

# ADVISING FOR TITLE IX AND INTERPERSONAL VIOLENCE & SEXUAL MISCONDUCT CASES

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OFFICE OF EQUAL OPPORTUNITY & REGULATORY COMPLIANCE





# UNIVERSITY POLICIES

- ❖ Title IX Policy
- ❖ Interpersonal Violence and Sexual Misconduct Policy





# REFRESHER: WHAT IS TITLE IX?



Title IX is a federal law that prohibits discrimination based on sex in educational programs and activities



Prohibited conduct under Title IX includes sexual assault, sexual harassment, and other forms of nonconsensual sexual conduct



Title IX protects both males AND females

- ❖ The Title IX Policy applies only to incidents that occur within a University program or activity.
- ❖ However, the University's Interpersonal Violence and Sexual Misconduct (IVSM) Policy applies to incidents that occur outside of a University program or activity or incidents that are not protected under Title IX.

JURISDICTION

# WHAT IS PROHIBITED AT THE UNIVERSITY OF MISSISSIPPI?

- ❖ Sexual harassment
- ❖ Sexual assault
- ❖ Relationship violence
- ❖ Stalking
- ❖ Sexual exploitation
- ❖ Retaliation

# SEXUAL HARASSMENT

- ❖ An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct; or
- ❖ Unwelcome sexual conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to an educational program or activity of the University.

# SEXUAL ASSAULT

- ❖ Rape
- ❖ Sodomy
- ❖ Sexual assault with an object
- ❖ Fondling
- ❖ Incest
- ❖ Statutory rape

# EFFECTIVE CONSENT

- ❖ An affirmative agreement—through clear actions or words—to engage in sexual activity
- ❖ The person giving the consent must act freely, voluntarily, and with an understanding of his or her actions when giving consent.
- ❖ Nonconsensual sexual activity requires a showing that a participant knew or reasonably should have known that the other party did not consent to the sexual activity.
- ❖ A person who is **incapacitated**—unconscious, unaware, or otherwise physically helpless—cannot give effective consent to sexual activity.
  - Someone is incapacitated when he or she engages in sexual activity and cannot understand or appreciate who, what, when, where why or how, with respect to the sexual interaction.

# MORE ABOUT CONSENT

- ❖ Consent must be present throughout the sexual activity.
- ❖ Consent can be withdrawn by any participant at any time during the sexual activity.
  - A participant to sexual activity can revoke consent through actions, conduct, or behavior that communicates that he or she no longer wishes to continue the existing sexual activity.
  - Once consent is withdrawn, the sexual activity must cease immediately.
- ❖ Although consent can be non-verbal (e.g. nodding), consent should never be assumed or inferred from silence, passiveness, or a lack of resistance.
  - A lack of protest or the failure to resist does not constitute consent.

# DATING AND DOMESTIC VIOLENCE

**Physical** violence committed against a partner  
in an intimate relationship



# STALKING

- ❖ Stalking is a course of conduct directed at a specific person that would cause a reasonable person to:
  - Fear for his or her safety or the safety of others; or
  - Suffer substantial emotional distress.

# SEXUAL EXPLOITATION

- ❖ Non-consensual videotaping, audiotaping, or photographing of sexual activity even if the sexual act is consensual;
- ❖ Non-consensual posting, publishing, sharing, or displaying photo, audio, or video of sexual activity even if the activity was originally recorded with effective consent;
- ❖ Voyeurism, which occurs when one individual engages in secretive observation of another for personal sexual pleasure; or
- ❖ Any disrobing of another or exposure to another without effective consent.

# IMPORTANT NOTE

The Title IX Policy does not include sexual exploitation, but the IVSM Policy does.

# AMNESTY

- ❖ Students **will not be in trouble under the drug and alcohol policy** for voluntary personal use of alcohol or drugs.
  - Applies to all parties, including potential witnesses
  - May be required to undergo alcohol or drug education
  - Amnesty is intended to encourage students to come forward in reporting or responding to an incident of sexual misconduct.

# RETALIATION

- ❖ The University **prohibits retaliation** due to reporting a conduct violation, participating or cooperating in an investigation, or pursuing legal action.
- ❖ The University defines retaliation as any adverse action, including intimidation, taken against an individual who has participated in any manner in an investigation, proceeding, or hearing under its policies and procedures.
  - Applies to all parties, including potential witnesses



# BEING AN ADVISOR

- ❖ The Basics
- ❖ Being an Advisor Compared to Other Roles

# THE BASICS OF BEING AN ADVISOR

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# THE BASICS OF BEING AN ADVISOR

- ❖ Both parties have the right to have an advisor of their choice, who may be, but is not required to be, an attorney, present throughout the entire grievance process.
- ❖ At any time during the grievance process, both parties may choose their own advisors or may request that the University provide them an advisor at no cost or fee.



# WHAT DOES AN ADVISOR DO?

- ❖ The Advisor for either the complainant or respondent may:
  - Accompany the party to any meeting or proceeding during the grievance process;
  - Assist the party with the gathering of evidence during the investigation;
  - Assist the party with inspecting and reviewing evidence gathered by the Investigator;
  - Be asked by the party to assist in making written responses to the information gathered throughout the investigative process;
  - Attend the live hearing and, for Title IX cases, conduct cross-examination, orally and in real time; and
  - Be asked by the respective party to assist in submitting a written statement in support of, or challenging, the outcome of the live hearing, if necessary.

# THE MAIN ROLE OF AN ADVISOR

The main role of an Advisor is to *advise* parties about the University process.

# BEING AN ADVISOR COMPARED TO OTHER ROLES

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# DIFFERENCES BETWEEN AN ADVISOR AND AN ATTORNEY

- ❖ Being an Advisor is *not* the same as being an attorney.
- ❖ The role of an Advisor is only to advise a student as they navigate through the grievance process.
  - Ideally, an Advisor helps make the process run smoothly and manages expectations.
  - Non-lawyers may be advisors.
  - An Advisor should only make arguments that are in **good faith**.
- ❖ The student is *not* an Advisor's client and Advisors do not have an attorney-client privilege with a party.

# DIFFERENCES BETWEEN AN ADVISOR AND AN ATTORNEY (CONTINUED)

- ❖ An administrative hearing is not the same as a criminal court procedure.
  - There is no need to “preserve arguments for the record” in order to refer to them if an appeal is filed. All hearings are recorded and may be referred to in any appeal.
- ❖ An Advisor should advise the student about the University's resources and encourage them to utilize them. Advocates are here for both the complainant and the respondent.

The University's EORC Office simply acts as a neutral and objective fact-finder. Please be courteous to all involved in the process.

# RELEVANCE

- ❖ Under our policies, almost all evidence that is relevant will be permitted in the investigative report and during the live hearing.
  - A piece of evidence or a cross-examination question is relevant if:
    - It has any tendency to make a fact more or less probable than it would be without the evidence; and
    - The fact is of consequence in determining the case.
  - All questions and evidence about prior sexual behavior or predisposition are irrelevant and therefore must be excluded from evidence during the live hearing, unless:
    - Such evidence is offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
    - The evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent.

# IF A PARTY DOES NOT SUBMIT TO CROSS- EXAMINATION UNDER TITLE IX

- ❖ If a party or witness does not submit to cross-examination at the live hearing **ONLY under Title IX**, the Independent Decision-Maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
- ❖ This rule **DOES NOT** apply under the IVSM Policy.

# UNIVERSITY ADVOCATES

- ❖ The University has two separate advocacy offices on campus, **Violence Intervention and Prevention Services** and the **UMatter: Student Support & Advocacy Office**, for complainants and respondents, respectively. Please use them as their support can be helpful.
- ❖ **Shelli Poole** is the confidential complainant advocate from Violence Intervention and Prevention Services.
- ❖ **Kimbrlei McCain** is the confidential respondent advocate from the U Matter Office.
- ❖ University advocates can:
  - Have confidential conversations with the respective party,
  - Offer emotional support and other resources, and
  - Provide accommodations and safety measures.



# DIFFERENCE BETWEEN AN ADVISOR AND AN ADVOCATE

- ❖ The main difference between being an Advisor and being an advocate is that advocates offer emotional support and other similar resources.
- ❖ Advisors, on the other hand, are there to help individuals navigate and understand the grievance process, but they are *not* meant to be emotional support for parties.



# THE TITLE IX AND IVSM GRIEVANCE PROCESSES

- ❖ Filing the Complaint
- ❖ The Investigation Process
- ❖ The Resolution of a Complaint
  - Hearing
  - Mediation
- ❖ The Appeal Process

# IMPORTANT NOTE

Keep in mind that parties can request an Advisor from the University *at any time* during the process.

Accordingly, the point in the process at which an Advisor connects with a student may vary depending upon the case.

# PHASE ONE: FILING THE FORMAL COMPLAINT

# FILING THE COMPLAINT

- ❖ Ordinarily, the Office of Equal Opportunity & Regulatory Compliance (EORC) will receive a report and will schedule an intake meeting with the potential complainant.
- ❖ At the intake meeting, the complainant may file a **formal complaint**, which alleges the respondent committed a Title IX or IVSM Policy violation.
- ❖ If what the complainant alleges would constitute a Title IX or IVSM Policy violation if true, the complainant is permitted to file a formal complaint with the University.



# COMPLAINANT INTERVIEW

- ❖ The complainant may file the formal complaint and choose to do their interview at a later time, or they may choose to have their interview conducted immediately after the filing of a formal complaint.
  - If the complainant chooses to do their interview *immediately after* the filing of a formal complaint, it will be important for the complainant's Advisor to meet with the complainant separately to hear their story.
  - If the complainant chooses to do their interview *at a later time, and requests an Advisor*, the Investigator will schedule a time to do the interview with both the complainant and the complainant's Advisor present.

# NOTICE OF ALLEGATIONS

- ❖ Upon receipt of a formal complaint, the EORC Office will provide written notice to the parties of the allegations contained in the complaint, along with notice of the University's grievance procedures.
- ❖ The **notice of allegations** will include sufficient details about the allegations potentially constituting a policy violation and will provide the parties sufficient time to prepare before any initial interview.
- ❖ The details in the notice of allegations will include, to the extent known:
  - The identities of the parties involved in the incident,
  - The conduct allegedly constituting a policy violation, and
  - The date and location of the alleged incident.

# NOTICE OF ALLEGATIONS (CONTINUED)

- ❖ The notice of allegations will also specify that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- ❖ If additional allegations are made after the initial notice is disseminated, or if new details pertaining to the allegations are discovered, all known parties will be given notice of the additional allegations or the newly discovered details.





# PHASE TWO: THE INVESTIGATION



# THE INVESTIGATION

- ❖ The Investigator will attempt to interview the complainant and the respondent about the alleged incident.
- ❖ The Investigator will request from both parties any information and evidence that is directly related to the allegations under investigation, including the names of potential witnesses to interview.
- ❖ The complainant and respondent will be given equal opportunity to:
  - Discuss the allegations under investigation with the Investigator;
  - Present witnesses during the investigation process, including fact and expert witnesses; and
  - Present other inculpatory and exculpatory evidence.





# THE ROLE OF THE INVESTIGATOR

- ❖ The role of the Investigator is simply to gather information.
- ❖ While gathering information, the Investigator remains objective. Accordingly, the Investigator:
  - Will *not* make determinations regarding credibility of the parties or witnesses, and
  - Will objectively evaluate evidence.

# HAVING OTHERS PRESENT

Both parties will be able to have others present during any meetings that take place during the investigation process, which includes an Advisor and/or an emotional support person such as a University advocate.

# THE DRAFT INVESTIGATIVE REPORT

- ❖ Prior to the completion of the investigative report, the Investigator will provide both parties an opportunity to inspect and review evidence that has been obtained as part of the investigation that is *directly related to the allegations* raised in the formal complaint.
  - To do this, the Investigator will send both parties a *draft* of the investigative report.
  - The **draft investigative report** will contain all directly related evidence, which includes witness statements and other evidence that has been collected during the investigation.
- ❖ The parties will have ten (10) days under Title IX and the IVSM Policy to submit **a written response** to the draft investigative report, which the Investigator will consider prior to the completion of the final investigative report.

# RESPONSE TO THE DRAFT INVESTIGATIVE REPORT

- ❖ Requests for edits or revisions to the statements and information contained in the investigative report should center around [relevance](#).
- ❖ If you submit a request, provide your reasoning along with the request.
  - e.g., “This part of Witness X's statement should not be included in the investigative report as it is not relevant to the allegations.”
- ❖ The responses can also include:
  - Clarifying statements from the parties,
  - Requests to interview additional witnesses, and
  - Submission of additional evidence.

# THE FINAL INVESTIGATIVE REPORT

- ❖ Once the Investigator has considered the parties' written responses, if any, and the investigation process has concluded, the Investigator will create a **final investigative report** that fairly summarizes relevant evidence.
  - The Investigator will work with the Assistant Director of EORC/Title IX Coordinator to determine what evidence is relevant and thus included in the final report.
- ❖ The final investigative report will not contain findings of fact as to whether a policy violation did or did not occur but will instead contain **a summary of the investigation and all relevant documents** submitted by the parties and witnesses.
- ❖ At least ten (10) days under the Title IX Policy or five (5) days under the IVSM Policy prior to a hearing, if a hearing is required or provided, the EORC Office will send to each party and the party's Advisor, if any, the final investigative report in an electronic format or hard copy.

# TIMEFRAMES

- ❖ Cases will generally be adjudicated within ninety (90) business days from the date the formal complaint is filed.
- ❖ The Investigator will make every effort to investigate the allegations raised in the formal complaint but will not allow speed to interfere with the quality of the investigation.



# TIME FOR THE INVESTIGATION

- ❖ The time required to conduct a thorough and complete investigation will vary depending upon, among other things:
  - The complexity of the allegations,
  - The availability or absence of the parties or witnesses,
  - The number of witnesses,
  - The volume of documentary evidence that must be reviewed or gathered, and
  - Break periods or periods where the University is either on break or closed.

# DELAYS IN TIME FOR GOOD CAUSE

- ❖ The timeframe for the resolution of a formal complaint may be extended for good cause with written notice to the parties and an explanation for the delay.
- ❖ Good cause includes, but is not limited to, considerations such as:
  - The absence of a party, a party's Advisor, or a witness;
  - Concurrent law enforcement activity; or
  - The need for language assistance or accommodation of a disability.

# DUE PROCESS

- ❖ Procedural due process of law requires **notice** and a **meaningful opportunity to be heard**.
- ❖ The Title IX grievance process was designed by the Dept. of Education to be consistent with the constitutional requirement of due process.
  - The University's IVSM Policy was modeled under the Title IX regulations.

# PHASE THREE: RESOLUTION OF A COMPLAINT

# MEDIATION

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# THE MEDIATION PROCESS

- ❖ Mediation is a structured, interactive process where an impartial third party assists the disputing parties in resolving a complaint.
  - Mediation will be facilitated by the Director of EORC, Kimberly DeVries.
- ❖ The mediation process generally does not result in a determination regarding the respondent's responsibility.
- ❖ During mediation, the parties typically discuss the grievances, and what each party is hoping to get out of the mediation process.
- ❖ Any terms that the parties agree to will be contained in a [mediation agreement](#) and will be binding upon the parties.



# THE MEDIATION PROCESS (CONTINUED)

- ❖ At any time prior to the Independent Decision-Maker reaching a determination regarding responsibility, the parties can agree to participate in mediation.
  - The mediation process may not involve a full investigation of the complainant's allegations.
- ❖ Mediation is only available after a formal complaint has been filed.
- ❖ Both parties must agree to the mediation process in writing and cannot be compelled to participate.



# MORE ABOUT MEDIATION

- ❖ Before reaching an agreement through mediation, either party has the right to withdraw from the mediation process and resume the grievance process with respect to the formal complaint.
- ❖ If, however, the parties reach an agreement during this process, the terms of the [mediation agreement](#) will be memorialized in writing and will be binding upon the parties.
  - Violation of the written agreement will result in the student being charged with Disregard for University Authority and may result in the agreement being voided.
- ❖ If the parties are unable to reach an agreement through the informal resolution process, the investigation and/or adjudication process will resume.



# IMPORTANT NOTE

Once it becomes clear that the Title IX or IVSM case will proceed to the hearing stage, if a party has not already requested or secured an Advisor, the University will appoint that party an Advisor to work with for purposes of the hearing.

# LIVE HEARING

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# THE PRE-HEARING CONFERENCE

- ❖ If the parties have not agreed to mediation, the matter will be resolved through a live hearing.
- ❖ Once the final investigative report has been made available to the parties and their Advisors, the EORC Office will schedule an individual **pre-hearing conference** with both the complainant and the respondent and their Advisors.
- ❖ Both parties will also be asked to provide the names of any witnesses who they anticipate will participate in the hearing.
- ❖ Additional meetings with the complainant or respondent will be scheduled if necessary.

# IMPORTANT NOTE

Again, it is possible that the parties will not have requested an Advisor before it becomes clear that the case is proceeding to a hearing.

If that is the case, an Advisor's first time connecting with a complainant or respondent may not be until after the pre-hearing conference.



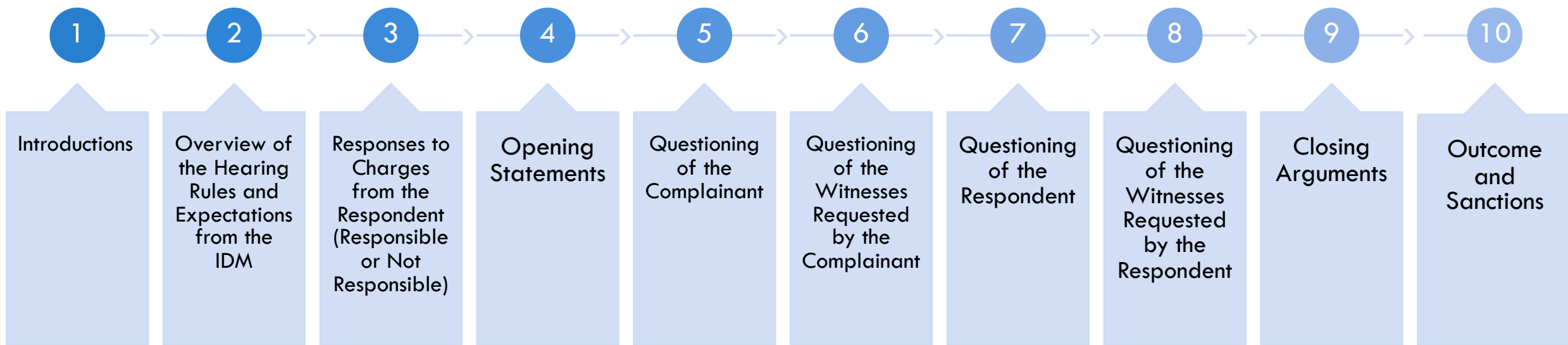
# THE HEARING PROCESS

- ❖ During the **hearing**, the complainant and respondent will have the opportunity to:
  - Explain their side of the story,
  - Present and challenge evidence, and
  - Ask questions of the parties and witnesses.



# SCHEDULING THE HEARING

The designated Hearing Clerk from the EORC Office will work with the complainant, respondent, Advisors, witnesses, advocates, and the Independent Decision-Maker to determine the date and time of the live hearing.



# MAJOR STEPS OF THE LIVE HEARING

# HEARING LOGISTICS

- ❖ Hearings ordinarily take place in a private courtroom located at the University's law school.
  - Each party will be given a designated private room near the hearing room so they will be able to confer with their Advisor and/or advocate during breaks.
- ❖ With respect to time, hearings generally range from 3-6 hours depending on the complexity of the case but may take longer.



# THE INDEPENDENT DECISION-MAKER

- ❖ The **Independent Decision-Maker (IDM)** presides over the hearing and determines the respondent's responsibility.
- ❖ The Independent Decision-Maker operates under the presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.
- ❖ The IDM is vested with the authority to maintain the order of the parties, participants, and proceedings.
- ❖ At the beginning of the hearing, the IDM will give an overview of the hearing process.

# OPENING STATEMENTS AND CLOSING ARGUMENTS

- ❖ The complainant and the respondent are permitted to make an opening statement to the IDM at the beginning of the hearing.
- ❖ Similarly, both parties are permitted to make a closing argument to the IDM at the conclusion of the hearing.
- ❖ Either party may elect to have their Advisor make their opening statement, closing argument, or both.
- ❖ The opening statement and closing argument each must not exceed ten (10) minutes in length.

# IMPORTANT NOTE

Either party may request to not see the other party or parties during a live hearing. If that is the case, we must provide that accommodation.

The Hearing Clerk may put up screens in the hearing room or work out another arrangement to ensure the parties do not see one another.

Alternatively, at the request of either the complainant or the respondent, the EORC Office will facilitate the live hearing with the parties located in separate rooms with technology enabling the Independent Decision-Maker and the parties to simultaneously see and hear the other party or witnesses answering questions.



# SECURITY AT THE HEARING

The EORC Office will make arrangements to have someone from the University Police Department (UPD) present at all hearings to ensure the safety, well-being, and comfort of the hearing participants.

# RELEVANCE

All evidence presented during the live hearing, as well as all questions asked during the cross-examination portions of the live hearing, must be relevant.

# COMPLAINANT'S SEXUAL BEHAVIOR OR PREDISPOSITION

- ❖ All questions and evidence about the complainant's sexual behavior or predisposition are **irrelevant** and therefore must be excluded from evidence during the live hearing, unless:
  - Such evidence about the complainant's sexual behavior is offered to prove that someone other than the respondent committed the conduct alleged by the complainant; or
  - The evidence concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent.

# CROSS EXAMINATION GENERALLY

- ❖ The Independent Decision-Maker may ask questions and will permit each party's Advisor to ask or submit questions, and follow up questions, including those that challenge credibility, but all questions asked during such cross-examination must be relevant.
- ❖ Before a complainant, respondent, or witness answers a cross-examination or other question, the Independent Decision-Maker must first determine whether the question is relevant and will explain any decision to exclude a question as not relevant.

# CROSS EXAMINATION UNDER TITLE IX

Under [Title IX](#), cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's Advisor and never by a party personally.



# CROSS EXAMINATION UNDER IVSM

- ❖ Under the [IVSM Policy](#), questions are submitted by the parties' Advisors to the IDM *prior* to the hearing.
  - This allows the IDM to make relevancy determinations ahead of time to increase efficiency during the hearing.
- ❖ When it is time for a party or witness to be questioned, the IDM will ask those questions that have been previously submitted by the Advisors that he has deemed relevant.
- ❖ For additional questions that were not submitted ahead of time, the Advisors will also have the opportunity to submit questions in real time.
  - Each party table will be supplied with notecards and pens. To submit a question in real time, a party's Advisor simply has to write the question down on a notecard and raise their hand, and an EORC staff member will retrieve the card from the Advisor and submit it to the IDM.

# IMPORTANT NOTE

Remember, under Title IX ONLY, if a party or witness does not submit to cross-examination at the live hearing, the IDM must not rely on any statement of that party or witness in reaching a determination regarding responsibility.

# OBJECTIONS

- ❖ Limited objections to the relevance of questions and evidence are allowed during the hearing.
- ❖ The IDM may decide that objections have become obstructive and unuseful.

# STANDARD OF EVIDENCE

- ❖ In reaching a determination regarding responsibility, the Independent Decision-Maker will apply a **preponderance of the evidence** standard.
- ❖ This standard requires a showing that a particular party's evidence is more credible or convincing than that presented by the other party, or a showing that the fact to be proven is more probable than not.

# DECISION OF THE INDEPENDENT DECISION-MAKER

- ❖ The decision of the IDM regarding the respondent's responsibility as well as possible sanctions will be determined within two (2) business days of the completion of the live hearing.
  - The IDM will generally try to have a decision by the conclusion of the live hearing.

# THE WRITTEN DETERMINATION

- ❖ The Independent Decision-Maker will issue a written determination regarding responsibility, which will include:
  - The allegations potentially constituting sexual harassment;
  - A description of the procedural steps taken;
  - Findings of fact supporting the determination;
  - Conclusions regarding the application of the University's Title IX or IVSM Policy to the facts;
  - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility and any disciplinary sanctions the University will impose on the respondent, if any; and
  - The procedures and permissible bases for the complainant or the respondent to appeal the decision.
- ❖ The complainant and the respondent will be notified of the determination simultaneously.

# DISCIPLINARY SANCTIONS

- ❖ Depending on the facts and circumstances of a particular case, sanctions resulting from a finding of responsibility may range from a verbal reprimand to expulsion from the University.
- ❖ Sanctions are enforced immediately upon determination of the violation.
- ❖ Though not a disciplinary sanction, the IDM may order remedies from the University that are designed to restore or preserve equal access to the University's education program or activity to the complainant.

# POSSIBLE SANCTIONS

❖ The following list encompasses all possible sanctions that may be imposed by the University:

- Oral reprimand
- Written reprimand
- Disciplinary probation
- Loss of privileges
- Restitution
- Community service
- Assessment
- Substance abuse education
- Educational project(s)
- Suspension
- Demotion
- Expulsion
- Termination
- A combination of any of the above sanctions.





# PHASE FOUR: THE APPEAL PROCESS

# SUBMITTING AN APPEAL

If a party wishes to appeal a determination regarding responsibility, including sanctions, or a dismissal of a formal complaint or any allegations therein, that party may submit a [written appeal](#) to the Appellate Consideration Board for the University within ten (10) business days.

# BASES FOR APPEAL

- ❖ Appeals can be made on the following bases:
  - Procedural irregularity *that affected the outcome of the matter;*
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, *which could affect the outcome of the matter;*
  - The Title IX Coordinator, Investigator, or Independent Decision-Maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent *that affected the outcome of the matter;*
  - The grievance process described in the University's Title IX or IVSM Policy was not followed;
  - The conduct alleged does not fall within the jurisdiction of the Title IX or IVSM grievance process; or
  - The sanctions imposed by the IDM were not appropriate for the violation that the respondent was found to have committed.

# AFTER AN APPEAL HAS BEEN FILED

- ❖ The non-appealing party will be notified in writing when an appeal is filed.
- ❖ The complainant and respondent will be provided a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome of the grievance proceeding giving rise to the appeal.
- ❖ The decision-maker for the appeal will not be the Title IX Coordinator, Title IX Investigator(s), nor the Independent Decision-Maker that reached the determination regarding responsibility or dismissal of a complaint giving rise to the appeal.

# THE DECISION OF THE APPELLATE CONSIDERATION BOARD

- ❖ The Chancellor of the University has delegated final authority of review to the Appellate Consideration Board.
- ❖ After reviewing the appeal and the documents related to a case, the Appellate Consideration Board will make a decision based upon the basis or bases of the appeal.



Questions?



# CONTACT THE EORC OFFICE AT ANY TIME!

Honey Ussery – Assistant Director of EORC/Title IX  
Coordinator

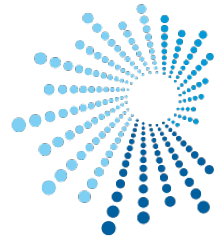
Valerie Yeakel – Investigator and Specialist

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**GRAND RIVER** | SOLUTIONS

# Conducting Fair and Thorough Trauma- Informed Investigations

August 2022

Chantelle Cleary Botticelli, J.D.



# About Us

## Vision

We exist to help create safe and equitable work and educational environments.

## Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

## Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

# Meet Your Facilitators



**Chantelle Cleary Botticelli, J.D.**

*She/Her/Hers*

Director of Strategic Partnerships  
and Client Relations

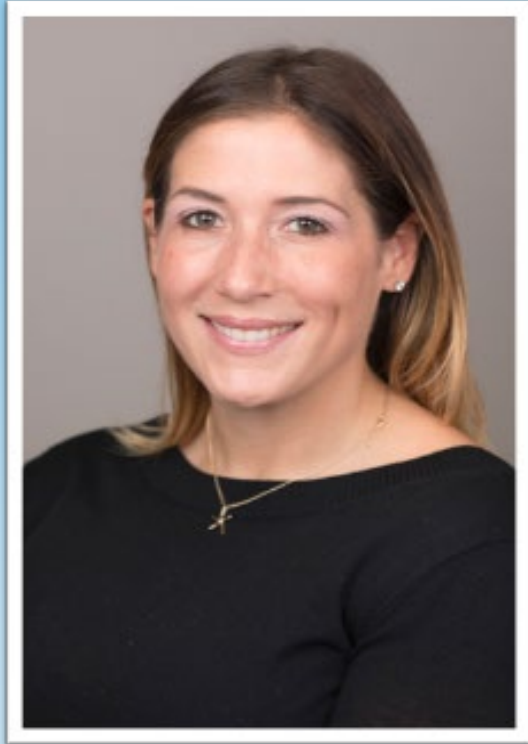


**Pari Le Golchehreh**

*She/Her/Hers*

Senior Solutions Specialist

## Meet Your Facilitator



**Chantelle Cleary Botticelli, J.D.**

*She/her/hers*

Director of Strategic  
Partnerships and Client Relations

## Meet Your Facilitator

Chantelle Cleary Botticelli is a nationally-recognized subject-matter expert in Title IX and related fields. She has more than 15 years of experience in the investigation and adjudication of sexual and interpersonal violence. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Prior to joining Grand River Solutions, Chantelle served as the Director for Institutional Equity and Title IX at Cornell University, and before that as the Assistant Vice President for Equity and Compliance and Title IX Coordinator at the University at Albany. In these roles, she provided direct, hands-on experience in the fields of Title IX, civil rights, employment law, and workplace and academic investigations. Her responsibilities included focusing on diversity efforts, sexual assault prevention and training, affirmative action, and protecting minors on campus.



# Day One Agenda

1

**Title IX's Requirements**

2

**The Proper Application of  
Trauma Informed Practices**

3

**The Importance of Understanding  
the Potential Impact of Trauma**

4

**Developing an Investigative  
Strategy**

5

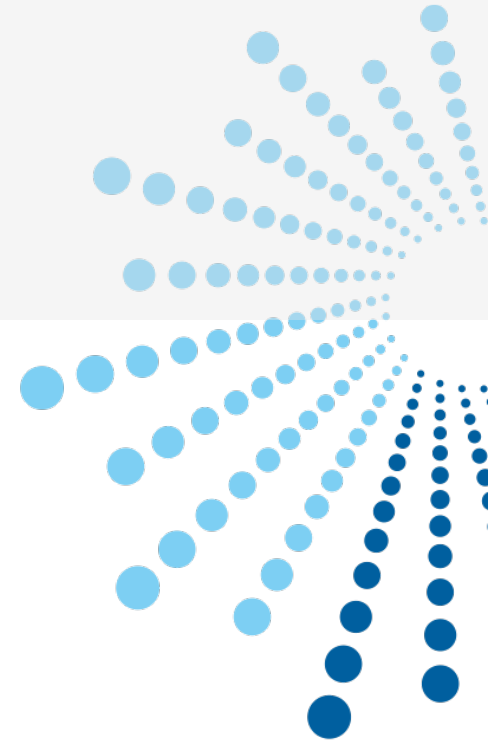
**Investigative Interviews: Part 1**



# Title IX's Requirements

01

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# Title IX of the Education Amendments Act of 1972

"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." 20 U.S.C. § 1681 (1972).



# The Title IX Regulations

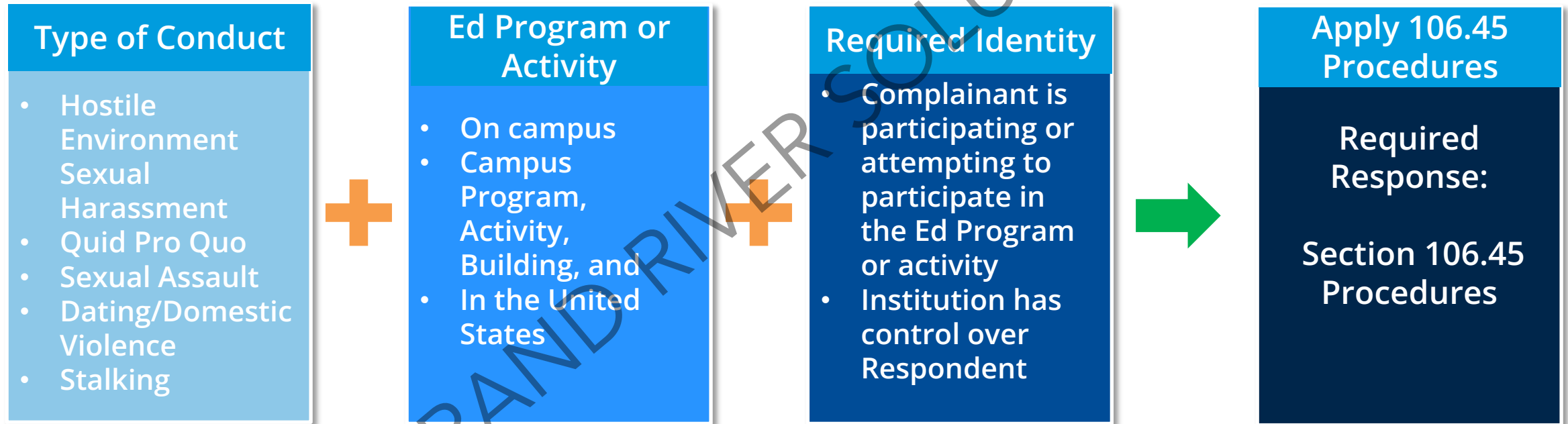
*Sexual Harassment Only*

1. Narrows the definition of sexual harassment;
2. Narrows the scope of the institution's educational program or activity;
3. Narrows eligibility to file a complaint;
4. Develops procedural requirements for the investigation and adjudication of sexual harassment complaints, only.



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# Title IX Application Post May 2020 Regulations





# Procedural Requirements for Investigations



Notice TO BOTH  
PARTIES



Equal opportunity  
to present evidence



An advisor of  
choice



Written notification  
of meetings, etc.,  
and sufficient time  
to prepare



Opportunity to  
review all directly  
related evidence,  
and 10 days to  
submit a written  
response to the  
evidence prior to  
completion of the  
report



Report  
summarizing  
relevant evidence  
and 10 day review  
of report prior to  
hearing



# Notice Requirements

Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:

the identities of the parties involved in the incident, if known,

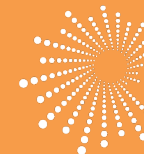
the conduct allegedly constituting sexual harassment under § 106.30,

and the date and location of the alleged incident, if known.

The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.

The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.

The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process



# Advisor of Choice During the Investigation

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The advisor can be anyone, including an attorney or a witness.

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Institutions cannot place restrictions on who can serve.

---

Institutions can create rules and guidelines for participation in the investigation.

---

No specific training required.



# Written Notification of Meetings and Sufficient Time to Prepare

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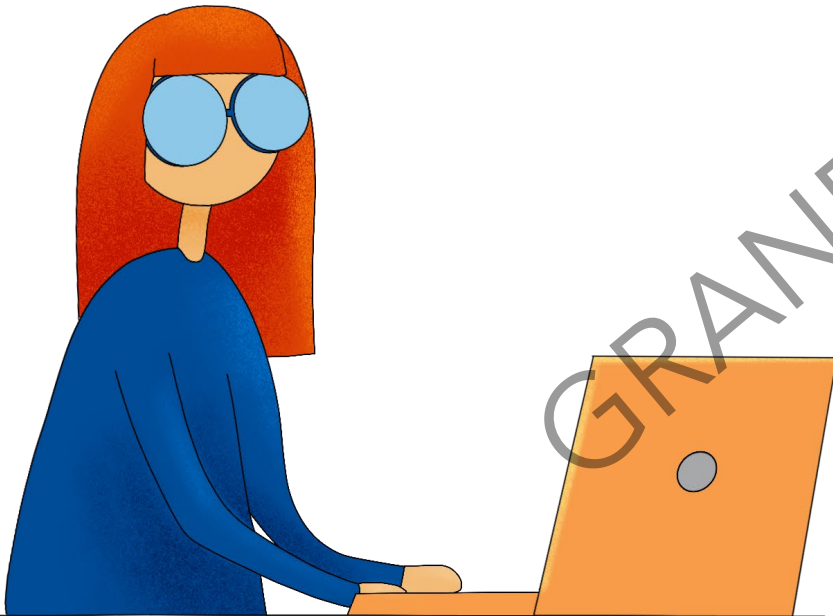
# Equal Opportunity to Present Evidence

# Evidence Review

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Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.

10 days to provide a written response.



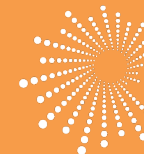
# Investigative Report and Review



After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence.

That report will be shared with the parties and the parties will have another opportunity to respond in writing.

The hearing must occur at least 10 days after the release of the final report.





“Directly  
Related” and  
“Relevant  
Evidence”

---

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# Directly Related Evidence

Regulations do not define “Directly Related” Evidence.

Preamble states it should be interpreted using its plain and ordinary meaning.

Term is broader than:

- “all relevant evidence” as otherwise used in Title IX regulations, and
- “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act

Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.

# “Relevant” Evidence

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

See, e.g., Federal Rule of Evidence  
401 Test for Relevant Evidence:

“Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

# Evidence That is Not “Relevant”

“Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,

- unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

“require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition.

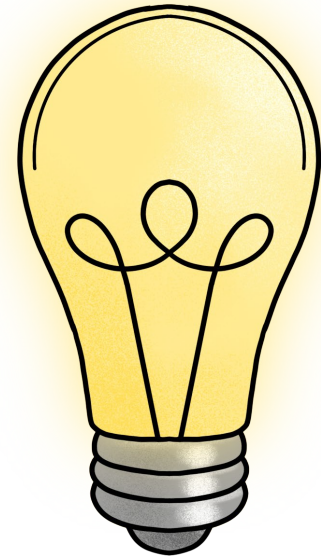
# Who Decides?

Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance at this stage of the process.

- Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight.

Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:

- Each party's right to argue their case, and
- Fact that decisions regarding responsibility will be made at hearing, not investigation stage.





# The Investigator

---



Can be the Title IX Coordinator, although that is disfavored.



The Investigator may not be a decision maker.



Must be trained in accordance with the requirements in the regulations.



Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest.

# The Requirement of Impartiality

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# Section 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution not to have a conflict of interest or bias

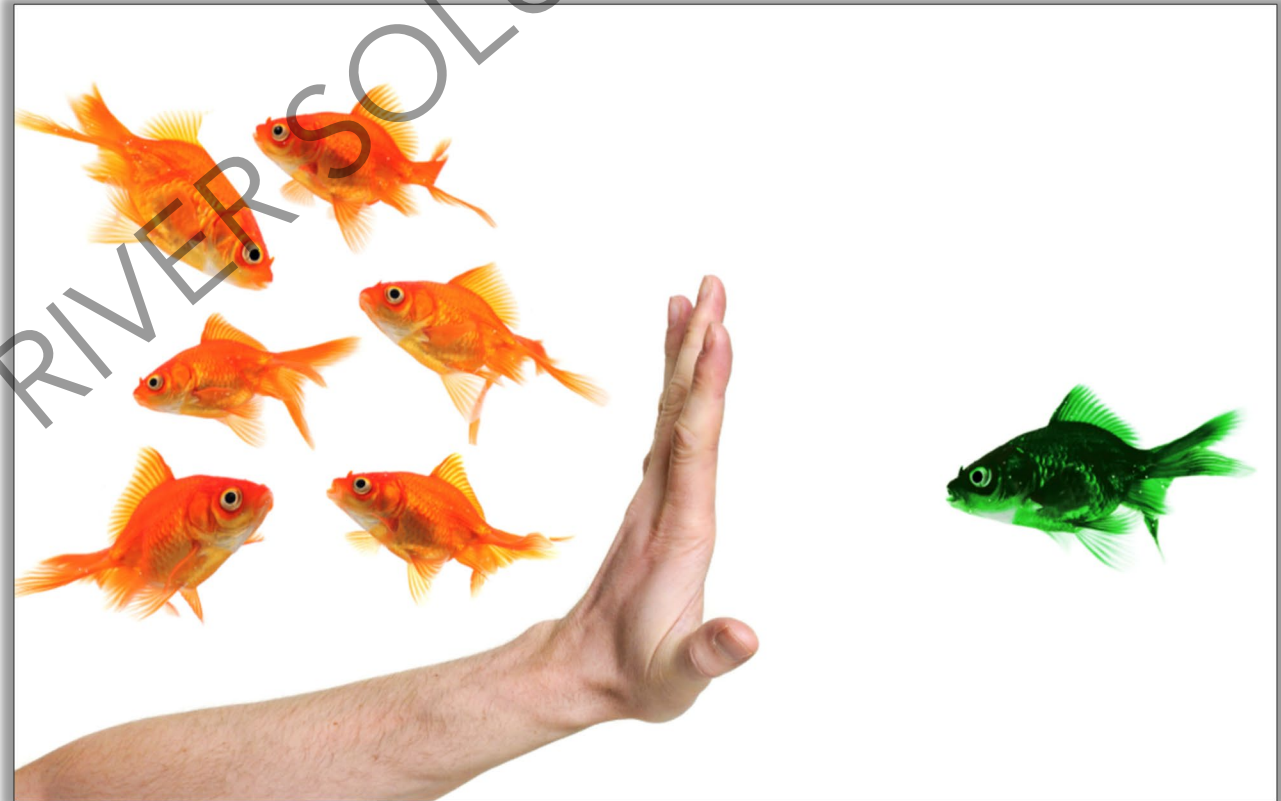
1. For or against complainants or respondents generally, or
2. An individual complainant or respondent

# What Constitutes Bias?

Conduct a fact-specific, objective inquiry based in common sense to determine bias.

## Includes:

- Decision-making that is grounded in stereotypes
- Different treatment based on a person's sex or other protected characteristic
- A decision based on something other than the facts





## Impermissible Bias

Making a decision, determination, or finding that is based on something other than the evidence and specific facts of the case.

A close-up photograph of Scrabble tiles on a wooden surface. The tiles are arranged to spell out the word 'CONFLICT' in a slightly curved line. The tiles are light-colored wood with dark blue letters and numbers. The word 'CONFLICT' is spelled as follows: C (3 points), O (1 point), N (1 point), F (4 points), L (1 point), I (1 point), C (3 points), and T (1 point). Several other tiles are scattered around, including S (1 point), A (1 point), G (2 points), C (3 points), E (1 point), R (1 point), and Z (10 points). A large, semi-transparent watermark reading 'GRAND RIVER SOLUTIONS' is diagonally across the image. At the bottom, there is a solid orange horizontal bar.

# Conflict of Interest



# Avoiding Prejudgment of the Facts

---

Requires that the Title IX professional refrain from making a judgement on individual facts, the allegations, or whether a policy violation occurred until they have had the opportunity to consider all of the evidence.

# An Impartial Investigation is...

Not influenced by bias or conflict of interest.

Committed to decisions based on an objective view of the facts and evidence as you know them and as they evolve.

Truth seeking, not "your truth" confirming.

# Trauma Informed Practices

In the preamble, the Department permits the use of trauma informed practices and recognizes that trauma informed practices can be used in an impartial and non-biased manner.

Trauma informed practices must be applied equally to all genders.



# The Proper Application of Trauma Informed Practices



02

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Trauma informed practices provide tools/techniques for interviewing and engaging with the Complainant, Respondent, and Witnesses.



Format/Structure of the Interview



Format of Questions



Approach to Clarification

# Trauma Informed Practices are Designed to:

01

Encourage thorough and complete investigations

02

Assist with recollection

03

Assist with recounting

04

Reduce potential for false information

05

Minimize unnecessary re-traumatization

06

Reduce Bias



# Misapplication of Trauma Informed Practices

**It is a misapplication of trauma informed principles to allow potential evidence of trauma to:**

1. Influence the interpretation of a specific item of evidence;
2. Substitute for missing evidence;
3. To serve as a justification for not doing a full and thorough investigation;
4. Cause a biased belief in the veracity of one or more party.



# The Importance of Understanding the Potential Impact of Trauma



03

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# Trauma

**An event that is experienced as terrifying, horrifying, or threatening and that is coupled with an actual or perceived lack of control.**

# Examples of Events that Might Trigger a Traumatic Response

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Sexual Assault

Physical Assault  
by a Stranger

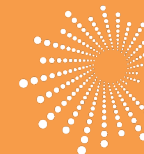
Physical Assault  
by an Intimate  
Partner

A Car Accident

Accident that  
causes serious  
injury or death

Robbery

Significant  
medical event



**When trauma occurs, there are very real changes in brain function that may affect a person's ability to make memory and to recount their experience.**

---

## Common Characteristics of Disclosures by a Trauma Brain

---

---

Inconsistent

---

---

Non-linear

---

---

Fragmented

---

---

Lack of detail

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---

New information

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---

Affect is unexpected

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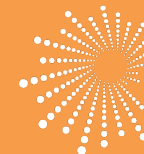
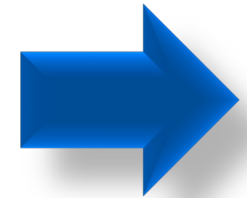


Historically, the seemingly inconsistent behaviors that frequently accompany disclosures of sexual assault and interpersonal violence resulted in the belief that the victim was being dishonest.

Inconsistencies  
Lack of Detail  
Non-Linear  
Fragmented  
New Information

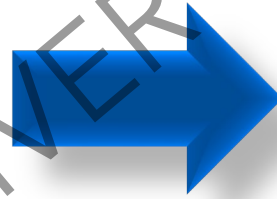


Not Credible

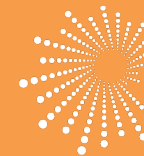


# The Historical Conclusion...

False Report  
Regretted Sex  
Not Provable



Investigation  
CLOSED





When an investigator uses “trauma informed” tools, they are less likely to:



CONCLUDE, WITHOUT A THOROUGH INVESTIGATION, THAT THE REPORTING INDIVIDUAL IS NOT CREDIBLE



ASK QUESTIONS OR MAKE DECISIONS FOUNDED IN BIAS



CAUSE ADDITIONAL HARM



JEOPARDIZE FUTURE REPORTING



# The Future

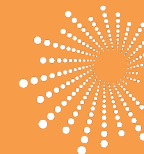
An understanding of trauma and its potential impact should encourage investigators to keep an open mind, and it should prevent investigators from immediately interpreting seemingly inconsistent behaviors with deception. An understanding of trauma provides another explanation for these seemingly inconsistent behaviors.

This is essential to a fair and thorough investigation.

When presented with the following characteristics in a disclosure,

Inconsistencies  
Lack of Detail  
Non-Linear  
Fragmented  
New Information

An investigator who understands trauma will....





**Continue their  
investigation.**



# Developing an Investigative Strategy

04

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# Essential Steps of an Investigation



Review Notice of Allegations and Formal Complaint



Initial Interviews



Evidence Collection



Evidence Review



Additional Evidence Collection/Follow Up Interviews



Report Writing

# Understand the Scope of the Investigation



Review the Notice of Allegations  
and the Formal Complaint



Ask questions if unsure

# Identify the Claims and What Needs to be Proven

- What will the decision maker be asked to decide?
- What does the formal complaint allege?
- What are the elements of each act of prohibited conduct alleged?



**Rape.** The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

1. Did Respondent penetrate Complainant's vagina or anus?
2. Without Complainant's affirmative consent?
  1. What is the ground for lack of consent
    1. Did respondent fail to seek and obtain Complainant's affirmative consent?
    2. Did Respondent force Complainant?
    3. Did Respondent coerce Complainant?
    4. Was Complainant incapacitated and therefore incapable of consent?

**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.

1. Did Respondent engage in a course of conduct?
2. Was that course of conduct directed at Complainant?
3. Would Respondent's conduct cause a reasonable person to either
  1. Fear for their safety or the safety of others, or
  2. Suffer substantial emotional distress

# The Process

## *Developing an Investigative Strategy*



# Investigation Timeline

## Prior History

- Between the Parties?
- Of the Parties?

## Incident

- Consent?
- Type of Contact?
- Injuries?

## Pre-Incident

- Communications?
- Interactions?
- Conduct?

## Post Incident

- Behaviors?
- Communications?



# The Importance of Organization

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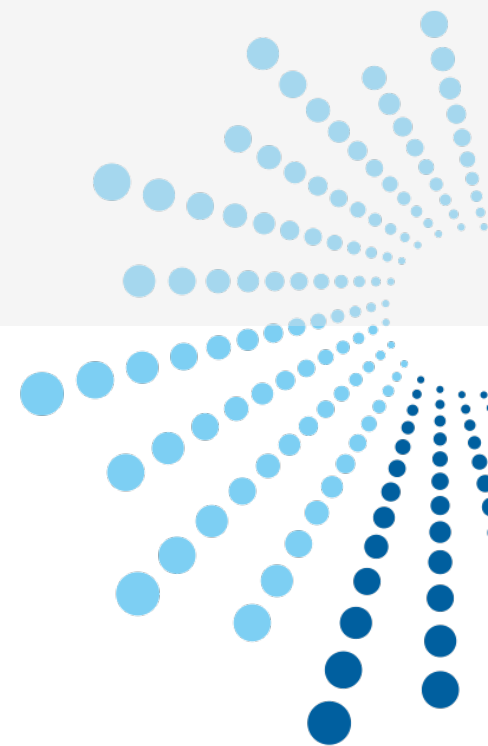
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05

# Investigative Interviews

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# Interview Objectives



## Connect

Build rapport  
Build trust  
Empower



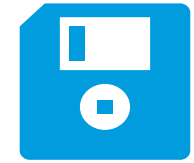
## Listen

Allow interviewee to  
share their experience



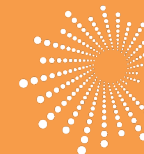
## Clarify

Understand what you  
have heard  
Seek additional  
information



## Evidence Preservation

Text Messages  
Photographs  
Names and contact info  
for witnesses



# Prior to the Interview



Secure an appropriate meeting location



Allow for enough time to conclude the meeting



If interviewing a party, inform them of their right to have an advisor present.



Prepare for the meeting

Areas of focus?

Other evidence?

Go back review what you have



Provide Written Notice of the Meeting

Advise the parties/witnesses that you will be collecting evidence



# Set Expectations

## What they should expect of you

- That you are neutral
- That you will listen, what they are saying is important to you
- That you will keep the information they share private
- What you will do with recording/notes
- That you may have to ask difficult questions
- Patience, respect, and appreciation
- This will not be their only opportunity to speak with you
- Prepare the parties for follow up interviews and the "shift"

## What you expect of them

- Honesty
- That they will seek clarity if needed (give them permission to do so)
- That they won't guess or fill in blanks

# How do we...

---



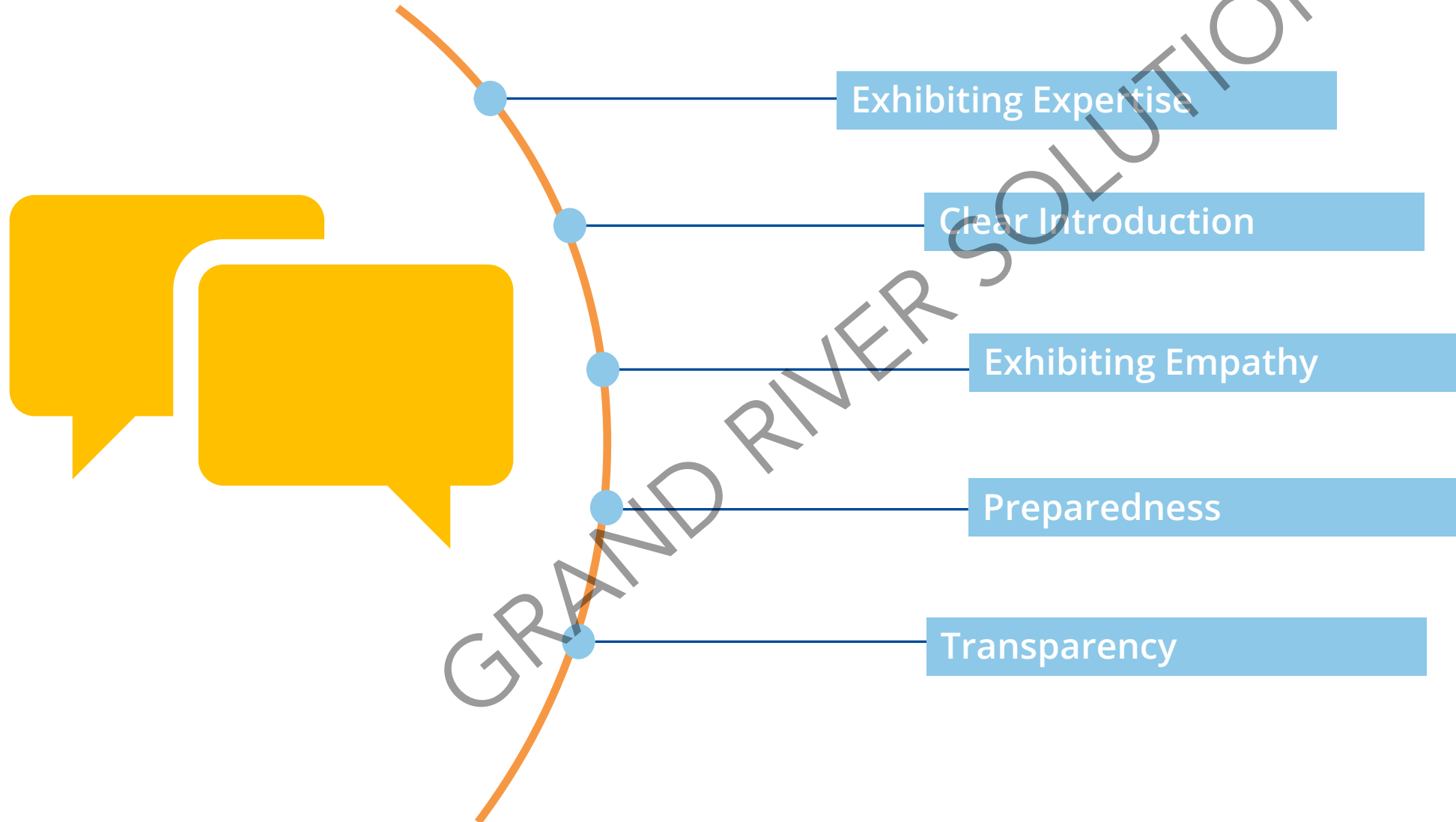
Build Rapport  
and Trust?



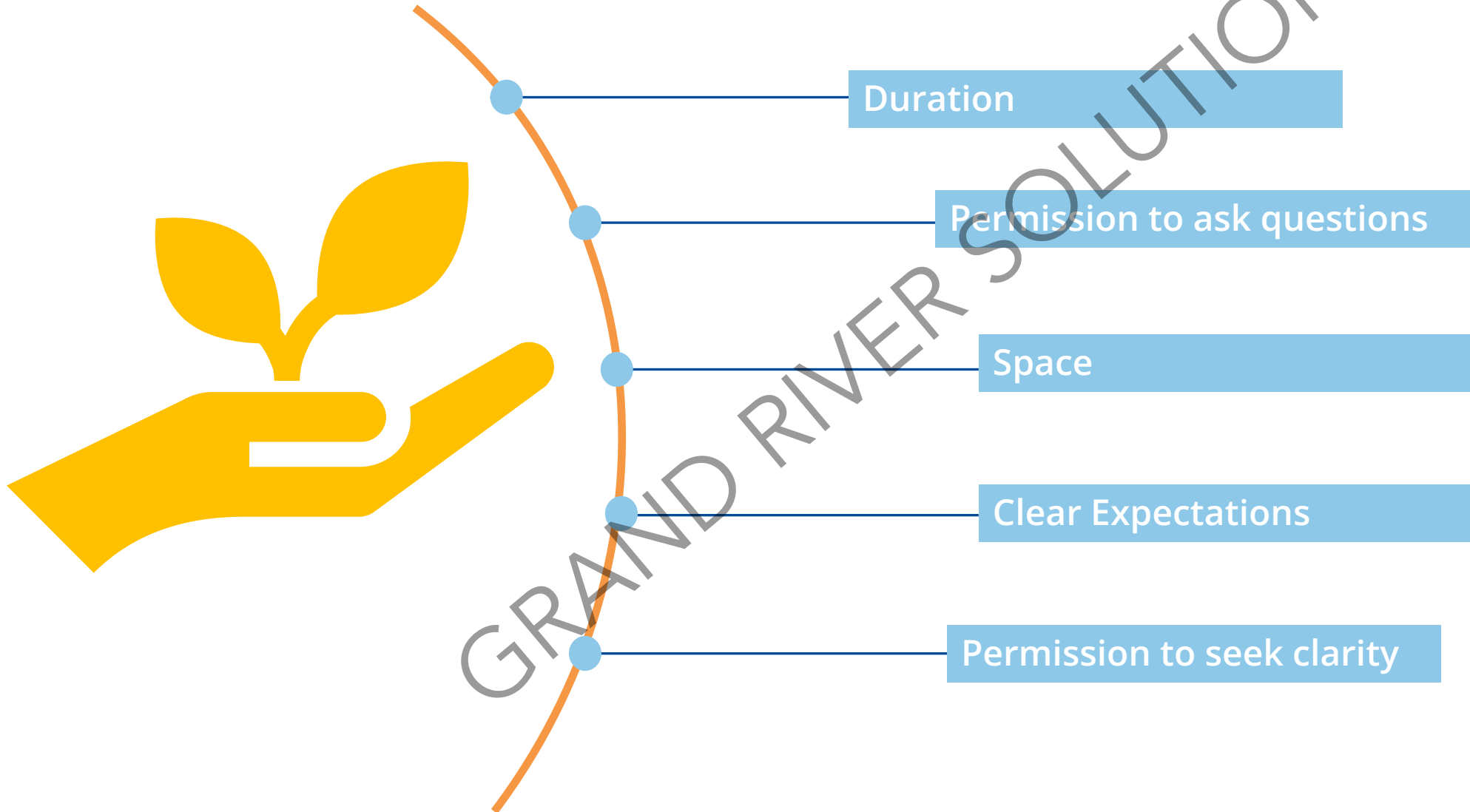
Empower?



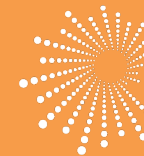
# Rapport and Trust



# Empowerment



# Investigative Interviews



# Start the interview by eliciting a narrative...

Help me understand your experience?

Start where you are comfortable and share what you are able to remember.

What are you able to tell me about your experience?

Allow the person to speak uninterrupted. This takes patience.



Next, ask questions that are intended to clarify and more deeply explore the information and details provided by the person in their narrative.

### Do Ask:

- Interview for clarification
- Help me understand?
- Can you tell me more about...?
- Is there anything else you can share about...?

### Avoid:

- Interrogation
- Questions that blame
- Questions that imply doubt
- Leading questions

A close-up photograph of a camera lens resting on a dark wooden surface. The lens is the primary focus on the left side of the frame, with its glass element and surrounding metal housing visible. The background is a blurred wooden texture.

# Capture the Entire Experience

- Ask about the physical and emotional reactions to the incident.
- Conclude with very open-ended questions:
  - What was the most difficult part of this experience for you?
  - Is there something that stands out/that you just can't stop thinking about?
  - Is there anything more that you would like me to know?



# The Before

At some point during the interview, it is also important to explore the prior history, if any, between the complainant and the respondent, and the history of the parties, individually.

# And The After

---

It is also important to explore the events following the incident. Oftentimes, the best evidence is produced after the incident.

- The parties' psychological reactions
- Changes in behavior
- Witnesses to the psychological reaction
  - "Has anyone expressed concern about you since the assault?"
- Communication/contact between the complainant and respondent

## Meet Your Facilitator



**Pari Le Golchehreh**

*She/her/hers*

**Senior Solutions Specialist**

## Meet Your Facilitator

Pari Le Golchehreh is a Senior Solutions Specialist at Grand River Solutions and has extensive experience in Title IX and Equity work on college campuses. Prior to joining Grand River, Pari served as the Equity and Title IX Office's Lead Investigator at California Institute of Technology where she developed a deep expertise in leading investigations, trained campus community members, and facilitated mediated conversations and remedy-based resolutions. Pari is a certified mediator, and is skilled in aiding parties to resolve disputes in a trauma informed and collaborative manner.



# Day Two Agenda

1

**Investigative Interviews  
(continued)**

2

**Evidence Collection and  
Assessment**

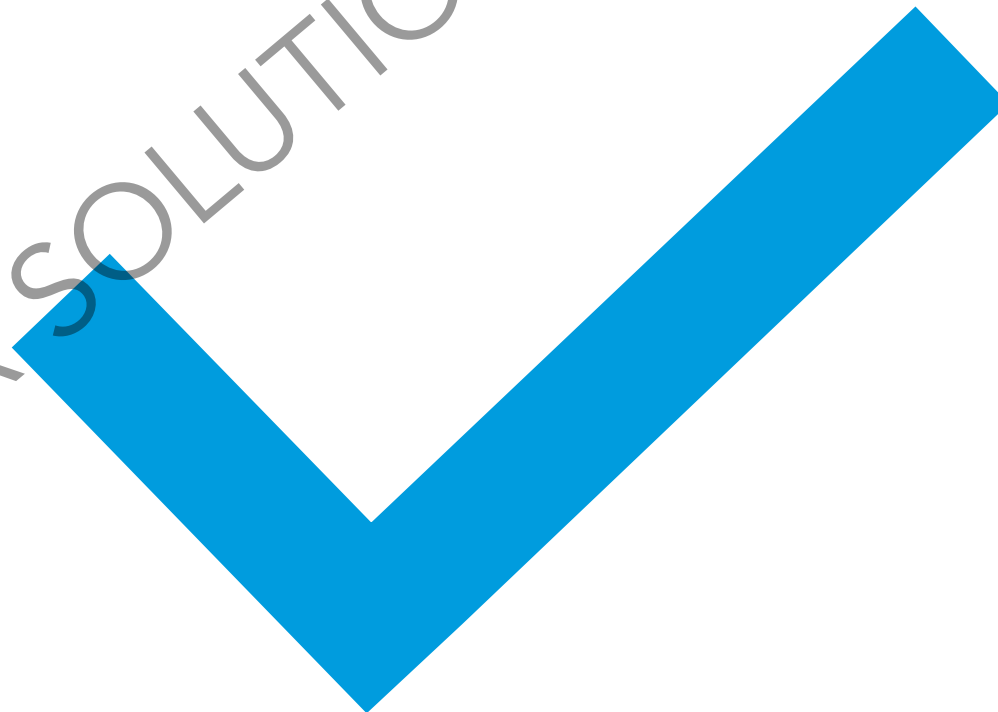
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**The Investigative Report and  
Record**



# Quick Review!

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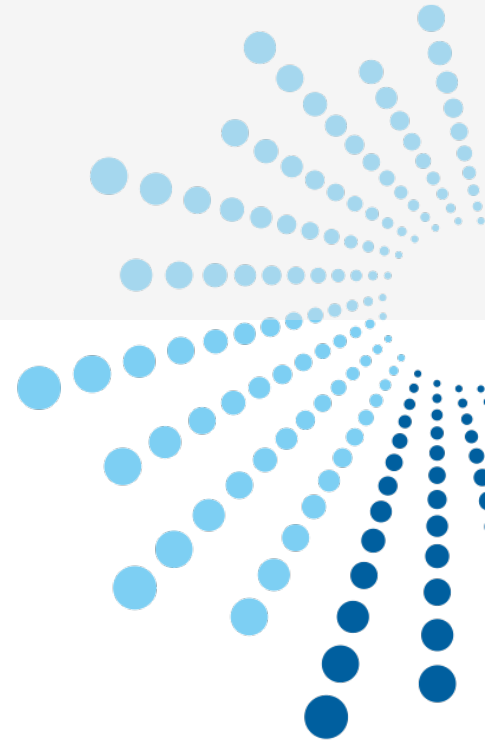




# Investigative Interviews: Continued

01

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# Throughout the Interview



Explain your questions,  
especially the difficult ones.

How much did you drink? What they  
hear: this is your fault because you were  
drinking.



Do not ask leading questions.



Watch your tone.



Do not rush.



LISTEN!!!!!!!!!!



Pay attention to and document information that might lead to  
additional evidence.



Document questions asked. Especially when a response is not  
provided.

# At the Conclusion of the Interview



Discuss submission of evidence.



Explain statement review process.



Explain next steps in the process.



Keep the lines of communication open.



Review available support, privacy requirements, and prohibition against retaliation.



# After the Interview: Actions



Memorialize the Interview in writing.

Notes

Summary

Transcript



Provide opportunity for the party or witness to review it.



Provide opportunity for party or witness to provide a response.



Incorporate the response.

# A Note About Witness Summaries



The reader of any report should not know of the investigator's presence in the report; for example, report should not say "I then asked ..."



Use interviewee's words and put the words in quotes if it is their words



Avoid conclusory words, or words that suggest that the investigator has an opinion about the information offered

# After the Interview: Reflection



Reflect.



Is there something you missed or forgot to ask?



Do you need clarity on any of the information shared?



Has this interview revealed additional evidence that you want to explore or collect?



Has evidence of additional policy violations been shared?

# Follow Up Interviews



Seek clarification

Explore inconsistencies

Explore contradictory evidence

Explore difficult issues

Opportunity to respond

# Follow Up Interview Approach

1

Explain the purpose of the follow up.

2

Set the stage for the topics you will be covering.

3

Prepare the interviewee for "the shift."

4

Do not avoid asking the hard questions.

# The “Hard” Questions

Details about the sexual contact

Seemingly inconsistent behaviors

Inconsistent evidence/information

What they were wearing

Alcohol or drug consumption

Probing into reports of lack of memory

# How to Ask the Hard Questions

Lay a foundation for the questions.

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

Be deliberate and mindful in your questions:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...

# What Questions Do You Have for Quinn?

“

Casey and I have been friends for a few weeks. On Friday night, we were hanging out alone in my room, watching a movie. We started to make out, and I was ok with that. After making out for a while, Casey started touching me down there. Then Casey tried to have sex with me. Casey knew that I didn't want to have sex but kept trying anyway. Casey was being really coercive, and so I just went along with it. Casey raped me and I want Casey to be held accountable.

”



# What Questions Do You Have for Barri?

“

When I got to the party, I was already lit. I kept letting Marc get me drinks anyway. At some point, I just kinda don't remember anything. And then I woke up in Marc's bed and it was morning. I had all my clothes on, but I know someone had sex with me. I could feel it. I just wanted to go, so I did. Before I left Marc woke up and tried to talk to me but I wasn't hearing it. He looked guilty and I could tell he felt bad

”

# What Questions Do You Have for Colin?

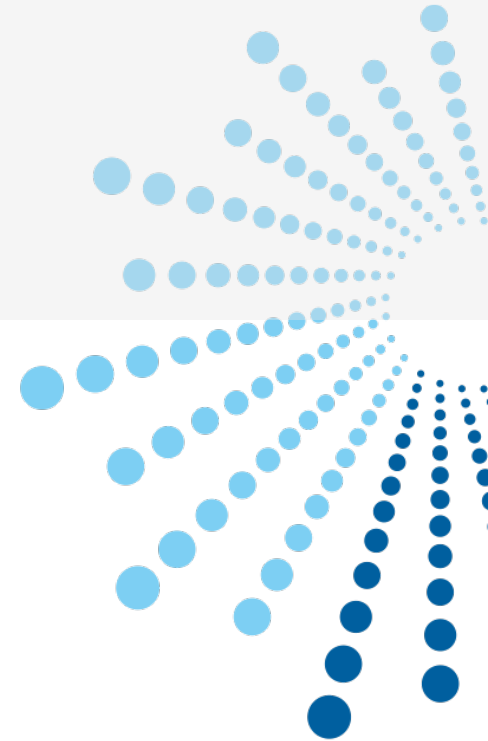
“

Pat and I have been together for about a month and have been intimate for the last two weeks. We went out with my friends on Friday night and Pat got really drunk. At some point we ran into my ex and Pat was really jealous, so we left. When we got back to my place, I thought things were fine. We started hooking up and all of a sudden Pat's mood changed. Pat got really aggressive and choked me. He was so angry and I was so scared.

”



# Evidence Collection and Assessment



02

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# Evidence

“Something (including testimony, documents, tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or non-existence of a fact.”

Black’s Law Dictionary

# Types of Evidence

## Direct Evidence

- Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

## Circumstantial Evidence

- Evidence based on inference and not on personal knowledge or observation.

## Corroborating Evidence

- Evidence that differs from but strengthens or confirms what other evidence shows

# Evidence

Testimony

Text Messages

Social Media  
Posts and  
messages

Emails

Surveillance

Videos

Photographs

Police Body  
Camera  
Footage

Swipe Records

Medical  
Records

Phone Records

Audio  
Recordings

# Evidence Collection



Identify the items of evidence that you would like to obtain.



Develop an intentional strategy for obtaining that evidence.



Overcome barriers to evidence collection.



Considerations about collecting certain types of evidence.

# A Thorough Investigation

is more than evidence collection



# Evaluating the Evidence

Is it relevant?

Is the evidence important, or of consequence, to the fact-finding process?



Is it authentic?

Is the item what it purports to be?



Is it credible/reliable?

Is the evidence worthy of belief and can the decision maker rely on it?



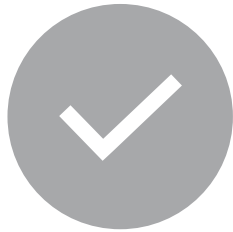
What weight, if any, should it be given?

How important is the evidence to the fact-finding process?

# A Thorough Investigation Permits the Decision Maker to Assess



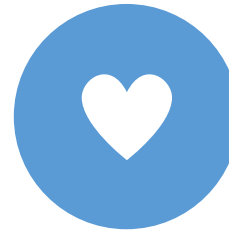
Relevance



Credibility



Reliability



Authenticity



Weight

# “Relevant” Evidence

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“require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition

# Assessing Relevance

*Why Does it Matter?*

---

Unsure about the relevance about a particular item of evidence? Ask the person who has proffered it.

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Character Evidence

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Polygraph evidence

---

Opinion Evidence

---



# Opinion Evidence

---

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?

# Opinion Evidence: Try it!

---

You are investigating an allegation that Casey had sex with Taylor when Taylor was incapacitated. You interview several witnesses, one of whom made the following statement:

"I got to the party pretty late, and Taylor was already lit."

"Taylor was wasted. Like totally messed up. There is no way they could have given permission for sex"



# Assessing Authenticity

*Investigating the products of the Investigation*



Never assume that an item of evidence is authentic.

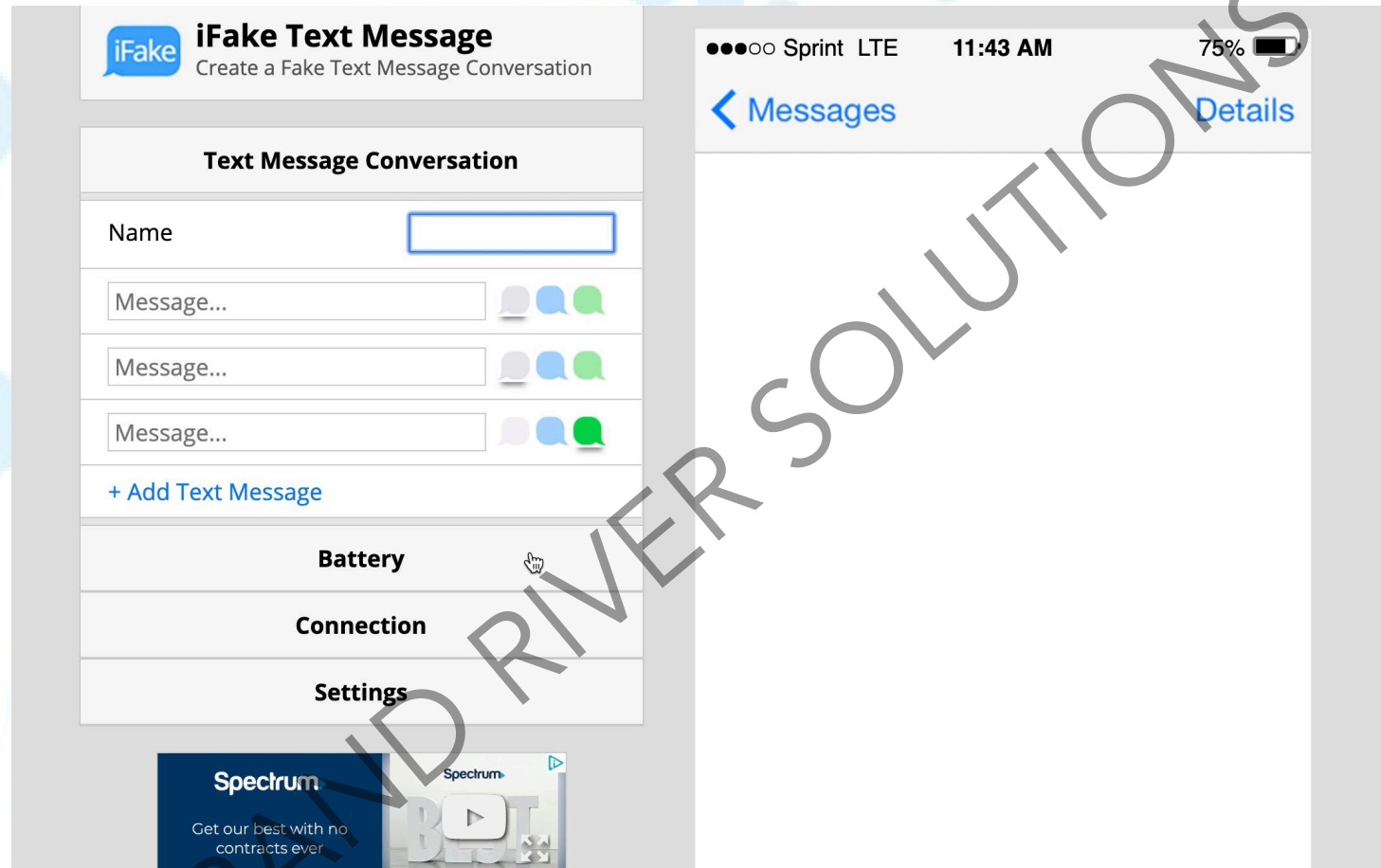


Ask questions, request proof.



Investigate the authenticity if necessary.





# Is it authentic?

---



QUESTION THE  
PERSON WHO  
OFFERED THE  
EVIDENCE



HAVE OTHERS  
REVIEW AND  
COMMENT ON  
AUTHENTICITY



REQUEST  
ORIGINALS



OBTAIN  
ORIGINALS FROM  
THE SOURCE



ARE THERE OTHER  
RECORDS THAT  
WOULD  
CORROBORATE?

# Assessing Credibility and Reliability

No formula exists, but consider the following:

Opportunity to view

Ability to recall

Motive to fabricate

Plausibility

Consistency

Character, background, experience, and training

Coaching

Bias

# Barriers to Evidence Collection

Non-Participating Parties

Uncooperative Witnesses

Uncooperative Advisors

Identity of party or witness unknown

Refusal to share materials

Materials lost or no longer accessible

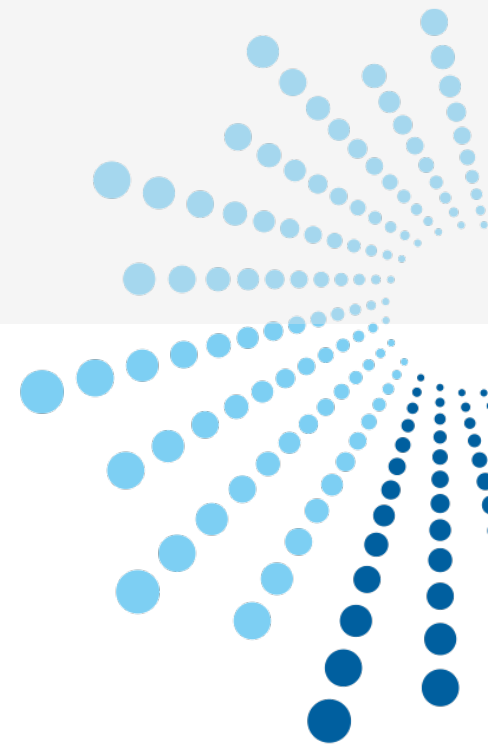
Difficult topics



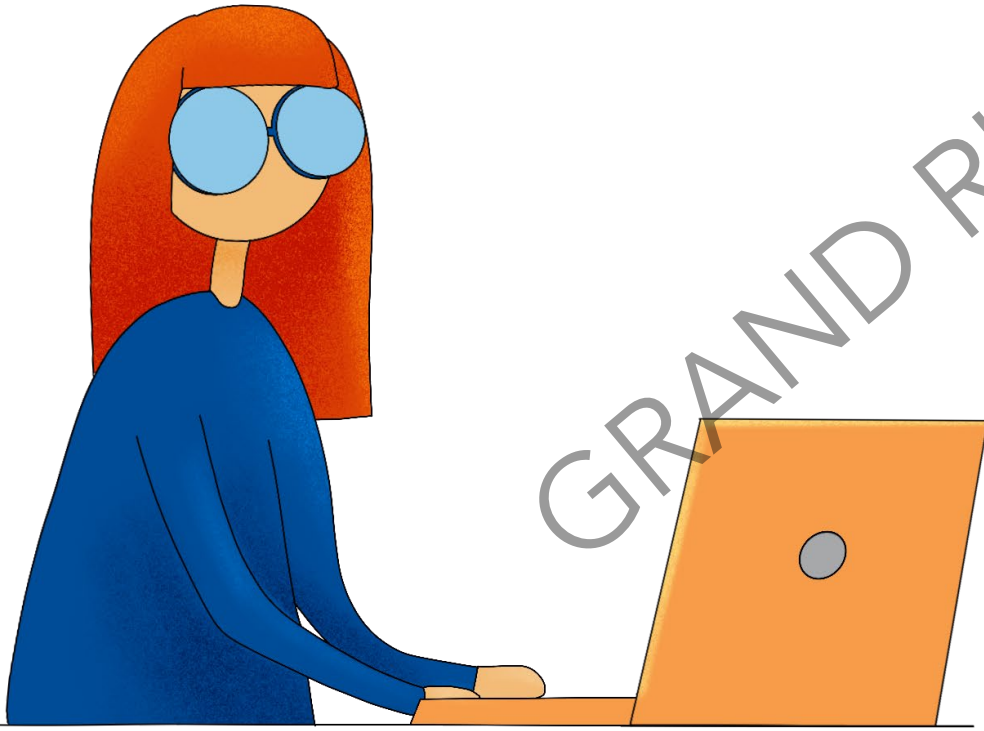
# The Investigative Report and Record

03

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At the conclusion of the investigation, we must create an investigative report that fairly summarizes relevant evidence.



# Relevancy Standard

## Relevant Evidence

- “Evidence is relevant if:
- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

## Irrelevant Evidence

- Prior sexual history of complainant, with two exceptions
- Legally recognized and unwaived privilege.
- Records related to medical, psychiatric, psychological treatment

# Who Decides?

Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance

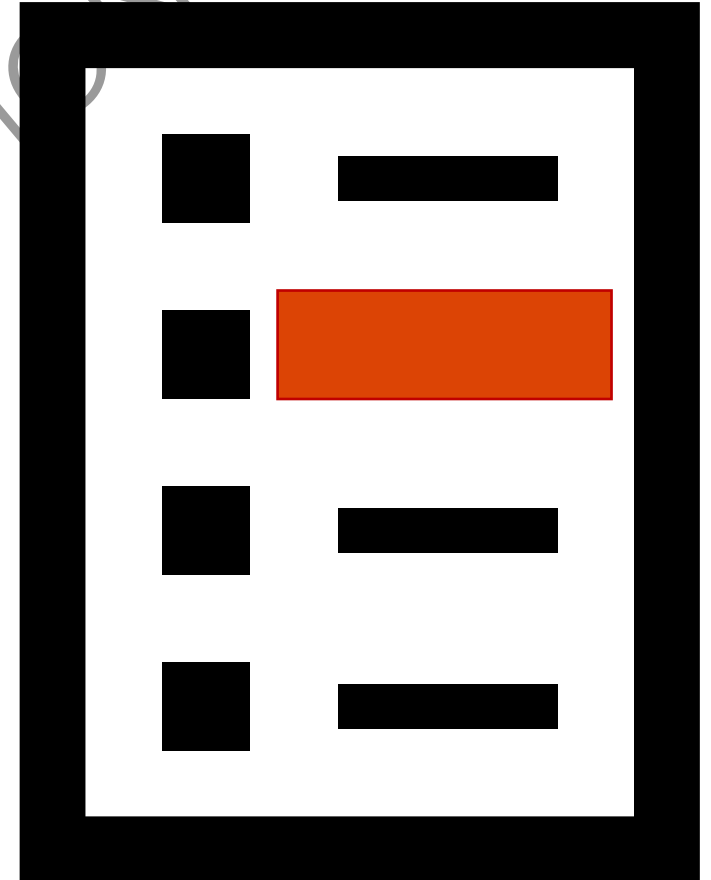
- Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight

Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:

- Each party's right to argue their case, and
- Fact that decisions regarding responsibility will be made at hearing, not investigation stage



# Redactions



# Additional Requirements



Share the report with the parties and their advisors



In electronic format or hard copy



At least 10 days prior to the hearing

# The Purpose of the Report

**To allow for advance Review**

**To allow for advance Preparation**

- By the Decision Maker
- By the Parties

**Reduce likelihood of bias in final outcome**

# Intended Recipients

The Parties

The Advisors

The Decision Maker

The Appeal Panel

# Other Recipients?

Friends of  
the parties

Parents

Law  
enforcement

Attorneys

Judges

Media

Social media

# Essential Elements

---

Intentionally organized to enhance comprehension

---

---

Factually accurate

---

---

Concise

---

---

Without editorial or opinion

---

---

Consistent format

---

# Report and Evidence File



Summary of the  
Evidence



Compilation of the  
Evidence

# The Evidence File



Compilation of the evidence



organized intentionally and consistently



Divided into Appendices



Is attached to the report



Includes a procedural timeline



# Examples of Appendices



## Appendix A

Contains all of the party/witness testimony (e.g., transcripts, statements summaries, etc.) that the investigator deems relevant



## Appendix B

Contains all of the documentary evidence (e.g., text messages, SANE reports, photographs, etc.) that the investigator deems relevant



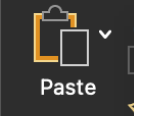
## Appendix C

Contains the remaining evidence deemed irrelevant by the investigator, but that is directly related to the allegations in the formal complaint



## Appendix D

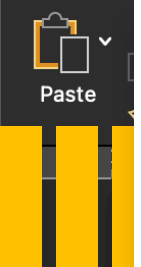
The procedural timeline



# Structure of the Report



- Overview of the Investigation
- Statement of Jurisdiction
- Identity of Investigators
- Objective of the Investigation and the Investigation Report
- Prohibited Conduct Alleged
- Witnesses
- Evidence Collected
- Summary of Evidence
- Conclusion

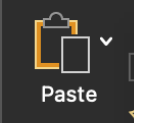


# Report Structure

## *Overview*

In this section, provide a very brief overview of the case. Include:

- the names of the parties,
- the applicable policy(ies)
- the prohibited conduct alleged,
- the date, time, and location of the conduct,
- a brief description of the alleged misconduct



# Report Structure

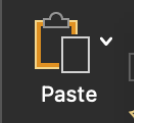
## *Statement of Jurisdiction*

---

1. Cite Jurisdictional Elements

---

2. State all grounds for Jurisdiction

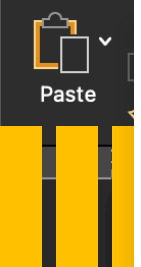


# Report Structure

## *Identify Investigators*

1. Identify the investigators by name

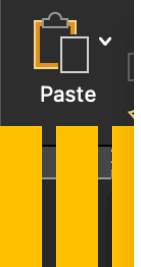
2. Investigator's training belongs in file, not in report



# Report Structure

## *Objective of the Investigation & Report*

1. This language should mirror the language in your policy or procedures.
2. State the objective of the investigation
3. Briefly state that all procedural steps were followed
4. Describe the purpose of the report.



# Report Structure

## *Prohibited Conduct Alleged*

1. List the allegations of prohibited conduct in the formal complaint.

2. Include definitions of prohibited conduct from institution's policy/procedures.

# Report Structure

## *List Witnesses*

---

List those witnesses that were interviewed

---

List witnesses that were identified, but not interviewed

---

Simple List

---

Detailed List



## Example of a Detailed List

Witness Name	Witness identified by:	Information offered
John Doe	Reporting Party	Mr. Doe is the Reporting Party's best friend. He was with the Reporting Party the night of the reported incident.
Jane Doe	Investigators	Jane Doe is the Responding Party's roommate. It is believed that she saw the Reporting Party leave the Responding Party's residence immediately following the reported incident.

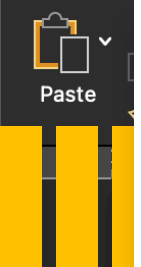


# Report Structure

## *Evidence Collected*

The final Title IX regulations require that all evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint be shared with the parties and “made available at any hearing to give each party equal opportunity to refer to such evidence during the hearing including for the purposes of cross-examination.”

In this section, list the Evidence or Refer to Appendices



# Report Structure

## *Summary of Evidence*

In this section, include a summary of all relevant evidence. This section can be organized in several ways. It is important that, however organized, the evidence is summarized clearly and accurately, and without opinion or bias. In this section, the writer should cite the evidence and information in the Appendices.

# Report Structure

## *Conclusion*

In this section, summarize next steps in the process, including any procedural pre-requisites for moving the matter forward to a hearing.

# Thank you!

## Email Us

info@grandriversolutions.com

## Follow Us



@GrandRiverSols

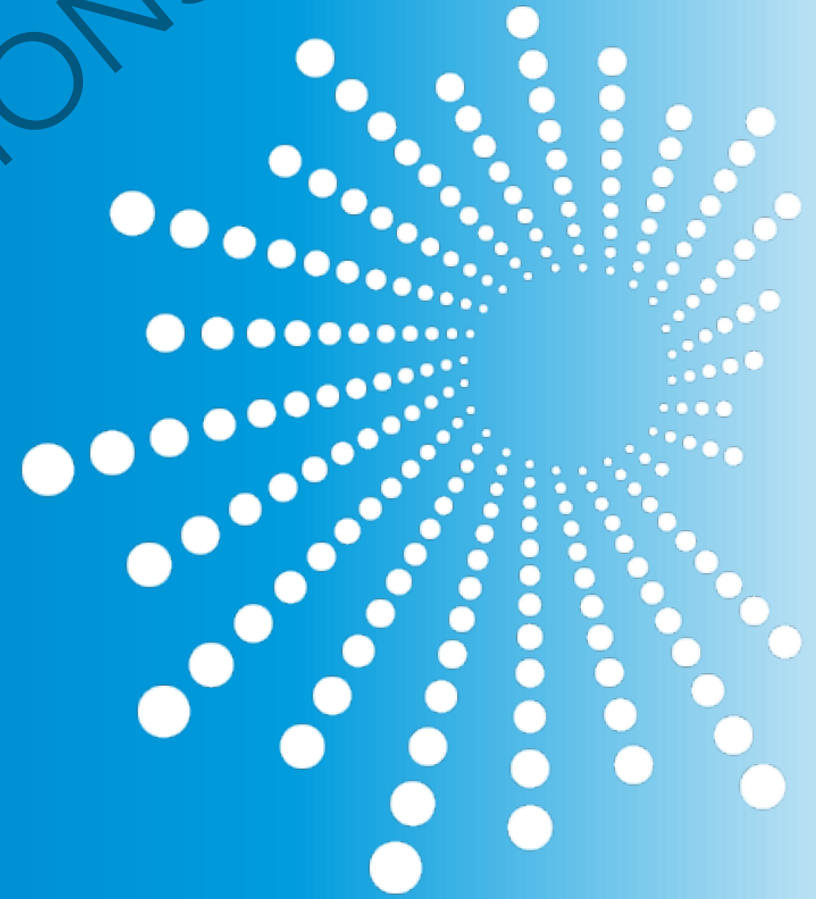


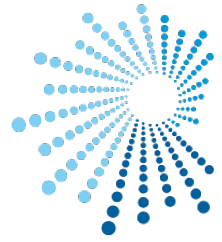
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## Send Feedback



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# Hearings in a Post Regulatory World

Oregon Alliance

Martha Compton | March 2022



Martha Compton

*She/her*

Director of Strategic Partnerships and  
Client Relations

## Meet Your Facilitator

Martha consults and trains nationally on Title IX and student conduct and has previously served as a technical trainer for Department of Justice VAWA campus grantees. Martha is a former President of the Association for Student Conduct Administration, has been a faculty member for ASCA's Gehring Academy, and was part of the core team that developed ASCA's Sexual Misconduct Institute. A student conduct professional for over 20 years, Martha is also a former dean of students and has extensive experience in residence life, behavior intervention, emergency services, orientation, leadership, and working with student organizations.



# About Us

## Vision

We exist to help create safe and equitable work and educational environments.

## Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

## Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

# Agenda

1

**Title IX Requirements for Hearings**

2

**Process Participants**

3

**Pre-Hearing Tasks**

4

**The Hearing**

5

**After The Hearing**

6

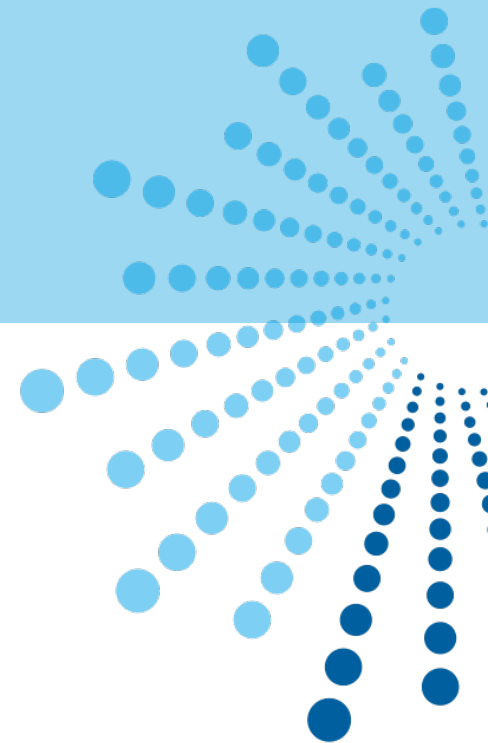
**Practical Application**



# Title IX Requirements For Hearings

01

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# Title IX of the Education Amendments Act of 1972

"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."

# Section 106.30: Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) 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 recipient's education program or activity; or
- (3) "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).

# AND... Only Covered, IF:

## Place of Conduct

- On campus
- Campus Program, Activity, Building, and
- In the United States

## Required Identity

- Complainant participating/attempting to participate in Program or Activity, AND
- Control over Respondent

# Procedural Requirements for Investigations

Notice to both parties

Equal opportunity to  
present evidence

An advisor of choice

Written notification of  
meetings, etc., and  
sufficient time to prepare

Opportunity to review all  
evidence, and 10 days to  
submit a written response  
to the evidence prior to  
completion of the report

Report summarizing  
relevant evidence and 10  
day review of report prior  
to hearing

# Procedural Requirements for Hearings

Must be live, but can be conducted remotely

Cannot compel participation of parties or witnesses

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision maker determines relevancy of questions and evidence offered

Written decision must be issued that includes finding and sanction



# **The Requirement of Impartiality**

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# Section 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution not to have a conflict of interest or bias:

For or against complainants or respondents generally, or

An individual complainant or respondent

## Section 106.45(b)(1)(iii)

“

Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution must receive training on...how to serve impartially, including avoiding prejudgment of the facts at issue, conflict of interest, and bias. This training material may not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

”

# Hearing Technology: Requirements and Considerations



If hearings cannot be in person, or if someone chooses to participate remotely, must have a remote participation platform available.



All hearings must be recorded.



Participants must be able to communicate during the hearing

The parties with the decision maker(s)  
The parties with their advisors

# Purpose of the Hearing

---

1

Review and  
Assess  
Evidence

2

Make Findings  
of Fact

3

Determine  
Responsibility/  
Findings of  
Responsibility

4

Determine  
Sanction and  
Remedy

# Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.



Is it authentic?

Is the item what it purports to be?



Is it credible?

Is it convincing?



Is it reliable?

Can you trust it or rely on it?



What weight, if any, should it be given?

Weight is determined by the finder of fact!

Trauma-informed practices provide tools/techniques for engaging with the Complainant, Respondent, and Witnesses.



Format/Structure of the Hearing



Format of Questions



Approach to Clarification



02

# Process Participants

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# The Participants

## The Parties

Complainant	Respondent
The person who is alleged to be the victim of conduct prohibited under the policy.	The person who has been reported to be the perpetrator of conduct prohibited under the policy.

# The Participants

## The Investigator

- Can present a summary of the final investigation report, including items that are contested and those that are not;
- Submits to questioning by the Decisionmaker(s) and the parties (through their Advisors).
- Can be present during the entire hearing process, but not during deliberations.
- Questions about their opinions on credibility, recommended findings, or determinations, are prohibited. If such information is introduced, the Chair will direct that it be disregarded.



- Can be anyone, including a lawyer, a parent, a friend, and a witness
- No particular training or experience required (institution appointed advisors should be trained)
- Can accompany their advisees at all meetings, interviews, and the hearing
- Advisors should help the Parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith
- May not speak on behalf of their advisee or otherwise participate, except that the advisor will conduct cross examination at the hearing.
- Advisors are expected to advise their advisees without disrupting proceedings

# The Participants

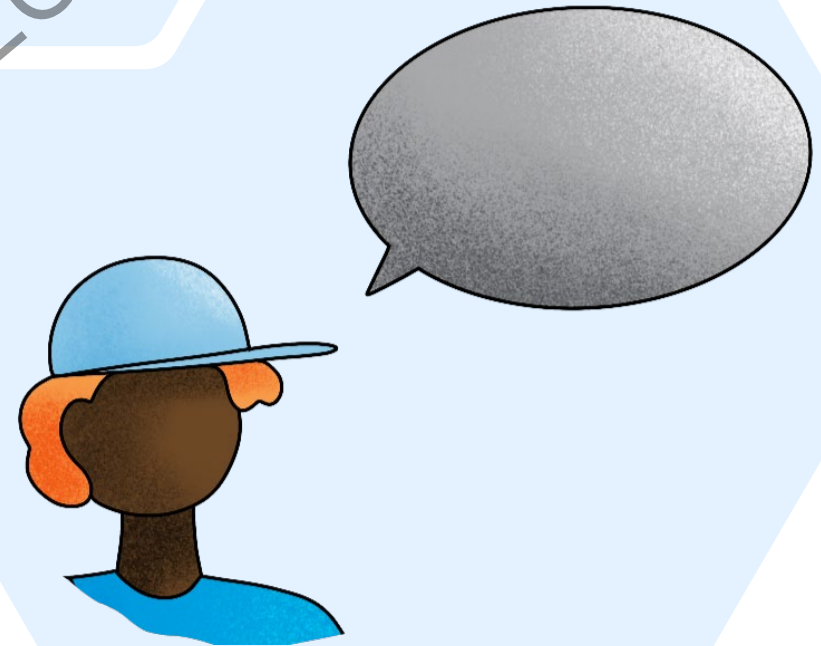
## Advisors



# The Participants

## Advisors: Prohibited Behavior

An Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting may be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability determine how to address the Advisor's non-compliance and future role.



# The Participants

## The Hearing Facilitator/Coordinator

- Manages the recording, witness logistics, party logistics, curation of documents, separation of the parties, and other administrative elements of the hearing process
- Non-Voting



# The Participants

## The Decision-Maker(s)

- One person or a panel
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate

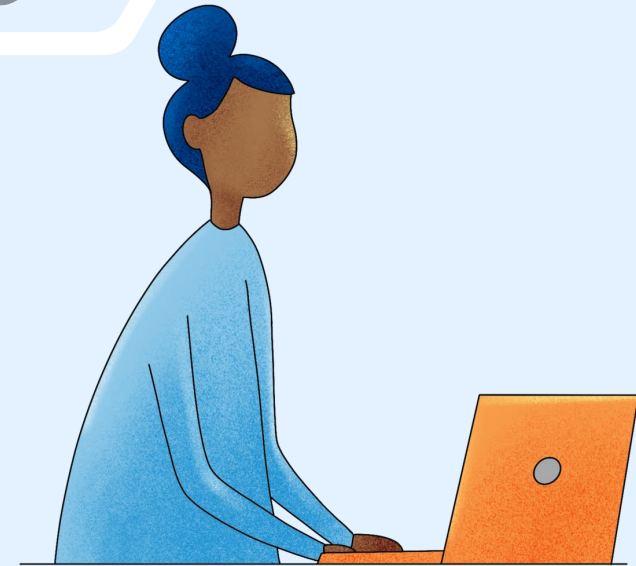




# The Participants

## The Hearing Chair

- Is a decision-maker
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written deliberation statement
- Assists in preparing the Notice of Outcome





# Pre-Hearing Tasks: Hearing Panel & Chair

What should be done in advance of the hearing

03



# Hearing Panel as a Whole



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



Develop questions of your own

# Hearing Panel Chair



Provide names of all individuals invited to participate in the hearing



Provide parties with investigation report and all pertinent evidence



Compile questions on behalf of the Panel



May convene a pre-hearing meeting



Review questions submitted by the parties



Anticipate challenges or issues



Become familiar with the script

# Common Areas of Exploration



Credibility?



Clarification on timeline?



The thought process?



Inconsistencies?

# Pre-Hearing Meetings

Review the Logistics for the Hearing

Set expectations

- Format
- Roles of the parties
- Participation
- Decorum
- Impact of not following rules

Cross Examination Expectations



04

# The Hearing

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# Order of the Proceedings

01

Introductions  
and instructions  
by the Chair;  
Opening  
Statements

02

Presentation by  
Investigator

03

Presentation of  
information and  
questioning of  
the parties and  
witnesses

04

Closing  
Statements

05

Deliberation &  
Determination

# Opening Introductions and Instructions by the Chair

- The institution should have a script for this portion of the proceedings, and it should be used.
- Introduction of the participants.
- Overview of the procedures.
- Be prepared to answer questions.





# Presentation of Information

---

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A man in a brown jacket and sunglasses is holding a megaphone to his mouth and shouting upwards. The image is overlaid with a semi-transparent teal background and a large, diagonal watermark that reads "GRAND RIVER SOLUTIONS".



# Presentation of Information & Questioning of the Parties

01

The Hearing Panel will question Complainant first

02

Cross examination of Complainant will occur next

03

Follow up by the Hearing Panel

04

The Hearing Panel will question Respondent second

05

Cross examination of Respondent will occur next

06

Follow up by the Hearing Panel

# Questioning of the Witnesses

01

The Chair will determine the order of questioning of witnesses

02

The Hearing Panel will question first

03

Advisor cross-examination will occur next (suggested: Complainant's advisor followed by Respondent's advisor)

04

Follow up by the Hearing Panel

# General Questioning Guidelines

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## Format of Questioning



The Hearing Panel or the advisor will remain seated during questioning



Questions will be posed orally



Questions must be relevant

# What constitutes a relevant question?

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

*See, e.g.,* Federal Rule of Evidence 401 Test for Relevant Evidence:

“Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

# When is evidence relevant?

Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence





# *Irrelevant and Impermissible Questions*

Questions that seek to illicit irrelevant information

- Complainant's prior sexual history
- Information protected by an un-waived legal privilege
- Medical treatment and care

Duplicative questions

Information that is otherwise irrelevant

# When Questioning....



Be efficient.



Explore areas where additional information or clarity is needed.



Listen to the answers.



Be prepared to go down a road that you hadn't considered or anticipated exploring.



Take your time. Be thoughtful. Take breaks if you need it.



# Foundational Questions to Always Consider Asking

Were you interviewed?

Did you see the interview notes?

Did the notes reflect your recollection at the time?

As you sit here today, has anything changed?

Did you review your notes before coming to this hearing?

Did you speak with any one about your testimony today prior to this hearing?

# Common Areas of Where Clarity or Additional Information is Needed

Details about the  
alleged  
misconduct

Facts related to  
the elements of  
the alleged policy  
violation

Relevancy of  
Certain Items of  
Evidence

Factual Basis for  
Opinions

Credibility

Reliability

Timelines

Inconsistencies

# Questioning to Assess Reliability

Inherent plausibility

Logic

Corroboration

Other indicia of reliability

# Questioning to Assess Credibility

No formula exists, but consider asking questions about the following:

opportunity to view

ability to recall

motive to fabricate

plausibility

consistency

character, background, experience, and training

coaching

# Credibility Versus Reliability

## Reliable Evidence

- I can trust the consistency of the person's account of their truth.
- It is probably true and I can rely on it.

## Credibility

- I trust their account based on their tone and reliability.
- They are honest and believable.
- It might not be true, but it is worthy of belief.
- It is convincingly true.
- The witness is sincere and speaking their real truth.



# Opinion Evidence

---

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?

# Asking Questions to Assess Authenticity

## Investigating the Products of the Investigation



Never assume that an item of evidence is authentic.



Ask questions, request proof.



Request further investigation of the authenticity if necessary.

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# Is it authentic?



**QUESTION THE  
PERSON WHO  
OFFERED THE  
EVIDENCE**



**REQUEST  
ORIGINALS**



**OBTAIN  
ORIGINALS FROM  
THE SOURCE**



**HAVE OTHERS  
REVIEW AND  
COMMENT ON  
AUTHENTICITY**



**ARE THERE  
OTHER RECORDS  
THAT WOULD  
CORROBORATE?**



# What are the “Hard” Questions

Details about the sexual contact

Seemingly inconsistent behaviors

Inconsistent evidence/information

What they were wearing

Alcohol or drug consumption

Probing into reports of lack of memory

# How to Ask the Hard Questions

## Lay a foundation for the questions

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

## Be deliberate and mindful in your questions:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...

# Special Considerations for Questioning the Investigator

- The Investigator's participation in the hearing is as a fact witness;
- Questions directed towards the Investigator shall be limited to facts collected by the Investigator pertinent to the Investigation;
- Neither the Advisors nor the Decision-maker(s) should ask the Investigator(s) their opinions on credibility, recommended findings, or determinations;
- The Investigators, Advisors, and parties will refrain from discussion of or questions about these assessments. If such information is introduced, the Chair will direct that it be disregarded.

# Special Considerations for Questioning the Investigator



Ask questions about how they conducted their investigation



Explore the investigators decision making



Seek clarity about evidence collected

Where it came from  
Authenticity of the evidence



Ask factual questions that will assist in evaluation of the evidence



If bias is not in issue at the hearing, the Chair should not permit irrelevant questions of the investigator that probe for bias.

# Special Considerations for Panels

If a panel, decide in advance who will take the lead on questioning

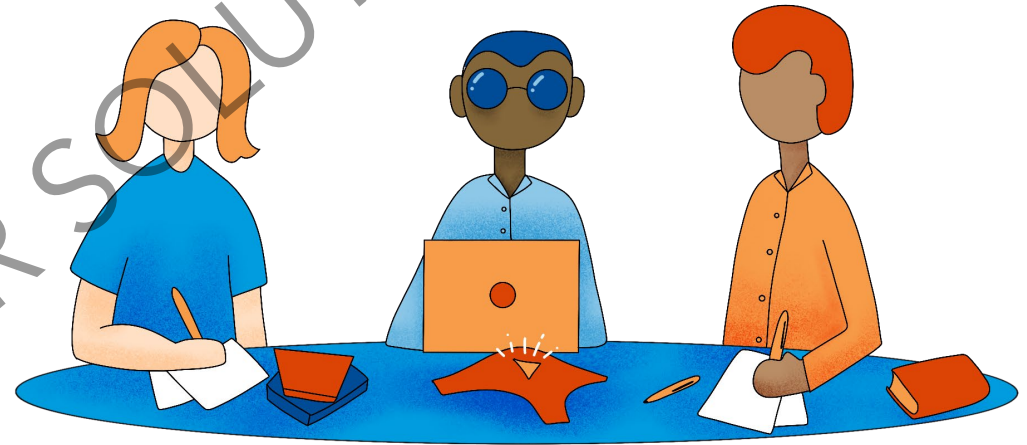
Go topic by topic

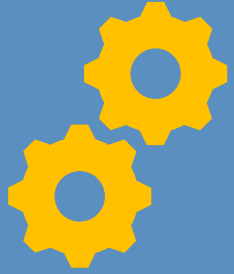
Ask other panelists if they have questions before moving on

Do not speak over each other

Pay attention to the questions of other panelists

Ok to take breaks to consult with each other, to reflect, to consult with the TIXC or counsel





# The Decision Maker's Role in Advisor Questioning

04(a)

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# Cross Examination

*Who does it?*

Must be conducted  
by the advisor

If party does not  
appear or does not  
participate, advisor  
can appear and  
cross

If party does not  
have an advisor,  
institution must  
provide one

# The Role of the Decision Maker During Questioning by the Advisors

After the Advisor poses a question, the proceeding will pause to allow the Chair to consider it.

Chair will determine whether the question will be permitted, disallowed, or rephrased. The Chair may explore arguments regarding relevance with the Advisors.

The Chair will limit or disallow questions on the basis that they are irrelevant, unduly repetitious (and thus irrelevant), or abusive.

The Chair will state their decision on the question for the record and advise the Party/Witness to whom the question was directed, accordingly. The Chair will explain any decision to exclude a question as not relevant, or to reframe it for relevance.

The Chair has final say on all questions and determinations of relevance. The parties and their advisors are not permitted to make objections during the hearing. If they feel that ruling is incorrect, the proper forum to raise that objection is on appeal.



# When Assessing Relevance, the Decision Maker Can:

---

Ask the Advisor why their question is relevant

---

Take a break

---

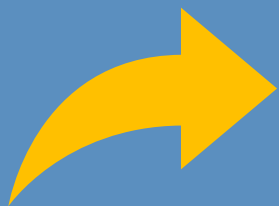
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Ask their own questions of the party/witness

---

Review the hearing record

---



## After the Hearing

05

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# Deliberations

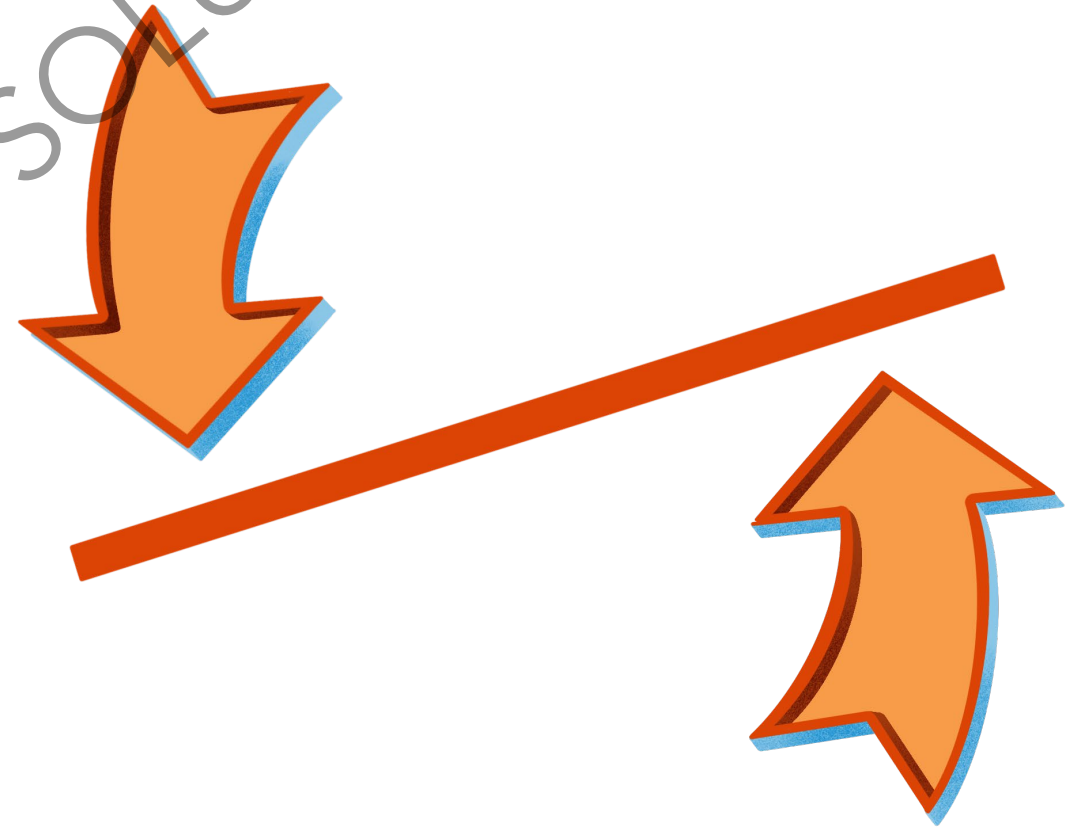
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# Weighing the Evidence & Making a Determination

1. Evaluate the relevant evidence collected to determine what weight, if any, you will afford that item of evidence in your final determination;
2. Apply the standard of proof and the evidence to each element of the alleged policy violation;
3. Make a determination as to whether or not there has been a policy violation.



# Preponderance of the Evidence

More likely than not

Does not mean 100% true or accurate

A finding of responsibility =  
There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated

A finding of not responsible =  
There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated





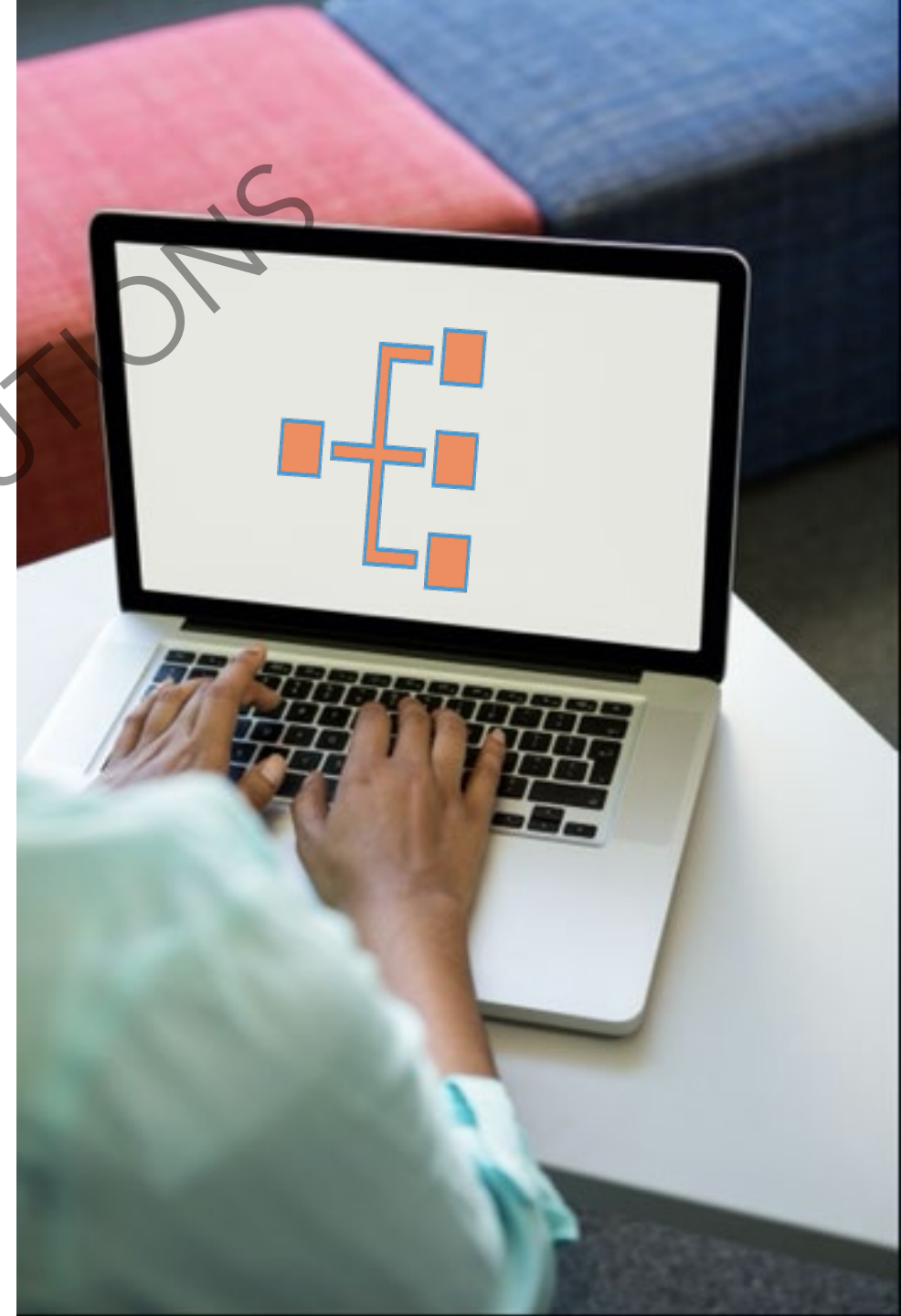
# Findings of Fact

- **A "finding of fact"**
  - The decision whether events, actions, or conduct occurred, **or** a piece of evidence is what it purports to be
  - Based on available evidence and information
  - Determined by a preponderance of evidence standard
  - Determined by the fact finder(s)
- **For example...**
  - Complainant reports that they and Respondent ate ice cream prior to the incident
  - Respondent says that they did not eat ice cream
  - Witness 1 produces a timestamped photo of Respondent eating ice cream
- **Next steps?**

# Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate

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# Allegation: Fondling

## Fondling is the:

- ❑ touching of the private body parts of another person
- ❑ for the purpose of sexual gratification,
- ❑ Forcibly and/or without the consent of the Complainant,
  - ❑ including instances where the Complainant is incapable of giving consent because of their age or **because of their temporary or permanent mental or physical incapacity.**



# Analysis Grid

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.	Respondent acknowledges and admits this element in their statement with investigators.  "We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."	Complainant: drank more than 12 drinks, vomited, no recall Respondent: C was aware and participating Witness 1: observed C vomit Witness 2: C was playing beer pong and could barely stand Witness 3: C was drunk but seemed fine Witness 4: carried C to the basement couch and left her there to sleep it off.

# Apply Preponderance Standard to Each Element

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.</p> 	<p>Respondent acknowledges and admits this element in their statement with investigators.</p>  <p>"We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</p>	<p>Complainant: drank more than 12 drinks, vomited, no recall Respondent: C was aware and participating Witness 1: observed C vomit Witness 2: C was playing beer pong and could barely stand Witness 3: C was drunk but seemed fine Witness 4: carried C to the basement couch and left her there to sleep it off.</p> 

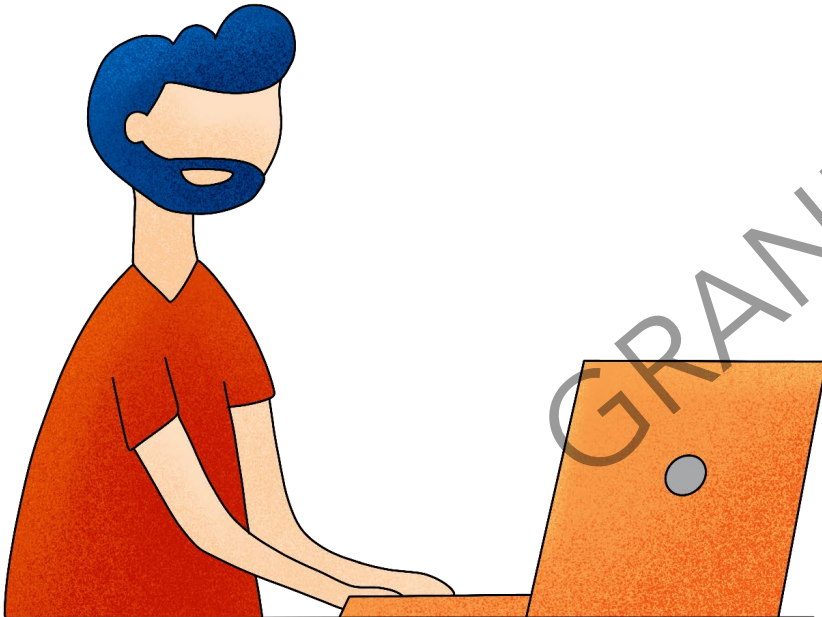
# Did You Also Analyze...?

(if required by policy)

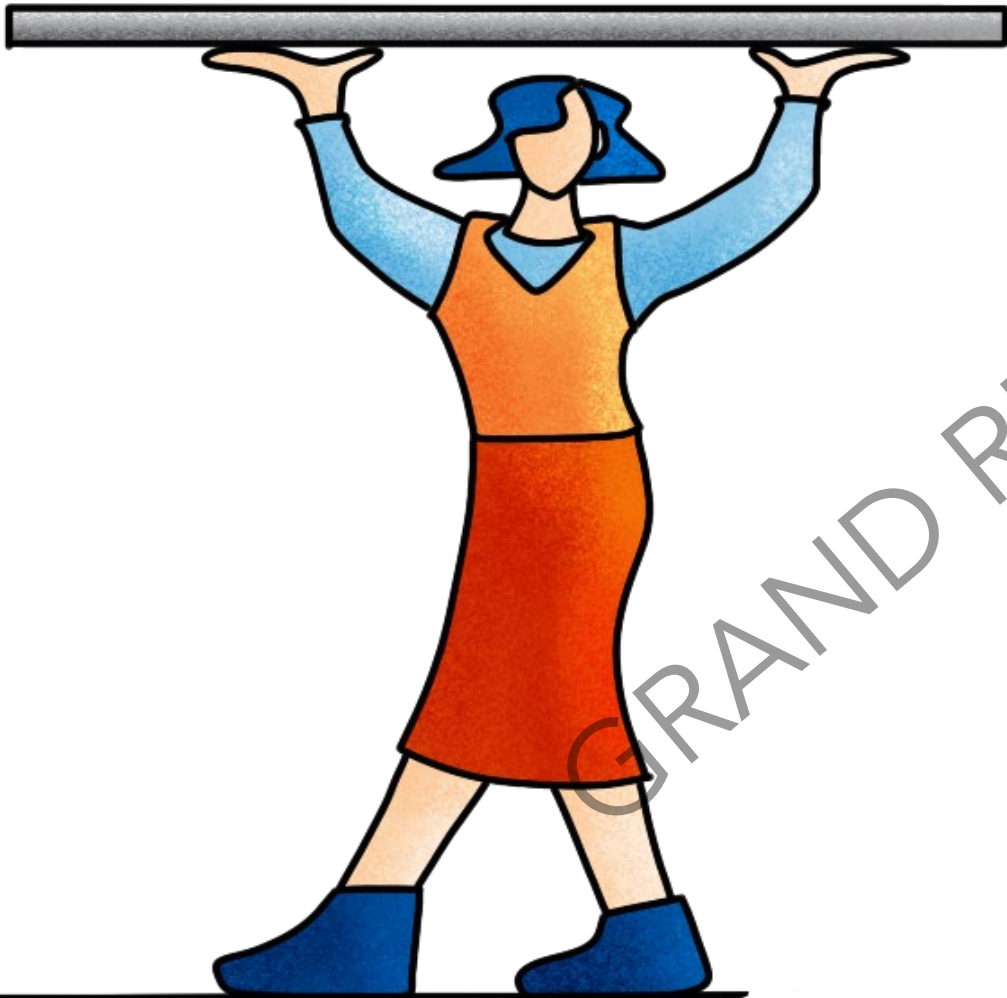
- ☐ On campus?
- ☐ Program or Activity?
- ☐ In a building owned/controlled by a recognized student organization?
- ☐ Substantial control over respondent and context?
- ☐ Complainant was attempting to access program/activity?

# Final Report

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and remedies
- Procedure for appeal



# The Final Determination Should **STAND** On Its Own



**S**

Simple and Easy to Comprehend

**T**

Transparent/Clear

**A**

Accurate

**N**

Neutral/Unbiased

**D**

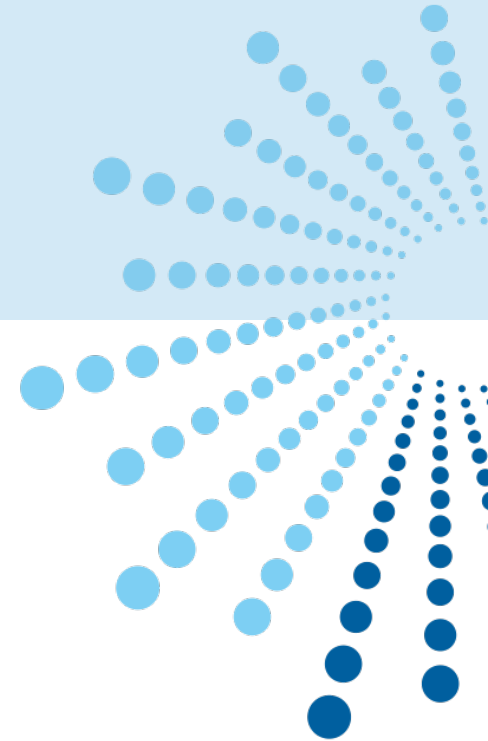
Draw Attention to Significant Evidence and Issues



# Practical Application

06

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# Scenario 1

Respondent appears at the hearing with Witness 7. Respondent would like Witness 7 to provide information testimony about text messages between them and Complainant that indicate that Complainant has made the allegations up.

- **Can the HP hear from Witness 7 at the hearing?**



## Scenario 2A

Respondent provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations.

- **The Investigator determines the report is irrelevant. Must the Investigator share the report with the decision maker?**



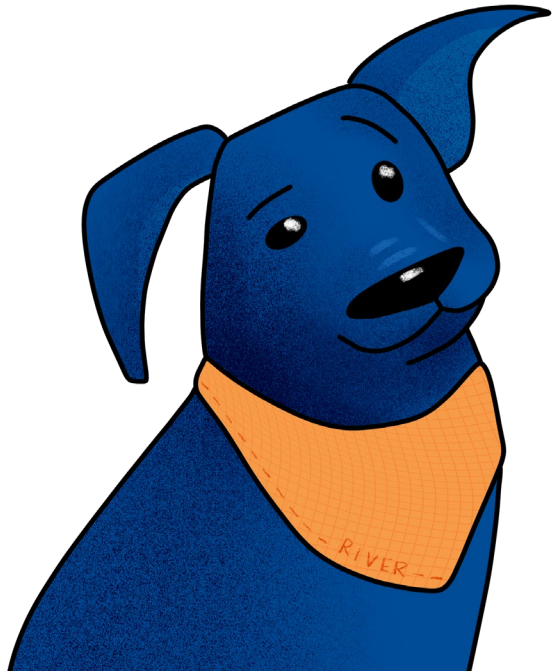


## Scenario 2B

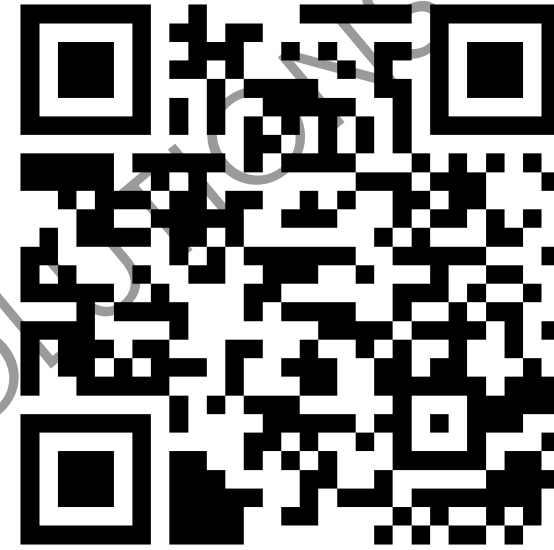
Respondent provides a polygraph report to Investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations. The polygrapher appears and answers all relevant questions on cross.

- **Must the Hearing Panel find Respondent not responsible because of the findings in the report?**

# Questions?



Leave Us Feedback:



Email Us:

[mcompton@grandriversolutions.com](mailto:mcompton@grandriversolutions.com)

[info@grandriversolutions.com](mailto:info@grandriversolutions.com)



@GrandRiverSols



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# Title IX Hearings in a Post Regulatory World

Day 2

Jody Shipper & Jessica Brown

March 2022

# Meet Your Facilitators



**Jody Shipper**

*She/Her/Hers*  
Co-Founder and Managing  
Director



**Jessica Brown**

*She/Her/Hers*  
Senior Solutions Specialist

# Overview of Day Two

*Let's Practice!*

- ☐ Pre-Hearing Preparation
- ☐ Testimony and Cross Examination

# Pre-Hearing

The investigation is complete!

It is time to schedule the hearing...

## Rapid Fire #1

Using the chat box, share your “To Do”  
List for coordinating the hearing.







# Rapid Fire Recap

Arranging for space

Arranging technology

Scheduling pre-hearing meetings with parties & advisors

Scheduling prehearing meetings of the panel

Providing report and record to panel and parties

Scheduling the hearing

Accommodations

Call for written submissions

Conflict checks

Other considerations?



You and your team did a great job scheduling the hearing and arranging all the logistics!

## Rapid Fire #2

It is now one week prior to the hearing. You have already received and reviewed the report and record and you will be meeting with the rest of the panel (or spending some quite time by yourself) to prepare for the hearing.

*Use the chat box to share what you plan to discuss/think about during the prehearing meeting.*



# Rapid Fire Recap

Development of introductory comments

Initial discussion of the evidence

Areas for further exploration

List of questions for the parties and the witnesses

Anticipation of potential issues

Logistics

Review of any written submissions by the parties

Other considerations?

# Break Out!

#1

Say hi!

Pick a scribe

Discuss

- All groups: Areas or topics that you would like to explore further in the hearing
- Group 1: Questions for Complainant and Witnesses Bob, Dylan, Stevie
- Groups 2: Questions for Respondent and Witnesses Nick, Kayla, Caitlyn

Email your responses to Laura

- [lfigueredo@grandriversolutions.com](mailto:lfigueredo@grandriversolutions.com)



# Report Out

- Group 1: Questions for Complainant and Witnesses Bob, Dylan, Stevie
- Groups 2: Questions for Respondent and Witnesses Nick, Kayla, Caitlyn

Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence



# The Hearing

# Break Out!

## #2



Say hi again



Select a member of your group to take notes and to report out to the whole group



Discuss the list of proposed questions for:

Group 1: Questions by Complainant for Respondent; Bob, Dylan, Stevie

Group 2: Questions by Respondent for Complainant; Nick, Kayla, Caitlyn







# Report Out

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### These questions are submitted by Complainant for Respondent

1. How many drinks did you have at Kayla's before going to TKE?
2. How big were those drinks?
3. Who mixed those drinks?
4. Were you drunk when you got to TKE?
5. How often do you go to parties?
6. How often do you get drunk at parties?
7. Why didn't you stay with your friends when you got to TKE?
8. When you got to TKE, did you intend to have sex with Angel that night?
9. What else do you remember from that night?
10. Did you play darts?
11. Isn't it true that you were easily able to throw darts and hit the bullseye that night?
12. When Angel was "hugging" you, as you called it, he was actually just holding on to you for support because he could not stand up, isn't that right?
13. How many times did he fall on to you when the two of you were on the couch?
14. Who got up first from the couch?
15. Isn't it true that you got up first and pulled Angel to his feet?
16. You told the investigator the two of you were drunk sloppy kissing? It seems you are admitting that Angel was drunk, isn't that correct?
17. Given all that you recall, it seems that you have a really good recollection of that night, no impaired memory, were easily able to play darts, and never fell down, so for you to act as if you were too drunk to give him a blow job and that you're the real victim here is nothing less than highly offensive, isn't that right?
18. If someone were sexually assaulted and the other person said it was the victim's fault, that is victim blaming, isn't it?
19. Are you alleging you were sexually assaulted?
20. Why would you make that up?
21. If you are saying that you were sexually assaulted, why didn't you file a complaint? Is that because you know you'll lose and be expelled for a false complaint and retaliation if you do that?
22. Are you making an allegation in order to retaliate against complainant?
23. Did you ever drink from Angel's water bottle?
24. Did you ever smell alcohol on Angel's breath while at the TKE party?
25. Have you seen the video of you giving Angel a blow job?
26. Did you initiate sex with Angel in order to get back at your boyfriend?
27. He wasn't restraining you, why didn't you just pull away?
28. Do you often give blowjobs to boys at parties?

### Questions submitted by Respondent for Complainant

1. You said you do not remember anyone drinking from your water bottle. How can you remember that?
  2. Did you file a report with the police?
  3. Why not?
  4. Did you get a medical exam?
  5. Why not?
  6. Is it true that you are hoping to go to medical school?
  7. Isn't it true that you are really worried about your grades this semester?
  8. Isn't it true you were struggling with inorganic chemistry class?
  9. And isn't it true that you wanted to drop the class, but you would have had a "W" on your transcript?
  10. Did you end up withdrawing from that class?
  11. And isn't it true that there is no notation on the transcript because you were given the gift of being pulled from the class without any transcript notation?
  12. And is that why you filed this claim, so you could get out of taking the class without anything showing up on your transcript?
  13. You said to the investigator that you "could not believe anyone would film" the sex act that occurred at the TKE party, isn't that correct?
  14. Have you ever watched any porn videos?
  15. Didn't you take a video last year of some of your friends, including Bob and Dylan, playing a game that involved simulating sex acts?
  16. During your interview with the investigator, isn't it true that you had to be reminded by your own advisor that your "story" is that you were too drunk to remember anything, right?
  17. How many times did you and your advisor rehearse your interview?
  18. You said you had no information or memories about what happened at the party, but also claim to remember how her hands were moving, when the two of you were sitting on the couch in the basement. Which one of those statements is the lie?
-

### Questions for Bob

By Complainant

1. When you were describing the vodka you poured into your water bottle, what exactly do you consider to be 2 or 3 shots?
2. Did you use shot glasses, red solo cups, or did you eyeball it?
3. What do you remember about Barb's Tinder profile?
4. Did it suggest what type of relationship she was looking for?
5. Did you match?
6. Why were you looking at Tinder?
7. How often do you troll on Tinder?
8. You said Barb took a huge gulp out of your water bottle toward the end of the evening. What did you mean by "huge gulp?"
9. How much of the vodka/orange juice in your bottle did you drink that night?
10. How much was left in the morning?

By Respondent

1. Doesn't your frat have a reputation on campus of getting girls drunk at parties?
  2. Isn't true when you say you take care of people at parties, that you actually just get them more drunk so they will have sex with one of your friends or brothers? That is what you were doing to the respondent, correct?
  3. Didn't you have to retake Measuring Science 101 where they teach you how to measure liquids?
  4. How many times did you watch that video before deleting it?
  5. Do you still have the video?
  6. Will you get in trouble with your fraternity for bringing in illicit alcohol to the party?
  7. Isn't it a violation of fraternity rules for you to drink, particularly when you were supposed to stay sober and prevent people from getting too drunk or harming themselves or others?
  8. Do you feel bad that, by drinking so much, you were unable to do your job well that night?
  9. Do you feel bad that, by drinking so much, you basically allowed the sex assault in the basement to occur, because you weren't keeping a watchful eye?
- 

### Questions for Dylan

By Complainant

1. You told the investigator you saw Angel spill beer on Barb, isn't that correct?
2. And didn't you tell the investigator that you also saw Angel stumbling and falling?
3. So basically, he was acting like he was so drunk that he could barely function, right?

By Respondent

1. You made a water bottle of vodka and orange juice correct?
  2. How much did you drink?
  3. Do you remember how much of it you had left at the end of the night?
  4. How strong was your orange juice and vodka?
  5. You bought beer. How old are you?
  6. Why do you have a fake ID?
  7. You said you saw Angel at the party, and that he was so drunk he could barely stand up; did you take any action to protect your drunk friend from drinking more?
  8. Is that because your friend was not really that drunk, or because you don't really care about someone being so drunk they can barely stand?
  9. Your friend passed out at the end of the night; which emergency number did you call for help?
  10. You said you put a trash can by him when you saw him passed out, but you didn't roll him on to his side? Is that because he was sleeping, and not really because he was drunk?
  11. Have you ever tried to hit on Barb?
  12. Didn't she reject your advances?
  13. Is that why you're exaggerating your supposed observations that Angel was so drunk?
  14. Respondent does better than you in all your classes, correct?
  15. And you said you once caught her cheating off of you, but isn't it actually true that you were the one referred to student conduct for a plagiarism charge?
  16. If you have a fake ID, what else is fake? Your testimony, for example?
-

### Questions for Stevie

By Complainant

1. How much did you have to drink?
2. How drunk did you feel that night?
3. Do you think you were close to blacking out?
4. Given how drunk you were, isn't it likely that you don't really have a good memory of that night?
5. You said Angel stumbles even when he is not drinking, yet you know he is an athlete, so how is it that an athlete stumbles and is as uncoordinated even when sober, as you described to the investigator?
6. Do you have a crush on Barb?
7. How long have you wanted to have sex with her?
8. Are you minimizing how very drunk Angel was in order for her to like you more?

By Respondent

1. Did you see Barb and Angel playing darts?
  2. Was Angel able to play darts?
  3. Was he hanging on to Barb for dear life or standing up and throwing darts?
- 

### Questions for Nick

By Complainant

1. Isn't true you have no real friends?
2. You don't get good grades, correct?
3. That is because you are always smoking weed, correct?
4. How much weed did you smoke that night?
5. Does smoking weed impact your ability to remember things?
6. Isn't it true that the reason you started smoking weed was because you got a card for medical marijuana, for your anxiety and ADHD?
7. Did you imagine the conversation about Angel wanting to hook up with a girl?
8. Does your anxiety or ADHD make you imagine things that did not happen?
9. Why did you presume Angel was "cheating" when he was actually the victim of a sexual assault?
10. Did you watch the video?
11. Isn't it obvious to you that Angel is swaying and can barely stand up while she gives him a blow job?
12. Do you still have the video of that night on your phone?
13. If I were to call the police on you and tell them that that you have evidence of a crime on your phone, aren't you scared they will find it?

By Respondent

1. So, the complainant seemed desperate to hook-up with a girl that night?
  2. Are you certain you remember that conversation?
  3. What else do you recall from that night?
  4. Can you remember what you ate for breakfast that day?
  5. And isn't it true that you are a really honest person who would never lie?
- 

### Questions for Kayla

By Complainant

1. Did you notice the complainant stumbling or falling over, once he was in the basement?
2. Did you feel drunk that night?
3. Was the amount you had to drink that night a lot for you?
4. Given how much you had to drink, do you think you can even trust your memories from that night?
5. Barb is a good friend of yours, isn't she?
6. You would say anything to support her, wouldn't you?
7. Did you tell the investigator that Barb was mad at herself?
8. Is it possible she was mad at herself for violating Angel?
9. You said Barb and Angel were "drunk sloppy kissing." Did you get that phrase from Barb, or did she get it from you?
10. Did she tell you what to say here today?
11. Do you know that, if you are caught lying for her, you will be disciplined and might be suspended or expelled?

By Respondent

1. Would you categorize Angel as the initiator of all the contact between him and Barb?
  2. So you would call him the aggressor, is that right?
  3. How many times did you see Angel fill Barb's beer that night?
  4. And you saw him keep topping it off, is that right?
  5. Did that feel predatory to you?
  6. Have you seen Angel or any of his friends like Bob, Dylan, Stevie, or Nick try to get a girl really drunk at a party, on any other occasion?
-



### Questions for Caitlyn

By Complainant

1. You would consider complainant a good guy, right?
2. Barb wanted to "have a good time" right?
3. Did she tell you she planned to have sex with Angel that night?
4. You saw her intentionally move down to give a blow job?
5. How often has she done this at other parties? Is giving blow jobs something she casually does at parties?
6. And she is a good friend, right?
7. So this is particularly painful for you, your telling the truth about her sexually assaulting him, right?
8. And would you agree that it does not matter if the victim is a man or a woman, but rape is rape, right?
9. You said Barb had her arm around Angel's waist when people were in the basement that night. Is that so that she could control him?

By Respondent

1. You told the investigator you had 4-5 beers and 2-3 swigs of from Bob's vodka, correct?
  2. Is that a lot for you?
  3. Were you feeling drunk that night?
  4. How drunk?
  5. Was the drink in Bob's water bottle strong?
  6. Given how drunk you were, why should we trust your recollections of that night?
  7. You said you were cheering on the sex act in the video; were you surprised to see yourself doing that?
  8. Do you remember cheering?
-

## Email Us

info@grandriversolutions.com

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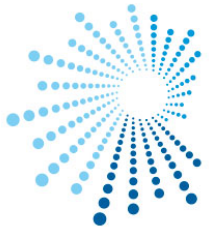
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# Title IX in a Post Regulatory World

Day One

Chantelle Cleary



## Meet Your Facilitators



**Chantelle Cleary, J.D.**  
Senior Consultant

Chantelle Cleary is a nationally-recognized subject-matter expert in Title IX and related fields. She has more than 10 years of experience in the investigation and adjudication of sexual and interpersonal violence. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Prior to joining Grand River Solutions, Chantelle served as the Director for Institutional Equity and Title IX at Cornell University, and before that as the Assistant Vice President for Equity and Compliance and Title IX Coordinator at the University at Albany. In these roles, she provided direct, hands-on experience in the fields of Title IX, civil rights, employment law, and workplace and academic investigations. Her responsibilities included focusing on diversity efforts, sexual assault prevention and training, affirmative action, and protecting minors on campus.



# About Us

Grand River Solutions provides Title IX, equity, and Clery Act consulting services. Together, our experts have decades of direct, on-campus experience at both small and large, public and private institutions. This practical expertise derived from years of hands-on experience enables our team to offer customized solutions unique to your educational institution's needs. Grand River has a suite of creative, cost-effective and compliant solutions to help schools meet their needs in innovative ways.

# Today's Agenda

01

A Whole New Word: The Post  
Regulatory Application of Title IX

05

Conducting the Investigation

02

Reports of Misconduct and  
the Post-Regulatory  
Requirements for Response

06

Evidence

03

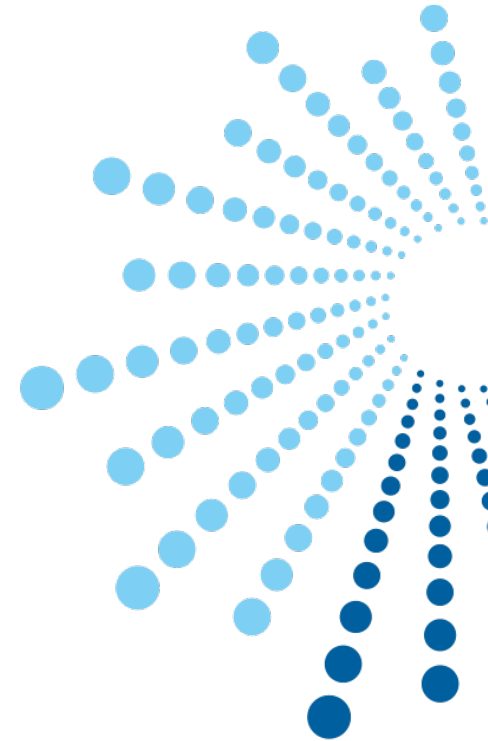
Investigations Post  
Regulations

07

The Investigation Report

04

The Investigator



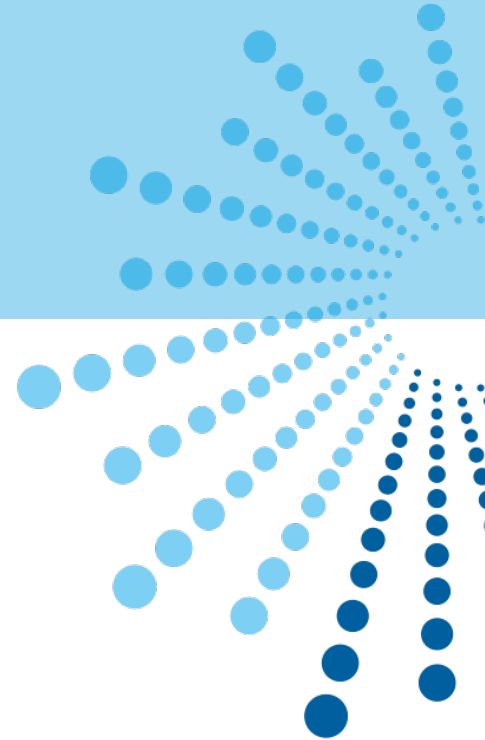


# A Whole New Word: The Post Regulatory Application of Title IX

Narrowed jurisdiction and expansive procedural requirements

01

GRAND RIVER SOLUTIONS



# Title IX of the Education Amendments Act of 1972

"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."

# Title IX Applies to All Forms of Sex Discrimination

- Sexual Harassment
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment
- Retention Rates
- Safety
- Screening Exams
- Sign-on Bonuses
- Student and Employee Benefits
- Thesis Approvals
- Vocational or College Counseling
- Research opportunities

# The May 2020 Title IX Regulations Cover A Narrow Scope of Title IX

- Sexual Harassment
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment

**Conduct Constituting  
Sexual Harassment  
as Defined in  
Section 106.30**

# Section 106.30: Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) 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 recipient's education program or activity; or
- (3) "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).



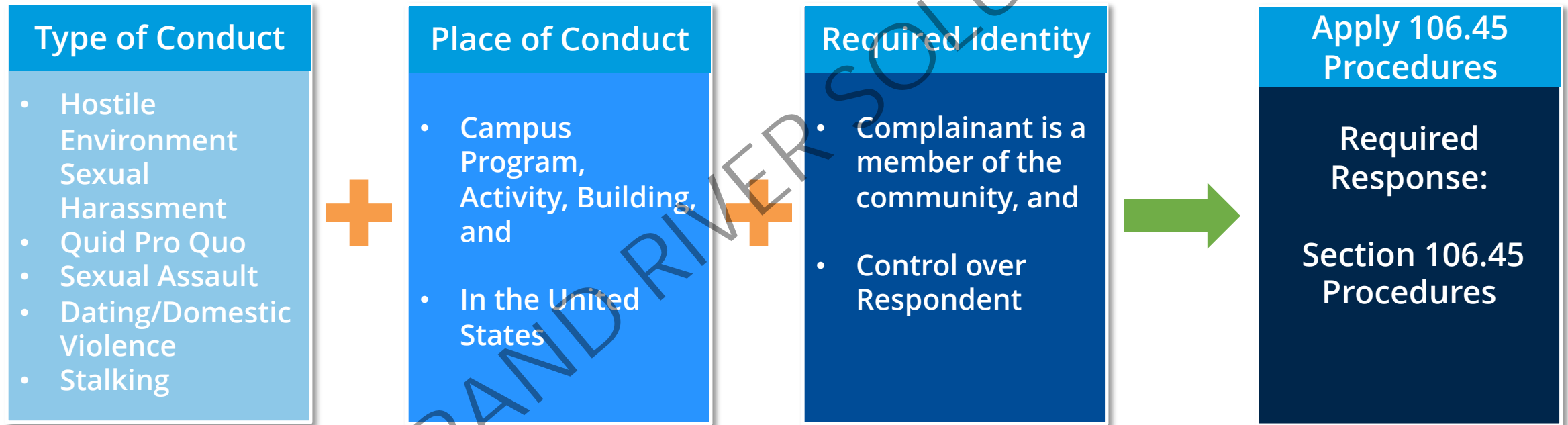
# Title IX Application Post May 2020 Regulations

**All Forms of Sex  
Discrimination, Retaliation**

**106.30 Sexual Harassment:**

- Hostile Environment
- Quid Pro Quo
- Sexual Assault
- Dating/Domestic Violence
- Stalking

# Title IX Application Post May 2020 Regulations



# First Question

What Happened?

## Does the Complaint Allege:

1. sexual harassment in which the harassment was so severe and pervasive that it denied the complainant equal access to an educational program or activity, or denied the employee the equal ability to continue their work;
2. Dating Violence, Domestic Violence, Stalking, or Sexual Assault;
3. A complaint of quid pro quo sexual harassment by an employee respondent against a student.



## Second Question

Where Did the Conduct  
Occur?

Did the conduct occur:

1. The incident(s) occurred at school, within the United States;
2. The incident(s) occurred as part of a recognized program in a building under the school's control, and within the United States;
3. The incident(s) was part of one of the school's programs or activities, such as part of a field trip or team athletic event, and within the United States.



## Third Question

Who Experienced the  
Conduct?

Is the Complainant:

1. a student (whether applicant, admitted, or currently enrolled); or
2. An employee (applicant, hired but not yet working, or employed),
3. Or someone who is otherwise still accessing or attempting to access a university program or activity, within the United States.



## Fourth Question

Is the Respondent:

1. A student (whether applicant, admitted, or currently enrolled), or
2. An employee (applicant, hired but not yet working, or employed).
3. Someone else that the institution may have control over (ie, a contractor, an alum, or a vendor)

Who is the Accused?





Apply the 106.45  
Procedures

**What do we do  
about misconduct  
that does not fall  
within this narrow  
scope?**

---





**Apply other applicable  
institutional policy or  
procedures.**



# Reports of Misconduct and the Post-Regulatory Requirements for Response

Actual Knowledge, Report Response, Initial Assessments, and Supportive Measures

02

First  
Thing's  
First...

Notice to College/University

Outreach/Response from Title IX Coordinator

Support Measures, whether or not Formal Complaint is  
filed

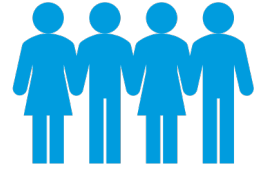
How to File

Options for Resolution

# Actual Notice: A Narrowed Scope of Institutional Responsibility

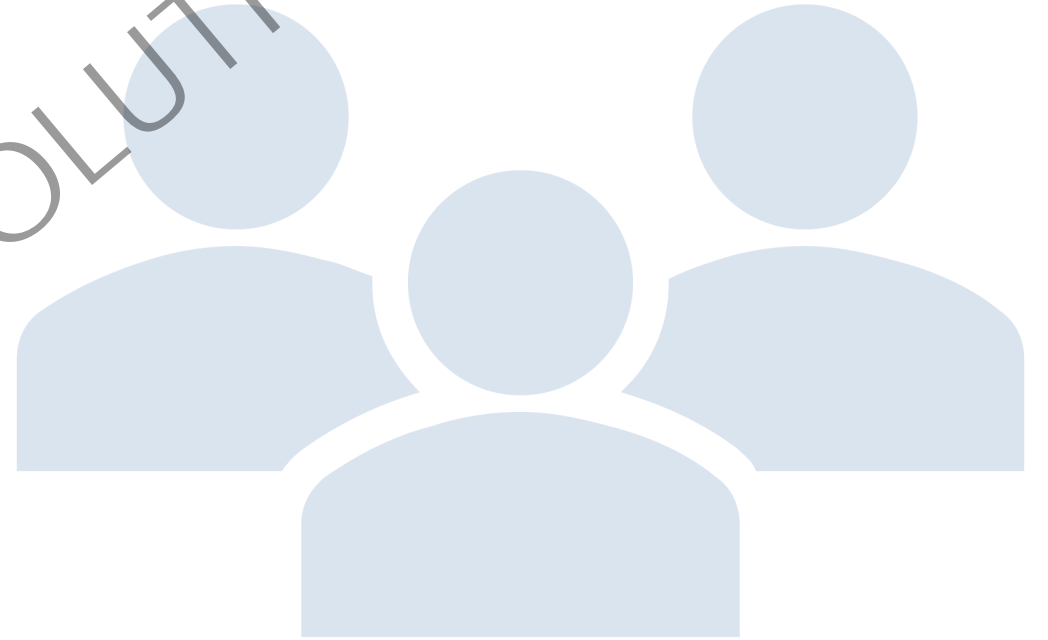
Institution must respond when it has:

- **“Actual knowledge”**
  - When “an official of the recipient who has authority to institute corrective measures” has notice, e.g., Title IX Coordinator
- **of “sexual harassment” (as newly defined)**
- **that occurred within the school’s “education program or activity”**
  - “includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred
  - Fact specific inquiry focused on control, sponsorship, applicable rules, etc.
- **against a “person in the United States” (so, not in study abroad context)**



# Responsible Employees

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# Mandatory Response

1. Discuss support measures

2. Explain that support measures are available without filing formal complaint

3. Explain options for resolution and how to file

# How to Proceed?

---



# Supportive Measures

Interim, not  
forever

Interim also  
includes “before  
investigation”

Equitable ≠  
Equal





## Not Punitive?

---

- No default, always case-by-case
- Right to challenge

# Emergency Removal of Student

- High threshold
- Not a determination of responsibility
- Whether or not grievance is underway
- Individualized
- Immediate threat (physical)
- Opportunity to challenge



# Mandatory Investigation

Complaint filed,  
**SIGNED**, requests  
investigation

Coordinator files,  
**SIGNS**, starts  
investigation



# But Do You **START** the Investigation?

Does it meet the  
elements? If not,  
**DISMISS**

Trying to do some  
pre-investigation  
to identify  
respondent

# Dismissing Complaints

## MANDATORY

- Not sexual harassment
- Did not occur in program or activity
- Not against person in the U.S.

## DISCRETIONARY

- Complainant withdraws complaint
- Respondent no longer enrolled/employed
- School unable to collect sufficient info

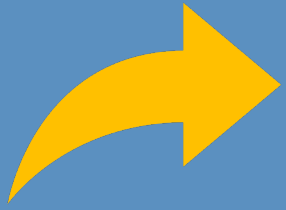
# Complaint Resolution

## Informal Resolution

- Formal Complaint Required
- Parties must agree
- Can withdraw from process
- Alternate Resolution/Mediation
- No appeal

## Formal Resolution

- Investigation and Adjudication process in compliance with Section 106.45



# Investigations Post Regulations

03

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# Procedural requirements for Investigations

Notice to both parties

Equal opportunity to  
present evidence

An advisor of choice

Written notification of  
meetings, etc., and  
sufficient time to prepare

Opportunity to review all  
evidence, and 10 days to  
submit a written response  
to the evidence prior to  
completion of the report

Report summarizing  
relevant evidence and 10  
day review of report prior  
to hearing





# Notice Requirements

- Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:
  - the identities of the parties involved in the incident, if known,
  - the conduct allegedly constituting sexual harassment under § 106.30,
  - and the date and location of the alleged incident, if known.
- The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.
- The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process



# Advisor of Choice

- The advisor can be anyone, including an attorney;
- Institutions cannot place restrictions on who can serve
- No training required
- Institution must provide advisor for the purposes of cross examination, only.



# Written Notification Meetings and Sufficient Time to Prepare

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# Equal Opportunity to Present Evidence

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# Evidence Review

- Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
- 10 days to provide a written response

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# Investigative Report and Review

- After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence.
- That report will be shared with the parties and they will have 10 more days to comment

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# **“Directly Related” and “Relevant Evidence”**

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# Directly Related Evidence

- Regulations do not define “Directly Related” Evidence
- Preamble states it should be interpreted using its plain and ordinary meaning.
- Term is broader than:
  - “all relevant evidence” as otherwise used in Title IX regulations, and
  - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act
- Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source



# “Relevant” Evidence

- The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”
- See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:
  - “Evidence is relevant if:
    - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
    - (b) the fact is of consequence in determining the action.”

# Evidence That is Not “Relevant”

- “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,
  - unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”
- “require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”
- Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition

# Who Decides?

- Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
  - Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight
- Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:
  - Each party's right to argue their case, and
  - Fact that decisions regarding responsibility will be made at hearing, not investigation stage



# The Investigator

04

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# The Investigator



Can be the Title IX Coordinator, although that is disfavored



Must be trained in accordance with the requirements in the regulations



Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest

# Impartiality: Avoiding Prejudgment and Bias

---

“The Department’s interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what “men” or “women” do or do not do.”

# Impartiality: Avoiding Prejudgment and Bias

Practical  
application of  
these  
concepts in  
investigations

Do not rely on cultural “rape myths” that essentially blame complainants

Do not rely on cultural stereotypes about how men or women purportedly behave

Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases

Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence

Avoid any perception of bias in favor of or against complainants or respondents generally

Employ interview and investigation approaches that demonstrate a commitment to impartiality

# Impartiality: Avoiding Bias

Department also rejected commenters' arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience

"Department encourages [schools] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased" WHILE

"exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents"



# Impartiality: Avoiding Conflicts of Interest

Commenters argued that investigators and hearing officers employed by schools have an “inherent conflict of interest” because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors

Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents

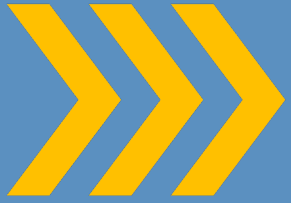
Department’s response: Department’s authority is over schools, not individual investigators and other personnel, so Department will focus on holding school’s responsible for impartial end result of process, without labeling certain administrative relationships as per se involving conflicts of interest

# Impartiality: Avoiding Prejudgment, Bias, and Conflicts of Interest

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## Bottom line

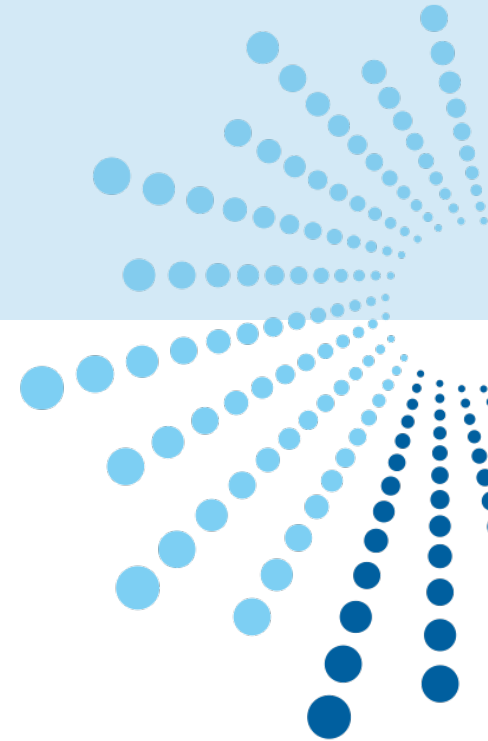
- Follow facts of every individual case
- Investigate in manner that will not allow even a perception of prejudgment or bias for or against any party



# Conducting the Investigation

05

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# Essential steps of an investigation



Notice of formal investigation



Initial Interviews



Evidence Collection



Report writing

# The Process: Developing an Investigative Strategy



# Investigation Timeline

## Prior History

- Between the Parties
- Of the Parties

## Alleged Assault

- Consent
- Type of Contact

## Pre Alleged Assault

- Pre-Meditation
- Manipulation
- Attempt to Isolate

## Post Alleged Assault

- Behaviors
- Communications

# Identify and Interview Parties/Witnesses

## Interview Objectives



### Connect

- Build rapport
- Build trust
- Empower
- Listen



### Safety Assessment

- Physical and Emotional Safety of the Victim
- Safety of the Community
- Safety of the Accused



### Services

- Advocates
- Police/Campus
- Medical care
- Interim action



### Evidence Preservation

- Text Messages
- Photographs
- Names and contact info for witnesses

# Prior to the Interview



Secure an appropriate meeting location



Allow for enough time to conclude the meeting



Prepare yourself for the meeting



If interviewing a party, inform them of their right to have an advisor present.



# Set Expectations

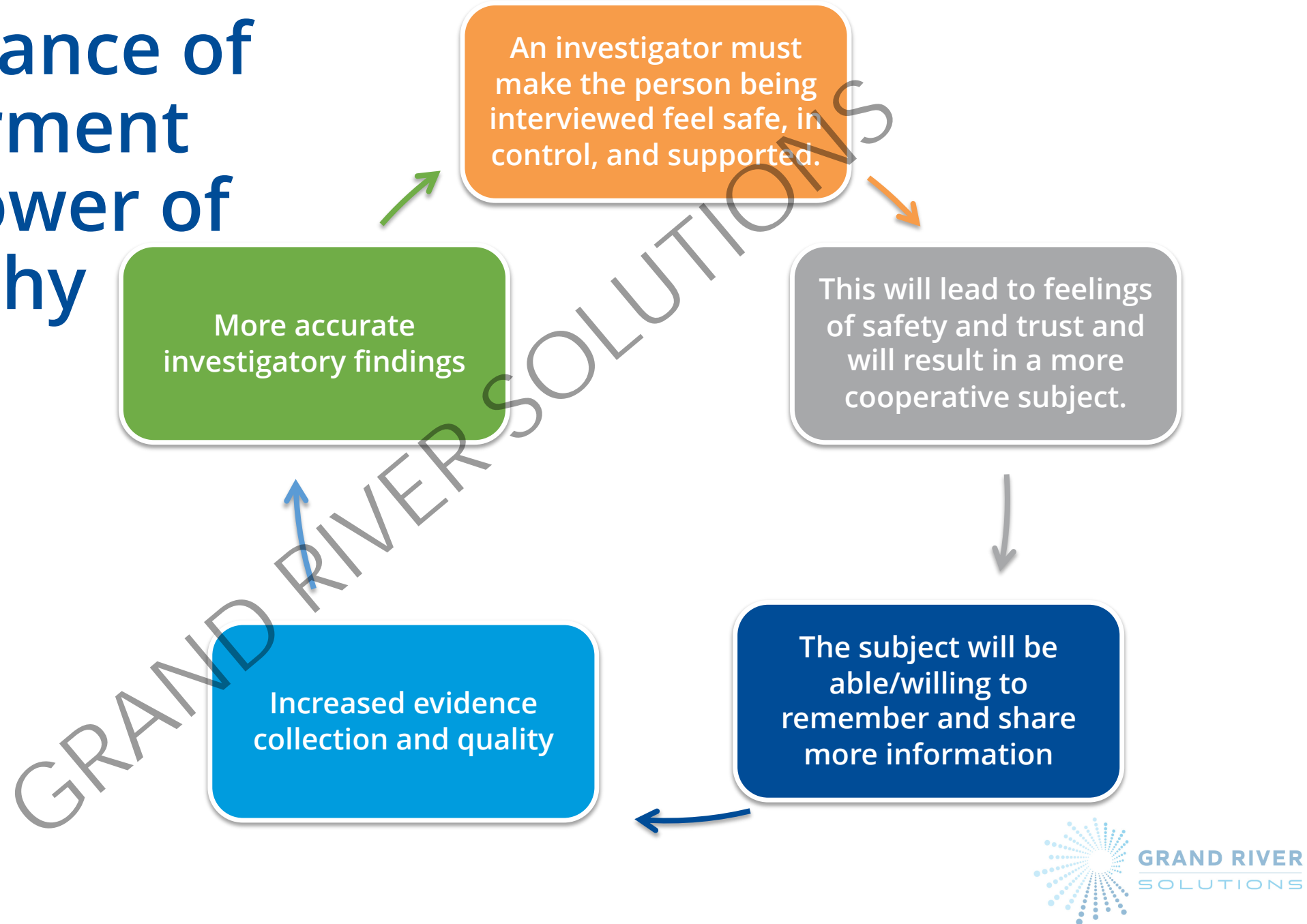
## What they should expect of you

- That you are neutral
- That you will listen, what they are saying is important to you
- That you will keep the information they share private
- What you will do with recording/notes
- That you may have to ask difficult questions
- Patience, respect, and appreciation

## What you expect of them

- Honesty
- That they will seek clarity if needed (give them permission to do so)
- That they won't guess or fill in blanks

# The importance of empowerment and the power of empathy



# Investigative Interviews





# Evidence

06

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# Evidence

“Something (including testimony, documents, tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or non-existence of a fact.”

# Types of Evidence

## Direct Evidence

- Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

## Circumstantial Evidence

- Evidence based on inference and not on personal knowledge or observation.

## Corroborating Evidence

- Evidence that differs from but strengthens or confirms what other evidence shows

# Non-Testimonial Evidence

Text Messages

Social Media  
posts

Social Media  
Communications

Emails

Surveillance

Videos

Photographs

Police Body  
Camera  
Footage

Swipe Records

Medical  
Records

Phone Records

Audio  
Recordings

# A Thorough Investigation

Is more than evidence collection



# A Thorough Investigation Permits the Decision Maker to Assess

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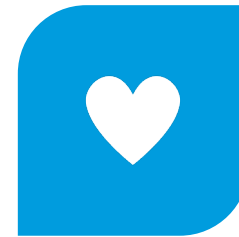
RELEVANCE



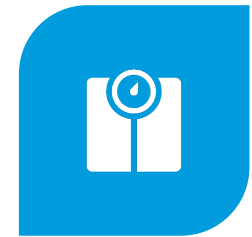
CREDIBILITY



RELIABILITY



AUTHENTICITY



WEIGHT

# “Relevant” Evidence

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- Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition

# Assessing Authenticity

Investigating the products of the Investigation



Never assume that an item of evidence is authentic.



Ask questions, request proof.



Investigate the authenticity if necessary.

# Assessing Credibility and Reliability

**No formula exists, but consider the following:**

- opportunity to view
- ability to recall
- motive to fabricate
- plausibility
- consistency
- character, background, experience, and training
- coaching
- Your own bias and limited experience

# Some Other Evidentiary Issues

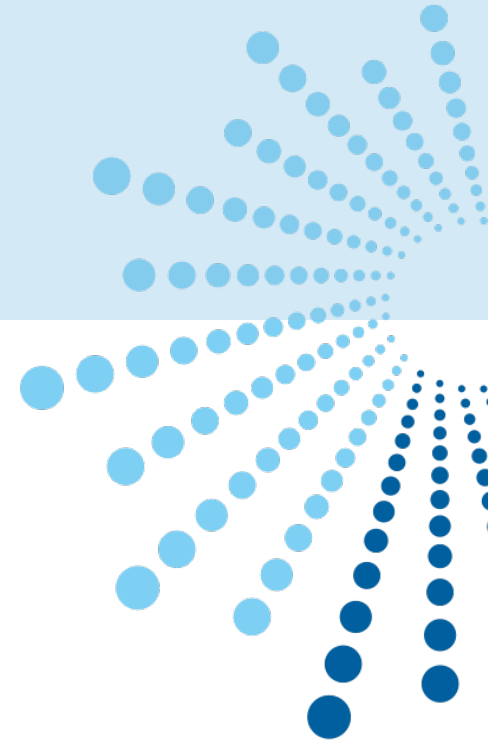
- Character evidence
- Polygraph examinations
- SANE reports
- Articles from journals
- Past conduct of complainant, respondent
- Unlawfully obtained evidence

**EVIDENCE**



# The Investigation Report

Narrowed Jurisdiction and Expansive Procedural Requirements



07

At the conclusion of the investigation, we must create an investigative report that fairly summarizes relevant evidence.





# Relevancy Standard

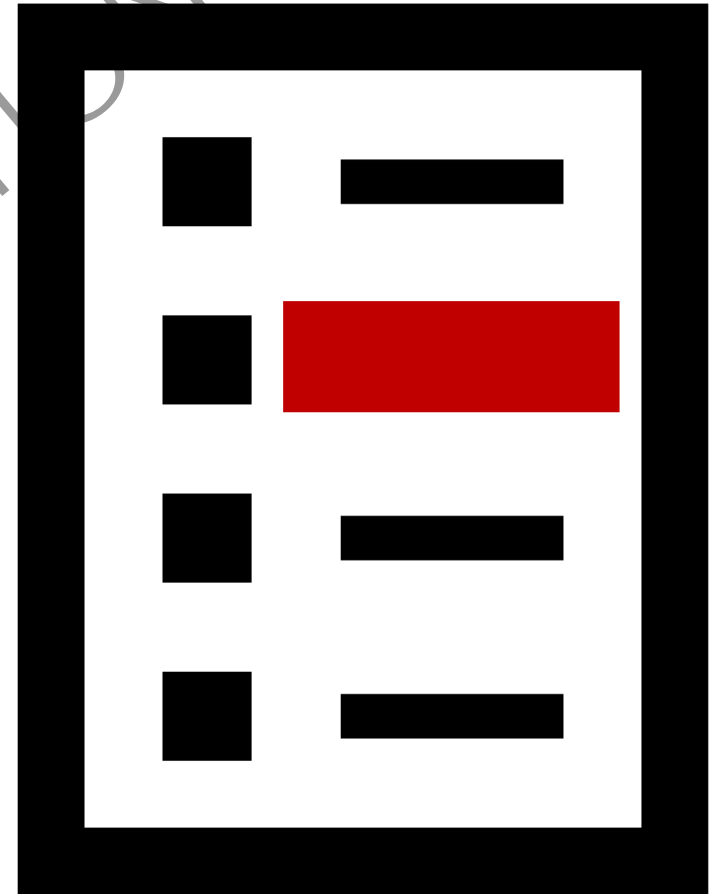
## Relevant

- “Evidence is relevant if:
- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action.”

## Per se Irrelevant

- Prior sexual history of complainant, with two exceptions
- Legally recognized and unwaived privilege.
- Records related to medical, psychiatric, psychological treatment

# Redactions



# Additional Requirements



Share the report with the parties and their advisors



In electronic format or hard copy



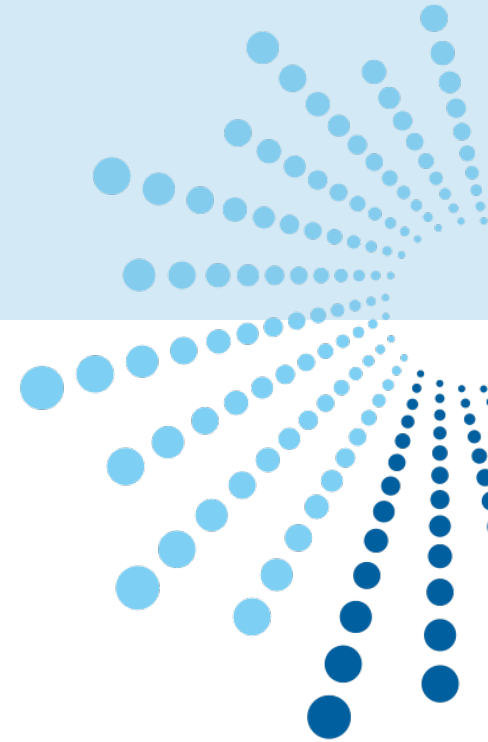
At least 10 days prior to the hearing



# The Importance of a Quality Report

7a

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# The Purpose of the Report

To allow for advance review

To allow for advance preparation

- By the decision maker
- By the parties

Reduce likelihood of bias in final outcome

# Intended Recipients

The Parties

The Advisors

The Decision Maker

The Appeal Panel

# Other Recipients?

Friends of  
the parties

Parents

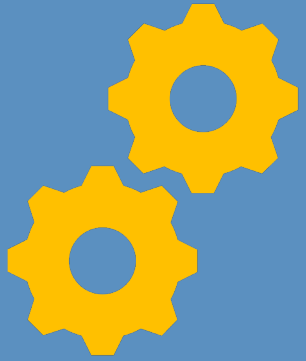
Law  
enforcement

Attorneys

Judges

Media

Social Media



# Essential Elements of a Quality Report

7b



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# Essential Elements

---

Intentionally organized to enhance comprehension

---

Factually accurate

---

Concise

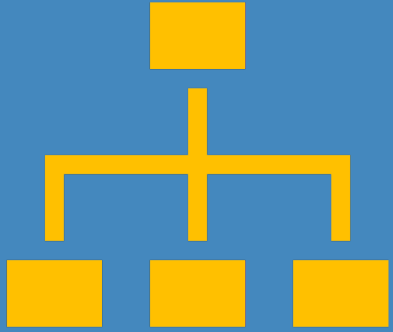
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Without editorial or opinion

---

Consistent format

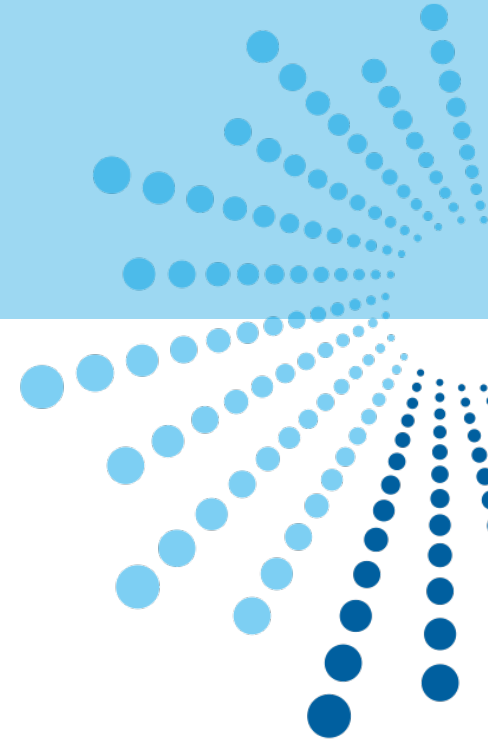
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# Structure of the Report

7c

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# Report and Record



Summary of the  
Evidence



Compilation of the  
Evidence

# The Record



Compilation of the evidence.



Organized intentionally and consistently.



Divided into appendices.



Is attached to the report.



Includes a procedural timeline.

# Examples of Appendices

Appendix A: witness testimony only (e.g., transcripts, statements summaries, etc.);

Appendix B: relevant documentary evidence (e.g., text messages, SANE reports, photographs, etc.);

Appendix C: the remaining evidence deemed irrelevant, but directly related to the allegations in the formal complaint;

Appendix D: the procedural timeline.

# Structure of the Report

- Overview of the Investigation
- Statement of Jurisdiction
- Identity of Investigators
- Objective of the Investigation and the Investigation Report
- Prohibited Conduct Alleged
- Witnesses
- Evidence Collected
- Summary of Evidence
- Conclusion





# Report Structure Overview

In this section, provide a very brief overview of the case.

## Include:

the names of the parties

the applicable policy(ies)

the prohibited conduct alleged

the date, time, and location of the conduct

a brief description of the alleged misconduct



# Report Structure Statement of Jurisdiction

1. Cite Jurisdictional Elements
2. State all grounds for Jurisdiction





# Report Structure

## Identify Investigators

1. Identify the investigators by name
2. State that they have been properly trained
3. List trainings, or cite documents in the record that detail investigators prior training



# Report Structure

## Objective of the Investigation & Report

1. This language should mirror the language in your policy or procedures.
2. State the objective of the investigation
3. Briefly state that all procedural steps were followed
4. Describe the purpose of the report.



# Report Structure

## Prohibited Conduct Alleged

1. List the allegations of prohibited conduct in the formal complaint.
2. Include definitions of prohibited conduct from institution's policy/procedures.



# Report Structure

## List Witnesses

- List those witnesses that were interviewed
- List witnesses that were identified, but not interviewed
- Simple List
- Detailed List

# Example of a Detailed List

Witness Name	Witness Identified By	Information Offered
John Doe	Reporting Party	Mr. Doe is the Reporting Party's best friend. He was with the Reporting Party the night of the reported incident.
Jane Doe	Investigators	Jane Doe is the Responding Party's roommate. It is believed that she saw the Reporting Party leave the Responding Party's residence immediately following the reported incident.



# Report Structure

## Evidence Collected

The final Title IX regulations require that all evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint be shared with the parties and “made available at any hearing to give each party equal opportunity to refer to such evidence during the hearing including for the purposes of cross-examination.”

In this section, list the Evidence or Refer to Appendices



# Report Structure

## Summary of Evidence

In this section, include a summary of all relevant evidence. This section can be organized in several ways. It is important that, however organized, the evidence is summarized clearly and accurately, and without opinion or bias. In this section, the writer should cite the evidence and information in the Appendices.



# Report Structure Conclusion

In this section, summarize next steps in the process, including any procedural pre-requisites for moving the matter forward to a hearing.



# Questions?

For More Information:

[info@grandriversolutions.com](mailto:info@grandriversolutions.com)



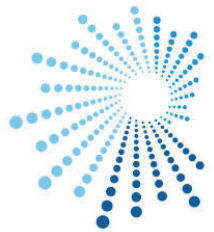
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# Title IX in a Post Regulatory World

## Day Two

Chantelle Cleary

# Today's Agenda

01

Hearings in a Post Regulatory World

04

Conducting the Hearing

02

Roles and Responsibilities

05

Evidentiary Issues

03

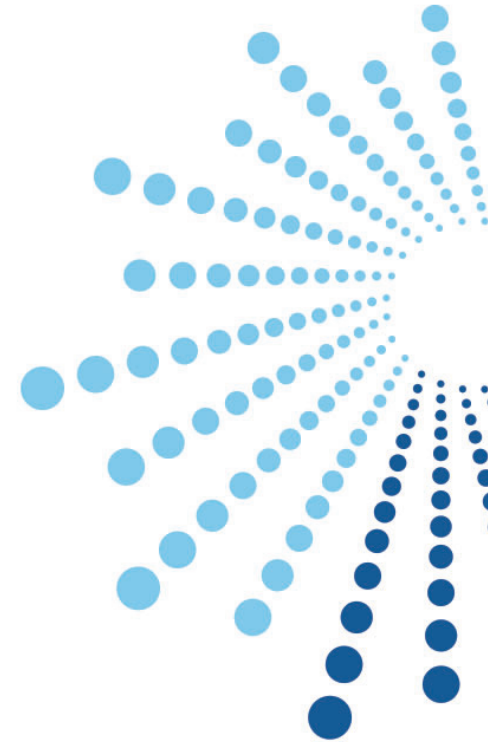
The Hearing

06

Post-Hearing

3A

Pre-Hearing Tasks





# Hearings in a Post Regulatory World

Procedural Requirements, Practical Requirements, and so much more



01

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# Procedural Requirements for Hearings

Must be live, but can be conducted remotely

No Compelling participation

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision maker determines relevancy of questions and evidence offered

Exclusion of Evidence if no cross examination

Written decision must be issued that includes finding and sanction

**What do we  
need to do all  
of this?**



Space



Technology



Clear & Comprehensive Procedures



Staff



Expertise and Confidence

# Purpose of the Hearing

Why are we doing all of this?

Review and Assess  
Facts



Make Findings of  
Fact



Determine  
Responsibility/  
Findings of  
Responsibility



Determine Sanction  
and Remedy



# The Essential Elements of All Hearings

---

Clear Procedures

---

Due/Fair Process

---

Fair, Equitable, and Neutral

---

Consistency

---

Trauma Informed

---

Well Trained Personnel

# Clear Procedures

## The Process

- Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings, impact statements, etc.

## The Players

- The roles of all participants

## The Evidence

- Relevancy, Exclusions, Timing of submission, how to submit, who decides, etc.

## The Outcome

- Deliberations; Notice; manner and method communicated.

# Rules of Decorum

- Optional
- Must apply to all participants, equally and consistently
- Expectations should be clear
- Rules should be provided and explained in advance
- Consequences for violating rules should be explicit
- Violations should be addressed and enforced consistently and equally

# Rules of Decorum: Examples

All participants at the live hearing are expected to treat each other and the decision-maker with respect.

Parties and advisors will refer to other parties, witnesses, advisors, and institutional staff using the name and gender used by the person and shall not intentionally mis-name or mis-gender another during when communicating or questioning.

Abusive behavior will not be tolerated and may be grounds for the participant to be removed from the hearing.

Parties and advisors may take no action at the hearing that a reasonable person in the shoes of the affected party would see as intended to intimidate that person (whether party, witness, or official) into not participating in the process or meaningfully modifying their participation in the process.

# Rules of Decorum: Examples

Advisors may not speak on behalf of a party except as necessary to perform direct or cross-examinations.

Advisors may not interrupt the proceedings repeatedly to ask questions or interject; advisors may only participate consistent with the advisor expectations outlined in the procedures.

# Rules of Decorum: Examples

If the decision-maker determines that these rules have been violated, they will provide the participant with one opportunity to correct their behavior. If the decision-maker determines that the participant continues to violate these rules, the decision-maker may either limit their participation moving forward or remove them from the hearing. For repeated violations and/or egregious behavior, an advisor may be prohibited from serving as an advisor in University processes.

# Rules of Decorum: Examples

If an advisor is removed from the hearing, the affected party may either select a new advisor or the University will provide an advisor to the party for the remainder of the hearing. In this case, the hearing, or rest of the hearing may be postponed if necessary to allow for the selection or provision of a new advisor.

Any actions taken by the decision-maker regarding violation of these rules or removal of participants, will be documented as part of the record made available upon appeal.



# Roles and Responsibilities

People, Functions, and Impartiality



02



# Hearing Participants

Complainant

the person bringing the complaint

Respondent

the person against whom the complaint has been filed

Advisor

will conduct cross examination; role varies depending on school

Investigator

summarizes the investigation, answers questions

Witnesses

present in the room only when answering questions

Hearing Coordinator/Officer

coordinates all aspects of the hearing, ensures a fair and equitable hearing process, acts as a resource for all participants

Decision-Maker

makes decision as to whether policy was violated

Administrative Staff

assists with the logistical coordination of the people, the space, technology, etc.

Who is NOT  
in the  
Hearing?

General Counsel

Spectators

Student newspaper

Interested faculty

Title IX Coordinator

# The Players

## Hearing Advisors

- Will conduct examination/cross
- Roles
- Training/Qualifications
- Communicating their role
- Compliance with the role



# The Players

## The Coordinator/Chair

- Oversees the Process
- Maintains order/decorum
- Supports the panel
- Makes ruling
- Voting or non-voting
- Writes the decision
- Trained

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# The Players

## The Decision Maker

- May be Hearing Chair or on panel
- Determines whether policy was violated
- Cannot be Investigator, Title IX Coordinator, or Appeals Officer



# The Players

## A Panel?

- Number of panelists?
- Composition?
- Makes the finding
- Unanimous?
- Pool?
- Recruitment and retention



# Impartiality

WHAT DOES THIS *REALLY* MEAN?



# Logistics of a Hearing

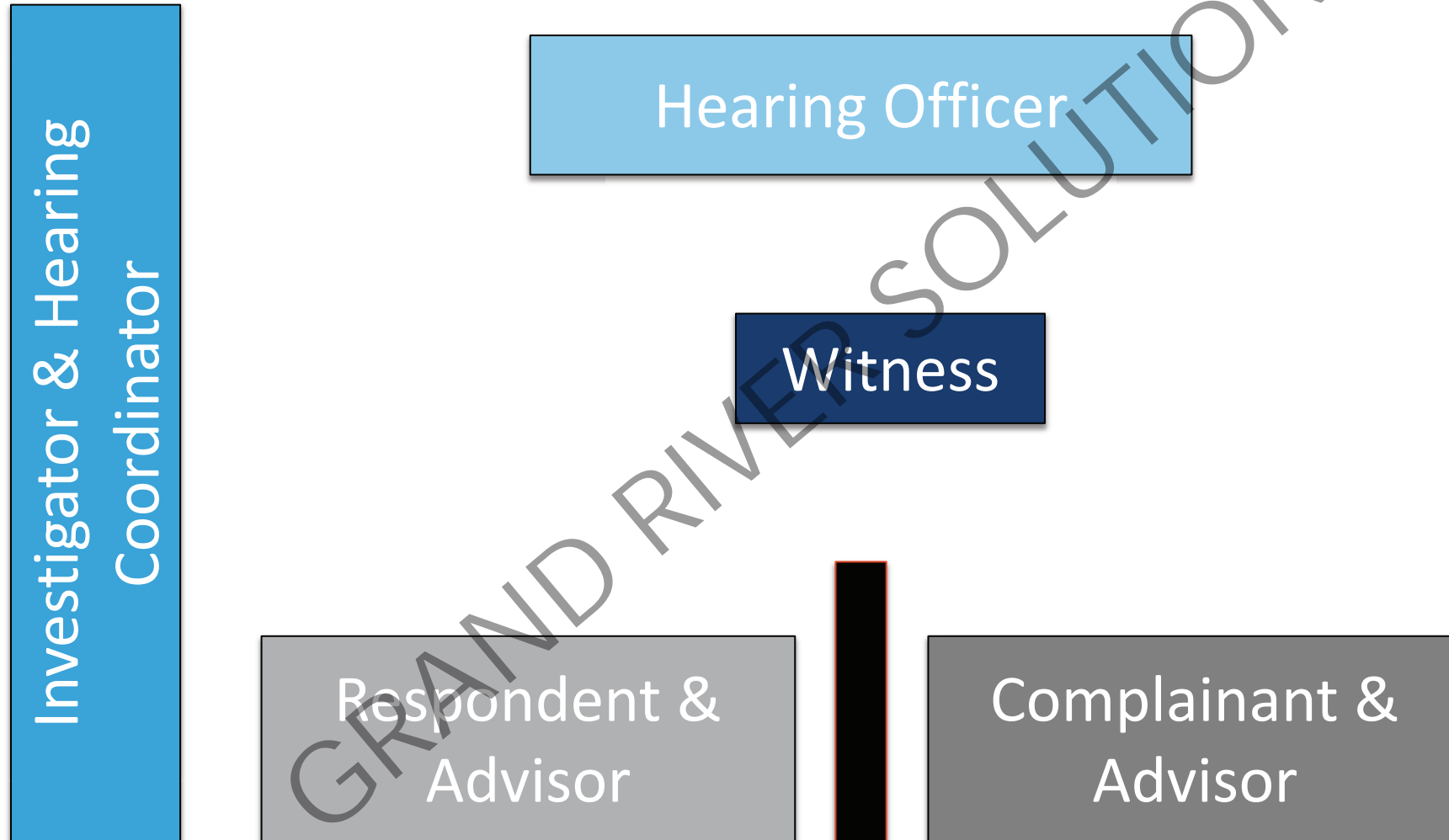




# Considerations for the Physical Space

- Room location and set-up
  - Entrances, exits, and proximity
- Privacy screens & partitions
- Technology
- Hallway control
- Space for extra visitors

# Hearing Room Configuration



# Remote Participation

- In whole or in part?
- Communication considerations
  - Chat function or emails
- Private consultation between parties and advisors
  - Use of breakout rooms
  - Communication considerations
- Practice runs
- Connectivity Considerations

# Other Considerations

Time Limits

Breaks

Formality, Order  
and Gate-Keeping

Handling  
disruptions and  
interruptions

Poor behavior?

Recording



## The Hearing

03

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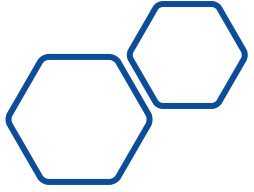




# Pre-Hearing Tasks

What should be done in advance of the hearing

3A



# Logistics

Scheduling participants

Reserving space

Provision of accommodations

Requests for delays; adjournments

# The Parties and their Advisors, and the Witnesses

## Pre-hearing instructions

- Via conference or meeting
- In writing

## Set expectations

- Format
- Roles of the parties
- Participation
- Evidence
- Decorum
- Impact of not following rules



# The Decision Maker(s)



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



Develop questions of your own



Anticipate the party's questions



Anticipate challenges or issues



## Conducting the Hearing

04

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# Opening Instructions by the Chair

- Set the stage
- Reiterate charges
- Reiterate rules and expectations
- Reiterate logistics for the day

*This should be scripted and used consistently.*



# Opening Statements

Permitted, but not required

Policy should include purpose and scope

If permitted, consider...

- Requiring submission prior to hearing
- Word limit
- Time limit

# Testimony

## Procedures should be clear

### Order of/parties and witnesses

- Could simply leave this up to the decision maker

### Order of examination

- Questioning by the decision maker
- Cross examination by the advisor
- Will the advisor be permitted to question their own party?
- Will there be a second round of questioning?

Consistency is essential. Consider putting this all in your procedures.

# Cross Examination

## Who does it?

Must be  
conducted by the  
advisor.

If party does not  
appear or does  
not participate,  
advisor can  
appear and cross.

If party does not  
have an advisor,  
institution must  
provide one.

# Cross Examination

## Permissible Questions

Questions must be relevant

Not relevant

- Duplicative questions
- Questions that attempt to elicit information about
  - Complainants prior sexual history
  - Privileged information
  - Mental health

# Cross Examination

## Role of the Decision Maker

Rulings by Decision Maker required

Explanation only required where question  
not permitted



# Cross Examination

## Impact of Not Appearing

Exclusion of all statements of that party

Exception - DOE Blog

What if a party or witness appears, but does not answer all questions?

# Closing Statements

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Permitted, but not required

Policy should include purpose and scope

If permitted, consider

- Time limit
- Submission in writing after the hearing

# Common Challenges

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Non-appearance by a party or witness

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Non-appearance by an advisor

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Party or witness appears but declines to answer some (or all) questions

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Disruptions

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Maintaining decorum

# Tips for Increasing Efficiency

01

Be prepared

02

Have an experienced chair

03

Have back up plans for technology issues

04

Require pre-hearing written submissions

- of opening statements
- of questions in advance



# Evidentiary Issues

05

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# Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.

Is it authentic?

Is the item what it purports to be?

Is it credible?

Is it convincing?

Is it reliable?

Can you trust it or really on it?

What weight, if any, should it be given?

Weight is determined by the finder of fact!

# Evaluating this evidence

- Character evidence
- Polygraph examinations
- SANE reports
- Articles from journals
- Past conduct of complainant, respondent
- Unlawfully obtained evidence

**EVIDENCE**

# Assessing Authenticity

Investigating the products of the investigation



Never assume that an item of evidence is authentic.



Ask questions, request proof.



Investigate the authenticity if necessary.



# Assessing Credibility and Reliability

**No formula exists, but consider the following:**

- opportunity to view
- ability to recall
- motive to fabricate
- plausibility
- consistency
- character, background, experience, and training
- coaching
- Your own bias and limited experience

# Assessing Reliability

Inherent plausibility

Logic

Corroboration

Past record

Other indicia of reliability

# Credibility Versus Reliability

## Reliable Evidence

- I can trust the consistency of the person's account of their truth.
- It is probably true and I can rely on it.

## Credibility

- I trust their account based on their tone and reliability.
- They are honest and believable.
- It might not be true, but it is worthy of belief.
- It is convincingly true.
- The witness is sincere and speaking their real truth.

# Being Convinced

## It Is True, or Biased Conclusion?

A credible witness may give  
unreliable testimony



## After the Hearing

06

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# Deliberations

# Weighing the Evidence & Making A Determination

- 1) Evaluate the evidence collected to determine what factually is more likely to have occurred, and then
- 2) Analyze whether the conduct that happened constitutes a violation of the school's policies

# Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate
- Apply Standard of Proof





# Final Report

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and Remedies
- Procedure for appeal



# Appeals

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# Appeals: Mandatory Grounds

- (A) Procedural irregularity that affected the outcome of the matter;
- (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or
- (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

# Appealing sanctions?

Other grounds for appeal?

YOUR DISCRETION

# Questions?



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