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

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Meet Your Facilitator

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.
Day One Agenda

01  Review: 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
Procedural Requirements for Investigations

- Notice TO BOTH PARTIES
- Equal opportunity to present evidence
- An advisor of choice
- Written notification of meetings, etc., and sufficient time to prepare
- Opportunity to review ALL evidence, and 10 days to submit a written response to the evidence prior to completion of the report
- Report summarizing relevant evidence and 10 day review of report prior to hearing

Procedural Requirements for Hearings

- Must be live, but can be conducted remotely
- No Compelling participation
- Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters
- Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution
- Decision maker determines relevancy of questions and evidence offered
- Exclusion of Evidence if no cross examination
- Written decision must be issued that includes finding and sanction
Advisor of Choice

The advisor can be anyone, including an attorney.

Institutions cannot place restrictions on who can serve.

No training required.

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

Written Notification of Meetings and Sufficient Time to Prepare
Equal Opportunity to Present Evidence

Evidence Review

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

10 days to provide a written response
Investigative Report and Review

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

That report will be shared with the parties and they will have 10 more days to comment.

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

An Impartial Grievance Process Is...

- Not influenced by bias or conflict of interest
- Committed to decisions based on an objective view of all of the facts and evidence
- Reliable and accurate
- Legitimate
- Truth Seeking
Trauma Informed Practices

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

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

Format/Structure of the Interview

Format of Questions

Approach to Clarification

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
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. 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.
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 every real changes in brain function that may affect a person’s ability to record or 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

Deception

False Report
Regretted Sex
Not Proveable

CASE CLOSED

The Historical Conclusion...
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….

Without trauma informed training and knowledge, those conducting investigations and interviews risk:

- Conducting their interview with bias
- Wrongfully concluding, without conducting a thorough investigation that the reporting individual is lying
- Causing further trauma
- Jeopardizing future reporting
- Prematurely Concluding the Investigation
Developing an Investigative Strategy

04

Essential Steps of an Investigation

- Notice of formal investigation
- Initial Interviews
- Evidence Collection
- Report writing
The Process: Developing an Investigative Strategy

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

Investigation Timeline

Prior History
- Between the Parties
- Of the Parties

Incident
- Consent
- Type of Contact
- Injuries

Pre-Incident
- Communications
- Interactions
- Conduct

Post Incident
- Behaviors
- Communications
Title IX Hearing Requirements: The Impact on Investigations

Strategies for Evidence Collection

- Testimony
- Text Messages
- Social Media Posts
- Medical Records
- Public Safety/Police Records
The Importance of Organization

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Introduction to Fair, Thorough, and Trauma Informed Sexual Violence investigations
Day 2
# Day Two Agenda

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<td><strong>03</strong></td>
<td>The Investigative Report and Record</td>
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**Quick Review!**
Investigative Interviews

Interview Objectives

Connect
- Build rapport
- Build trust
- Empower

Listen
- Allow interviewee to share their experience

Clarity
- 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

Prepare yourself for the meeting

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

Set Expectations

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

What you expect of them:
- Honesty
- That they will seek clarity if needed (give them permission to do so)
- That they won't guess or fill in blanks
The Importance of Empowerment and the Power of Empathy

An investigator must make the person being interviewed feel safe, in control, and supported. This will lead to feelings of safety and trust and will result in a more cooperative subject.

The subject will be able/willing to remember and share more information.

Increased evidence collection and quality

More accurate investigatory findings

How do we...

Build Rapport and Trust?

Empower?
Investigative Interviews

Start by eliciting a narrative

Listen

Interview for clarification

Listen

Avoid leading questions, questions that blame, interrogating

Start the interview by eliciting a narrative.

Where would you like to begin?

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

What are you able to tell me about your experience?

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

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

**Avoid:**
- Interrogation
- Questions that blame
- Questions that imply doubt
- Leading questions

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

- If you have to, ask about the physical and emotional reactions to the incident.
- Conclude with a 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?
... 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
- Do not ask leading questions
- Watch your tone
- Do not rush.
- LISTEN!!!!!!!!!

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

- Seek clarification
- Explore inconsistencies
- Explore contradictory evidence
- Explore difficult issues
- Opportunity to respond

Follow Up Interview Approach

- Explain the purpose of the follow up
- Set the stage for the topics you will be covering
- Be deliberate and mindful in your questions:
  - Can you tell me what you were thinking when....
  - Help me understand what you were feeling when...
  - Are you able to tell me more about...
Evidence Collection and Assessment

Evidence

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

Black’s Law Dictionary
Types of Evidence

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

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

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

Testimony is Evidence
Non-Testimonial Evidence

- Text Messages
- Social Media Posts
- Social Media Communications
- Emails
- Surveillance
- Videos
- Photographs
- Police Body Camera Footage
- Swipe Records
- Medical Records
- Phone Records
- Audio Recordings

Evidence Collection

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

is more than evidence collection

Evaluating the Evidence

<table>
<thead>
<tr>
<th>Question</th>
<th>Description</th>
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<tr>
<td>Is it relevant?</td>
<td>Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.</td>
</tr>
<tr>
<td>Is it authentic?</td>
<td>Is the item what it purports to be?</td>
</tr>
<tr>
<td>Is it credible/reliable?</td>
<td>Is the evidence worthy of belief?</td>
</tr>
<tr>
<td>What weight, if any, should it be given?</td>
<td>Weight is determined by the finder of fact!</td>
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A Thorough Investigation Permits the Decision Maker to Assess

- Relevance
- Credibility
- Reliability
- Authenticity
- Weight

Evidence That is Not “Relevant”

- “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,
  • unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  • if the questions and evidence concern specific 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
“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.”

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

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

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

Never assume that an item of evidence is authentic.

Ask questions, request proof.

Investigate the authenticity if necessary.
Is it authentic?

- Question the person who offered the evidence
- 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 and Assessment

**Barriers to Collection**
- Uncooperative Witnesses
- Non-Participating Parties
- Unknown Identity of a Witness
- Obtaining Emails
- Difficult Topics

**Barriers to Assessment**
- Technology
- Colluding Witnesses
- Colluding Parties
- Uncooperative witnesses
- Totally different facts from different sources

Understanding the Impact of our Investigations
At the conclusion of the investigation, we must create an investigative report that fairly summarizes relevant evidence.
Relevancy Standard

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

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

Who Decides?

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

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

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

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

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  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

Compilation of the Evidence

The Record

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

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

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

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

Appendix D: the procedural timeline

Structure of the Report

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