

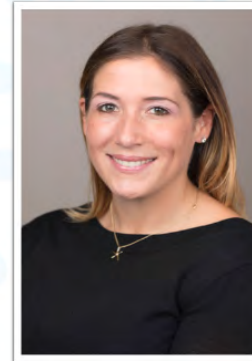


From Intake to Final Resolution: A Deep Dive into the Practice of Responding to Sexual and Related Misconduct

St. Mary's College of Maryland

Chantelle Cleary Botticelli, J.D.
August 2021

Meet Your Facilitator



Chantelle Cleary Botticelli, J.D.
Director of Strategic Partnerships and Client Relations

Chantelle Cleary 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.



Grand River Solutions



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



Today's Agenda

01

Title IX's Requirements

02

Receipt of Reports

03

Complaint Intake and Supportive Measures

04

Report Resolution

05

Developing an Investigative Strategy

06

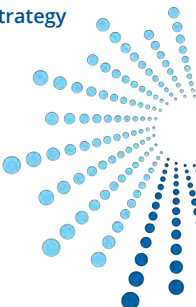
Investigative Interviews

07

Evidence Collection and Assessment

08

The Investigative Report and Record





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."

Sexual Harassment: Section 106.30

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).

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Covered Geography

Includes locations, events, or circumstances over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

- On campus or in a building owned or controlled
- Off-campus incident that occurs as part of the institution's operations
- Institution exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
- the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution



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Not
Covered

- Off campus conduct, even if it has an impact on the educational program or activity;
- Conduct that occurs outside of the United States.

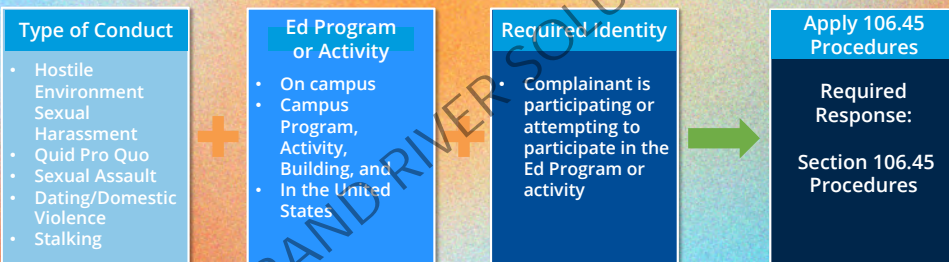
Covered Individuals

Eligibility for Title IX's Protections

"At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed." 34 C.F.R. § 106.30

- Applicant
- Accepted/Hired
- Enrolled/Employed

Title IX Application Post May 2020 Regulations



Conduct Falling Outside the Scope of Title IX

- Apply other institutional policies and procedures
- Ensure that those policies and procedures are compliant with VAWA/Clery, other intersecting federal and state laws





July 2021 Q & A

VRLC v. Cardona



b. Section 106.45(b)(6)(i)'s Prohibition on All Statements Not Subject to Cross-Examination is Arbitrary and Capricious.

Nevertheless, in the Department's review of the Final Rule's individual provisions, it failed to consider the

(45)

Last accessed Aug 3, 2021, available via:
<https://storage.courtlistener.com/recap/gov.uscourts.mad.222276/gov.uscourts.mad.222276.183.0.pdf>

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Receipt of Reports

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

02

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Regulatory Requirements

Notice to College/University

Outreach/Response from Title IX Coordinator

Support Measures, whether or not Formal Complaint is filed

How to File

Options

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Receiving Reports and Initiating the Response



Review the Report



Determine the appropriate initial response



Promptly initiate that response



Document/Record the receipt of the report and the response thereto

Initial Outreach Considerations:

How will you connect?

The Title IX Office receives the following anonymous report via your institution's online reporting form:

Riley Smith is in trouble. I live on their floor in River Hall and I constantly hear fighting and crying coming from their room at night. Every time I see Riley with their partner, they seem really submissive and nervous and I have noticed bruises on Riley the mornings after the biggest fights. The RA and Riley's partner are friends and so the RA doesn't do anything about it. It's getting so bad that some of the other people on the floor are talking about intervening, but we are afraid of Riley's partner too.

The Title IX Office is contacted by a professor who forwards the following email from a student to you:

I really don't want to bother you but I'm in a really hard situation.

I and my boyfriend had a row for these days. And he beat me yesterday and this morning that I attached some pictures before XXXX final starts this afternoon because I found out I couldn't hold pencil because of trembling and I couldn't even think in the first thirty minutes. These pictures show my arms after he twisting them, which doesn't look violent but feel hurt. One hour before lab final started, I told him I'm going to call police after he beat me, then he dragged me from bed to the floor and threatened to kill me if I call police. It was horrible and hard to reminisce. I knew he tends to use violence before and I forgave him some times when he just pinched my chin and dragged my arm. But this time it is too bad. So he took my phone away and restrain me in my room, not letting me go because I told him I would tell my TA about this whole thing after the final. So he just let me go to final after I promised I won't tell school and police.

When I go to two finals today (XXXX and XXXX, especially the latter), I really couldn't think and even hold pen (and I grabbed my bag but almost nothing in it) for the first thirty minutes. Now everything is done, he promised not to show up in my life nor my room, which is good because I don't want to take penalty on anyone. But I couldn't predict what my final shows out. It won't match my work for the whole semester. I don't expect any makeup chance. I just want to let you know since I barely know any American women here, am I doing wrong? Is there anything I can do to fix anything from academics or life?

Sorry for bothering.

The Title IX Office receives the following email from a responsible employee:

My name is Professor Jones. One of my students shared that they were raped last weekend at a party by another student. They don't want the school starting an investigation, and so I am not going to share their name or the details with you. They are thinking about talking to the police, but are not sure who to contact. Can you please provide me with information that I can share with the student?

Your communications team sends you the following post from Instagram



Complainant Intake and Supportive Measures

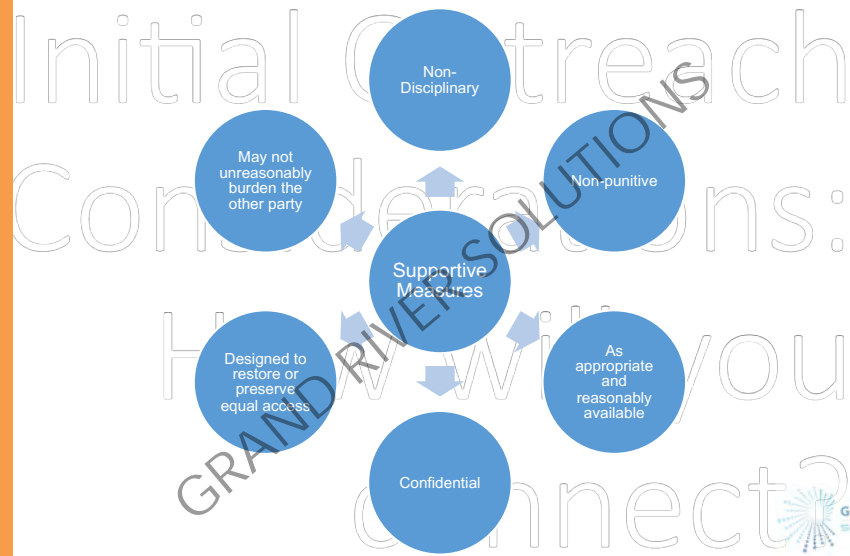
03

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Initial Meeting with the Complainant

- Prepare for the meeting
- Select appropriate space
- Build trust and rapport; empower
- Explain your role
- Discuss available support
- Options for reporting
- Answer questions
- Evidence collection/preservation
- Conclude with a discussion of next steps

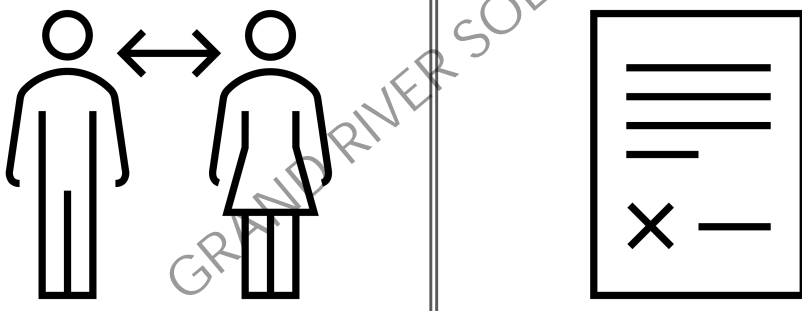




Examples of Supportive Measures

- Assistance obtaining access to counseling, advocacy, or medical services;
- Assistance obtaining access to academic support and requesting academic accommodations;
- Changes in class schedules;
- Assistance requesting changes in work schedules, job assignments, or other work accommodations;
- Changes in campus housing;
- Safety escorts;
- Leaves of absence;
- Mutual restrictions on contact between the Parties ("No-contact" orders).

"Mutual Restrictions On Contact Between the Parties"






No Contact Order Request

Complainant reports that Respondent, a classmate and acquaintance, kissed them without consent. Complainant further reported that they Respondent continues to try to talk to them and to engage them, even after Complainant clearly asked Respondent to stop. Complainant does not want to file a formal complaint, but does want a No Contact Order.

Complainant and Respondent are both scheduled to graduate this year. They are in a small class together that they both need to complete in order to graduate. What does this no contact order look like?

Post Meeting Tasks

-  Document the meeting
-  Send a summary email with resources, options, next steps
-  Follow up
-  Make connections
-  Provide the supportive measures
-  Document supportive measures requested, provided, and not provided. Where not provided, indicate why.

Emergency Removal of Student

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



Report Resolution

Remedies Based, Informal, or Formal

04

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How to Proceed?



Remedies-based
No formal process



Alternative/Informal
Signed agreement
Voluntary



Formal/ Investigation/ Hearing
All requirements of 106.45



Formal Complaint Resolution

Informal Resolution

- Formal Complaint Required
- Parties must agree
- Can withdraw from process
- Alternate Resolution/Mediation
 - Be mindful of Maryland Law
- No appeal

Formal Resolution

- Investigation and Adjudication process in compliance with Section 106.45

Remedies Based Resolution

Remedies Based, Informal, or Formal

04(a)

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Remedies Based Resolution

Supportive Measures

Educational Conversations

Targeted Education

The Title IX Office has received several anonymous complaints against the same student over the course of several months. The complaints allege that respondent engaged in the following conduct:

- C1 was at a party and was dancing with a large group. Respondent started dancing with her and while they were dancing, Respondent "grabbed" Complainant's breasts without consent.
- C2 reported that while at a party, Respondent started dancing with her. While dancing, Respondent put his hands "up her skirt" and touched her vagina without consent.
- C3 reports that Respondent "aggressively grabbed her butt" while she was waiting in line to get a drink at a party
- C4 alleged that she took an uber home from a party with Respondent and that while in the Uber Respondent exposed his penis, and "tried to force her to touch it."

Each Complaint alleges conduct on a different date and at a different house party hosted by a fraternity. Respondent is not a member of a fraternity.



Formal Complaint and Notice Requirements

04(b)

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Formal Complaint Filed

By
complainant

By the Title IX
Coordinator

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Factors to consider when determining whether to file a formal complaint

Allegations of Violence

Threats

Use of weapons

Serial predation

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Formal Complaint

A Formal Complaint must include:

The Complainant's digital or physical signature, or an indication that the Complainant is the person filing the Formal Complaint;

An allegation of Prohibited Conduct as defined under this Policy. This may include:
• Where the incident(s) occurred; what incident(s) occurred; when the incident(s) occurred;

Identity of Respondent, if known;

A request for a resolution.

Formal Complaints may be made to the Title IX Coordinator by US Mail, email, or in person.

Dismissing Complaints

MANDATORY

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

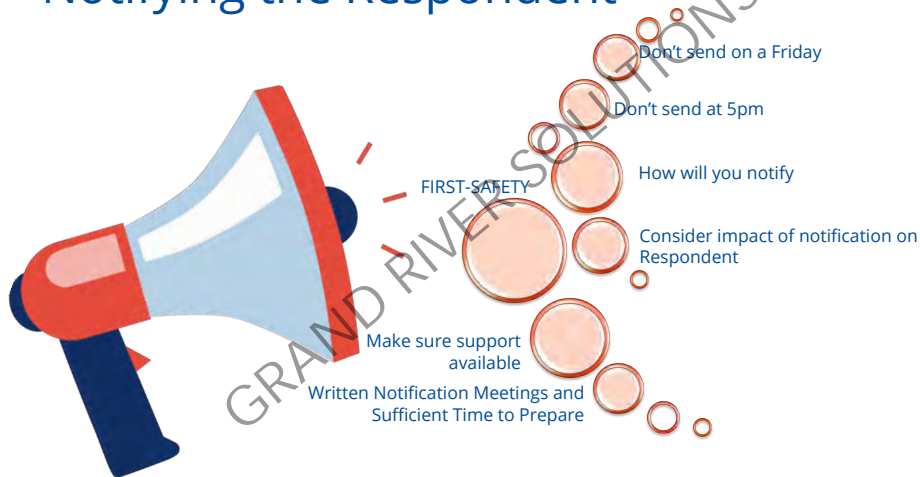
DISCRETIONARY

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



If a matter is dismissed, determine if you can (and want to) proceed under a different policy

Notifying the Respondent



Notice of Allegations

The Notice of Allegations will include:

- An explanation of the grievance process
- The allegations of Prohibited Conduct, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview..
- The College's decision to proceed with the resolution process or dismiss the Formal Complaint as described below.
- The parties' rights to appeal the designation and/or dismissal decision.
- 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 parties may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence.
- The Code of Conduct provisions that prohibit knowingly making false statements or knowingly submitting false information during the grievance process.

Advisor of Choice: Regulatory Requirements

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

Institutions cannot place restrictions on who can serve

No training required

Institution must provide advisor for the purposes of cross examination, only.

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Attorneys, Advocates, Personal Supporters

In addition to attending meetings and interviews, advocates are permitted to assist parties through:

- Private consultations with the party during meeting and interviews;
- Providing advice to the party in a non-disruptive manner (such as communicating in writing);
- Assisting a party's exercise of any right during the investigative and adjudicatory process.

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Attorneys, Advocates, Personal Supporters

Advocates and supporters may accompany the student to any meeting or interview. Parties may not have more than two people, including a supporter and advocate, at any meeting or interview.

Advocates and supporters have no speaking role in a meeting or interview and are not permitted to ask or answer questions during those sessions. All communication regarding the resolution process will be directed to the student. The College will only respond to communications received from the student. An advocate will not be permitted to communicate on the student's behalf.

In the context of serving as an advocate or supporter to a Party, their statements are not made on behalf of the College but are solely made as an advocate and/or supporter for a Party. It is important, when one chooses an advocate or supporter, to ask for the individual's consent to serve in that capacity before divulging any confidential information.

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Initial Meeting with Respondent

Prepare for the meeting

Select appropriate space

Build trust and rapport; empower

Explain your role

Discuss available supportive measures

Supportive measures that provided to complainant that impact them

Answer questions

Evidence collection/preservation

Conclude with a discussion of next steps

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Post Meeting Tasks



Document the meeting



Send a summary email with resources, options, next steps



Follow up



Make connections

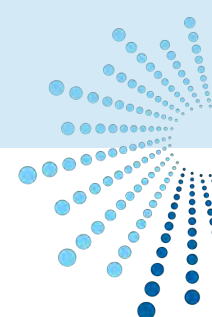


Provide the supportive measures



04(c)

Informal Resolution



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An informal resolution is a process, such as mediation, that does not involve a full investigation and adjudication of allegations of Prohibited Conduct.



An Informal Resolution might include, but is not limited to, non-disciplinary remedies such as:



Implementing agreed upon supportive measures;



Providing training or counseling to an individual or group;



Having an informal discussion with the respondent;



Requesting a written apology from the respondent;



Increasing monitoring or security at specified locations; or



Facilitating a confidential conversation between the Parties; and



• Any other remedy that can be tailored to the Parties to achieve the goals of the Policy.

Informal Resolution Requirements

Formal Complaint must be filed

Participation in an informal resolution must be voluntary

Must occur prior to resolution via a formal process

Parties must be permitted to withdraw and seek formal resolution

Voluntary, written consent to the informal resolution must be obtained

Facilitators of informal resolution must be trained

Informal Resolution is prohibited to resolve allegations that an employee sexually harassed a student.

Informal Resolution Notice Requirements

the allegations,

the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process

and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;


Facilitators of informal resolution as witnesses???




Formal Resolution

04(d)


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



Initiation of an Investigation

Investigations begin with the filing of a formal complaint and the issuance of a notice of investigation and allegations.



Advisor of Choice During the Investigation

- The advisor can be anyone, including an attorney or a witness.
- The College may not place restrictions on who can serve.
- The advisor may not actively participate in the investigation.



Written Notification of Meetings and Sufficient Time to Prepare

Equal Opportunity to Present Evidence

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- Throughout the investigation and adjudication process, the College will provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.
- The Investigation ordinarily will include interviews of the parties and any witnesses who may have relevant information, unless clearly unreasonable or duplicative of information already gathered; a review of any pertinent documents, medical records, and communications; and may include other actions deemed appropriate by the Investigator(s). Interviews will not be recorded.
- If a party or witness declines to participate in the Investigation and the College is aware of relevant information pertaining to or in the knowledge of that party, the Title IX Coordinator may present this information to the Investigator.

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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.

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"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."

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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

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Who Decides Relevancy During the Investigation?

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.

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Interview Summary Review

After each investigative interview, the Investigator(s) shall prepare a written summary of the interview and shall email a copy of the summary of the interview to the Party or witness who was interviewed as soon as practicable after the interview is conducted. The Party or witness will be given two (2) business days from the date upon which the Investigator(s) send the summary of the interview to provide any comments or additional information via email to the Investigator(s).

If the Party or witness does not provide comments or additional information to the Investigator(s) within this time period, the summary of the interview will be included in the Investigative Report without comment from the Party or witness. If the Party or witness provides comments or additional information to the Investigator(s) within this time period, the Investigator(s) shall include the comments and additional information in the Investigative Report, as defined below, and may, in the Investigator(s)’ discretion, conduct another interview of the Party or witness.

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Preliminary Investigative Report

At the conclusion of the initial investigation, the Investigator(s) will prepare a written summary of the information gathered, including but not limited to the names of the witnesses interviewed, summaries of the information provided by each Party and each witness, and copies of all documents or physical evidence provided to the Investigator(s) (the “Preliminary Investigative Report”).

The College will provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.

The College will send the Preliminary Investigative Report to each party and the party’s advisor, if any. Each party will have ten (10) days to submit a response, which the Investigators will consider prior to the completion of the investigative report (the Response to the Preliminary Investigative Report).

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Additional Investigation

- Upon receipt of each Party's Response to Preliminary Investigative Report or the expiration of the deadline to submit the Response to Preliminary Investigative Report, whichever is earlier, the Title IX Coordinator will submit the Parties' Responses to Preliminary Investigative Report for the Investigator(s)' consideration. Parties will receive copies of the same. The Investigator(s) will carefully review all of the information submitted by the Parties in response to the Preliminary Investigative Report. The Investigator(s) may conduct additional interviews to the extent reasonable, based on the relevancy and materiality of the statement of information known by a witness.



Final Investigative Report

After the Investigator(s) review the Responses to the Preliminary Investigative Report and conduct any additional investigation, the College will prepare the final investigative report (the "Final Investigative Report"). The Final Investigative Report will fairly summarize relevant evidence. The College will send the Final Investigative Report to the party and the party's advisor, if any, ten (10) days prior to the hearing. The College will send the investigative report in an electronic format or a hard copy to the parties' and the hearing officer(s).

Investigation Timeline

The Investigators will strive to complete the formal investigation process within 120 days of the Notice of Investigation.

The Title IX Coordinator or Deputy will keep the parties informed of the status of the College's resolution of the report throughout the process.

The College will strive to schedule and conduct the hearing within a reasonably prompt time frame after the completion of the investigation.

The Requirement of Impartiality

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

Impermissible Bias

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

Conflict of Interest

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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.

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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

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From Intake to Final Resolution: A Deep Dive into the Practice of Responding to Sexual and Related Misconduct

St. Mary's College of Maryland
Day 2

Chantelle Cleary Botticelli, J.D.
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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.

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

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.



Developing an Investigative Strategy

05

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Essential Steps of an Investigation



Notice of Formal Investigation



Initial Interviews



Evidence Collection



Evidence Review



Additional Evidence Collection/Follow-Up Interviews



Report Writing

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Understand the Scope of the Investigation



Review the formal complaint



Ask questions if unsure

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The Process

Developing an Investigative Strategy

Receive Report

Develop a timeline

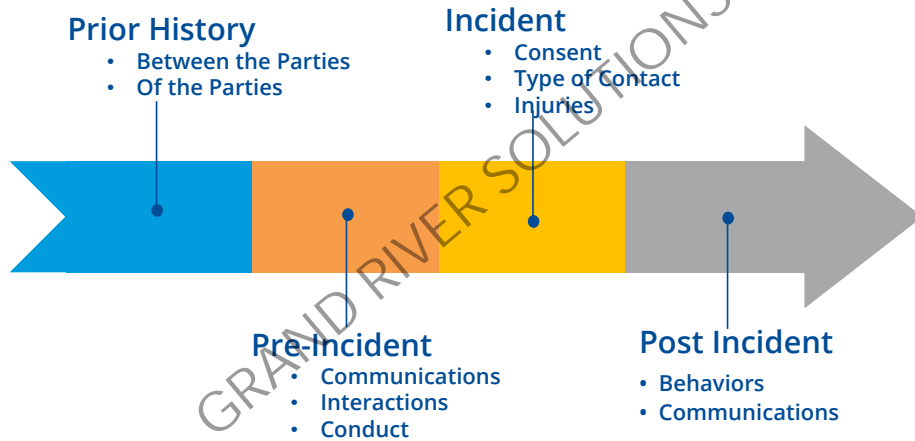
Identify Witnesses

Identify Potential Evidence

Develop Strategy to Collect Evidence

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Investigation Timeline



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Title IX Hearing Requirements: The Impact on Investigations



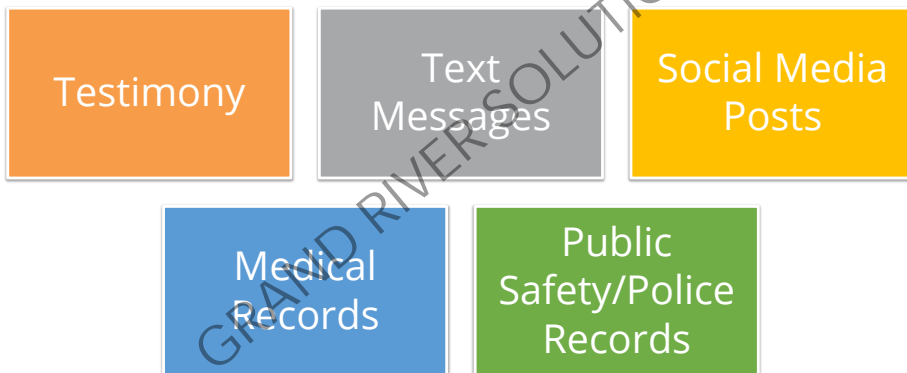
EVIDENCE COLLECTION



INVESTIGATE THE EVIDENCE

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Considerations for Evidence Collection in a Post-Regulatory World



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The Importance of Organization

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Investigative Interviews

06

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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

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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

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

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The Importance of Empowerment and the Power of Empathy



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How do we...

Build Rapport and Trust?

Empower?



Investigative Interviews



Start the interview by eliciting a narrative...

Where would you like to begin?

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



Capture the Entire Experience

- If you have to, 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 reporting individual and the accused.










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



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.

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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

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?

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Follow-Up Interviews

- Seek clarification
- Explore inconsistencies
- Explore contradictory evidence
- Explore difficult issues
- Provide opportunity to respond

Follow-Up Interview Approach

Explain the purpose of the follow-up.

Set the stage for the topics you will be covering.

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.

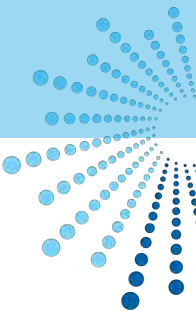
Be deliberate and mindful in your questions:

- 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...

Evidence Collection and Assessment



07



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

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Evidence Collection



Identify the items of evidence that you would like to obtain



Develop an intentional strategy for obtaining that evidence



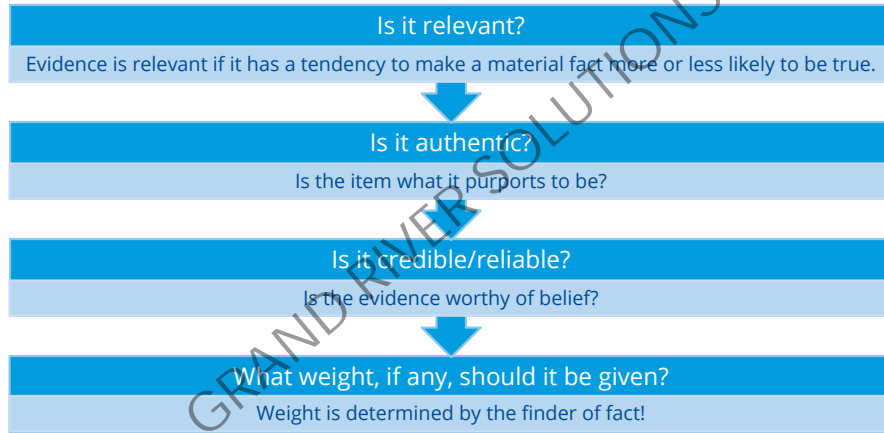
Overcome barriers to evidence collection



Considerations about collecting certain types of evidence



Evaluating the Evidence



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A Thorough Investigation Permits the Decision Maker to Assess



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"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."

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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

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Assessing Relevance

Why Does it Matter?

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

Character Evidence

Polygraph evidence

Opinion Evidence

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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.

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

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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

Barriers to Evidence Assessment

- Authenticity/Technology
- Colluding witnesses
- Colluding parties
- Totally different versions



The Investigative Report and Record

08

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



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

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The Purpose of the Report

To allow for advance Review

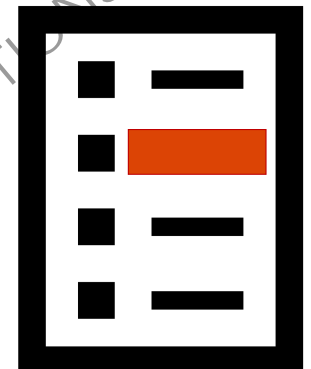
To allow for advance Preparation

- By the Decision Maker
- By the Parties

Reduce likelihood of bias in final outcome



Redactions



Essential Elements

Intentionally organized to enhance comprehension

Factually accurate

Concise

Without editorial or opinion

Consistent format



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

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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




Final Report

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Share Comments

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

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Final Report

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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

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Report Structure

Statement of Jurisdiction

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

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Final Report

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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

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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.

Final Report

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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

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Final Report

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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.

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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.

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01

Title IX Requirements
For Hearings

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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

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Impact of Not Submitting to Cross Examination



Exclusion of all statements of that party or witness



Cross Examination

Exceptions to the Exclusionary Rule



Statements that consist of or are made in the course of the prohibited conduct



When cross examination is waived or not conducted



When Has a Party Submitted to Cross Examination?



The party or witness has answered all questions deemed relevant on cross



A party or witness appears for cross, but the advisor does not ask any relevant questions



A party or witness refuses to answer one relevant question posed by advisor



A party or witness only answers the decision maker's questions and refuses to answer questions on cross

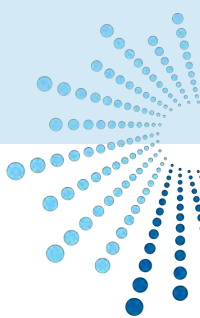


Purpose of the Hearing



02

Process Participants



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Hearing Participants

Complainant	the person bringing the complaint
Respondent	the person against whom the complaint has been filed
Advisor	May not participate in the process
Investigator	• Summarizes the final investigative report
Witnesses	present in the room only when answering questions
Hearing Chair	coordinates all aspects of the hearing, ensures a fair and equitable hearing process;
Decision-Maker	makes decision as to whether policy was violated
Hearing Facilitator	assists with the logistical coordination of the people, the space, technology, etc.

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The Participants Advisors

- May not participate in the hearing, other than to conduct cross examination.
- No required Training/Qualifications
- Communicating their role
- Enforcing their role



The Participants

The Hearing Facilitator

- Provides administrative support to the DM
- Coordinates the technology
- Coordinates the schedule
- Can be anyone, including the Title IX Coordinator



The Participants

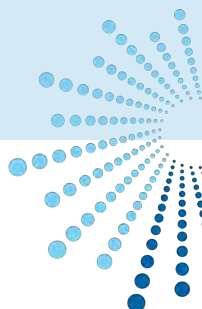
The Hearing Chair

- Is a decision maker
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains Decorum
- Will often take the lead in writing the decision



Pre-Hearing Tasks

What should be done in advance of the hearing



Pre-Hearing Meetings

Review the Logistics for the Hearing

Set expectations

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

Advance Submission of Questions

Relevancy Arguments and Advance Rulings



Pre-Hearing Preparation

Do Your Homework












Identify the Claims, What Needs to be Proven

- Why are we here?
- What are the elements for the charge?
- What are the definitions of those elements?
 - Consent?
 - Incapacitation?



Decision Maker Preparation

-  Review evidence and report
-  Review applicable policy and procedures
-  Understand the Scope of the Matter
-  Preliminary analysis of the evidence
-  Determine areas for further exploration
-  Develop questions of your own
-  Anticipate the party's questions
-  Anticipate challenges or issues
-  Prepare the script

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Common Areas of Exploration

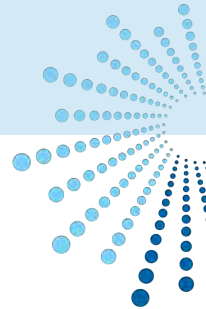
-  Credibility?
-  Clarification on timeline?
-  The thought process?
-  Inconsistencies?





The Hearing

05



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Order of the Proceedings

01

Opening introductions and instructions by the Chair

02

Investigator presents a summary of the final investigative report and findings

03

Opening statements

04

Testimony and Questioning

05

Deliberations



Opening Instructions by the Chair

- Introduction of the participants.
- Overview of the procedures.
- Expectations of behavior
- Opportunity for the parties to ask procedural questions.
- Consider using a script



Testimony

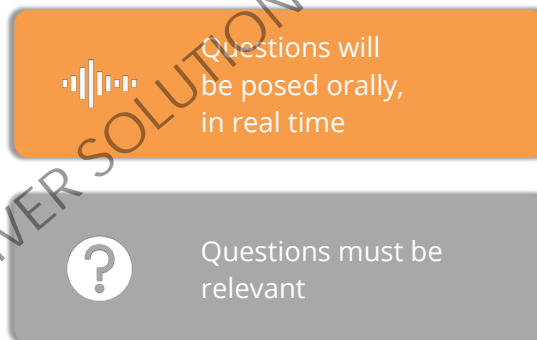


Testimony of the Parties & Witnesses



Questioning Guidelines

Format of Questioning



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



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 Decision Maker's Role in Advisor Questioning

05(a)

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When Assessing Relevance, the Decision Maker Can:

Ask the advisor why their question is relevant

Take a break

Ask their own questions of the party/witness

Review the hearing record

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Impact of Not Submitting to Cross Examination



Exclusion of all statements of that party or witness

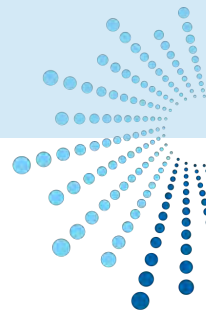


When a Party or Witness Declines to Answer a Relevant Question Posed by an Advisor

The Chair should:

- Remind the party of the impact of not submitting to cross examination;
- Pause the proceedings to allow the party or witness to reconsider.

After the Hearing



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Deliberations



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

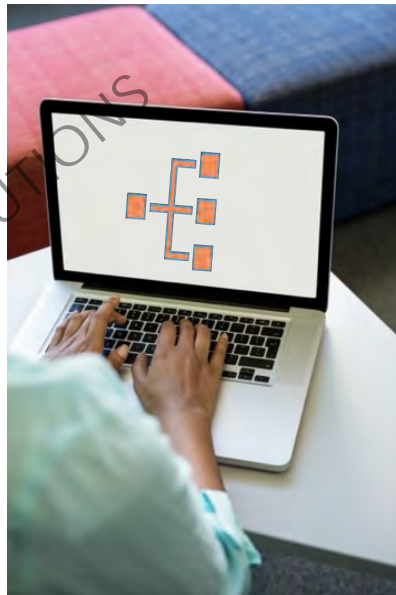
A finding of responsibility = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated

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



Policy Analysis

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



Allegation: Fondling

Fondling is the:

- ❑ touching of the private body parts of another person
- ❑ for the purpose of sexual gratification,
- ❑ without the consent of the victim,
 - ❑ including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental 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.

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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
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. 

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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

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Practical Application

07

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Scenario 1

During the hearing, Witness 1 appears. Witness 1 answers all relevant questions by the Decision Maker, the Complainant's Advisor, and the Respondent's Advisor. After cross by both Advisors, the Decision Maker asks a second round of questions. Witness 1, who is now tired and frustrated, refuses to answer any of the Decision Maker's follow up questions.

- **Can the Decision Maker rely upon/consider the statements of Witness 1?**

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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?**

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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 declines to answer all questions posed on cross by Complainant's advisor.

- **Can the Decision Maker consider the answers to other questions during the hearing? The report?**

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Scenario 2C

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 Decision Maker find Respondent not responsible because of the findings in the report?**

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Scenario 3

Complainant provides records of a sexual assault forensic exam. In the record, the nurse notes that Complainant had bruising on her inner thighs and abrasions on her cervix. The nurse does not appear at the hearing. Complainant testifies and fully submits to cross. In her testimony she states that she saw bruises on her inner thighs and that the nurse told her about the injuries to her cervix.

- **Can the DM consider evidence of the inner thigh injuries?**
- **Can the DM consider evidence of the injuries to C's cervix?**

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Scenario 4

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 DM hear from Witness 7 at the hearing?**

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The Formal Complaint charges Respondent with sexual assault for engaging in sexual contact with Complainant when she was incapacitated by alcohol. Specifically, Complainant alleges that they were at a party with friends when they met Respondent. Complainant reported that prior to the party she pre-gamed with Witness 1 and they split a bottle of prosecco. Complainant stated that while at the party, Respondent and Witness 2 approached her and her friend, Witness 3, and asked if they would be their partners in a round of beer pong. Complainant reported that she paired up with Respondent and they played several rounds. She further alleged that Respondent was the one who filled their cups. Complainant stated that she "got drunk fast" and her last memory was of Respondent handing her a celebratory shot because they had won the tournament. Her next memory was waking up on a couch in a bedroom that was unfamiliar to her, naked from the waist down. Respondent was on the floor next to her, asleep. He was under a blanket but was also naked.



Witness 1

Witness 1 was interviewed by the investigator and reported that she and Complainant are roommates, but they are not close. Witness 1 is an athlete and tends to hang out with her teammates. She stated that for this reason, they rarely hang-out, but that the night of the alleged incident they did because they were planning on going to the same party. Witness 1 stated that they split a bottle of prosecco, but that Complainant drank most of it because Witness 1 had an early practice the next morning and so didn't want to get "too messed up." Witness 1 said that they went to the party together, but then went their separate ways. Witness 1 stated that towards the end of the night, she saw Complainant and described her as "a disaster." She also reported that Respondent was "practically carrying her" and so she approached them and offered to take Complainant home. According to Witness 1, Complainant said she was fine, but her words were slurred, and she could barely stand. Witness 1 told Respondent to take care of her and he said, "I'm just going to put her to bed."

She didn't see either party again that night.

At the hearing, Witness 1 gave testimony that was substantially the same as what she told the investigator.



Witness 2

Witness 2 told the investigators that he is Respondent's best friend and teammate. Witness 2 stated that when looking for partners for the beer pong tournament, Respondent saw Complainant and Witness 3 and suggested that they approach them because Complainant "was hot" and Witness 3 "looked drunk enough to be a good time." Witness 2 said that Complainant was fine and didn't appear to be that drunk. He also stated that she made most of the winning shots after several rounds of the game so she couldn't have been too messed up. When asked who was filling the cups, he said that he wasn't sure who did it each round, but he definitely saw Complainant fill them on two occasions. After the tournament was over, he helped Witness 3 get home and so didn't see Complainant and Respondent again that night. He also mentioned that he and Witness 3 are now dating.

At the hearing, Witness 2 testified that Complainant was fine. He also stated that Respondent never filled Complainant's cup and that Complainant was all over Respondent the entire night.



Witness 3

Witness 3 was Complainant's best friend at the time of the incident. They are no longer close and Witness 3 is now dating Witness 2.

Immediately following the alleged incident, Witness 3 told the investigators that Complainant was already drunk when she got to the party. She stated that Respondent and Witness 2 asked them to play beer pong and they agreed. She stated that the parties seemed to hit it off immediately. She stated that they won the tournament and so played at least five rounds and that by the end of the game Complainant was the "drunkest she had ever seen her." Witness 3 stated that Complainant was slurring her words, couldn't stand on her own, and was really loud, which is not like her. Witness 3 stated that that she was pretty drunk too, but not as bad as Complainant. Witness 3 stated that she left the party with Witness 2.

At the hearing, Witness 3 stated that she may have exaggerated her description of Complainant when she spoke to the investigators. She told the decision makers that although Complainant drank a lot, she wasn't that out of it, because she had a high tolerance and drank a lot all the time.



Questions?



Email Us:

Chantelle@grandriversolutions.com
info@grandriversolutions.com



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