



GRAND RIVER | SOLUTIONS

Introduction to Fair, Thorough, and Trauma Informed Sexual Violence Investigations

Chantelle Cleary, J.D.

June 2021

Meet Your Facilitator



Chantelle Cleary, J.D.

Director of Strategic Partnerships
and Client Relations

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



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

01

Title IX's Requirements

02

The Proper Application of Trauma Informed Practices

03

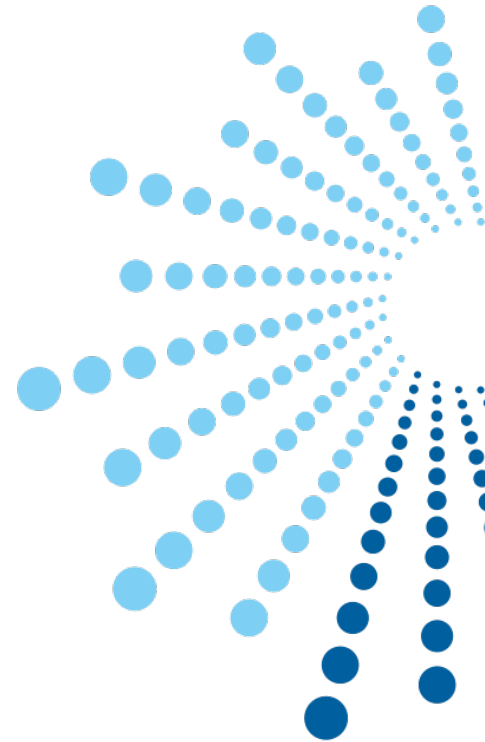
The Importance of Understanding the Potential Impact of Trauma

04

Developing an Investigative Strategy

05

Investigative Interview





Title IX's Requirements

01

GRAND RIVER SOLUTIONS



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



GRAND RIVER SOLUTIONS

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

GRAND RIVER SOLUTIONS

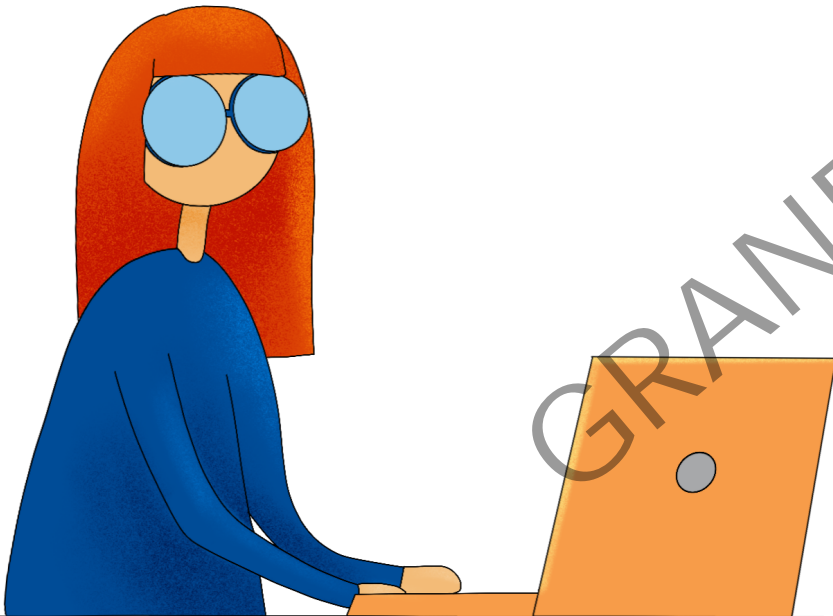
Equal Opportunity to Present Evidence

GRAND RIVER SOLUTIONS

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

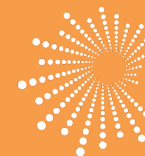
10 days to provide a written response



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 they will have 10 more days to comment



Procedural Requirements for Hearings

Must be live, but can be conducted remotely

You may not compel 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

A 3D puzzle with one red piece standing out among white and blue pieces. The puzzle is set against a blue background with a white puzzle piece pattern. The red piece is the central focus, standing out from the other pieces. The text "Directly Related" and "Relevant Evidence" is written in white on the blue background. A white horizontal line is below the text. The text "GRAND RIVER SOLUTIONS" is written diagonally across the puzzle pieces in a light blue color.

—

“Directly
Related” and
“Relevant
Evidence”

GRAND RIVER SOLUTIONS

Directly Related Evidence

Regulations do not define “Directly Related” Evidence

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

Term is broader than:

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

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

“Relevant” Evidence

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

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

“Evidence is relevant if:

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

Evidence That is Not “Relevant”

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

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

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

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

Who Decides?

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

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

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

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

The Investigator



Can be the Title IX Coordinator, although that is disfavored



Must be trained in accordance with the requirements in the regulations



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

The Requirement of Impartiality

GRAND RIVER SOLUTIONS

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

Impermissible Bias

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

GRAND RIVER SOLUTIONS

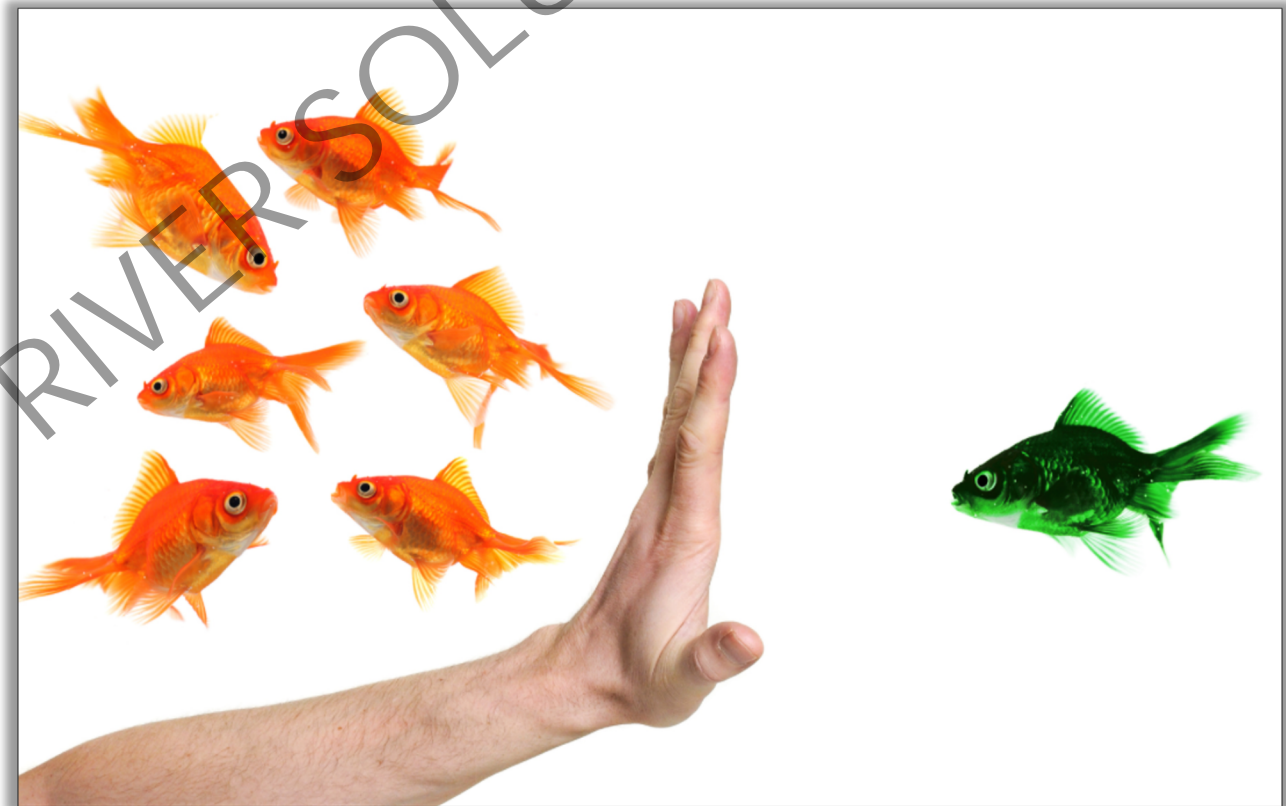
STIS

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



Conflict of Interest

GRAND RIVER SOLUTIONS



Avoiding Prejudgment of the Facts

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

An Impartial Investigation is...

Not influenced by bias or conflict of interest

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

Truth seeking, not "your truth" confirming

Trauma Informed Practices

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

Trauma informed practices must be applied equally to all genders.



The Proper Application of Trauma Informed Practices

02

GRAND RIVER SOLUTIONS

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



Format/Structure of the Interview

Format of Questions



Approach to Clarification

Trauma Informed Practices are Designed to:

01

Encourage thorough and complete investigations

02

Assist with recollection

03

Assist with recounting

04

Reduce potential for false information

05

Minimize unnecessary re-traumatization

06

Reduce Bias

Misapplication of Trauma Informed Practices

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

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



The Importance of Understanding the Potential Impact of Trauma

03

GRAND RIVER SOLUTIONS

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

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

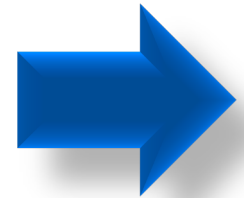


Historically, the seemingly inconsistent behaviors that frequently accompany disclosures of sexual assault and interpersonal violence resulted in the belief that the victim was being dishonest.

Inconsistencies
Lack of Detail
Non-Linear
Fragmented
New Information



Not Credible



The Historical Conclusion...

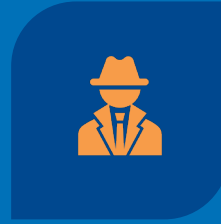
False Report
Regretted Sex
Not Provable



CASE CLOSED



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



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



PREMATURELY CONCLUDE THE INVESTIGATION



ASK QUESTIONS OR MAKE DECISIONS FOUNDED IN BIAS



CAUSE ADDITIONAL HARM



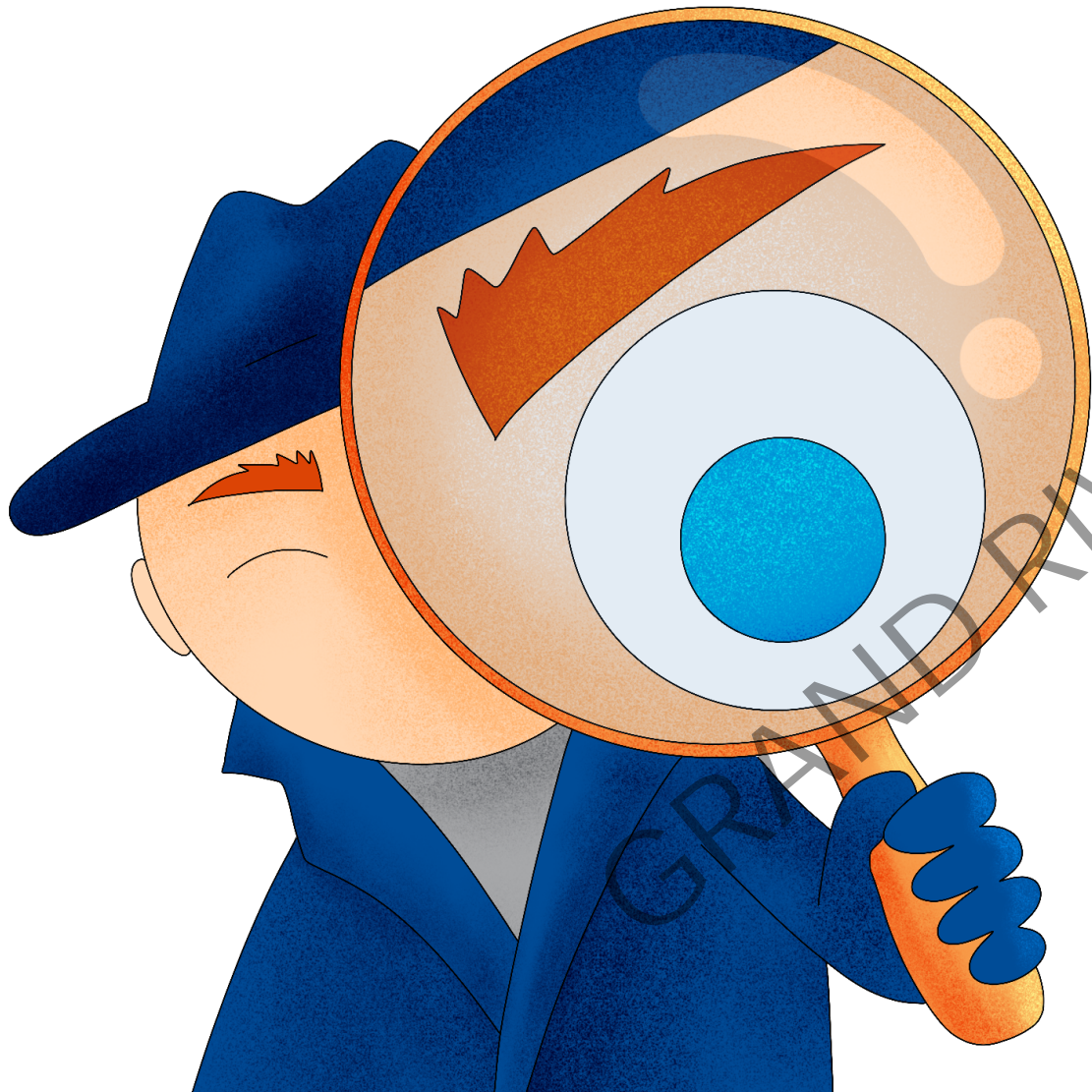
JEOPARDIZE FUTURE REPORTING



The Future...

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

This is essential to a fair and thorough investigation.



The Investigation Continues....



Developing an Investigative Strategy

04

GRAND RIVER SOLUTIONS



Essential Steps of an Investigation



Notice of Formal Investigation



Initial Interviews



Evidence Collection



Evidence Review



Additional Evidence Collection/Follow Up Interviews



Report Writing

GRAND RIVER SOLUTIONS

Understand the Scope of the Investigation



Review the formal complaint



Ask questions if unsure

The Process

Developing an Investigative Strategy



Investigation Timeline

Prior History

- Between the Parties
- Of the Parties

Incident

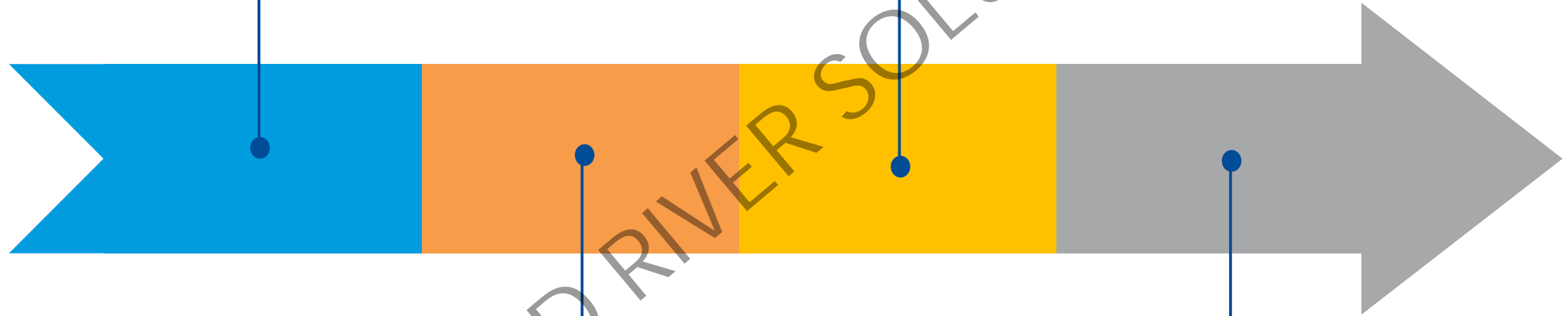
- Consent
- Type of Contact
- Injuries

Pre-Incident

- Communications
- Interactions
- Conduct

Post Incident

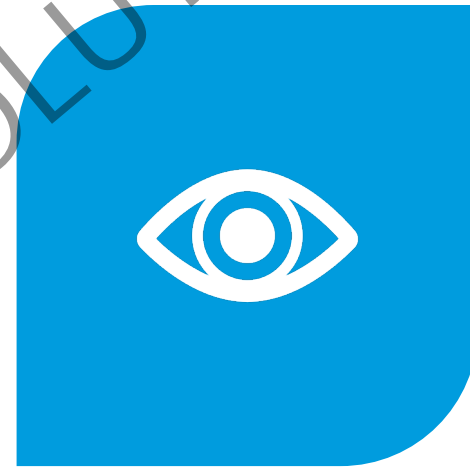
- Behaviors
- Communications



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

GRAND RIVER SOLUTIONS



Investigative Interviews

05

GRAND RIVER SOLUTIONS



Interview Objectives



Connect

Build rapport
Build trust
Empower



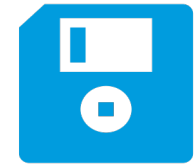
Listen

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

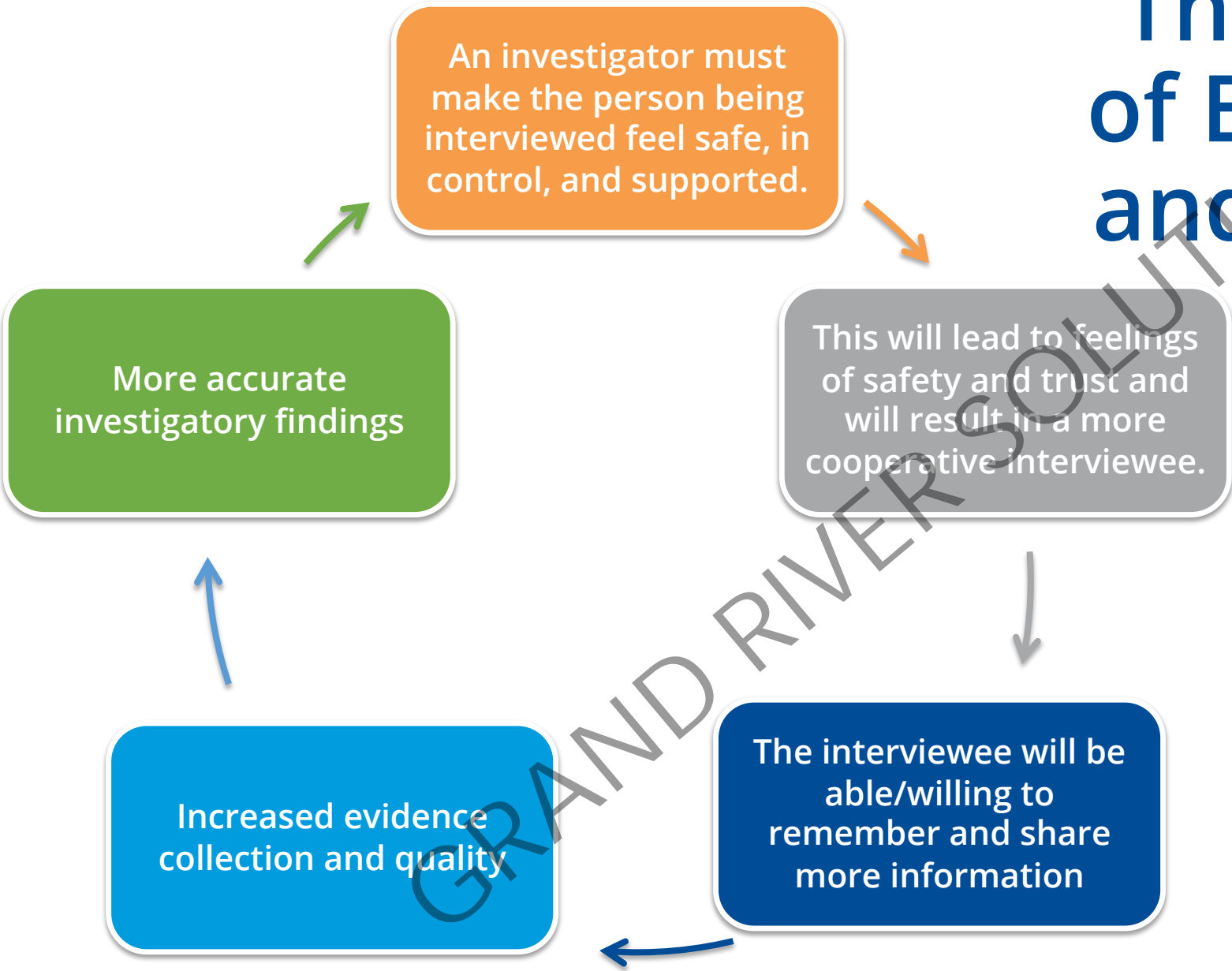
What they should expect of you

- 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

The Importance of Empowerment and the Power of Empathy



How do we...



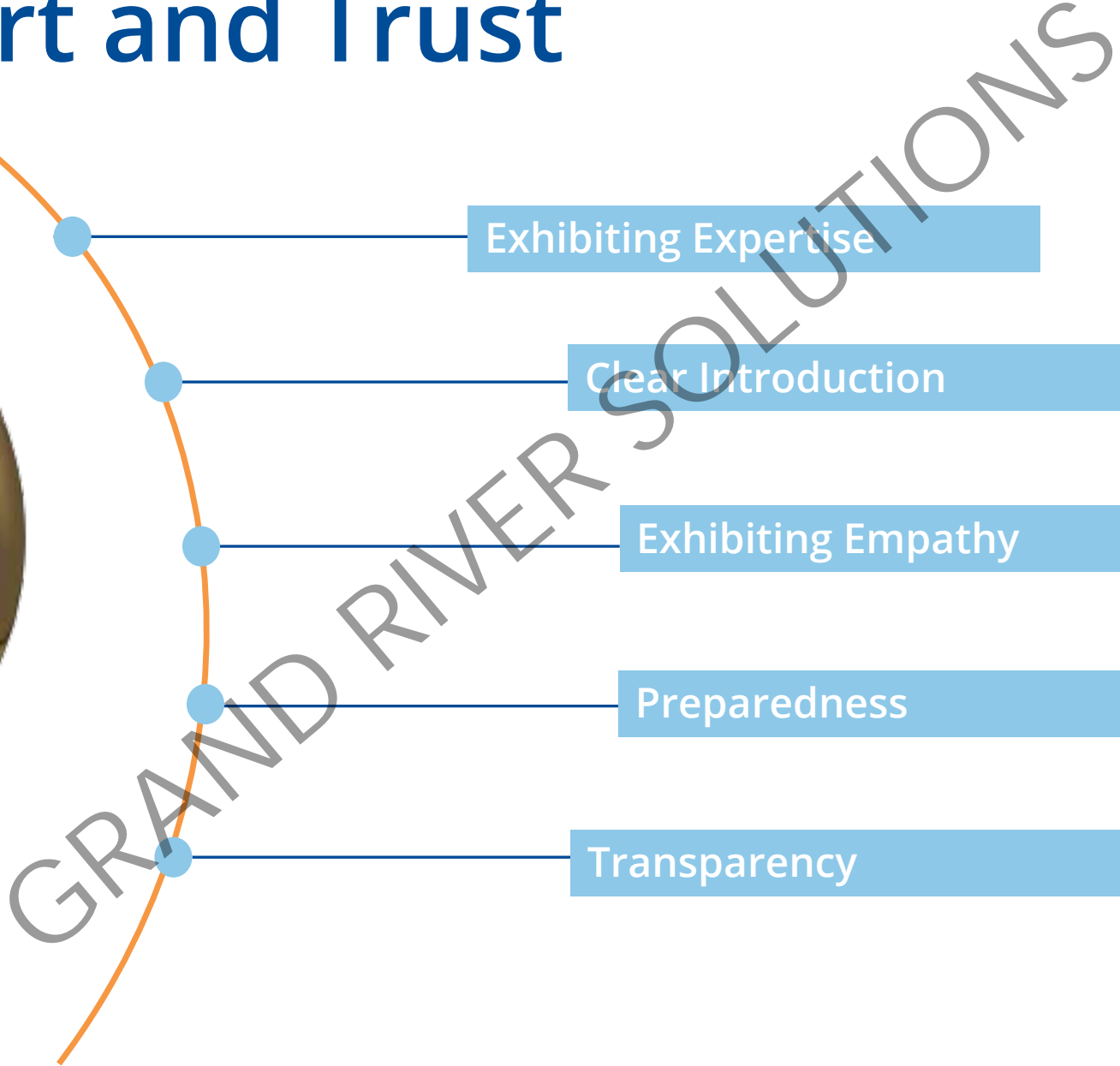
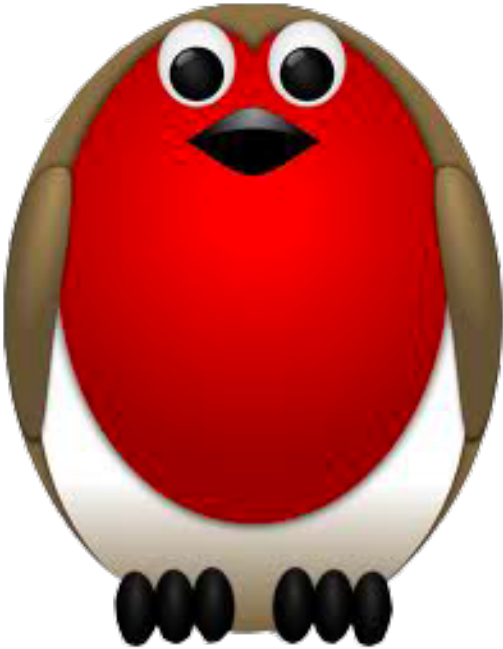
Build Rapport
and Trust?



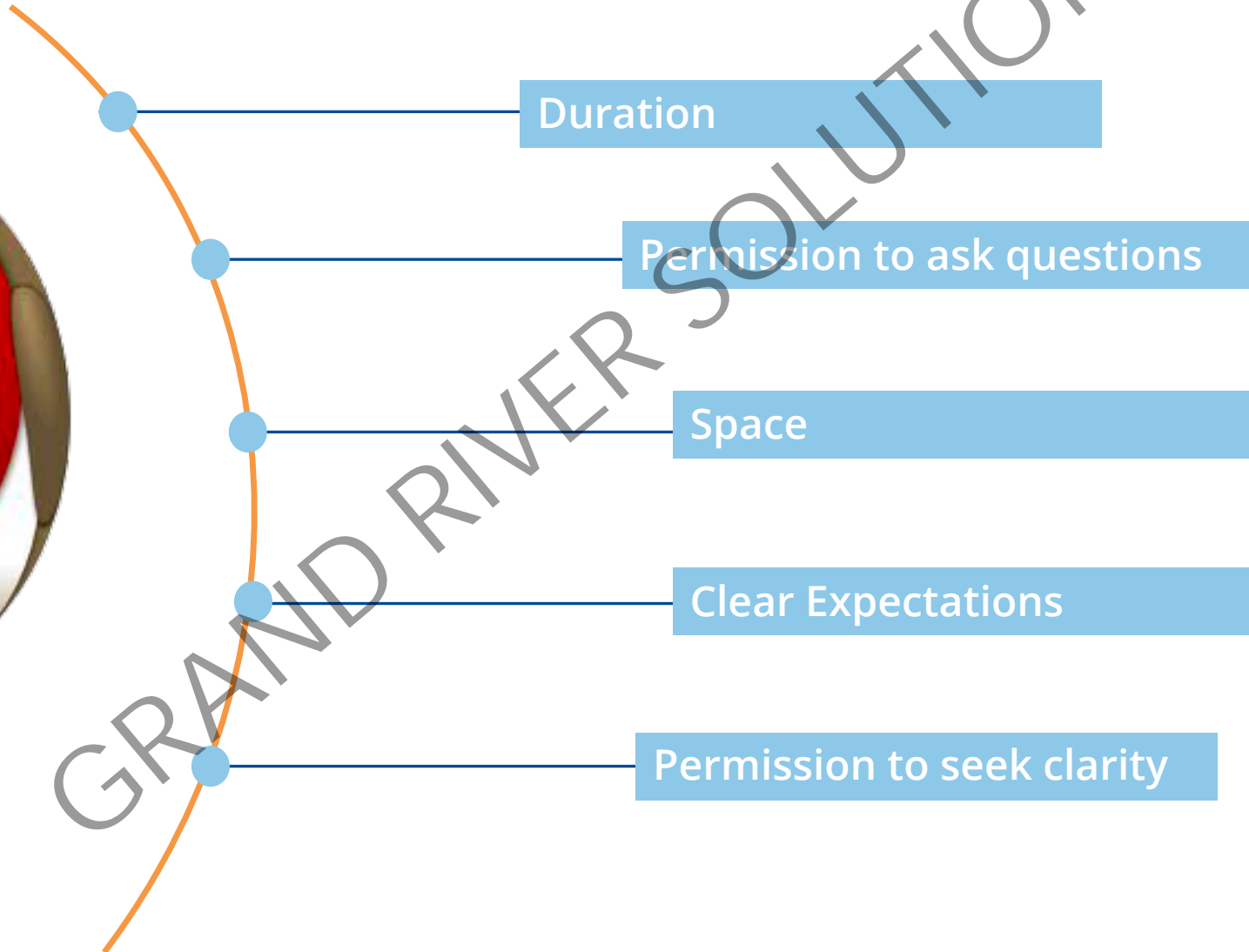
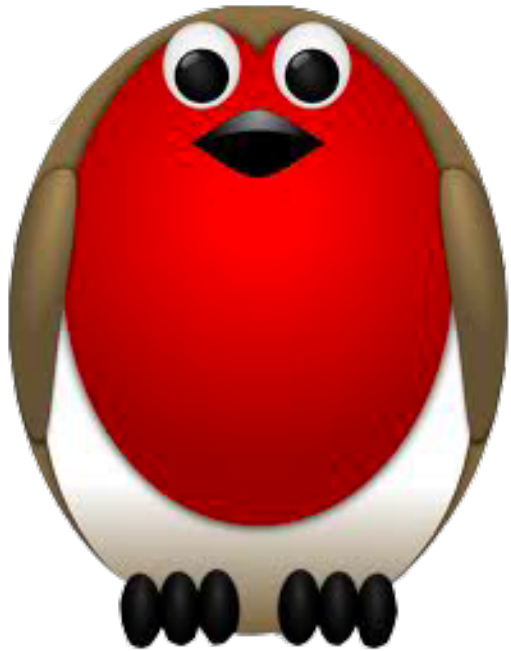
Empower?



Rapport and Trust



Empowerment



GRAND RIVER SOLUTIONS

Investigative Interviews



Start the interview by eliciting a narrative...

Where would you like to begin?

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

Allow the person to speak uninterrupted. This takes patience.

What are you able to tell me about your experience?



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

Explore implicit memories by asking questions about the sensory experience and peripheral details.

- What are you able to tell me about:
 - What you saw?
 - What you heard?
 - What you smelled?
 - What you felt?
 - What you tasted?
- What are you able to tell me about any images, smells, or sounds that keep coming back to you?



"I felt an animal. I think it was dead. I was terrified that he hurt it. I thought he would do the same to me."



"Help me understand why you keep rubbing your wrists like that?"



Capture the Entire Experience

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

The Before

At some point during the interview, it is also important to explore the prior history, if any, between the reporting individual and the accused.

And The After

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

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

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

GRAND RIVER SOLUTIONS

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?

Questions?

Email Us:

Chantelle@grandriversolutions.com

info@grandriversolutions.com

Follow Us:



[@GrandRiverSols](https://twitter.com/GrandRiverSols)



[Grand River Solutions](#)



Day Two Agenda

01

Evidence Collection and Assessment

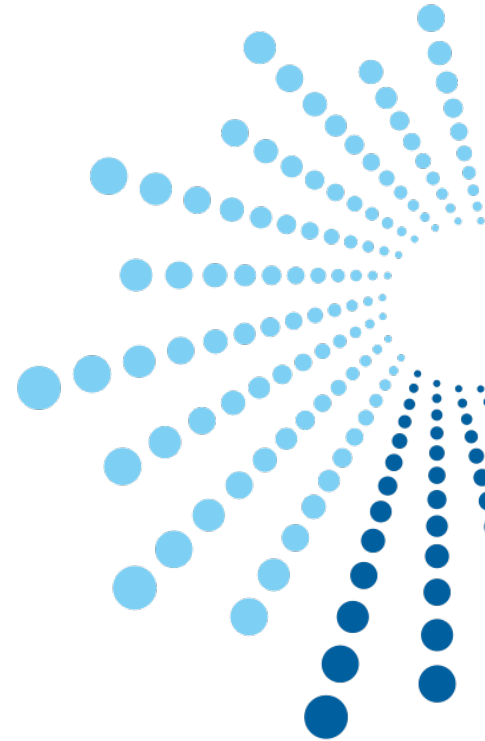
02

Practice

03

The Investigative Report and Record

GRAND RIVER SOLUTIONS





Quick Review!

GRAND RIVER SOLUTIONS



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

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

01

GRAND RIVER SOLUTIONS



Evidence

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

Black’s Law Dictionary

Types of Evidence

Direct Evidence

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

Circumstantial Evidence

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

Corroborating Evidence

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

Evidence

Testimony

Text Messages

Social Media
Posts and
messages

Emails

Surveillance

Videos

Photographs

Police Body
Camera
Footage

Swipe Records

Medical
Records

Phone Records

Audio
Recordings

Evidence Collection



Identify the items of evidence that you would like to obtain



Develop an intentional strategy for obtaining that evidence



Overcome barriers to evidence collection



Considerations about collecting certain types of evidence

A Thorough Investigation

is more than evidence collection

GRAND RIVER SOLUTIONS

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?



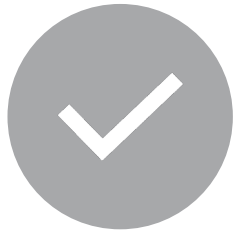
What weight, if any, should it be given?

Weight is determined by the finder of fact!

A Thorough Investigation Permits the Decision Maker to Assess



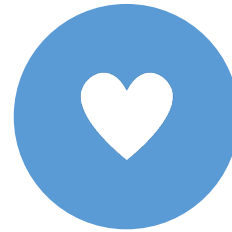
Relevance



Credibility



Reliability



Authenticity



Weight

“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.




GRAND RIVER SOLUTIONS




iFake **iFake Text Message**
Create a Fake Text Message Conversation

Text Message Conversation

Name

Message...   

Message...   

Message...   

[+ Add Text Message](#)

Battery

Connection

Settings

Spectrum
Get our best with no contracts ever

Spectrum
BEST

Sprint LTE 11:43 AM 75% 

[← Messages](#) [Details](#)

GRAND RIVER SOLUTIONS



Is it authentic?



QUESTION THE
PERSON WHO
OFFERED THE
EVIDENCE



REQUEST
ORIGINALS



OBTAIN
ORIGINALS FROM
THE SOURCE



HAVE OTHERS
REVIEW AND
COMMENT ON
AUTHENTICITY



ARE THERE OTHER
RECORDS THAT
WOULD
CORROBORATE?

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

GRAND RIVER SOLUTIONS



Barriers to Evidence Assessment

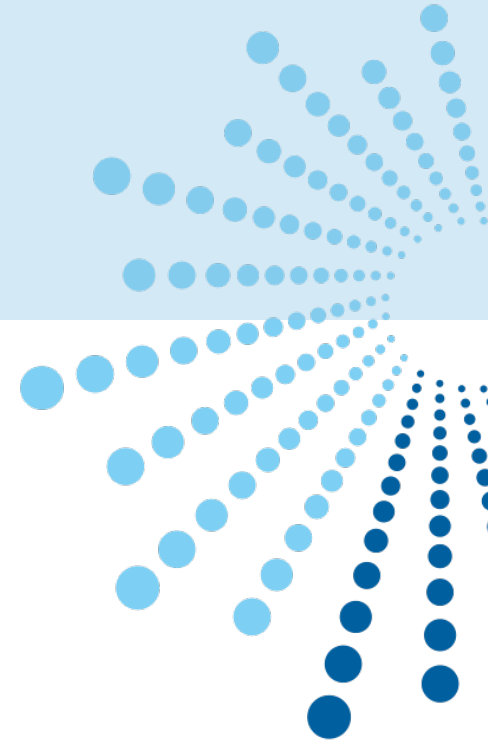
- Authenticity/Technology
- Colluding witnesses
- Colluding parties
- Totally different versions

GRAND RIVER SOLUTIONS



Practice

GRAND RIVER SOLUTIONS



02



The Case of Mary and John



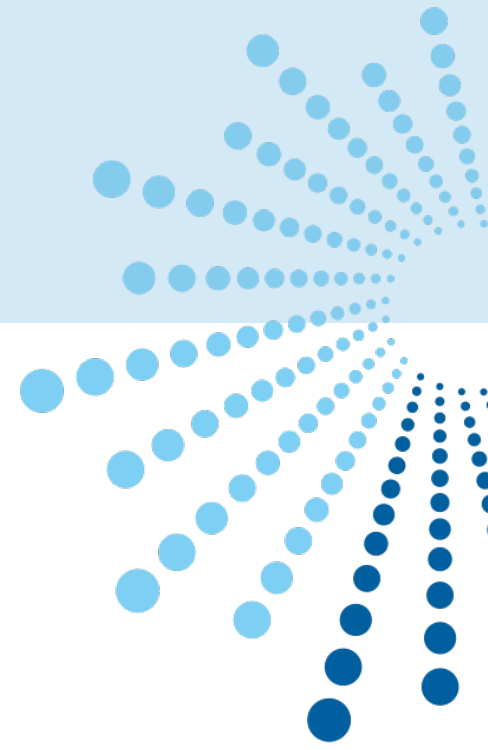
GRAND RIVER SOLUTIONS



The Investigative Report and Record

03

GRAND RIVER SOLUTIONS



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



Relevancy Standard

Relevant Evidence

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

Irrelevant Evidence

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

Who Decides?

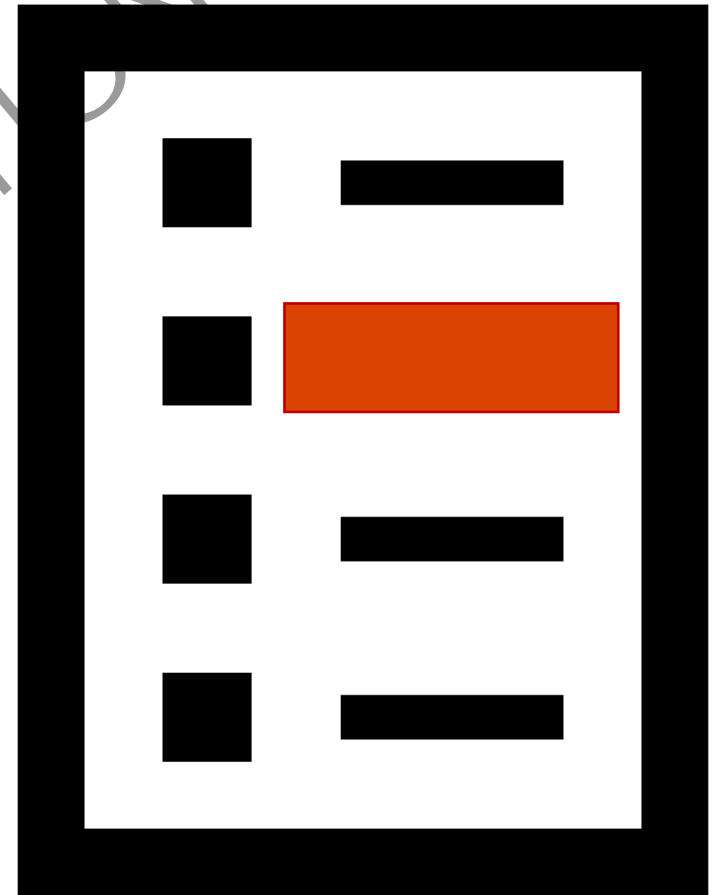
Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance

- 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

Essential Elements

Intentionally organized to enhance comprehension

Factually accurate

Concise

Without editorial or opinion

Consistent format

Report and Record



Summary of the Evidence



Compilation of the Evidence

GRAND RIVER SOLUTIONS

The Record



Compilation of the evidence



organized intentionally and consistently



Divided into Appendices



Is attached to the report



Includes a procedural timeline

Examples of Appendices

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

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

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

Appendix D:
the procedural
timeline



Structure of the Report



Overview of the Investigation

Statement of Jurisdiction

Identity of Investigators

Objective of the Investigation and the Investigation Report

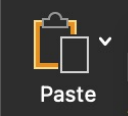
Prohibited Conduct Alleged

Witnesses

Evidence Collected

Summary of Evidence

Conclusion



Report Structure Overview

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

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



Report Structure

Statement of Jurisdiction

1. Cite Jurisdictional Elements

2. State all grounds for Jurisdiction



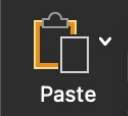
Report Structure

Identify Investigators

1. Identify the investigators by name

2. State that they have been properly trained

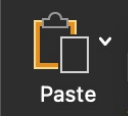
3. List trainings, or cite documents in the record that detail investigators prior training



Report Structure

Objective of the Investigation & Report

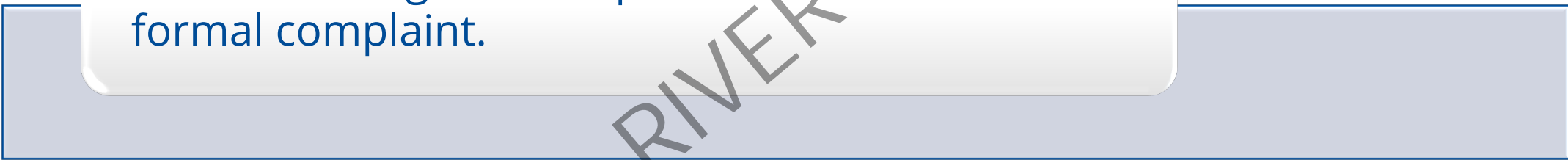
1. This language should mirror the language in your policy or procedures.
2. State the objective of the investigation
3. Briefly state that all procedural steps were followed
4. Describe the purpose of the report.



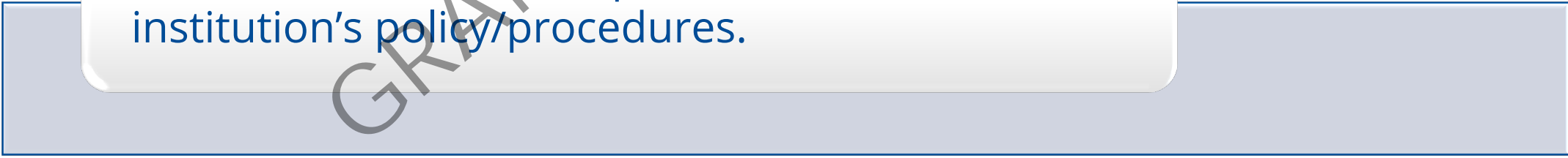
Report Structure

Prohibited Conduct Alleged

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



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



Report Structure

List Witnesses

List those witnesses that were interviewed

List witnesses that were identified, but not interviewed

Simple List

Detailed List

Example of a Detailed List

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

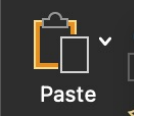


Report Structure

Evidence Collected

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

In this section, list the Evidence or Refer to Appendices



Report Structure

Summary of Evidence

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

Report Structure

Conclusion

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

Questions?



Email Us:

Chantelle@grandriversolutions.com
info@grandriversolutions.com

Follow Us:

 [@GrandRiverSols](https://twitter.com/GrandRiverSols)
  [Grand River Solutions](https://www.linkedin.com/company/grand-river-solutions)

©Grand River Solutions, Inc., 2021. Copyrighted material. Express permission to post training materials for those who attended a training provided by Grand River Solutions is granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). These training materials are intended for use by licensees only. Use of this material for any other reason without permission is prohibited.






AGENDA

November 19, 2020

1. The Mediation – Communication Strategies
2. Preparing the Agreement
3. Failure to Reach Agreement
4. Preparing for Mock Mediation
5. Module 1: Setting the Scene & Messaging
6. Module 2: Dealing with Party Advisors & Saving the Mediation
7. Mock Mediation Debrief
8. Day Two Q&A

1

1



CHAT

Refresh & Reset

Please turn on your cameras and mics (if able) and let us know one lesson that resonated the most from yesterday's training or one strategy you're looking forward to today.

2

2

#6

The Mediation – Communication Strategies

3

3



Party Proposals

- Hearing the proposal
 - If unreasonable or will be rejected, discuss ways to modify the proposal.
 - Be subtly evaluative.
- Communicating a proposal
 - Avoid criticism of the proposal unless asked or unless you believe your opinion will not hinder further discussions.

4

4



Techniques for Keeping the Parties Talking

- Bracketing issues
- Mediator's proposal
- Time to consider
- Risks of no agreement
 - Future administrative process
 - Less control over outcome
 - Time considerations
 - Emotional considerations
 - Healing

5

5



Ethical Considerations

- Conflicts of interest
- Confidentiality
- Pressuring to reach agreement
- Subsequent disclosure of information
- Appearance of impropriety
- Disclosure of background
- Impartiality
- Mental competency of a party
- Autonomy informed consent
- Honesty
- Role boundaries
- Privileged communications

6

6



#7

Preparing the Agreement

7

7



Memorializing the Resolution Agreement

Memorialize the agreed upon resolution in writing signed by both parties.

- Acknowledgment that the parties are entering into the resolution agreement freely, voluntarily, and because each party believes entering into the agreement is in their best interest.
- Acknowledgement that the parties' participation in the Informal Resolution Process was not required, not a product of coercion, nor was it a condition of continued enrollment or employment, or enjoyment of any other right.
- Agreement to waive right to appeal.

8

8



Preparing the Resolution Agreement

- Provide the agreed terms that may include:
 - Administrative remedies
 - Corrective or punitive measures for respondent
 - Non-disclosure (confidentiality)
 - Non-disparagement clause (essentially no retaliation)
- Consequences for breach of the agreement.
- Institutional record keeping responsibility.
- Institutional obligation to maintain confidentiality, unless permitted by law.

9

9



Types of Remedies

Types of remedies, include but are not limited to:

- Complainant or respondent relocate their housing.
- Each party is assigned to a different dining hall, workout facility, area of library.
- Complainant/Respondent withdraws from a class that the parties have together.
- Respondent writes an apology letter to Complainant acknowledging harm caused.
- Indefinite mutual no contact order

10

10



Types of Corrective or Punitive Measures

Types of corrective or punitive measures may include but are not limited to:

- Suspension from extra-curricular activities (athletics, student groups, Greek life, etc.)
- Restriction from campus activities (athletics events, dances, concerts, etc.)
- Enter counseling or other educational programming relating to alleged misconduct.
- Temporary withdrawal from the institution (semester, year, etc.)
- Permanent withdrawal from the institution

11

11

RESOURCE

Template

Resolution Agreement

12

12



13



14

#8

Failure to Reach Agreement

15

15



Failure to Reach Agreement

- Explain...
 - The inability to reach an agreement does not mean we stop trying.

- Methods of continuing dialogue
 - Date certain to resume
 - Follow-up phone conferences
 - Meeting with each party
 - Time to think
 - Time to consult others

16

16

CHAT

Failure to Reach Agreement
Other ideas?

17

17


ai ACADEMIC IMPRESSIONS

#9

Preparing for the Mock Mediation

18


18

ACTIVITY 

- **Fact Pattern**
- **Review of the Fundamentals**

19

19

 **Personality & Communication Strengths Review**

<u>Personality Strengths</u>	<u>Communication Strengths</u>
Tolerant	Characterize but don't criticize
Thoughtful	Clarity
Practical	Emotional control
Collaborative	Simplicity trumps complexity
Respectful	Facts are foundation to persuasion
Empathetic	Eye contact
Intuitive	Relaxed tone
Self-Aware	Avoid negative body language
Creative	Avoid negative verbal reactions
Non-Judgmental	Avoid negative facial expressions
Open-Minded	
Credible	

20

20



Questioning Techniques Review

Open-ended questions

- Encourages party to open-up, vent and articulate.
- Allows story to be told.
- Who, what, when, where, why, how, describe, explain, tell...
 - *"Describe what happened after he/she left your room?"*
 - *"Who was with you?"*
 - *"Why did you wait until the next afternoon to call?"*
 - *"Tell me how you felt when you saw him/her earlier?"*

21

21




Questioning Techniques Review (continued)

Closed or leading questions.

- Question suggests the answer
 - *"You called the Title IX Coordinator two days later."*
 - *"So, your roommate called him/her to ask if he/she was ok?"*
- Confines response
- Summarizes

22

22



Questioning Techniques Review – Probing Questions Review

Probing questions.

- Exploring feelings, opinions, thoughts...
 - *"How would you feel if we are unable to reach an agreement?"*
 - *"What is the best result for you today?"*
 - *"If you couldn't achieve the best result what will you need to feel comfortable about an agreement?"*

- A guide to persuasive discussions with the other party.

23

23



#10

Mock Mediation Module I: Setting the Scene & Messaging

24

24



25



26



ai ACADEMIC IMPRESSIONS

#12

Mock Mediation Debrief and Final Q&A with Faculty

27

This slide features a dark blue background. In the top right corner is the logo for 'ai ACADEMIC IMPRESSIONS'. On the left side, there is a vertical orange bar. To the right of this bar, the number '#12' is displayed in a large, white, sans-serif font. Below the number, the text 'Mock Mediation Debrief and Final Q&A with Faculty' is written in a smaller, white, sans-serif font. In the bottom right corner, the number '27' is visible.

27



QUESTIONS?

ai ACADEMIC IMPRESSIONS

28

This slide has a light gray background with a pattern of faint, overlapping question marks. In the center, there is a dark blue rectangular box containing the word 'QUESTIONS?' in a large, white, bold, sans-serif font. At the bottom center, the logo for 'ai ACADEMIC IMPRESSIONS' is displayed. In the bottom right corner, the number '28' is visible.

28

Thank you!

Please remember to complete the [event evaluation](#).
Your comments will help us continually improve the
quality of our programs.

[Please look in the Chat for the event evaluation link.](#)

Building Skills to Successfully Mediate Title IX Sexual Harassment Cases

Welcome & Faculty Introductions



Rabia Khan Harvey, M.Ed., MSHR
Senior Program Manager
Academic Impressions
rabia@academicimpressions.com

November 18 & 19, 2020



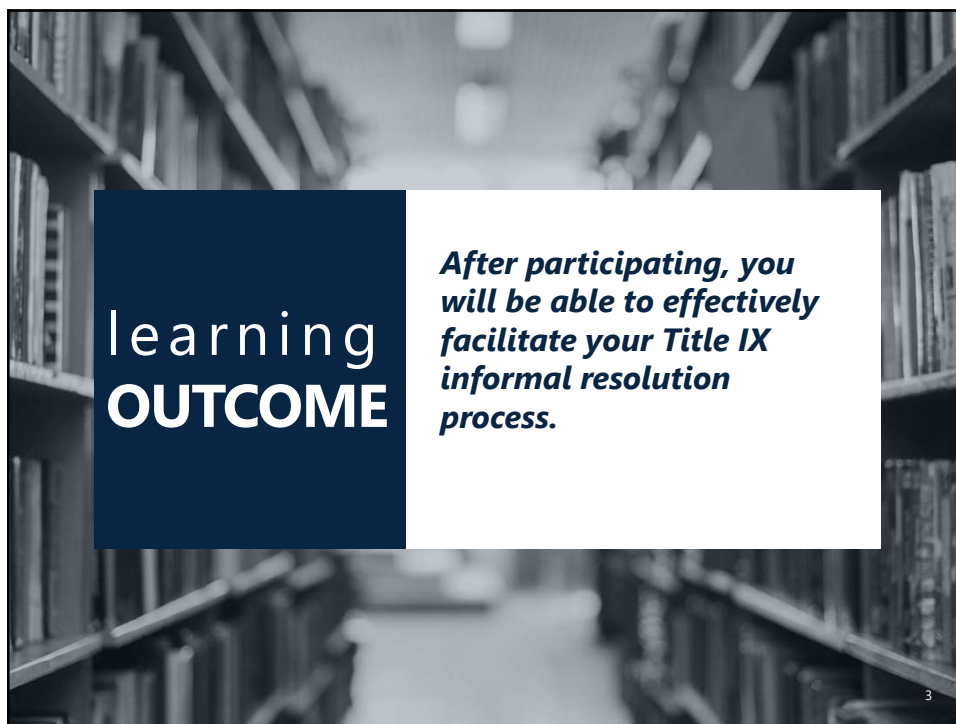
1

1

The Big Why!



2



**Learning
OUTCOME**


After participating, you will be able to effectively facilitate your Title IX informal resolution process.

3

3


Disclaimer

The information provided in this training does not, and is not intended to, constitute legal advice; instead, all information, content, and materials available during this training are for training and general informational purposes only.

 **ACADEMIC
IMPRESSIONS**

4

4



RESOURCES

Welcome to Zoom and its features:

- Mics (keep muted please)
- Camera (option to keep on or off)
- Gallery vs. Speaker View
- Participant List with Emoji's
- Chat Box
 - Use whenever you need it to ask questions or respond
 - Look here for downloadable files during the presentation
 - Option to send private messages to each other or host
 - Chats will be transcribed (not private ones)
- Close windows (e.g., polls)
- Recording (except during breaks or in small groups)
- Changing your name option (hover over your name, select "more" then "rename" to change your name)

5

5



AGENDA

November 18, 2020

- Informal Resolution Overview
- Mediation in the Context of Title IX and Pre-Mediation Prep
- Role of the Mediator & Setting the Environment
- The Mediation – Critical Steps & Considerations
- The Mediation – Fundamental Skills
- Day One Q&A & Reception

6

6



AGENDA

November 19, 2020

1. The Mediation – Communication Strategies
2. Preparing the Agreement
3. Failure to Reach Agreement
4. Preparing for Mock Mediation
5. Module 1: Setting the Scene & Messaging
6. Module 2: Dealing with Party Advisors and Saving the Mediation
7. Mock Mediation Debrief
8. Day Two Q&A

7

7

Meet Your Expert Faculty



Cara Hardin, J.D.
Title IX Deputy Coordinator
Marquette University
cara.hardin@marquette.edu




Hon. Sanford M. Brook (Ret.)
Mediator and Arbitrator
Judicial Arbitrator Group
sbrook@jaginc.com



8

8




#1

Informal Resolution Overview

9

9



Informal Resolution Under The Final Regulations

The Final Regulations allow for informal resolution in lieu of the investigatory and/or hearing process after a formal complaint is filed. §106.45(b)(9).

- Informal resolution is a *voluntary* option that allows parties to resolve disputes in a forum that is separate and distinct from the institution's live-hearing process.
- It's discretionary whether to offer informal resolution at all or only in certain cases.
- Informal resolution processes must have reasonably prompt timeframes.

10

10



Informal Resolution Under The Final Regulations (continued)

- Parties can withdraw from the informal resolution process and resume the §106.45 grievance (investigation and/or hearing) process at any time.
- Informal resolution can be facilitated any time prior to reaching a determination regarding responsibility.
- Both parties must voluntarily agree in writing to participate in an informal resolution process.

11

11



Truly Voluntary?



How do you know if the consent is truly voluntary?

12

12



Written Notice

Institution **MUST** provide *written notice* to the parties disclosing the:

- Allegations. §106.45(b)(9)(i)
- Discussion about the availability of informal resolution. §106.45(b)(A)
- The types of informal resolution processes available. §106.45(b)(2)(i).

13

13



Range of Conflict Resolution Strategies

Informal resolution may encompass a broad range of conflict resolution strategies, including but not limited to:

- Facilitated dialogue resulting in remedies-based resolution
- Respondent accepts responsibility
- Mediation
- Restorative justice
- Arbitration

14

14



Written Notice: Requirements

Institution MUST provide written notice to the parties disclosing the:

- Requirements of the informal resolution process. §106.45(b)(2)(i)
 - Voluntary consent; without coercion. §106.45(b)(2)(ii)
 - The circumstances that preclude the parties from resuming a formal complaint. §106.45(b)(9)(i)
 - Can withdrawal any time before resolution agreement reached.
 - Facilitation by neutral, objective and trained facilitator. ¹⁵

15



Written Notice: Consequences

Institution MUST provide written notice to the parties disclosing the:

- Consequences from participation in informal process
 - The records that will be maintained or that could be or could not be shared. §106.45(b)(10). Examples...
 - Resolution agreement subject to a subpoena.
 - Resolution agreement maintained as educational record.
 - Whether there is confidentiality within the informal resolution process.
 - Whether facilitator will be called as a witness in the formal grievance process if informal resolution fails. ¹⁶

16




17



18



19



Informal Resolution Participants

Participants within the Informal Resolution Process:

- The Complainant(s): A "complainant" refers to an individual who is alleged to be the victim of conduct that could constitute sexual harassment (or sex discrimination or retaliation). §106.30(a).
- The Respondent(s): A "respondent" refers to an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment. §106.30(a).
- The Facilitator: An objective and neutral third party who facilitates the informal resolution process (e.g., mediator).

20

20



Advisors

Additional participants within the Informal Resolution process:

- Advisors: Individuals who may accompany a complainant or respondent to any meeting or proceeding within any the grievance proceeding. §106.45(b)(1)-(9).
 - No requirement that institutions provide an advisor prior to or during informal resolution or that the parties must consult with an advisor prior to entering the informal resolution process.

21

21



Visualization



22

22



Facilitator's Role

A facilitator of informal resolution plays an essential role within the process.

- The facilitator brings the parties together,
- Encourages and guides meaningful dialogue between the parties, allowing each party to feel that they have been heard,
- Helps uncover the parties' underlying needs and interests, and
- Guides the parties toward an amicable resolution.

Facilitators have no power to render a resolution to the matter – only the parties do.

23

23



Facilitators Free of Bias/Conflict of Interest

Facilitators of informal resolution MUST:

- Facilitate impartially (independent, neutral and objective)
 - No conflicts of interest. §106.45(b)(1)(iii).
 - No bias for or against complainants or respondents generally or an individual Complainant or Respondent. §106.45(b)(1)(iii).

**Recommendation: Allow for challenge of the informal resolution facilitator for perceived bias or conflict of interest.*

24

24



Facilitator Training

Facilitators of informal resolution MUST undergo "robust" training.

➤ Training topics include:

- The §106.30 definitions of sexual harassment.
§106.45(b)(1)(iii)

25

25



Title IX Sexual Harassment (§106.30)

Sexual Harassment is conduct based on sex that satisfies one or more of the following:

- Quid Pro Quo harassment. 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.
- Hostile environment harassment. "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 school's education program or activity."
- "Sexual assault," "dating violence," "domestic violence," or "stalking" as those terms are defined under the Clery Act and VAWA

26

26



Facilitator Training Topics

Training topics (cont.):

- The scope of the institution's program or activity.
§106.45(b)(1)(iii)

Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs.

Also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

27

27



Training Topics (continued)


- How to conduct an informal resolution process. §106.45(b)(1)(iii)
- How to serve impartially, including by avoiding prejudgment of the facts at issue. §106.45(b)(1)(iii)
- *The §106.45 formal grievance process.*
- *The Institution's policy against sexual harassment and discrimination (generally).*
 - *Institution's definitions of "Consent," "Incapacitation," and "Retaliation."*

28

28



29



Informal Resolution Agreements

- Terms/outcome of the resolution are negotiable.
 - May or may not include a respondent's admission of harm or responsibility.
- May result in party-imposed corrective or punitive measures for a Respondent.
- Informal resolution agreements may become binding according to their terms (i.e., contractual in nature).
- Outcome should be enforceable by the institution.

30

30



Appeal

Informal resolution agreements may or may not be subject to appeal.

- On the one hand, § 106.45(b)(8) states that recipients must offer both parties an appeal from determinations regarding responsibility, or from a recipient's dismissal of a formal complaint or any allegations contained in a formal complaint.
- But, *Preamble* states, "Importantly, the final regulations require recipients to offer both parties an appeals process to help mitigate risks such as procedural irregularity and investigator, decision-maker, or informal resolution facilitator bias." *Preamble*, p.1374 (Federal Register version)

31

31

CHAT

What are the reasons a party would want to challenge resolution agreement after the fact?

32

32



Record Keeping

An institution must maintain records relating to informal resolutions and the result thereof for at least seven (7) years.

- Notice of Allegations discussing informal resolution
- Written agreement to enter informal resolution
- Signed resolution agreement, including terms thereof

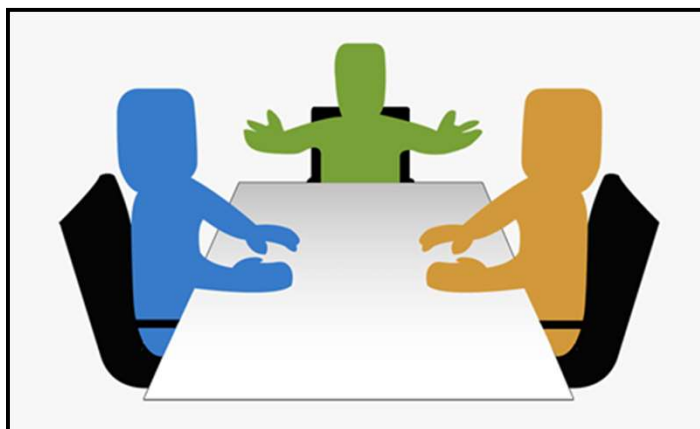
§106.45(b)(10)

33

33



Title IX Cases Conducive to Informal Resolution



34

34



Limitations

No limitations on the availability of informal resolution except:

- Institutions must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student. §106.45(b)(9)(iii)

Just because you can facilitate informal resolutions in all other Title IX sexual harassment cases doesn't mean you should.

- Amenity for informal resolution should be conducted on a case-by-case basis.
- Title IX Coordinator remains in control over decision to allow informal resolution and when to allow it.

35

35



Title IX Cases *Generally* Conducive to Informal Resolution

Cases *generally* amenable to Informal Resolution:

- Hostile environment sexual harassment cases between employees or between students where little to no power differential.
- Non-sexual harassment cases:
 - Retaliation
 - Sex discrimination (including pregnant and parenting discrimination)

36

36

Title IX Cases Generally Conducive to Informal Resolution - EXAMPLES

- Lower-level sexual assault cases.*
- Sexual assault cases resulting from miscommunication.*
- Dating/domestic violence cases where mutual harm is alleged.*
- Stalking potentially connected to a mental health or personality disorder.

*

Sexual/dating/domestic violence cases are the most challenging to informally resolve due to the nature and intimacy of the harm and the power imbalances often associated with these offenses. Accordingly, proceed with caution.

37

37

Title IX Cases Generally Not Conducive to Informal Resolution

Cases *generally not* amenable to Informal Resolution:

- Alleged offenses involving:
 - Physical or threatened violence,
 - Predation,
 - Intimidation,
 - A dangerous pattern of conduct, or
 - Where the power differential between the parties, under the circumstances, could exacerbate the harm.

38

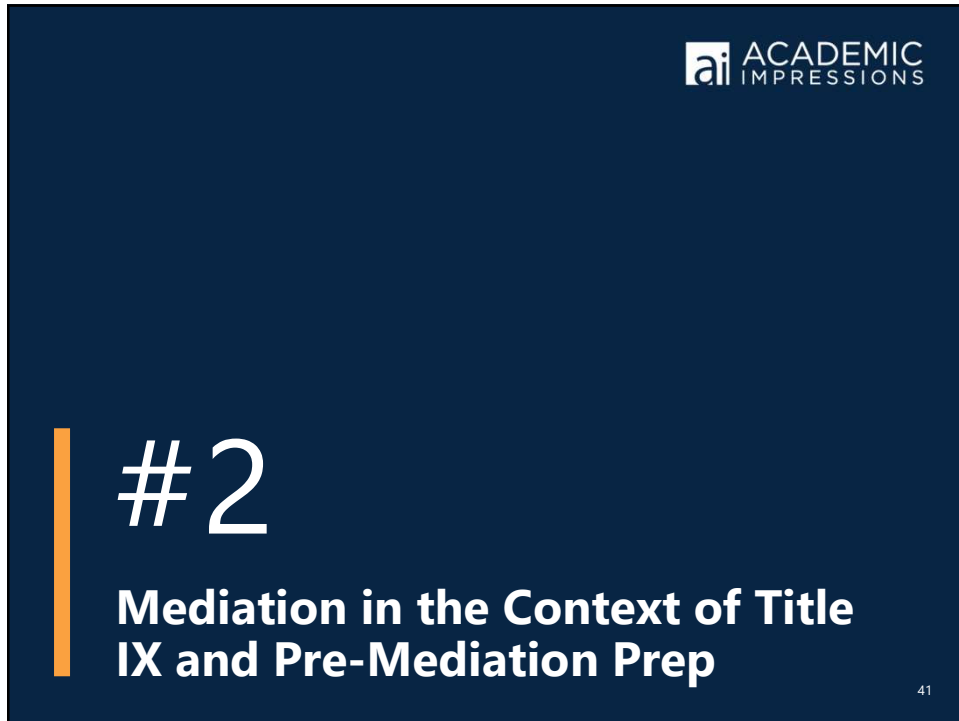
38



39



40



ACADEMIC IMPRESSIONS

#2

Mediation in the Context of Title IX and Pre-Mediation Prep

41

This slide features a dark blue background. In the top right corner, the logo for 'ACADEMIC IMPRESSIONS' is displayed in white. On the left side, a vertical orange bar is positioned to the left of the large white text '#2'. Below this, the title 'Mediation in the Context of Title IX and Pre-Mediation Prep' is written in white. A small white number '41' is located in the bottom right corner of the slide.

41



CHAT

Mediation is a "collaborative process."

What does "collaborative process" mean to you?

42

This slide has a background of overlapping grey paper-like shapes. A dark blue square on the left contains the word 'CHAT' in white, with a white speech bubble icon below it. To the right of this square is a white rectangular box containing the text 'Mediation is a "collaborative process."' and 'What does "collaborative process" mean to you?' in bold black font. A small white number '42' is in the bottom right corner.

42



Mediation – The Characteristics

- Voluntariness
- Informed Consent
- Impartiality of Facilitator
- Party control over outcome
- Confidentiality

43

43



Mediation – The Types

- *Facilitative* - conducted by third-party neutral with no authority to propose a solution or opine on issues
- *Evaluative* - conducted by third-party neutral who may give opinions and propose solutions
- *Title IX Hybrid* – facilitative with measured evaluation

44

44



Pre- Mediation Communication

Contact with the Parties

- Email or call to set up pre-mediation conference
- Pre-mediation conference
 - 5-7 days before mediation
- Memorialize all contact

45

45



Pre-Mediation Conference – Do's

Do


- Introduce yourself
- Get to know the party
- Explore comfort/discomfort
- Explain role – neutral facilitator
- Explain compromise is often a part of the process

Do

- Explain process
- Explain goal
- Explain option and role of advisor
- Explain confidentiality
- Explain that party has a voice in the outcome

46

46



Pre-Mediation Communication – Don'ts

<u>Don't</u>	<u>Don't</u>
<ul style="list-style-type: none"> • Discuss what happens if no agreement • Pre-judge issues • Predict outcome • Discuss conversations with other party 	<ul style="list-style-type: none"> • Sound rigid, managerial, controlling • Evaluate claims of either party • Discuss what other observers/witnesses say • Overload

47

47



ACTIVITY



The telephone call to the Respondent pre-mediation.

The Do's

48

48



Pre-Mediation - Preparation

- Read materials
- Outline strong facts and weak facts for Complainant (weak facts for Complainant are strong facts for Respondent and strong facts for Complainant are weak facts for Respondent)
- Determine how to structure mediation
- If possible, determine expectation of parties

49

49



Pre-Mediation - Evaluation

- Is case possible to resolve by mediation?
- What are the undisputed facts?
- The human element
 - Who, if either, do the facts favor?

50

50



Pre-Mediation – Framing the Issues

- What are the issues?
- Determine if there are issues outside of the Complaint and Respondent.
- Do the parties see the issues differently?

51

51



Pre-Mediation – Focusing on Objectives

- Where might compromise be achieved?
- What are the respective party objectives?
- What might the ultimate agreement look like?

52

52



Pre-Mediation - Strategy

- Who do I talk to first?
- What will I address in the first session with each of the parties?
 - Undisputed facts
 - Non-threatening issues
 - Confirming objective(s) of each party
- When and how will I address the more sensitive facts?

53

53



Resolution Agreement Form and Draft

- Preparation pre-mediation is essential
 - Anxiety
 - Relief
 - *"I want to go."*
- Alternative results

54

54

CHAT

Mediation preparation, like mediation, is often an intuitive exercise for the mediator.

What are your reactions and additional recommendations?

55

55


ai ACADEMIC IMPRESSIONS

#3

Role of the Mediator & Setting the Environment

56

56




Personality & Communication Strengths

<u>Personality Strengths</u>	<u>Communication Strengths</u>
<p>Tolerant</p> <p>Thoughtful</p> <p>Practical</p> <p>Collaborative</p> <p>Respectful</p> <p>Empathetic</p> <p>Intuitive</p> <p>Self-Aware</p> <p>Creative</p> <p>Non-Judgmental</p> <p>Open-Minded</p> <p>Credible</p>	<p>Characterize but don't criticize</p> <p>Clarity</p> <p>Emotional control</p> <p>Simplicity trumps complexity</p> <p>Facts are foundation to persuasion</p> <p>Eye contact</p> <p>Relaxed tone</p> <p>Avoid negative body language</p> <p>Avoid negative verbal reactions</p> <p>Avoid negative facial expressions</p>

57

57



The Facilitator, Communicator and Neutral

- Empathetic listening
- Paraphrase and summarize
 - *"I want to make sure I understand, it is rare for you to drink in excess."*
 - *"You were embarrassed to tell your roommate."*
- Validate
 - *"Not wanting to tell someone else is not unusual. It happens all the time."*

58

58



Continued

The Facilitator, Communicator, and Neutral

- Avoid negativity
 - *"He/She doesn't understand the seriousness of what he/she has done."*
- Participatory empowerment
 - *"What would you like me to tell him/her about how you are feeling?"*
 - *"What do you want me to say to him/her about the fear you continue to have?"*

59

59



The Evaluator

- Subtle opinions
 - *"I know you don't want to agree to these restrictions but if we don't reach an agreement you risk more severe restrictions imposed by others."*
 - *"These particular facts may not be helpful to you..."*
 - *"I believe he/she is both remorseful and embarrassed."*

60

60



The Physical Environment

- The venue
 - Ensures privacy/confidentiality
 - Is not intimidating
 - Comfortably accommodates multiple participants
 - Not a busy place
- The rooms
 - Sufficiently separated from one another
 - Large enough to be comfortable
 - Extra room necessary
- Administrative
 - Computer, copier, etc.

61

61



The Virtual Environment

- Structure the start
 - Parties to join at different times
 - Discuss the success of virtual mediation
- Explore:
 - Is anybody with or intending to be with party
 - Need to get comfortable with technology
- The pragmatics
 - Get cell numbers from all participants
 - No recording by anybody
 - Insist on live video
 - Clarity of visual image

62

62

CHAT

Based upon your experience, going into mediation...

What might be Complainant's perspective?

63

63

CHAT

Based upon your experience, going into mediation...

What might be Respondent's perspective?

64

64



65



66



Avoid Joint Sessions with Parties

- Mediation historical perspective on joint caucus
- Dynamic of parties meeting in joint caucus
- Will it ever be appropriate to bring the parties together in a joint caucus?

67

67



Facilitating Introductions

- 1st session with both parties
 - Introduction
 - Get to know party
 - Discuss process
 - Discuss goal
 - Avoid talking about substance of case

68

68



ACTIVITY

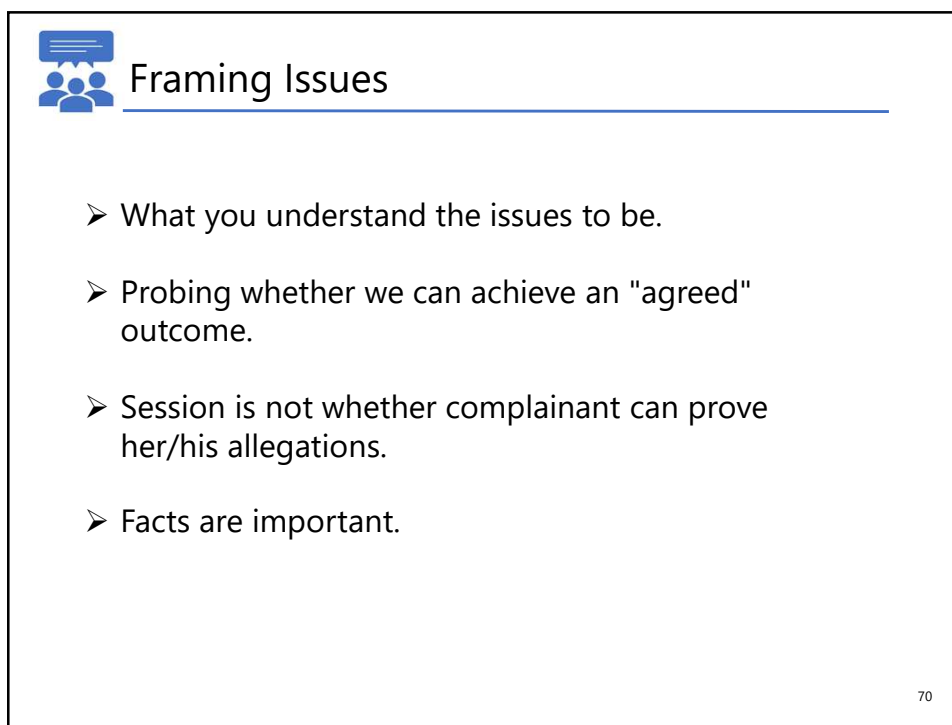



First Session w/Party

- 1. Introduction**
- 2. Get to know party**
- 3. Discuss process**
- 4. Discuss goal**

69

69



 **Framing Issues**

- What you understand the issues to be.
- Probing whether we can achieve an "agreed" outcome.
- Session is not whether complainant can prove her/his allegations.
- Facts are important.

70

70



Establishing Common Grounds

- What are the facts not in dispute?
- What do parties individually hope to accomplish?
- Why is it important to reach an agreement?

71

71



Searching for Shared Values

- Subtly probe
 - Do each hope an agreement can be reached?
 - If agreement reached, what if any relationship will exist with the other party?
 - Are there underlying interests?

72

72



Establishing Credibility

- The mediator
- The process
- The agreement

73

73



Maintaining Confidence

- It is a process, not an event.
- Patience is key.
- Report where progress is being made.
- Sharing positive aspects of what you have heard and observed.

74

74



Dealing with Party Advisors

- Victim advocates, parents, roommates, friends, and lawyers
- Role can be restrictive
- A role of support and collaboration
- An advisor who is challenging, adversarial, intimidating, and/or dominating is not acting in the best interests of the party they are supporting
 - Handling the challenge

75

75



76

#5

The Mediation – Fundamental Skills

77

77



Questioning Techniques

Open-ended questions

- Encourages party to open-up, vent and articulate.
- Allows story to be told.
- Who, what, when, where, why, how, describe, explain, tell...
 - *"Describe what happened after he/she left your room?"*
 - *"Who was with you?"*
 - *"Why did you wait until the next afternoon to call?"*
 - *"Tell me how you felt when you saw him/her earlier?"*

78

78



Questioning Techniques continued

Closed or leading questions.

- Question suggests the answer
 - *"You called the Title IX Coordinator two days later."*
 - *"So, your roommate called him/her to ask if he/she was ok?"*
- Confines response
- Summarizes

79

79



Questioning Techniques – Probing Questions

Probing questions.

- Exploring feelings, opinions, thoughts...
 - *"How would you feel if we are unable to reach an agreement?"*
 - *"What is the best result for you today?"*
 - *"If you couldn't achieve the best result what will you need to feel comfortable about an agreement?"*
- A guide to persuasive discussions with the other party.

80

80



ACTIVITY

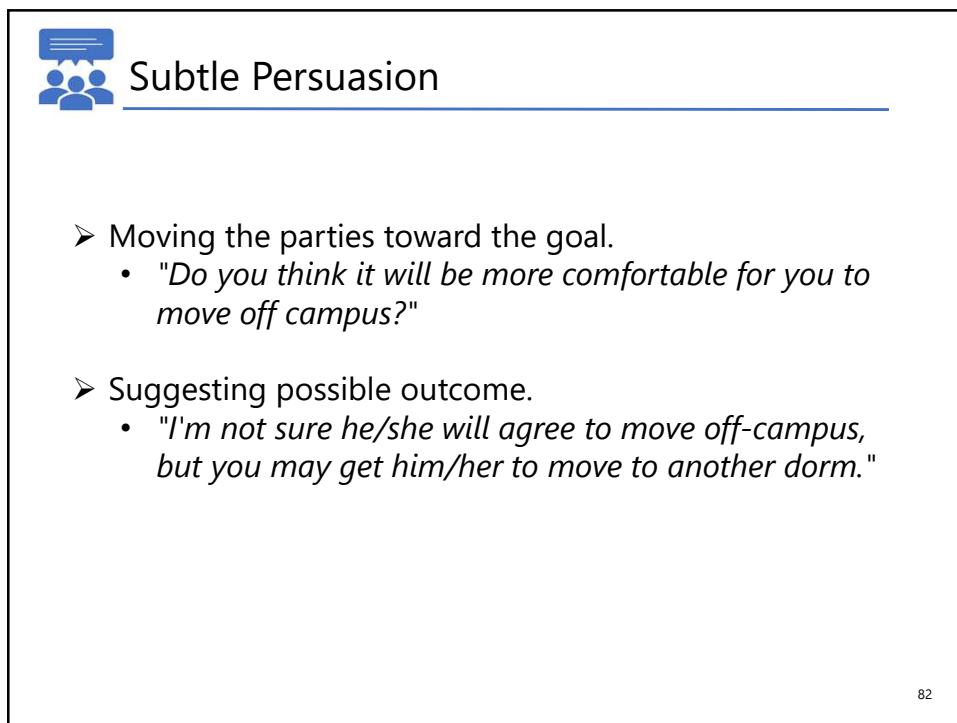



Respondent
"He was not drunk, and we talked about this. When I got back to my room, I told my roommate I want to see him again."

Follow-Up Questions

81

81




 **Subtle Persuasion**

- Moving the parties toward the goal.
 - *"Do you think it will be more comfortable for you to move off campus?"*
- Suggesting possible outcome.
 - *"I'm not sure he/she will agree to move off-campus, but you may get him/her to move to another dorm."*

82

82



The Facts

- Addressing factual strengths
- Addressing factual weaknesses
- Addressing contested facts

83

83



CHAT

Why are "the facts" the most important component of any case?

84

84



Dealing with Unreasonable Demands

- Won't lead to agreement.
- Won't be able to achieve demand in the next stage.
- Won't be seen as a compromise gesture.
- May be met with an unreasonable response.

85

85

ACTIVITY

**NETWORKING
RECEPTION**

We invite you to turn on your cameras and mics to ask any remaining questions and to network with each other.

86

86

**CONDUCTING TRAUMA-INFORMED INVESTIGATIONS
FOR SEXUAL MISCONDUCT CASES**

Cheryl Wayne, M.Ed, JD

CWayne & Associates, LLC | cwayneassociates@gmail.com



LEARNING OUTCOME

After participating...

...you will be better able to account more completely for the role trauma plays in your investigation process.



■ Agenda

- Overview of the Neurobiological Impact of Trauma
- How Trauma Could Impact Title IX Investigations
- Conducting Trauma-Informed Investigations
- Preparing the Final Investigation Report




■ Trauma Informed Approach


- Check your biases (we all have them)
- Avoid appearing impatient
- Emphasize these points
 - Safe place/comfort
 - Personal support
 - Available services
 - Always remain neutral on the facts
 - Trust and transparency




■ Trauma Informed Approach

- Build rapport immediately
- Provide information to the Party
- Acknowledge the difficult situation
- Provide as many options as possible
- The Process
 - Your role (impartial, neutral, fact-finder)
 - Policy
 - Communication
 - Rapport

 **ai** ACADEMIC
IMPRESSIONS 5

 **CHAT**

**What would happen if we did not
apply trauma-informed training to
our investigations?**

 **ai** ACADEMIC
IMPRESSIONS 6

■ Value of this Approach

1. Avoid unnecessary biased and unfounded conclusions.
2. Understand how trauma impacts the brain and response of a Complainant during an attack.
3. Strategize to get the most complete story from the Complainant.
4. Trauma informed approach does not rely on a timeline in chronological order.



■ Neurobiological Impact of Trauma



- Physical Reaction:
 - Brain detects a threat to the body
 - Trauma triggers chemical reaction which impacts
 - Perception
 - Ability to react
 - Memory (fragmented- can't provide narrative- misinterpreted as lying)
 - Each individual reacts differently (highly subjective)



Neurobiological impact of Trauma (cont.)

- Sympathetic
 - “fight,”
 - “flight,”
 - “freeze”
- Focus on survival
- A feeling of dissociation,
often described as an “out of
body” experience



9

“Rules of the road”



- Stay in your lane
- Don't put your blinkers on
- Remember your role
- Remain neutral



QUESTIONS



CHAT

What might be some of the range of emotions that a sexual assault survivor may experience?



ONE SIZE DOES
not FIT ALL

ai ACADEMIC
IMPRESSIONS 13

■ Trauma - the possible impact

- Shock
- Denial
- Self-Blame
- Embarrassment
- Fear
- Angry
- Confused
- Degraded
- Humiliated
- Demeanor (lack of emotion, misinterpreted as lying)

ai ACADEMIC
IMPRESSIONS 14

■ Trauma Informed Approach

- Complainants may experience certain responses during and after the assault
- Traumatic memory is fragmented, can't provide narrative - misinterpreted as lying
- Demeanor: lack of emotion or odd or inappropriate affect - misinterpreted as lying or "not being upset"
- Sensory memories may be more detailed



■ Trauma Informed Approach

The trauma informed approach changes the way we respond and investigate, and most importantly the way we interview Complainants.



■ Trauma Informed Approach

- Important to focus on two concepts:
 - What are you able to tell me about your experience?
 - Where would you like to begin?
 - Provide space to allow Complainant to begin where he/she wants.
 - If Complainant has a run-on statement, let it run.
 - Use follow-up questions (non-leading) for example, "You mentioned that you told him/her "no", can you tell me what you were experiencing at the time?"



■ Trauma Informed Approach

- Instead of asking "why", ask about what the Complainant was thinking during the experience
- Ask about memories associated with the senses such as: sight, smells, feelings.
- Avoid "Victim Blaming"
Questions to avoid: Why did you...? Why didn't you...? or ask...



Trauma Informed Approach

- Quote Complainant's exact words on key elements
- Identify Witnesses:
 - Who was there before and after?
 - Who else knows anything about the sexual misconduct?
- Expect fragmented memory

Current Events



■ “Rules of the road”



- Stay in your lane
- Don't put your blinkers on
- Remember your role
- Remain neutral



QUESTIONS

■ Trauma-Informed Approach Wrap up

- Clarify information and details
- Focus on the Respondent
- Ask how the experience has affected the Complainant physically and emotionally
- Ask what has been the most difficult part of the experience
- Ask if there is anything the Complainant cannot forget
- Outline communication expectations



■ Trauma-Informed Investigation Reports

It is important to integrate interview details into the investigation report.



Trauma-Informed Investigation Reports

Documenting the survivors experience:

- What did "no" look like? (absence of yes)
- What did fear feel like? (paint the picture)
- How did that make you feel?
- What did you think was going to happen?
- What was your thought process...?



Trauma-Informed Investigation Reports

Documenting the Complainant's experience

Interviewing for sensory and peripheral details

What did you see, hear, smell, taste, touch

What were your reactions to this experience?

Physically and emotionally

Documenting the psychological after effects of trauma

What has changed / family & friends observations?



■ “Rules of the road”



- Stay in your lane
- Don't put your blinkers on
- Remember your role
- Remain neutral


■ Promoting Fairness in Trauma-Informed Investigations


- Equitable and appropriate to use the trauma informed interview approach with Respondent.
- Opportunity to describe the events as to what the Respondent was able to recall about the event.
- Allow Respondent describe their thought and sensor perception regarding the alleged event.
- Questioned respectfully and professionally, non-judgmental manner

Promoting Fairness in Trauma-Informed Investigations


- Crucial to ask follow-up and clarifying questions to complainant without victim blaming:

Can you please help me understand the contradictory evidence or counter intuitive behavior ?



 **TAKEAWAYS**

- Traumatic event - brain is in survival mode.
- One size does NOT fit all.
- Your words and reactions matter.
– *Revictimization will silence a Complainant.*
- Stay in your lane, don't put your blinkers on, remember your role - remain neutral.
- Apply similar strategy to a Respondent.





QUESTIONS

References

- Strand, Russell, The Forensic Experiential Trauma Interview
- Campbell, Rebecca, Neurobiology of Sexual Assault. National Institute of Justice.
- Salko, Heather A, Tools for Trauma Informed investigations. National Sexual Violence Center.
- Dinse, Jeff-Podcast on Promoting Fairness in Trauma Informed Investigations



EVALUATION

Thank you!

Please remember to complete the event evaluation.
Your comments will help us continually improve the
quality of our programs.

© Copyright 2018 Academic Impressions

Follow us:



33

Title IX Training

Presented by

Natalie Powell, Natalie.Powell@coag.gov

Jenna Zerylnick, Jenna.Zerylnick@coag.gov

Jacob Paul, Jacob.Paul@coag.gov

Alison Kyles, Alison.Kyles@coag.gov

Colorado Attorney General's Office

1300 Broadway, 10th Floor

Denver, Colorado 80203

Introduction

Who Must be Trained:

- Title IX Personnel: Title IX Coordinator, any investigator, any decision-maker, and any person who facilitates an informal resolution

Training Topics Must Include:

- Title IX's definition of "sexual harassment"
- The scope of the IHE's education program or activity
- How to conduct an investigation and grievance process
- How to serve impartially, including by avoiding prejudgment of the facts at issue
- How to avoid conflicts of interest and bias
- Decision-makers must receive training on any technology to be used at a live hearing, and on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant
- Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence

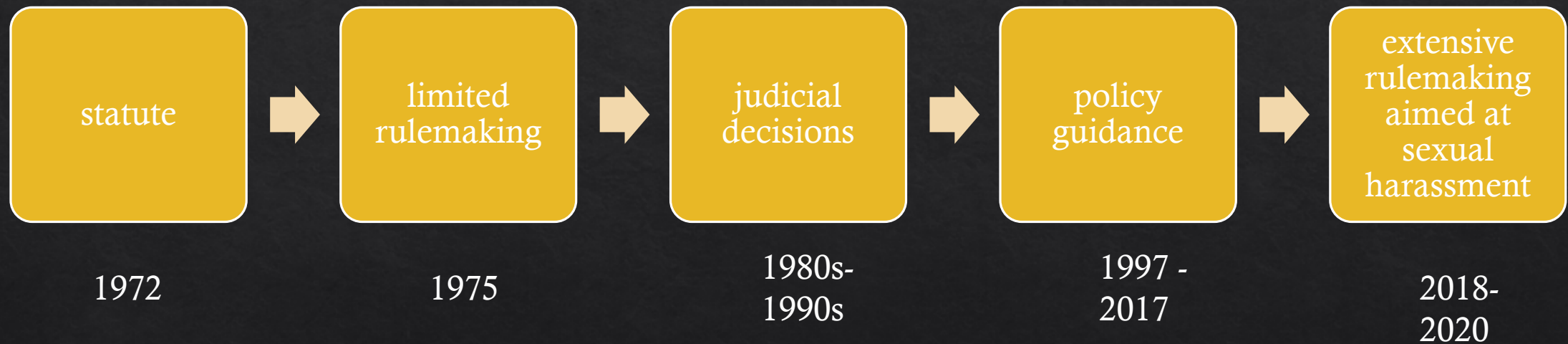
What Has Changed

Title IX

"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."

- ◇ Background
- ◇ Overview of New Regulations
- ◇ But, not everything changed. There is room for discretion and policy choices...

Background



Current Status of Title IX Regulations

- ◇ May 6, 2020: DOE released new regulations
- ◇ May 19, 2020: new regulations published in federal register
- ◇ August 14, 2020: regulations take effect
- ◇ **multiple lawsuits challenging the rules are pending**

Policy Guidance vs. Rules

- ◆ Most recent federal guidance on Title IX—Dear Colleague Letters and Q&A Documents from 2011, 2014, and 2017—was policy guidance.
- ◆ New regulations (also known as rules) were promulgated through the Administrative Procedure Act's rulemaking process and have the force and effect of law.
- ◆ New rules are 26 pages long.
- ◆ Preamble is more than 2,000 pages long.

Overview of Changes and New Requirements

Substantive

Procedural

Substantive

new terms and definitions

emphasis on impartiality and prohibition of bias, conflicts of interest, and prejudice

changes to scope of conduct actionable under Title IX

IHE response and liability standards

confidentiality requirements

emphasis on protection of constitutional rights

rape shield protections

no “gag orders”

Procedural

reporting

notice
requirements

supportive
measures

informal
resolution

prescriptive
grievance
process

no single-
investigator
model

live hearing
and cross
examination

mandatory
appeals

training

Discretionary Areas

standard of evidence

misconduct that falls outside of Title IX's scope

which employees to impose reporting duties upon

defining undefined terms

adoption of rules of procedure and/or rules of decorum

setting parameters on advisors' roles

developing templates/forms for IHE and party use

reasonable timelines

emergency removal process

types of supportive measures and sanctions

option of virtual hearings

Definitions and Key Terms

Actual Knowledge: means notice of sexual harassment or allegations of sexual harassment to an IHE's Title IX Coordinator or any official of the IHE who has authority to institute corrective measures on behalf of the IHE.

- ◆ Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.

Definitions and Key Terms

Consent. IHEs are not required adopt a particular definition of consent with respect to sexual assault.

But:

- ◇ IHEs cannot shift the burden to a respondent to prove consent, or shift the burden to a complainant to prove the absence of consent.
- ◇ IHEs must clearly define consent and must apply that definition consistently.
- ◇ Title IX Personnel must be trained on how to apply definitions used by the IHE with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45.

Definitions and Key Terms

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the IHE investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant **must be participating in or attempting to participate in the education program or activity of the IHE** with which the formal complaint is filed.

Examples given of individuals, other than current students or employees, who may be “participating in or attempting to participate” in the education program or activity:

- ◇ Alumni
- ◇ Complainant on a leave of absence
- ◇ Desire to re-enroll
- ◇ Admitted students
- ◇ Applicants

Definitions and Key Terms

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

- ❖ An employee of the IHE conditioning the provision of an aid, benefit, or service of the IHE on an individual's participation in unwelcome sexual conduct (*i.e.* quid pro quo);
- ❖ 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 IHE's education program or activity;
- ❖ "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v);
- ❖ "Dating violence" as defined in 34 U.S.C. 12291(a)(10);
- ❖ "Domestic violence" as defined in 34 U.S.C. 12291(a)(8);
- ❖ "Stalking" as defined in 34 U.S.C. 12291(a)(30).

Definitions and Key Terms

Sexual harassment continued...

Unwelcome conduct:

- ❖ Must be severe, pervasive, **and** objectively offensive
- ❖ Based on a reasonable person standard
- ❖ No concrete injury required to conclude a reasonable person was denied the ability to access the IHE's education program or activity

Definitions and Key Terms

Sexual harassment continued...

“Sexual assault” means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. “Sexual assault” includes rape, fondling, statutory rape, and incest.

- ❖ The Federal Bureau of Investigation (FBI) currently has two crime reporting systems: the SRS and the NIBRS.
- ❖ The Clery Act directs IHEs to look to the SRS for a definition of rape, and to the NIBRS for a definition of fondling, statutory rape, and incest as the offenses falling under “sexual assault.”
- ❖ The FBI has announced it will be retiring the SRS on January 1, 2021, and moving entirely to the NIBRS.

Definitions and Key Terms

Education program or activity includes locations, events, or circumstances over which the IHE 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. § 106.44(a).

- Includes all incidents of sexual harassment occurring on an IHE's campus.
- Includes incidents of sexual harassment off campus if **any** of the three conditions are met:
 - if the off campus incident occurs as part of the IHE's "operations;"
 - if the IHE exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a);
 - if a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by the IHE pursuant to § 106.44(a).

Definitions and Key Terms

Education program or activity continued...

What constitutes an IHE's operations?

“Operations” may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the IHE.

Definitions and Key Terms

Education Program or Activity Continued...

What constitutes “substantial control over the respondent and the context of the alleged sexual harassment”:

- ❖ Factors such as whether the IHE funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred . . . may be helpful or useful for IHEs to consider . . . to determine the scope of an IHE’s program or activity, [but] no single factor is determinative.
- ❖ A teacher’s sexual harassment of a student is likely to constitute sexual harassment “in the program” of the school even if the harassment occurs off campus.
- ❖ As another example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the IHE exercises substantial control.

Definitions and Key Terms

Education Program or Activity Continued...

Officially recognized student organizations:

- ❖ Where sexual harassment occurs in an off campus location **not** owned or controlled by an officially recognized student organization yet involving members of the organization, the IHE's Title IX obligations will depend on whether the IHE exercised substantial control over the respondent and the context of the harassment, or whether the circumstances may otherwise be determined to have been part of the "operations of" the IHE.
- ❖ As part of the process for official recognition, an IHE may require a student organization that owns or controls a building to agree to abide by the IHE's Title IX policy and procedures under the regulations.

Definitions and Key Terms

Education Program or Activity Continued...

Considerations when the alleged sexual harassment occurs both in and outside of the education program and activity:

- ❖ Under Section 106.45(b)(3)(i), an IHE must dismiss the allegations in a formal complaint about conduct not occurring in the IHE's education program or activity for the purpose of Title IX.
- ❖ However, such dismissal does not preclude action under another provision of the IHE's code of conduct.
- ❖ The IHE has the option of resolving the allegations of conduct outside the IHE's education program or activity by applying the same grievance process required under § 106.45 for formal complaints of Title IX sexual harassment, even though such a process is not required under Title IX or the regulations.

Notifications

Designation of Title IX Coordinator

Dissemination of Policy

Grievance Procedures

Training Materials

Publications

Designation of Title IX Coordinator

- ◆ IHE must designate and authorize at least one employee to coordinate its efforts to comply with Title IX responsibilities, which employee must be referred to as the Title IX Coordinator. § 106.8(a)
- ◆ IHE must notify applicants for admission and employment, students and all unions or professional organizations holding collective bargaining professional agreements with the IHE, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator. § 106.8(a)
- ◆ IHE must prominently display contact information for the Title IX Coordinator on its website, if any, and in each handbook or catalog that it makes available to persons entitled to notification per the regulations. § 106.8(b)(2)(i)

Dissemination of Policy

- ◆ IHE must notify persons entitled to notification under these rules that the IHE does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX not to discriminate in such a manner. § 106.8(b)(1)
- ◆ Such notification must state that the requirement not to discriminate in the education program or activity extends to admission and employment, and that inquiries about Title IX's application may be referred to the IHE's Title IX Coordinator, the Assistant Secretary of Education, or both. § 106.8(b)(1)
- ◆ Colorado law also has notice and posting requirements. *See* § 23-5-146, C.R.S.

Grievance Procedure

- ◆ IHE must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by Title IX and a grievance process that complies with Title IX's requirements for formal complaints as defined in the regulations. § 106.8(c)
- ◆ IHE must provide notice of its grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond. § 106.8(c)

Content of Grievance Procedure

- ◆ description of the range of possible disciplinary sanctions and remedies or a list of possible disciplinary sanctions and remedies that the IHE may implement following any determination of responsibility;
- ◆ statement of whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard
- ◆ procedures and permissible bases for the complainant and respondent to appeal; and
- ◆ description of the range of supportive measures available to complainants and respondents.

§ 106.45(b)(1)(vi) – (ix).

Training Materials

- ◆ IHE must make its Title IX training materials publicly available on its website, or if the IHE does not maintain a website, it must make the materials available upon request for inspection by members of the public. § 106.45(b)(10)

Publications Generally

- ◆ IHE must not use or distribute a publication stating that the IHE treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX. § 106.8(b)(2)(ii)

Intake and
IHE Response

reporting

duty to act

response obligations

dismissals

Reporting

anyone can report
sexual harassment

both informal
reports and formal
complaints trigger
IHE duty to act

Actual Knowledge and Duty to Act

- ◆ IHEs with actual knowledge of sexual harassment in an education program or activity of the IHE against a person in the United States must respond promptly in a manner that is not deliberately indifferent, meaning not clearly unreasonably in light of the known circumstances. § 106.44(a)

Who counts as having actual knowledge?

- ◆ For postsecondary institutions, the regulations limit actual knowledge to only when a Title IX Coordinator or an official with authority to take corrective measures has notice. § 106.30(a).
- ◆ Determining whether an employee is an official with authority to institute corrective measures depends on the IHE's operational structure and the employee's roles and duties. p. 30039.
- ◆ Standard is not met when the only official of the IHE with actual knowledge is the respondent. § 106.30(a).

General Response Obligations

- ◆ must treat complainants and respondents equitably. § 106.44(a)
- ◆ Burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rests on IHE, not the parties. § 106.45(b)(5)(i)
- ◆ must follow Title IX grievance process before imposing discipline § 106.44(a)
- ◆ Regulations require “reasonably prompt time frames.” § 106.45(b)(1)(v)
 - ◆ Colorado law requires good faith effort to complete the adjudication process, exclusive of appeals, within an average of sixty to ninety days. § 23-5-146(3)(d)(I), C.R.S.
- ◆ IHE may need to undertake some degree of investigation or inquiry at outset to determine whether allegations fall under scope of Title IX.

Initial Response to Sexual Harassment Report

Upon receipt of a sexual harassment report from anyone, Title IX Coordinator must:

- ◇ contact complainant to discuss availability of supportive measures, with or without formal complaint;
- ◇ consider complainant's wishes with respect to supportive measures; and
- ◇ explain to complainant the process for filing a formal complaint.

§ 106.44(a)

Formal Complaints

Formal complaint triggers IHE's obligation to initiate grievance process. § 106.44(b)(1). To be a formal complaint, a report must:

- ◇ allege sexual harassment;
- ◇ be made by a person (or the parent of a person) who: (1) allegedly experienced the conduct complained of, and (2) is participating or attempting to participate in a program or activity;
- ◇ be a document filed by a complainant or signed by a Title IX Coordinator;
- ◇ be made “against a respondent”; and
- ◇ request an investigation.

Reports Covered by Title IX *but without* a Formal Complaint

When a complainant has not made a formal complaint, yet the alleged conduct falls under Title IX, the Title IX Coordinator must either:

- ◆ close the report – if, for example the complainant does not want an investigation; or
- ◆ sign a formal complaint and initiate the Title IX grievance process.
 - ◆ Some circumstances may require Title IX Coordinator to initiate an investigation and adjudication of allegations in order to protect the IHE's educational community or otherwise avoid being deliberately indifferent to known sexual harassment. p. 30132

Notifications after Formal Complaint

IHE must provide:

- ◇ notice of the IHE's grievance process that complies with this section, including any informal resolution process
- ◇ notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, 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.

Notifications Continued

Written notice must also:

- ◇ 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
 - ◇ inform parties 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
 - ◇ inform parties of any provision in the IHE's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
-
- ◇ If IHE decides to investigate allegations about the complainant or respondent that fall within Title IX and are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

§ 106.45(b)(2)(i)(A)-(B), and (ii)

Mandatory Dismissal

Must dismiss a complaint from Title IX process if the alleged conduct:

- ◇ would not constitute sexual harassment as defined in the regulations;
- ◇ did not occur in the IHE's education program or activity; OR
- ◇ did not occur against a person in the United States.

§ 106.45(b)(3)(i)

Discretionary Dismissal

May dismiss a complaint from the Title IX process, at any time, if:

- ◇ complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
- ◇ the respondent is no longer enrolled or employed by the IHE; or
- ◇ specific circumstances prevent the IHE from gathering evidence sufficient to reach a determination.

§ 106.45(b)(3)(ii)

Dismissal Requirements

Upon dismissal from Title IX process, IHE must:

- ◇ promptly send written notice of dismissal and the reason to both parties, and
- ◇ offer an appeal based on procedural irregularity, new evidence, or conflict of interest/bias.

§ 106.45(b)(3)(iii)

Non-Title IX Misconduct

- ◆ Dismissal from Title IX proceeding does not preclude action under another provision of the IHE's code of conduct. § 106.45(b)(3)(i)
- ◆ Word of Caution:
 - ◆ carefully categorize reports and complaints
 - ◆ potential Title IX violation for mis-categorizing complaints and using “wrong” grievance procedure, 30221 & 30283

Supportive Measures

Nondisciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

Designed to restore or preserve equal access to the IHE's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the IHE's educational environment, or deter sexual harassment.

Supportive Measures

counseling

extensions of deadlines or other course-related adjustments

modifications of work or class schedules

campus escort services

mutual restrictions on contact between the parties

changes in work or housing locations

leaves of absence

increased security and monitoring of certain areas of the campus

other similar measures

Supportive Measures

- ◇ **Considerations when offering supportive measures:**
 - ◇ **Consider the complainant's wishes.**
 - ◇ **Do not have to be “proportional to the harm alleged” or constitute the “least burdensome measures” possible.**
 - ◇ **Cannot impose an unreasonable burden on the other party.**
 - ◇ **Cannot be a sanction, if IHE has listed the measure as a possible sanction.**
 - ◇ **Must be kept confidential.**
 - ◇ **Must be documented when they are, or are not, provided.**

Informal Resolution

An IHE can use informal resolution when all of the following are true:

- ◆ A formal complaint has already been filed.
- ◆ The complaint does not allege that an employee sexually harassed a student.
- ◆ Both parties provide voluntary, written consent to an informal resolution.
- ◆ The IHE gives the parties a written notice disclosing the allegations and the requirements of the informal process.

An IHE may not condition enrollment, employment, or any other right of students or employees on agreeing to an informal process.

At any time prior to agreeing to a resolution, either party has the right to withdraw from the informal process and resume the formal grievance process with no consequences.

Informal Resolution

Method: Informal resolutions can include: mediation, arbitration, restorative justice, or other strategies.

Who facilitates: Facilitators can be third party providers, and do not have to sign MOUs with the IHE. All facilitators are subject to the same training and impartiality requirements as are an IHE's Title IX coordinators, investigators, and other decision-makers.

Sanctions: An IHE can impose any disciplinary consequence after an informal process that they could also impose in a formal process, including expulsion. However, the respondent may withdraw from the informal process at any point, and can thus choose to begin or resume a formal process instead of agreeing to a particular sanction.

Serving as witnesses: Under the regulations, facilitators can serve as witnesses in subsequent grievance procedure as long as this possibility is disclosed to the parties in the written notice prior to the informal process beginning. However, IHEs may also want to consider Colorado state law concerning confidentiality of mediation communications.

Big Picture – how does relevance fit in Title IX?

Relevance

- ◇ investigators and decision-makers must objectively evaluate *all relevant evidence*
- ◇ Title IX grievance process is designed to bring *all relevant evidence* to decision-maker's attention in order to reach a fair and reliable result

Relevance Definitions

Merriam Webster Definition

- ◇ affording evidence tending to prove or disprove the matter at issue or under discussion

Legal Definition in Federal Rules of Evidence

- ◇ “Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Federal Rule of Evidence Rule 401

Preamble Explanation

- ◇ “evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.” (p. 30294).

Title IX Exclusions

Title IX bars the following types of evidence as not relevant (or otherwise excluded):

- ◇ information protected by rape shield provisions
- ◇ information protected by a legally recognized privilege, unless waived
- ◇ any party's medical, psychological, and similar records, unless party gives voluntary written consent
- ◇ party or witness statements from person not subject to cross exam

Rape Shield Provisions

(1) All questions and evidence of a complainant's sexual predisposition are irrelevant, with no exceptions; and

(2) Questions and evidence about a complainant's prior sexual behavior are irrelevant, unless:

- ◇ questions and evidence are offered to prove that someone other than the respondent committed the conduct alleged; or
- ◇ questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

Sexual Predisposition and Prior Sexual Behavior

- ◇ The regulations do not define these terms. Preamble explains that Title IX's rape shield provisions are patterned after Federal Rule of Evidence 412. Rule 412's Advisory Committee Notes provide guidance:
 - ◇ sexual behavior = all activities involving actual physical contact or that imply sexual intercourse or sexual contact, including victim's use of contraceptives, evidence of childbirth, and sexually transmitted diseases
 - ◇ includes "behavior of the mind" such as dreams or fantasies
 - ◇ sexual predisposition = the victim's mode of dress, speech, or lifestyle

Relevance Considerations

grievance
process
generally

investigation

hearing/cross-
examination

appeal

training

effect of IHE
violation of
relevance rules

RELEVANCE HYPOS

Investigations

Formal Complaint

Sets forth the allegations that will be investigated
May be expanded

Collect Information

Plan Investigation
Collect all available information
Interview Witnesses

Prepare Report

Parse through available evidence
Provide parties opportunity to review evidence and submit response
Complete report
Provide completed report to parties and opportunity to submit response

Why are Investigations Important

- ◆ **Standard of Review**

- ◆ **Burden of Proof**

 - ◆ **Burden lies with the IHE**

- ◆ **Inspect and Review**

Relevance Considerations

Directly Related vs. Relevance

- ◇ Directly Related

- ◇ Evidence that relates to the allegations under investigation.

- ◇ Relevance

- ◇ Evidence related to an allegation, that makes a fact at issue more or less likely.

Uses for Investigative Reports

- ◆ Grievance Hearing.
 - ◆ Can be presented by the IHE, Complainants, or Respondents.
- ◆ Appeal, Discrimination Lawsuits, Federal Civil Rights Claim, or other Litigation.
- ◆ Presented as part of an IHE's defense to those lawsuits.
- ◆ Personnel Action.

Who should
conduct the
investigation?

The investigator should be:

- Objective and impartial.
- Familiar with the Title IX regulations and the IHE's rules, policies, and procedures.
- Trained in conducting the type of investigation required by the grievance process.
- Able to maintain confidentiality, as appropriate.
- Detailed and organized.

Planning the Investigation

- ◆ Equal opportunity for the parties to present witnesses, and evidence. § 106.45(b)(5)(ii).
- ◆ Scope
 - ◆ Confined only to original issue; or
 - ◆ Expand to include additional allegations
 - ◆ Must provide notice to all known parties if additional allegations added. §106.45(b)(2)(B)(ii).
 - ◆ IHE may consolidate formal complaints where the allegations of sexual harassment arise out of the same facts or circumstances. §106.45(b)(4).
- ◆ Collect available background information before conducting interviews.
- ◆ Obtain necessary, written, consent for certain information. § 106.45(b)(5)(i).
 - ◆ Records maintained by a physician, psychiatrist, psychologist, or other recognized professional in connection with the provision of treatment to the party.

Conducting the Investigation

Deciding whom to interview.

Representation at the interviews.

- Parties have the right to be accompanied by an advisor of their choice, but the IHE can place restrictions on the extent to which the advisor can participate, so long as restriction applied equally to both parties. § 106.45(b)(3)(iv).

Conducting the interviews.

- Must provide parties with written notice of investigative interviews with sufficient time for the party to prepare and participate. §106.45(b)(5)(v).

Conducting an Interview

Types of questions to ask

Demeanor toward interviewees

Alternatives for preserving a record of the interview

Cautions about promising confidentiality

Cautions about promising certain results

Avoiding assumptions

Presuming a conclusion

Failing to show your work


Avoiding personal bias

Concluding the Investigation

- ◆ IHE must provide directly related evidence to the parties prior to completion of investigative report:
 - ◆ Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation, so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation. § 106.45(b)(5)(vi).
 - ◆ Prior to completion of the investigative report, the IHE must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. *Id.*
 - ◆ The IHE must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination. *Id.*

Writing the Investigative Report

What to put in/leave out of the report: report must fairly summarize the relevant evidence. §106.45(b)(5)(vii).



Cautions about including recommendations or conclusions in the report.



Regulations require: At least 10 days prior to a hearing...the IHE must send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response. §106.45(b)(5)(vii).

Hearing



Grievance process must include live hearing. This requirement cannot be waived by either or both parties, or by the IHE.



Live hearings may be conducted with all parties physically present or, at the IHE's discretion, or the request of either party, the hearing can be done virtually, with technology enabling participants simultaneously to see and hear each other.



The live hearing must be recorded or transcribed.

Hearing

Advisors

Parties have the right to an advisor of their choice, who may be, but does not have to be, an attorney.

An advisor must be provided if a party does not have one to conduct cross-examination.

Only an advisor can conduct cross examination.

Advisors may conduct direct examination at IHE's discretion.

Support Persons

Generally, a party **cannot** have a person (including a support person), other than their advisor, attend the hearing.

However, if a party has a disability, IHEs must comply with disability laws that may require accommodations. A person assisting a party with a disability may accompany a party to the hearing.

Decision-Makers

Right and responsibility to ask questions.

Must determine relevancy of each question.

Must objectively evaluate the evidence, and independently reach a determination without deference to the investigative report.

Must evaluate relevant evidence for weight or credibility.

Hearing

Procedural Issues

- No pre-hearing depositions or hearing subpoenas allowed
- Rules of decorum permitted

Evidentiary Issues

- Parties must have equal opportunities to present evidence, including expert evidence
- IHE can also present evidence
- Standard of Evidence: must be clear and convincing, or preponderance of the evidence. But, consider Colorado law on standard of evidence.
- Relevance is the standard that the final regulations require, and any evidentiary rules that an IHE chooses must respect this standard. For example, an IHE may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- Credibility determinations

Hearing

- ◆ Cross Examination

- ◆ If a party or witness does not submit to cross examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross examination or other questions.

- ◆ Exceptions

- ◆ Video Evidence (not including statements in the video)

- ◆ Statement = Sexual Harassment

Hearing

Written Determination Regarding Responsibility:

- ◆ Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
- ◆ A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
- ◆ Findings of fact supporting the determination;
- ◆ Conclusions regarding the application of the IHE's code of conduct to the facts;
- ◆ A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the IHE imposes on the respondent, and whether remedies designed to restore or preserve equal access to the IHE's education program or activity will be provided by the IHE to the complainant; and
- ◆ The IHE's procedures and permissible bases for the complainant and respondent to appeal.

Technology for Virtual Hearings

- ◆ Know how to share content/screen to show exhibits.
- ◆ Know how to control the mute settings.
- ◆ Know how to record the hearing if needed, as the regulations require the hearing to be recorded or transcribed.
- ◆ If platform allows, know how to put participants in lobby or waiting area.
- ◆ Consider having an advance test of the technology with participants before the actual live hearing.
- ◆ Consider having parties submit and/or exchange potential exhibits in advance of the hearing.
- ◆ Encourage participants to participate in a location that has strong internet connection, is private and quiet, and has adequate lighting.
- ◆ Encourage participants to silence computer and telephone notifications during the hearing.



Appeals

Mandatory Opportunity for Appeals

- ◇ IHEs must allow both parties to appeal:
- ◇ a determination regarding responsibility
- ◇ a dismissal of a formal complaint

§ 106.45(b)(8)

- ◇ Regulations suggest that informal resolution agreements should be treated as binding contracts and are not appealable. § 106.45(b)(9) & p. 30405

Appeal Grounds

Either party may appeal on these grounds:

- ◇ procedural irregularity that affected the outcome of the matter;
- ◇ new evidence that was not reasonably available at the time the determination was made that could affect the outcome of the matter; or
- ◇ Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against one of the parties that affected the outcome of the matter.

§ 106.45(b)(8)

- ◇ Schools may also offer opportunity for appeal equally to both parties on additional bases. § 106.45(b)(8)

Grievance Process & Appeals

An IHE's grievance process must:

- ◆ include a description of the procedures and permissible bases for both parties to appeal. § 106.45(b)(1)(viii)
- ◆ include a reasonably prompt timeframe for filing and resolving appeals. § 106.45(b)(1)(v)
 - ◆ Colorado statute requiring good faith effort to complete adjudication process within average of 60 to 90 days is exclusive of appeals. § 23-5-146(3)(d)(I), C.R.S.

Appeal Procedural Requirements

For all appeals, IHE must:

- ◇ notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
- ◇ ensure that the decision-maker for the appeal is not the same person as the decision-maker that reached the determination regarding responsibility or dismissal, the investigator, or the Title IX Coordinator;
- ◇ ensure that the decision-maker for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of section 106.45, i.e., the training requirements and prohibitions against conflicts of interest and bias;
- ◇ give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- ◇ issue a written decision describing the result of the appeal and the rationale for the result; and
- ◇ provide the written decision simultaneously to both parties.

Appeals: Additional Considerations

- ◆ A written determination becomes “final” only after the time period to file an appeal has expired, or if a party does file an appeal, after the appeal decision has been sent to the parties. p. 30393
- ◆ Supportive measures to maintain the status quo may need to continue during pendency of appeal. p. 30393
- ◆ IHE must maintain any records of an appeal and its result for 7 years. § 106.45(b)(10)
- ◆ IHE must ensure decision-makers for appeals receive training. § 106.45(b)(1)(iii)

Sanctions and Remedies

Sanctions

- IHEs are not required to implement certain sanctions, and sanctions do not have to be proportional to the conduct
- IHE can consider mitigating circumstances in imposing sanctions
- Sanctions cannot be effective until after appeal, if an appeal is initiated by either party

Remedies

- Where a determination of responsibility has been made against respondent, IHE must provide remedies to complainant
- Remedies must be designed to restore or preserve equal access to the IHE's education program or activity
- Remedies may overlap with sanctions
- IHEs are prohibited from disclosing remedies to the respondent when the remedies do not directly affect the respondent

Bias and Conflicts of Interest

Any individual designated by an IHE as a Title IX Coordinator, investigator, decisionmaker, or any person designated by an IHE to facilitate an informal resolution process, cannot have a conflict of interest or bias for or against complainants or respondents generally, or an individual complainant or respondent.



Dictionary definitions of conflicts of interest, bias, and partial



Based on a reasonable person standard

Bias and Conflicts of Interest

Avoiding Bias and Conflicts of Interest

- Treat complainants and respondents equitably
- Avoid using sex stereotypes in training materials, policies, or procedures
- Treat each person as an individual, not as a member of a class
- Objectively examine relevant evidence before reaching a determination
- Give both parties equal opportunity to present witnesses and evidence
- Continue to evaluate bias and conflicts of interest throughout the process

Examples of Allegations of Bias from Prior Cases Nationwide

- IHE's training materials were one-sided;
- IHE failed to conduct adequate investigation and objectively pursue the evidence;
- IHE failed to reveal information learned during the investigation to both parties;
- IHE investigator advocated for certain discipline;
- IHE personnel made statements demonstrating favor towards complainants or respondents;
- IHE failed to follow its own policies;
- IHE failed to follow established procedures for Title IX investigations and hearings
- Decision-maker was influenced by other school officials in reaching a decision;
- Decision-maker had professional connections with one of the party's parents.

Regulations' Intersection with Other Laws

Internal References to:

- ◇ Constitutional protections: First, Fifth, & Fourteenth Amendments
- ◇ FERPA
- ◇ Title VII
- ◇ Title VI (procedural provisions)
- ◇ parent/guardian legal rights
- ◇ Clery Act and VAWA
- ◇ IDEA, Section 504, & ADA

...and more
potential areas
for overlap

◆ HIPAA

◆ Open Meeting Laws

◆ criminal law and proceedings

Natalie Powell,
Natalie.Powell@coag.gov

Jenna Zerylnick,
Jenna.Zerylnick@coag.gov

Jacob Paul,
Jacob.Paul@coag.gov

Alison Kyles,
Alison.Kyles@coag.gov

Contact Information