Agenda

1. Pre-Hearing Tasks
2. The Hearing
3. How do I know which Questions to Ask?
4. The Decision Maker’s Role in Advisor Questioning
5. After The Hearing
6. Questions
Quick Review
Pre-Hearing Tasks: Hearing Panel

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

Cross Examination/Questioning Format & Expectations
Hearing Panel as a Whole

- Review evidence and report
- Review applicable policy and procedures
- Preliminary analysis of the evidence
- Determine areas for further exploration
- Develop questions of your own
Hearing Panel Chair

- Compile questions on behalf of the Panel
- May convene a pre-hearing meeting
- Review questions submitted by the parties
- Anticipate challenges or issues
- Become familiar with the script
Common Areas of Exploration

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

01 Introductions and instructions by the Chair; Opening Statements
02 Presentation by Investigator
03 Presentation of information and questioning of the parties and witnesses
04 Closing Statements
05 Deliberation & Determination
Presentation of Information & Questioning of the Parties

01 The Hearing Panel will question Complainant first

02 Cross examination of Complainant will occur next

03 Follow up by the Hearing Panel

04 The Hearing Panel will question Respondent second

05 Cross examination of Respondent will occur next

06 Follow up by the Hearing Panel
Questioning of the Witnesses

01. The Chair will determine the order of questioning of witnesses

02. The Hearing Panel will question first

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

04. Follow up by the Hearing Panel
General Questioning Guidelines
When Questioning....

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

- Details about the sexual contact
- Seemingly inconsistent behaviors
- Inconsistent evidence/information
- What they were wearing
- Alcohol or drug consumption
- Probing into reports of lack of memory
Lay a foundation for the questions

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

Be deliberate and mindful in your questions:

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

- If a panel, decide in advance who will take the lead on questioning
- Go topic by topic
- Ask other panelists if they have questions before moving on
- Do not speak over each other
- Pay attention to the questions of other panelists
- Ok to take breaks to consult with each other, to reflect, to consult with the TIXC or counsel
How do I know which Questions to Ask?
Common Areas of Where Clarity or Additional Information is Needed

- Details about the alleged misconduct
- Facts related to the elements of the alleged policy violation
- Relevancy of Certain Items of Evidence
- Factual Basis for Opinions
- Credibility
- Reliability
- Timelines
- Inconsistencies
Did You Also Cover . . . ?

- On campus?
- Program or Activity?
- In a building owned or controlled by a recognized student organization
- Substantial control over respondent and context
- Complainant was attempting to access program/activity
Putting it all together...
Break Out!

#1

Say hi!

Pick a scribe

Discuss

- All groups: Areas or topics that you would like to explore further in the hearing
- Group 1: Questions for Complainant
- Group 2: Questions for Witnesses Bob and Nick
- Group 3: Questions for Respondent
Report Out

- Group 1: Questions for Complainant
- Group 2: Questions for Witnesses Bob and Nick
- Group 3: Questions for Respondent
The Hearing
The Decision Maker’s Role in Advisor Questioning
**Cross Examination**

*Who does it?*

- Must be conducted by the advisor
- If party does not appear or does not participate, advisor can appear and cross
- If party does not have an advisor, institution must provide one
The Role of the Decision Maker During Questioning by the Advisors

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

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

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

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

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

- Ask the Advisor why their question is relevant
- Take a break
- Ask their own questions of the party/witness
- Review the hearing record
Irrelevant and Impermissible Questions

- Information protected by an un-waived legal privilege
- Medical treatment and care
- Unduly repetitious or duplicative questions
- Information that otherwise irrelevant
- Complainant's prior sexual history, with limited exceptions.
Break Out!

#2

Say hi again

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

Discuss the list of proposed cross examination questions for:

- Group 1: Questions for Respondent
- Group 2: Questions for Witnesses Stevie and Caitlyn
- Group 3: Questions for Complainant
Report Out
These questions are submitted by Complainant for Respondent

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

Questions submitted by Respondent for Complainant

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

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

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

Questions for Nick

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

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

Questions for Kayla

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

By Respondent
1. Would you categorize Angel as the initiator of all the contact between him and Barb?
2. So you would call him the aggressor, is that right?
3. How many times did you see Angel fill Barb’s beer that night?
4. And you saw him keep topping it off, is that right?
5. Did that feel predatory to you?
6. Have you seen Angel or any of his friends like Bob, Dylan, Stevie, or Nick try to get a girl really drunk at a party, on any other occasion?
Questions for Caitlyn (Group 2)
Submitted By Complainant
1. You would consider complainant a good guy, right?
2. Barb wanted to “have a good time” right?
3. Did she tell you she planned to have sex with Angel that night?
4. You saw her intentionally move down to give a blow job?
5. How often has she done this at other parties? Is giving blow jobs something she casually does at parties?
6. And she is a good friend, right?
7. So this is particularly painful for you, your telling the truth about her sexually assaulting him, right?
8. And would you agree that it does not matter if the victim is a man or a woman, but rape is rape, right?
9. You said Barb had her arm around Angel’s waist when people were in the basement that night. Is that so that she could control him?

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

• A "finding of fact"
  • The decision whether events, actions, or conduct occurred, or a piece of evidence is what it purports to be
  • Based on available evidence and information
  • Determined by a preponderance of evidence standard
  • Determined by the fact finder(s)

• For example...
  • Complainant reports that they and Respondent ate ice cream prior to the incident
  • Respondent says that they did not eat ice cream
  • Witness 1 produces a timestamped photo of Respondent eating ice cream

• Next steps?
Identify the Claims

- What are we being asked to decide?
- What does the formal complaint allege?
- What are the elements of each act of prohibited conduct alleged?
**Fondling**: is the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim.

1. Did Respondent touch the Complainant's private body parts?
2. For the purposes of sexual gratification?
3. Without Complainant’s consent?
Domestic Violence. Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

1. Are the parties in, or have they been in, a romantic or intimate relationship?

2. Did Respondent engage in physical or sexual violence, or threats thereof against Complainant?
**Stalking.** Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress.

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

- Break down the policy into elements
- Organize the facts by the element to which they relate
Breakout 3

What are the questions that you/the DM must answer?

In your small groups, create an analysis grid.
Report Out: Break Out 3
### Analysis Grid: List the Elements

<table>
<thead>
<tr>
<th>Did Respondent engage in oral or anal sexual intercourse with Complainant?</th>
<th>Was Angel incapacitated and therefore incapable of providing consent?</th>
<th>Did Barb know Angel was Incapacitated?</th>
<th>Should Barb have known that Angel was incapacitated?</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td></td>
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</tr>
</tbody>
</table>
Breakout 4

In your small groups, fill in the analysis grid.
### Analysis Grid: List the Elements

<table>
<thead>
<tr>
<th>Did Respondent engage in oral or anal sexual intercourse with Complainant?</th>
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<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Making a Determination

1. Apply the standard of proof and the evidence to each element of the alleged policy violation.
2. Make a determination as to whether or not there has been a policy violation.
Recommended Outline

- Hearing Overview
- Policy Statement
- Procedural Timeline
- Findings of Fact Supporting the Final Determination
- Analysis and Determination of Responsibility
- Sanction and Remedies
- Appellate Procedures
Writing the Finding of Facts and Final Determination

Use the analysis grid to guide this section of the final determination

Adhere to the guidelines set forth above

Always cite to the investigative report, record, and hearing
Thank you!

Email Us
info@grandriversolutions.com

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Conducting Fair and Thorough Trauma-Informed Investigations
Open Training

Pari Le Golchehreh – October 2022
Meet Your Facilitator

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

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

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

**Core Values**
- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity
Day One Agenda

1. Title IX’s Requirements
2. The Proper Application of Trauma Informed Practices
3. The Importance of Understanding the Potential Impact of Trauma
4. Developing an Investigative Strategy
5. Investigative Interviews: Part 1
Title IX’s Requirements
Title IX of the Education Amendments Act of 1972

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681 (1972).
The Title IX Regulations
Sexual Harassment Only

1. Narrows the definition of sexual harassment;
2. Narrows the scope of the institution's educational program or activity;
3. Narrows eligibility to file a complaint;
4. Develops procedural requirements for the investigation and adjudication of sexual harassment complaints, only.
Title IX Application Post May 2020 Regulations

Type of Conduct
• Hostile Environment
• Sexual Harassment
• Quid Pro Quo
• Sexual Assault
• Dating/Domestic Violence
• Stalking

Ed Program or Activity
• On campus
• Campus Program, Activity, Building, and
• In the United States

Required Identity
• Complainant is participating or attempting to participate in the Ed Program or activity
• Institution has control over Respondent

Required Response:
Section 106.45 Procedures

Apply 106.45 Procedures
Procedural Requirements for Investigations

Notice TO BOTH PARTIES

Equal opportunity to present evidence

An advisor of choice

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

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

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

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

- the identities of the parties involved in the incident, if known,
- the conduct allegedly constituting sexual harassment under § 106.30,
- and the date and location of the alleged incident, if known.

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

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

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

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

Institutions cannot place restrictions on who can serve.

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

No specific training required.
Written Notification of Meetings and Sufficient Time to Prepare
Equal Opportunity to Present Evidence
Evidence Review

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

10 days to provide a written response.
Investigative Report and Review

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

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

The hearing must occur at least 10 days after the release of the final report.
“Directly Related” and “Relevant Evidence”
Regulations do not define “Directly Related” Evidence.

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

Term is broader than:

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

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

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

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

“Evidence is relevant if:
• (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
• (b) the fact is of consequence in determining the action.”
Evidence That is Not “Relevant”

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

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

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

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

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

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

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

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

- Can be the Title IX Coordinator, although that is disfavored.
- The Investigator may not be a decision maker.
- Must be trained in accordance with the requirements in the regulations.
- Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest.
The Requirement of Impartiality
Section 106.45(b)(1)(iii)

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

1. For or against complainants or respondents generally, or
2. An individual complainant or respondent
What Constitutes Bias?

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

Includes:

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

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

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

- Not influenced by bias or conflict of interest.
- Committed to decisions based on an objective view of the facts and evidence as you know them and as they evolve.
- Truth seeking, not “your truth” confirming.
Trauma Informed Practices

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

Trauma informed practices must be applied equally to all genders.
The Proper Application of Trauma Informed Practices
Trauma informed practices provide tools/techniques for interviewing and engaging with the Complainant, Respondent, and Witnesses.

Format/Structure of the Interview

Format of Questions

Approach to Clarification
Trauma Informed Practices are Designed to:

01 Encourage thorough and complete investigations
02 Assist with recollection
03 Assist with recounting
04 Reduce potential for false information
05 Minimize unnecessary re-traumatization
06 Reduce Bias
Misapplication of Trauma Informed Practices

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

1. Influence the interpretation of a specific item of evidence;
2. Substitute for missing evidence;
3. To serve as a justification for not doing a full and thorough investigation;
4. Cause a biased belief in the veracity of one or more party.
The Importance of Understanding the Potential Impact of Trauma
An event that is experienced as terrifying, horrifying, or threatening and that is coupled with an actual or perceived lack of control.
Examples of Events that Might Trigger a Traumatic Response

- Sexual Assault
- Physical Assault by a Stranger
- Physical Assault by an Intimate Partner
- A Car Accident
- Accident that causes serious injury or death
- Robbery
- Significant medical event
When trauma occurs, there are very real changes in brain function that may affect a person’s ability to make memory and to recount their experience.
Common Characteristics of Disclosures by a Trauma Brain

- Inconsistent
- Non-linear
- Fragmented
- Lack of detail
- New information
- Affect is unexpected
Historically, the seemingly inconsistent behaviors that frequently accompany disclosures of sexual assault and interpersonal violence resulted in the belief that the victim was being dishonest.
The Historical Conclusion...

False Report
Regretted Sex
Not Provable

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

- Conclude, without a thorough investigation, that the reporting individual is not credible.
- Ask questions or make decisions founded in bias.
- Cause additional harm.
- Jeopardize future reporting.
An understanding of trauma and its potential impact should encourage investigators to keep an open mind, and it should prevent investigators from immediately interpreting seemingly inconsistent behaviors with deception. An understanding of trauma provides another explanation for these seemingly inconsistent behaviors.

This is essential to a fair and thorough investigation.
When presented with the following characteristics in a disclosure,

- Inconsistencies
- Lack of Detail
- Non-Linear
- Fragmented
- New Information

An investigator who understands trauma will....
Continue their investigation.
Developing an Investigative Strategy
Essential Steps of an Investigation

- Review Notice of Allegations and Formal Complaint
- Initial Interviews
- Evidence Collection
- Evidence Review
- Additional Evidence Collection/Follow Up Interviews
- Report Writing
Understand the Scope of the Investigation

- Review the Notice of Allegations and the Formal Complaint
- Ask questions if unsure
Identify the Claims and What Needs to be Proven

- What will the decision maker be asked to decide?
- What does the formal complaint allege?
- What are the elements of each act of prohibited conduct alleged?
Rape. The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

1. Did Respondent penetrate Complainant’s vagina or anus?
2. Without Complainant’s affirmative consent?
   1. What is the ground for lack of consent
      1. Did respondent fail to seek and obtain Complainant’s affirmative consent?
      2. Did Respondent force Complainant?
      3. Did Respondent coerce Complainant?
      4. Was Complainant incapacitated and therefore incapable of consent?
Stalking. Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
Fear for the person’s safety or the safety of others; or
Suffer substantial emotional distress.

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

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?
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
- Prepare the parties for follow up interviews and the “shift”

What you expect of them

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

Build Rapport and Trust?

Empower?
Rapport and Trust

- Exhibiting Expertise
- Clear Introduction
- Exhibiting Empathy
- Preparedness
- Transparency
Empowerment

- Duration
- Permission to ask questions
- Space
- Clear Expectations
- Permission to seek clarity
Investigative Interviews

1. Start by eliciting a narrative
2. Listen
3. Interview for clarification
4. Listen
5. Avoid leading questions, questions that blame; interrogating
Start the interview by eliciting a narrative...

Help me understand your experience?

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

What are you able to tell me about your experience?

Allow the person to speak uninterrupted. This takes patience.
Next, ask questions that are intended to clarify and more deeply explore the information and details provided by the person in their narrative.

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

**Avoid:**
- Interrogation
- Questions that blame
- Questions that imply doubt
- Leading questions
• 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?
At some point during the interview, it is also important to explore the prior history, if any, between the complainant and the respondent, and the history of the parties, individually.
And The After

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

• The parties’ psychological reactions
• Changes in behavior
• Witnesses to the psychological reaction
  • “Has anyone expressed concern about you since the assault?”
• Communication/contact between the complainant and respondent
Day Two Agenda

1. Investigative Interviews (continued)
2. Evidence Collection and Assessment
3. The Investigative Report and Record
Quick Review!
Investigative Interviews: Continued
Throughout the Interview

- Explain your questions, especially the difficult ones.
- How much did you drink? What they hear: this is your fault because you were drinking.
- Do not ask leading questions.
- Watch your tone.
- Do not rush.
- LISTEN!!!!!!!!!
- Pay attention to and document information that might lead to additional evidence.
- Document questions asked. Especially when a response is not provided.
At the Conclusion of the Interview

- Discuss submission of evidence.
- Explain statement review process.
- Explain next steps in the process.
- Keep the lines of communication open.
- Review available support, privacy requirements, and prohibition against retaliation.
After the Interview: Actions

- Memorialize the Interview in writing.
- Provide opportunity for the party or witness to review it.
- Provide opportunity for party or witness to provide a response.
- Incorporate the response.
A Note About Witness Summaries

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

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

Avoid conclusory words, or words that suggest that the investigator has an opinion about the information offered
After the Interview: Reflection

- Reflect.
- Is there something you missed or forgot to ask?
- Do you need clarity on any of the information shared?
- Has this interview revealed additional evidence that you want to explore or collect?
- Has evidence of additional policy violations been shared?
Follow Up Interviews

- Seek clarification
- Explore inconsistencies
- Explore contradictory evidence
- Explore difficult issues
- Opportunity to respond
Follow Up Interview Approach

1. Explain the purpose of the follow up.
2. Set the stage for the topics you will be covering.
3. Prepare the interviewee for "the shift."
4. Do not avoid asking the hard questions.
The “Hard” Questions

- Details about the sexual contact
- Inconsistent evidence/information
- Alcohol or drug consumption
- Probing into reports of lack of memory
- Seemingly inconsistent behaviors
- What they were wearing
How to Ask the Hard Questions

Lay a foundation for the questions:

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

Be deliberate and mindful in your questions:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...
What Questions Do You Have for Quinn?

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

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

“Pat and I have been together for about a month and have been intimate for the last two weeks. We went out with my friends on Friday night and Pat got really drunk. At some point we ran into my ex and Pat was really jealous, so we left. When we got back to my place, I thought things were fine. We started hooking up and all of a sudden Pat’s mood changed. Pat got really aggressive and choked me. He was so angry and I was so scared.”
Evidence Collection and Assessment
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.
<table>
<thead>
<tr>
<th>Evidence</th>
<th>Testimony</th>
<th>Text Messages</th>
<th>Social Media Posts and messages</th>
<th>Emails</th>
</tr>
</thead>
<tbody>
<tr>
<td>Surveillance</td>
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<td>Videos</td>
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<td>Photographs</td>
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<td>Police Body Camera Footage</td>
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<td>Swipe Records</td>
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<td>Medical Records</td>
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<td>Phone Records</td>
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<tr>
<td>Audio Recordings</td>
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</tr>
</tbody>
</table>
Evidence Collection

- Identify the items of evidence that you would like to obtain.
- Develop an intentional strategy for obtaining that evidence.
- Overcome barriers to evidence collection.
- Considerations about collecting certain types of evidence.
A Thorough Investigation is more than evidence collection
Evaluating the Evidence

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

Is it authentic?
Is the item what it purports to be?

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

What weight, if any, should it be given?
How important is the evidence to the fact-finding process?
A Thorough Investigation Permits the Decision Maker to Assess

- Relevance
- Credibility
- Reliability
- Authenticity
- Weight
“Relevant” Evidence

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

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

“Evidence is relevant if:
• (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
• (b) the fact is of consequence in determining the action.”
**Evidence That is Not “Relevant”**

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

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

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

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

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?
Opinion Evidence: Try it!

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

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

“Taylor was wasted. Like totally messed up. There is no way they could have given permission for sex”
Assessing Authenticity

Investigating the products of the Investigation

Never assume that an item of evidence is authentic.

Ask questions, request proof.

Investigate the authenticity if necessary.
Is it authentic?

- Question the person who offered the evidence
- Have others review and comment on authenticity
- Request originals
- Obtain originals from the source
- Are there other records that would corroborate?
Assessing Credibility and Reliability

No formula exists, but consider the following:

- Opportunity to view
- Ability to recall
- Motive to fabricate
- Plausibility
- Consistency
- Character, background, experience, and training
- Coaching
- Bias
Barriers to Evidence Collection

- Non-Participating Parties
- Uncooperative Witnesses
- Uncooperative Advisors
- Identity of party or witness unknown
- Refusal to share materials
- Materials lost or no longer accessible
- Difficult topics
At the conclusion of the investigation, we must create an investigative report that fairly summarizes relevant evidence.
## Relevancy Standard

<table>
<thead>
<tr>
<th>Relevant Evidence</th>
<th>Irrelevant Evidence</th>
</tr>
</thead>
</table>
| • “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.” | • Prior sexual history of complainant, with two exceptions  
• Legally recognized and un-waived privilege.  
• Records related to medical, psychiatric, psychological treatment |

- Prior sexual history of complainant, with two exceptions
- Legally recognized and un-waived privilege.
- Records related to medical, psychiatric, psychological treatment
Who Decides?

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

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

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

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

- Share the report with the parties and their advisors
- In electronic format or hard copy
- At least 10 days prior to the hearing
The Purpose of the Report

To allow for advance Review

To allow for advance Preparation

• By the Decision Maker
• By the Parties

Reduce likelihood of bias in final outcome
Intended Recipients

- The Parties
- The Advisors
- The Decision Maker
- The Appeal Panel
Other Recipients?

- Friends of the parties
- Parents
- Law enforcement
- Attorneys
- Judges
- Media
- Social media
<table>
<thead>
<tr>
<th>Essential Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intentionally organized to enhance comprehension</td>
</tr>
<tr>
<td>Factually accurate</td>
</tr>
<tr>
<td>Concise</td>
</tr>
<tr>
<td>Without editorial or opinion</td>
</tr>
<tr>
<td>Consistent format</td>
</tr>
</tbody>
</table>
Report and Evidence File

Summary of the Evidence

Compilation of the Evidence
The Evidence File

- Compilation of the evidence
- Organized intentionally and consistently
- Divided into Appendices
- Is attached to the report
- Includes a procedural timeline
Examples of Appendices

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

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

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

Appendix D
The procedural timeline.
Structure of the Report

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

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

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

Statement of Jurisdiction

1. Cite Jurisdictional Elements

2. State all grounds for Jurisdiction
Report Structure
Identify Investigators

1. Identify the investigators by name

2. Investigator's training belongs in file, not in report
Report Structure
Objective of the Investigation & Report

1. This language should mirror the language in your policy or procedures.

2. State the objective of the investigation

3. Briefly state that all procedural steps were followed

4. Describe the purpose of the report.
Report Structure
Prohibited Conduct Alleged

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

2. Include definitions of prohibited conduct from institution’s policy/procedures.
Report Structure
List Witnesses

List those witnesses that were interviewed

List witnesses that were identified, but not interviewed

Simple List

Detailed List
## Example of a Detailed List

<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>
Report Structure
Evidence Collected

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

In this section, list the Evidence or Refer to Appendices
Report Structure
Summary of Evidence

In this section, include a summary of all relevant evidence. This section can be organized in several ways. It is important that, however organized, the evidence is summarized clearly and accurately, and without opinion or bias. In this section, the writer should cite the evidence and information in the Appendices.
In this section, summarize next steps in the process, including any procedural pre-requisites for moving the matter forward to a hearing.
Thank you!

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info@grandriversolutions.com

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