement to witness to see if they "got it right", then witness can sign off)
- Recordings may help an appeals officer or DM with determining whether or not “bias” in the interview was a factor
- Would you allow the witness to record at the same time you record?



Transcription Apps/Software



Live
Transcribe

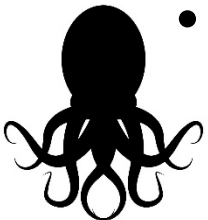


oTranscribe



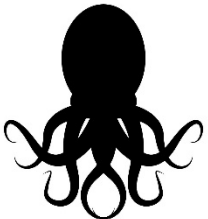
Phase IV: Reviewing Relevant Information Gathered; Closing the Gaps & Follow-up

- Were there any new witness suggestions? Are they relevant to the issue? Why or why not?
- Was there documentary evidence introduced by witnesses (copies provided to the investigator)?
- Is there any relevant information? Is there any relevant information that should not be used? Why or why not? Non-relevant information? (Can you explain why for each?)
- Witness statements & sign off (interview transcript vs. interview transcript and documentary evidence); “narrative”



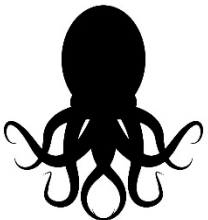
Phase V: Closing the Gaps; Follow-up

- Do you need to follow up with a witness?
- How do you deal with large time gaps? Memory lapses? Unwillingness to provide info?
- Reschedule another interview? Phone call? Email?
- Any “holes” in your analysis? Why? (Lack of witnesses? Lack of information?, etc.)
- Do you have additional questions you’ll need to ask as a follow up to a witness? Is that done?



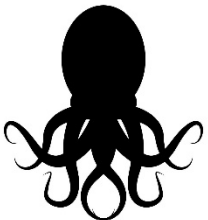
Pre-Report Writing Considerations

1. Permissive dismissals; “**may**” dismiss at any time during the investigation, if any of the following: [34 CFR 106.45(b)(3)(ii)]
 - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any of the allegations
 - The respondent is no longer enrolled or employed by the recipient
 - Or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein



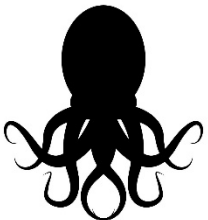
Phase V: Closing the Gaps; Follow-up

- Do you have a transcript or finalized statement of a witness' interview? Signoff?
- Have you made sure to maintain copies of all documentary evidence? If not apparent on the evidence, do you have info about how you received the evidence?
- Final meeting with T9 Coordinator (make sure no other allegations were filed)
- Ready to start writing the report?



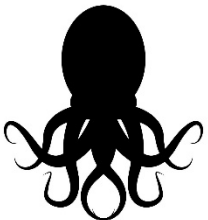
The 5 phase investigation strategy will allow investigators to:

- Align investigations and plan appropriately with the Coordinator using institutional policies and procedures from the start
- Design and execute a plan to notify, schedule and interview witnesses
- Effectively identify, organize and record any/all relevant, available information (sufficiency!)
- Identify any gaps in your process or information gathered before you begin writing, so you can “cure the defect”



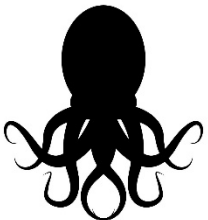
Don't forget about 2 important investigative timeframes:

1. Both parties must be allowed to inspect and review any evidence obtained as part of the investigation; provide 10 days to submit a written response [*§106.45(b)(5)(vi)*]
2. Create an investigative report that fairly summarizes relevant evidence and send a copy to the parties and the parties' advisors (if they have them) at least 10 days prior to a hearing OR before a determination regarding responsibility is made [*§106.45(b)(5)(vii)*]



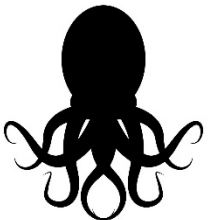
Investigative Report Considerations

- Fact-based report: No opinions; is it information as it was provided to you by the witnesses? (substance)
- One voice? (If an investigative team is used)
- Written in first person?
- What is the template format (consistency)?
- Case identification?
- Is there a logical flow to the information as it is presented?



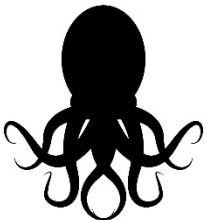
BASIC INVESTIGATIVE REPORT CONSIDERATIONS (CONT'D)

- Assume a newspaper reporter will get copies of your report
 - Does it reflect professionalism and confidence?
 - Does it contain personal opinion that appears to be biased?
- Numbering (UHW02015-S-01; Page 1 of 14)
- Cite institutional policies and procedures as the basis for the investigation
- Use as many relevant direct quotes from the verbal or written statements of witnesses as possible. Make it "their" statement not yours!



BASIC INVESTIGATIVE REPORT CONSIDERATIONS (CONT'D)

- Understand what each section of the report is designed to show or explain to a reader.
- Save "marking exhibits" for last.
- Consider making exhibits distinguishable (bold; italicized) within the report.
- Eclectic appeal. (Does it look nice?)



Mahalo!

Any Questions?

End of Day 3 of 4

