Meet Your Facilitator

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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

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


**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 by the institution
- Off-campus incident that occurs as part of the institution’s operations
- Incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution
Off campus conduct, even if it has an impact on the educational program or activity;
Conduct that occurs outside of the United States.
July 2021 Q &A

VRLC v. Cardona

Last accessed Aug 3, 2021, available via:

Receipt of Reports

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

Regulatory Requirements

Options

How to File

Support Measures, whether or not Formal Complaint is filed

Notice to College/University

Outreach/Response from Title IX Coordinator
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 friend 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 contact 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 shows 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 tended 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?

Complainant Intake and Supportive Measures

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”

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 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

Remedies Based, Informal, or Formal Report Resolution

- Remedies-based
  - No formal process
- Alternative/Informal
  - Signed agreement
  - Voluntary
- Formal/Investigation/Hearing
  - All requirements of 106.45

How to Proceed?
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)

Factors to consider when determining whether to file a formal complaint

- Allegations of Violence
- Threats
- Use of weapons
- Serial predation

Formal Complaint Filed

By complainant
By the Title IX Coordinator

Formal Complaint

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

FIRST-SAFETY
- How will you notify
- Consider impact of notification on Respondent
- Don’t send on a Friday
- Don’t send at 5pm
- Make sure support available
- Written Notification Meetings and Sufficient Time to Prepare

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.

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.

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.

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
Post Meeting Tasks

- Document the meeting
- Send a summary email with resources, options, next steps
- Follow up
- Make connections
- Provide the supportive measures

Informal Resolution

04(c)

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;

Formal Resolution

04(d)

Facilitators of informal resolution as witnesses???
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
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.

Regulations do not define “Directly Related” Evidence

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

Terms 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.

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.”

Equally important to a college's ability to effectively manage campus safety and prevent sexual harassment is its commitment to providing a fair and transparent process for adjudicating such incidents. This includes ensuring that all parties have an equal opportunity to present evidence and witnesses in support of their cases. It is vital that colleges provide a robust investigation process that addresses the concerns of all involved parties, and this includes ensuring that all relevant evidence is considered and that the process is handled in a manner that upholds the principles of due process and fairness.
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 that someone other than the respondent committed the conduct alleged by the complainant.

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

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.

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.

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).
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

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.

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

Essential Steps of an Investigation

- Notice of Formal Investigation
- Initial Interviews
- Evidence Collection
- Evidence Review
- Additional Evidence Collection/Follow-Up Interviews
- Report Writing

Understand the Scope of the Investigation

- Review the formal complaint
- Ask questions if unsure

The Process
Developing an Investigative Strategy

1. Receive Report
2. Develop a Timeline
3. Identify Witnesses
4. Identify Potential Evidence
5. Develop Strategy to Collect Evidence
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

Title IX Hearing Requirements: The Impact on Investigations

EVIDENCE COLLECTION
INVESTIGATE THE EVIDENCE

Considerations for Evidence Collection in a Post-Regulatory World

Testimony
Text Messages
Social Media Posts
Medical Records
Public Safety/Police Records

The Importance of Organization
Investigative Interviews

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

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
An investigator must make the person being interviewed feel safe, in control, and supported. This will lead to feelings of safety and trust and will result in a more cooperative interviewee. The interviewee will be able/willing to remember and share more information.

Increased evidence collection and quality
More accurate investigatory findings

How do we...

Build Rapport and Trust?
Empower?

Investigative Interviews
Start by eliciting a narrative... Listen
Interview for clarification
Listen
Avoid leading questions, questions that blame, interrogating

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

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**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?

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**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.

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**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.

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?

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
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 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

Types of Evidence:

- Testimony
- Text Messages
- Social Media Posts and messages
- Emails
- Surveillance
- Videos
- Photographs
- Medical Records
- Phone Records
- Audio Recordings
- Police Body Camera Footage
- Swipe Records
- Medical Records
- Phone Records
- Audio Recordings
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/reliable?
  Is the evidence worthy of belief?
- What weight, if any, should it be given?
  Weight is determined by the finder of fact!

A Thorough Investigation Permits the Decision Maker to Assess

Relevance  Credibility  Reliability  Authenticity  Weight

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 instances of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

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

  “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.

Character Evidence

Polygraph evidence

Opinion Evidence

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Opinion Evidence

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.”

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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

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
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

**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

**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

**Report and Record**

- Summary of the Evidence
- Compilation of the Evidence

**The Record**

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  - organized intentionally and consistently
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**Examples of Appendices**

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- **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.

Prohibited Conduct Alleged

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

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

<table>
<thead>
<tr>
<th>Witness Name</th>
<th>Witness identified by</th>
<th>Information offered</th>
</tr>
</thead>
<tbody>
<tr>
<td>John Doe</td>
<td>Reporting Party</td>
<td>Mr. Doe is the Reporting Party's best friend. He was with the Reporting Party the night of the reported incident.</td>
</tr>
<tr>
<td>Jane Doe</td>
<td>Investigators</td>
<td>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.</td>
</tr>
</tbody>
</table>
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.

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.

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

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

Why does it matter?

Review and Assess Evidence → Make Findings of Fact → Determine Responsibility / Findings of Responsibility → Determine Sanction and Remedy

Process Participants

02

Hearing Participants

<table>
<thead>
<tr>
<th>Role</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complainant</td>
<td>the person bringing the complaint</td>
</tr>
<tr>
<td>Respondent</td>
<td>the person against whom the complaint has been filed</td>
</tr>
<tr>
<td>Advisor</td>
<td>May not participate in the hearing, other than to conduct cross examination.</td>
</tr>
<tr>
<td>Investigator</td>
<td>• Summarizes the final investigative report</td>
</tr>
<tr>
<td>Witnesses</td>
<td>• coordinates all aspects of the hearing, ensures a fair and equitable hearing process;</td>
</tr>
<tr>
<td>Hearing Chair</td>
<td>• makes decision as to whether policy was violated</td>
</tr>
<tr>
<td>Decision-Maker</td>
<td>• assists with the logistical coordination of the people, the space, technology, etc.</td>
</tr>
<tr>
<td>Hearing Facilitator</td>
<td>• ensures a fair and equitable hearing process;</td>
</tr>
</tbody>
</table>

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 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

Common Areas of Exploration

- Credibility?
- Clarification on timeline?
- The thought process?
- Inconsistencies?
Order of the Proceedings

01 Opening introductions and instructions by the Chair
02 Investigator presents a summary of the final investigative report and submits to questioning by the decision maker(s) and the advisors
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**

01 Investigator will testify first
02 Party and Witness Testimony
03 The Decision Maker will question first
04 Advisor questioning will occur next
05 Follow up by the Decision Maker

**Questioning Guidelines**

Format of Questioning

Questions will be posed orally, in real time

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

When Questioning....

- Be efficient.
- Be prepared to go down a road that you hadn't considered or anticipated exploring.
- Explore areas where additional information or clarity is needed.
- Take your time. Be thoughtful. Take breaks if you need it.
- Listen to the answers.

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

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

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.

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.

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

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.
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 acknowledged 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.

Analysis Grid

Apply Preponderance Standard to Each Element

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
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?

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 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?

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?
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?

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?

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 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 “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 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 he 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 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.