



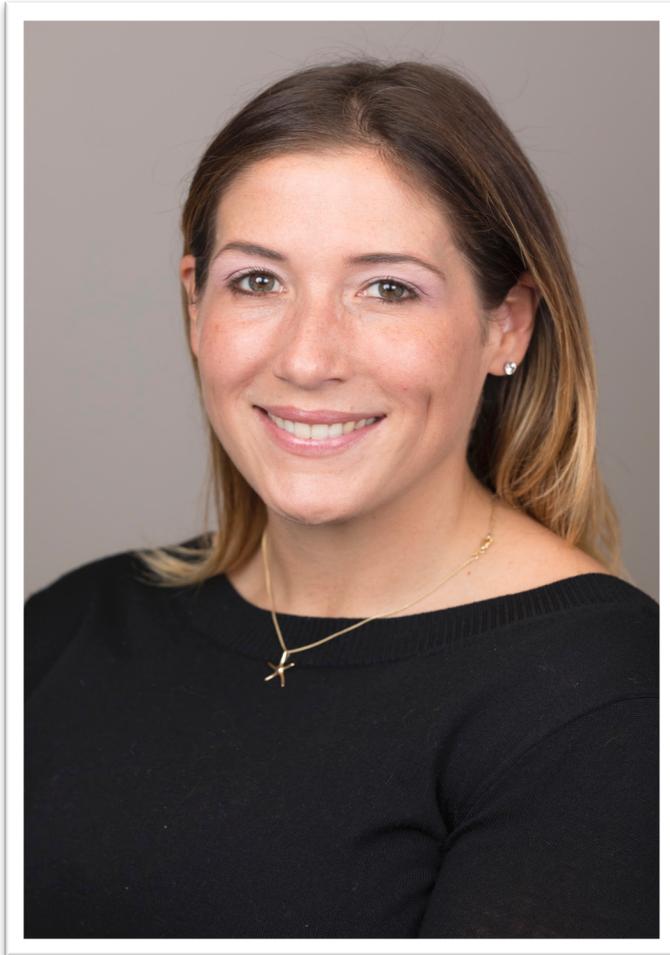
GRAND RIVER | SOLUTIONS

Title IX in a Post Regulatory World

Day One

Chantelle Cleary

Meet Your Facilitators



Chantelle Cleary, J.D.
Senior Consultant

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.



About Us

Grand River Solutions provides Title IX, equity, and Clery Act consulting services. Together, our experts have decades of direct, on-campus experience at both small and large, public and private institutions. This practical expertise derived from years of hands-on experience enables our team to offer customized solutions unique to your educational institution's needs. Grand River has a suite of creative, cost-effective and compliant solutions to help schools meet their needs in innovative ways.

Today's Agenda

01

A Whole New Word: The Post Regulatory Application of Title IX

05

Conducting the Investigation

02

Reports of Misconduct and the Post-Regulatory Requirements for Response

06

Evidence

03

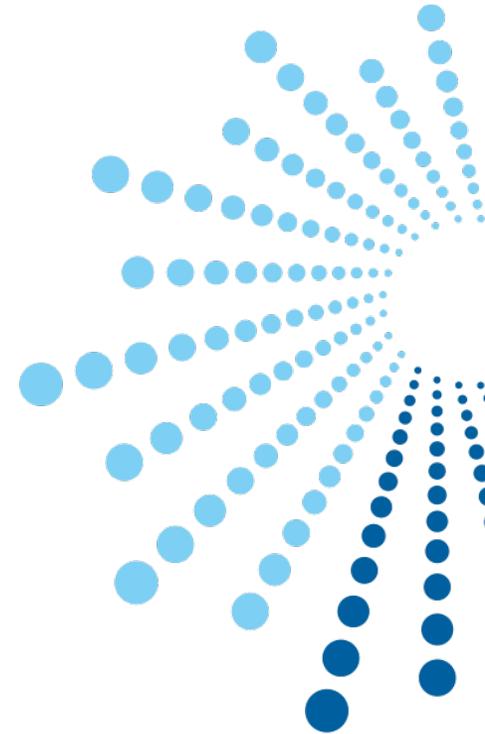
Investigations Post Regulations

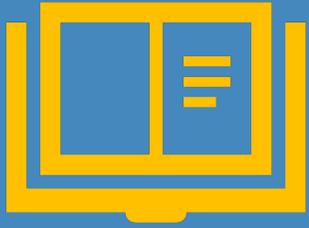
07

The Investigation Report

04

The Investigator





A Whole New Word: The Post Regulatory Application of Title IX

Narrowed jurisdiction and expansive procedural requirements

01

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Title IX of the Education Amendments Act of 1972

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Title IX Applies to All Forms of Sex Discrimination

- Sexual Harassment
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment
- Retention Rates
- Safety
- Screening Exams
- Sign-on Bonuses
- Student and Employee Benefits
- Thesis Approvals
- Vocational or College Counseling
- Research opportunities

The May 2020 Title IX Regulations Cover A Narrow Scope of Title IX

- Sexual Harassment
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment

**Conduct Constituting
Sexual Harassment
as Defined in
Section 106.30**

Section 106.30: Sexual Harassment

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

- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).

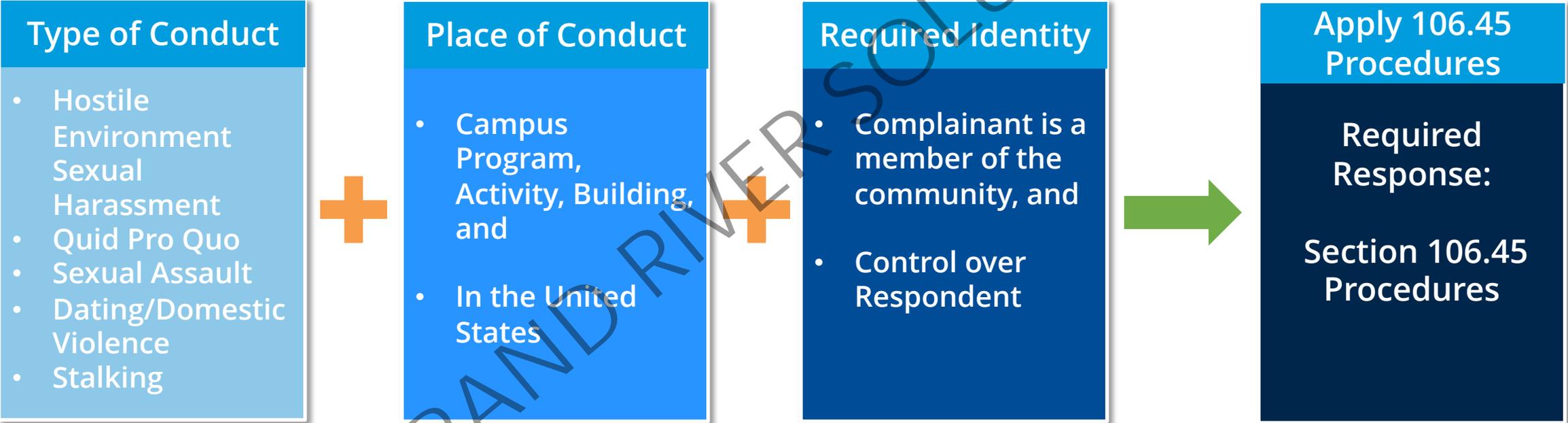
Title IX Application Post May 2020 Regulations

All Forms of Sex
Discrimination, Retaliation

106.30 Sexual Harassment:

- Hostile Environment
- Quid Pro Quo
- Sexual Assault
- Dating/Domestic Violence
- Stalking

Title IX Application Post May 2020 Regulations



First Question

What Happened?

Does the Complaint Allege:

1. sexual harassment in which the harassment was so severe and pervasive that it denied the complainant equal access to an educational program or activity, or denied the employee the equal ability to continue their work;
2. Dating Violence, Domestic Violence, Stalking, or Sexual Assault;
3. A complaint of quid pro quo sexual harassment by an employee respondent against a student.



Second Question

Where Did the Conduct
Occur?

Did the conduct occur:

1. The incident(s) occurred at school, within the United States;
2. The incident(s) occurred as part of a recognized program in a building under the school's control, and within the United States;
3. The incident(s) was part of one of the school's programs or activities, such as part of a field trip or team athletic event, and within the United States.



Third Question

Who Experienced the
Conduct?

Is the Complainant:

1. a student (whether applicant, admitted, or currently enrolled); or
2. An employee (applicant, hired but not yet working, or employed),
3. Or someone who is otherwise still accessing or attempting to access a university program or activity, within the United States.



Fourth Question

Who is the Accused?

Is the Respondent:

1. A student (whether applicant, admitted, or currently enrolled), or
2. An employee (applicant, hired but not yet working, or employed).
3. Someone else that the institution may have control over (ie, a contractor, an alum, or a vendor)





Apply the 106.45 Procedures

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**What do we do
about misconduct
that does not fall
within this narrow
scope?**



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**Apply other applicable
institutional policy or
procedures.**

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Reports of Misconduct and the Post-Regulatory Requirements for Response

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

02

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First
Thing's
First...

Notice to College/University

Outreach/Response from Title IX Coordinator

Support Measures, whether or not Formal Complaint is
filed

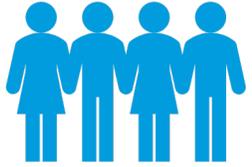
How to File

Options for Resolution

Actual Notice: A Narrowed Scope of Institutional Responsibility

Institution must respond when it has:

- **“Actual knowledge”**
 - When “an official of the recipient who has authority to institute corrective measures” has notice, e.g., Title IX Coordinator
- **of “sexual harassment” (as newly defined)**
- **that occurred within the school’s “education program or activity”**
 - “includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred
 - Fact specific inquiry focused on control, sponsorship, applicable rules, etc.
- **against a “person in the United States” (so, not in study abroad context)**



Responsible Employees

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Mandatory Response

1. Discuss support measures

2. Explain that support measures are available without filing formal complaint

3. Explain options for resolution and how to file

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How to Proceed?



Supportive Measures

Interim, not
forever

Interim also
includes “before
investigation”

Equitable ≠
Equal



Not Punitive?

- No default, always case-by-case
- Right to challenge

Emergency Removal of Student

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



Mandatory Investigation

Complaint filed,
SIGNED, requests
investigation

Coordinator files,
SIGNS, starts
investigation



But Do You **START** the Investigation?

Does it meet the elements? If not,
DISMISS

Trying to do some pre-investigation to identify respondent

Dismissing Complaints

MANDATORY

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

DISCRETIONARY

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

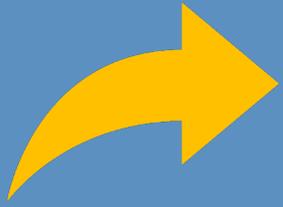
Complaint Resolution

Informal Resolution

- Formal Complaint Required
- Parties must agree
- Can withdraw from process
- Alternate Resolution/Mediation
- No appeal

Formal Resolution

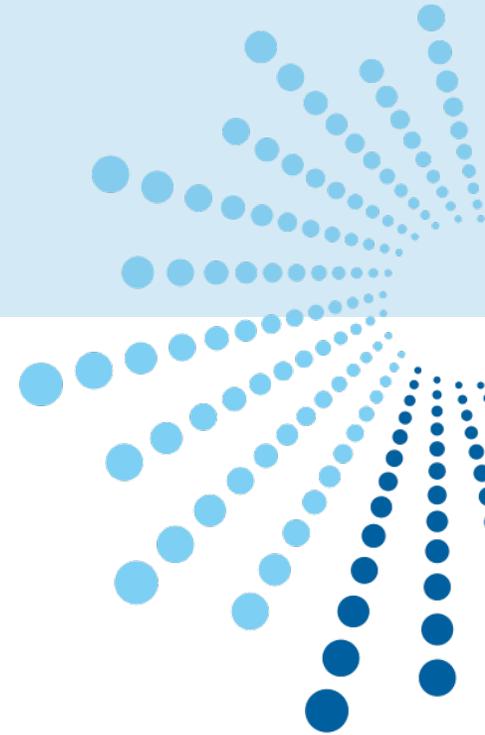
- Investigation and Adjudication process in compliance with Section 106.45



Investigations Post Regulations

03

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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



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

- 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.

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Written Notification Meetings and Sufficient Time to Prepare

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Equal Opportunity to Present Evidence

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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

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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

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“Directly Related” and “Relevant Evidence”

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Directly Related Evidence

- Regulations do not define “Directly Related” Evidence
- Preamble states it should be interpreted using its plain and ordinary meaning.
- Term is broader than:
 - “all relevant evidence” as otherwise used in Title IX regulations, and
 - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act
- Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source

“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?

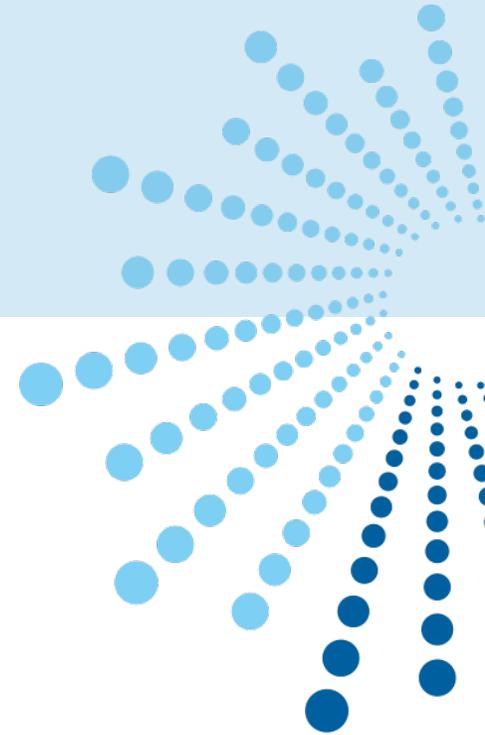
- Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
 - Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight
- Investigators 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

04

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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

Impartiality: Avoiding Prejudgment and Bias

“The Department’s interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what “men” or “women” do or do not do.”

Impartiality: Avoiding Prejudgment and Bias

Practical application of these concepts in investigations

Do not rely on cultural “rape myths” that essentially blame complainants

Do not rely on cultural stereotypes about how men or women purportedly behave

Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases

Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence

Avoid any perception of bias in favor of or against complainants or respondents generally

Employ interview and investigation approaches that demonstrate a commitment to impartiality

Impartiality: Avoiding Bias

Department also rejected commenters' arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience

"Department encourages [schools] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased" WHILE

"exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents"

Impartiality: Avoiding Conflicts of Interest

Commenters argued that investigators and hearing officers employed by schools have an “inherent conflict of interest” because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors

Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents

Department’s response: Department’s authority is over schools, not individual investigators and other personnel, so Department will focus on holding school’s responsible for impartial end result of process, without labeling certain administrative relationships as per se involving conflicts of interest

Impartiality: Avoiding Prejudgment, Bias, and Conflicts of Interest

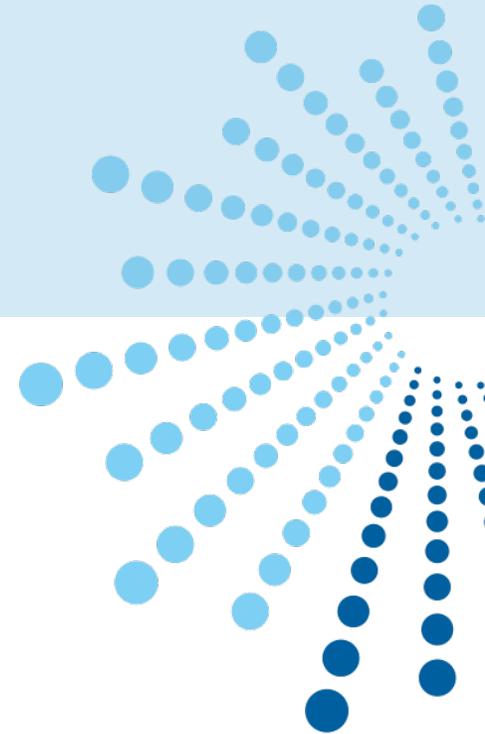
Bottom line

- Follow facts of every individual case
- Investigate in manner that will not allow even a perception of prejudgment or bias for or against any party



Conducting the Investigation

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05

Essential steps of an investigation



Notice of formal investigation



Initial Interviews



Evidence Collection



Report writing

The Process: Developing an Investigative Strategy



Investigation Timeline

Prior History

- Between the Parties
- Of the Parties

Alleged Assault

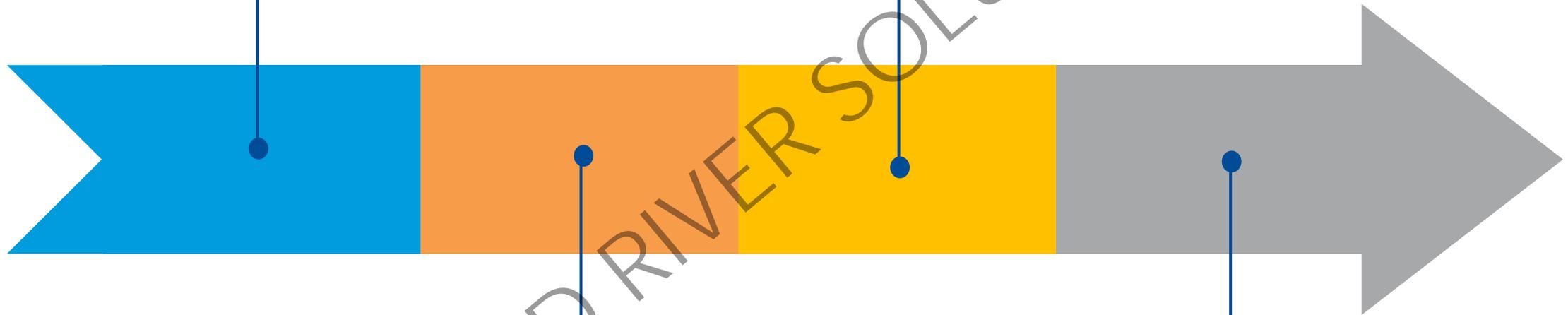
- Consent
- Type of Contact

Pre Alleged Assault

- Pre-Meditation
- Manipulation
- Attempt to Isolate

Post Alleged Assault

- Behaviors
- Communications



Identify and Interview Parties/Witnesses

Interview Objectives



Connect

- Build rapport
- Build trust
- Empower
- Listen



Safety Assessment

- Physical and Emotional Safety of the Victim
- Safety of the Community
- Safety of the Accused



Services

- Advocates
- Police/Campus
- Medical care
- Interim action



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

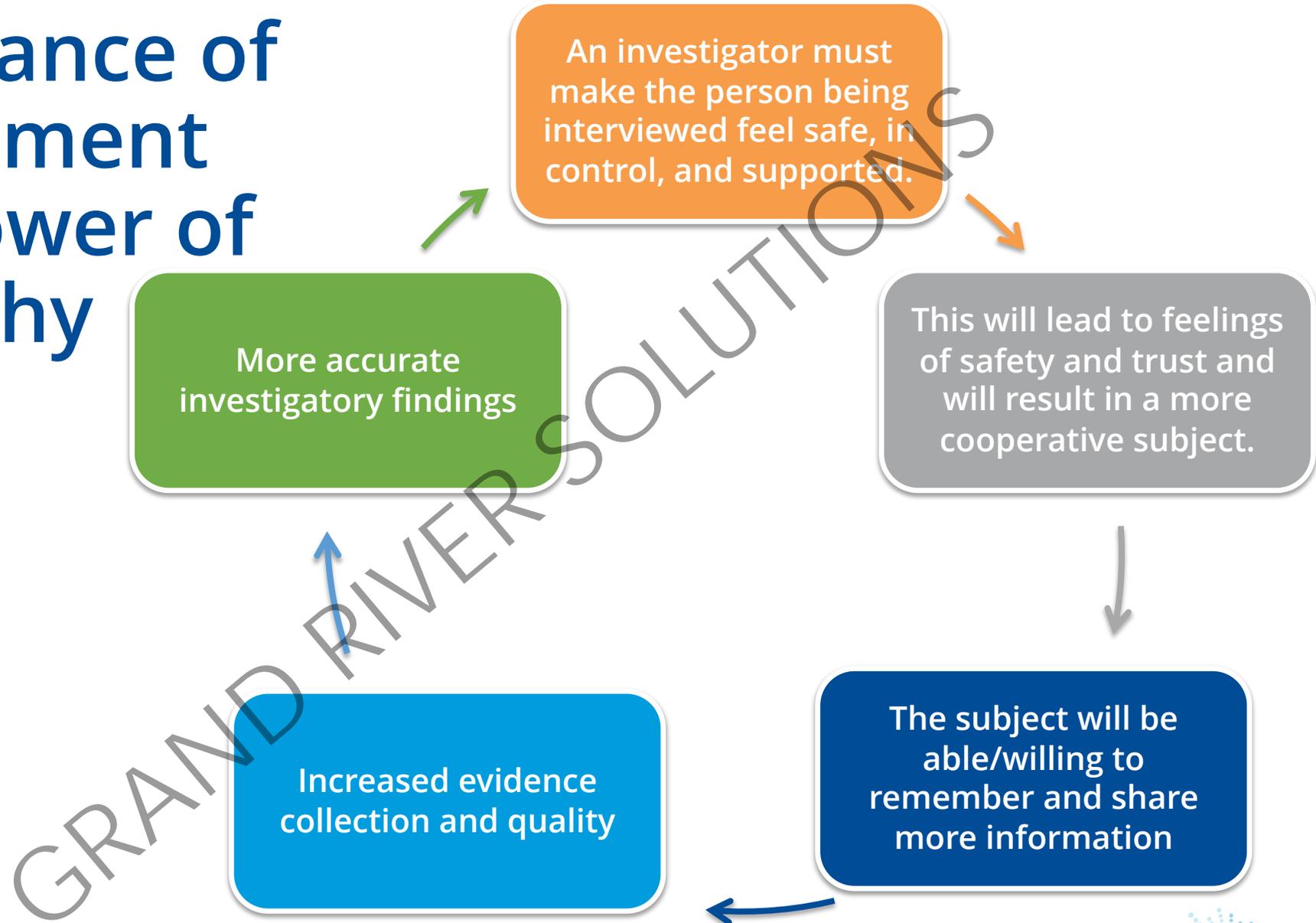
What they should expect of you

- 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

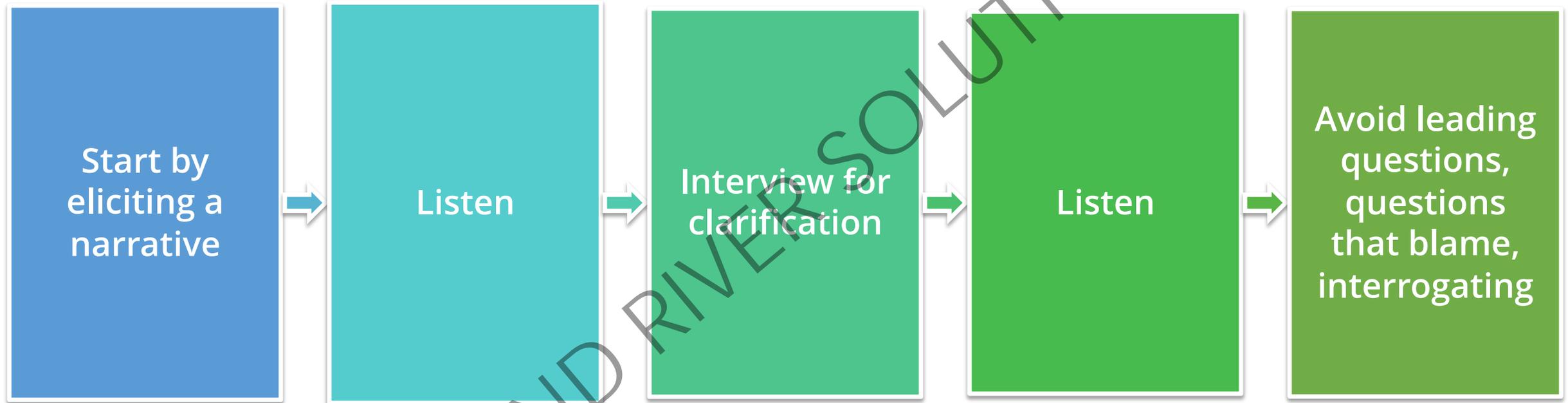
- Honesty
- That they will seek clarity if needed (give them permission to do so)
- That they won't guess or fill in blanks

The importance of empowerment and the power of empathy



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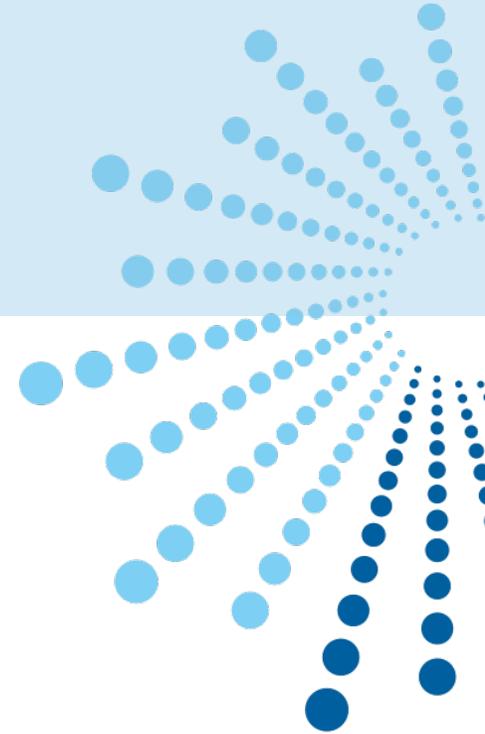
Investigative Interviews





Evidence

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06

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

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

A Thorough Investigation

Is more than evidence collection

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A Thorough Investigation Permits the Decision Maker to Assess



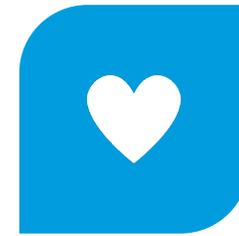
RELEVANCE



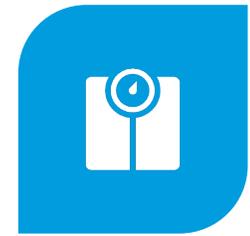
CREDIBILITY



RELIABILITY



AUTHENTICITY



WEIGHT

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“Relevant” Evidence

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

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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
- Your own bias and limited experience

Some Other Evidentiary Issues

- Character evidence
- Polygraph examinations
- SANE reports
- Articles from journals
- Past conduct of complainant, respondent
- Unlawfully obtained evidence

EVIDENCE

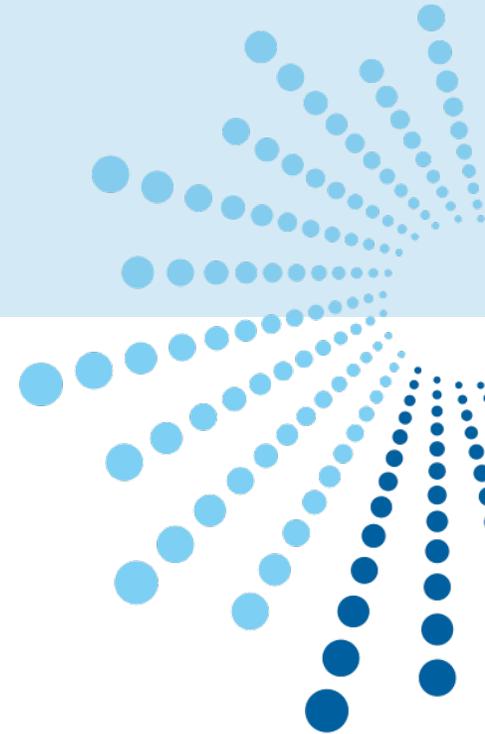


The Investigation Report

Narrowed Jurisdiction and Expansive Procedural Requirements

07

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

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Relevancy Standard

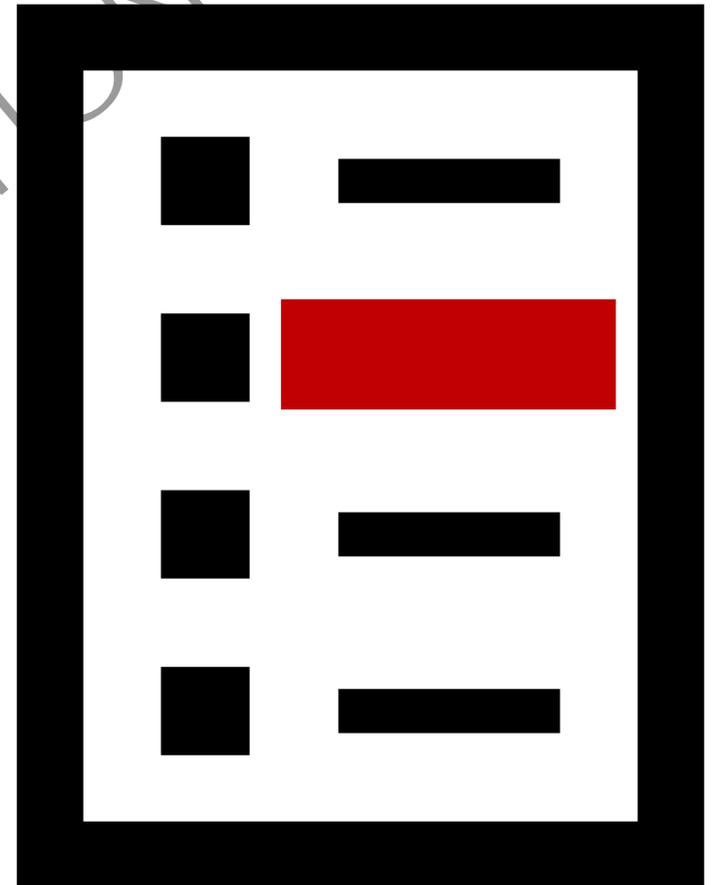
Relevant

- “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.”

Per se Irrelevant

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

Redactions



Additional Requirements



Share the report with the parties and their advisors



In electronic format or hard copy



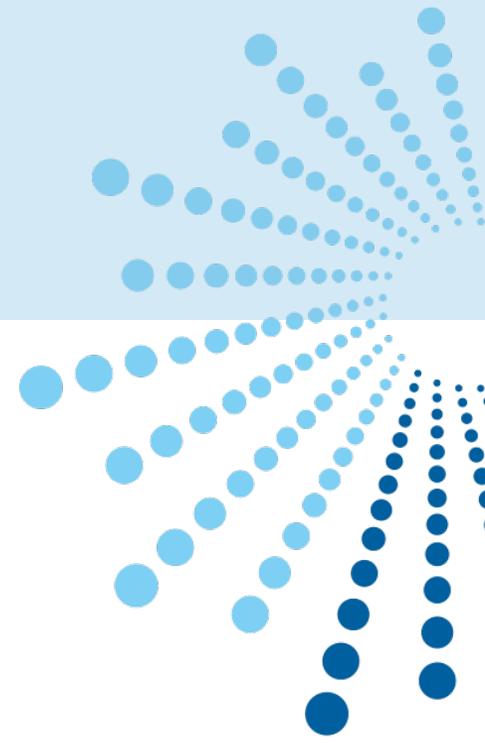
At least 10 days prior to the hearing



The Importance of a Quality Report

7a

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The Purpose of the Report

To allow for advance review

To allow for advance preparation

- By the decision maker
- By the parties

Reduce likelihood of bias in final outcome

Intended Recipients

The Parties

The Advisors

The Decision Maker

The Appeal Panel

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Other Recipients?

Friends of
the parties

Parents

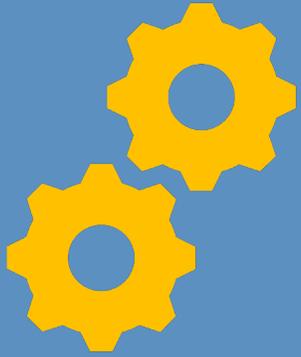
Law
enforcement

Attorneys

Judges

Media

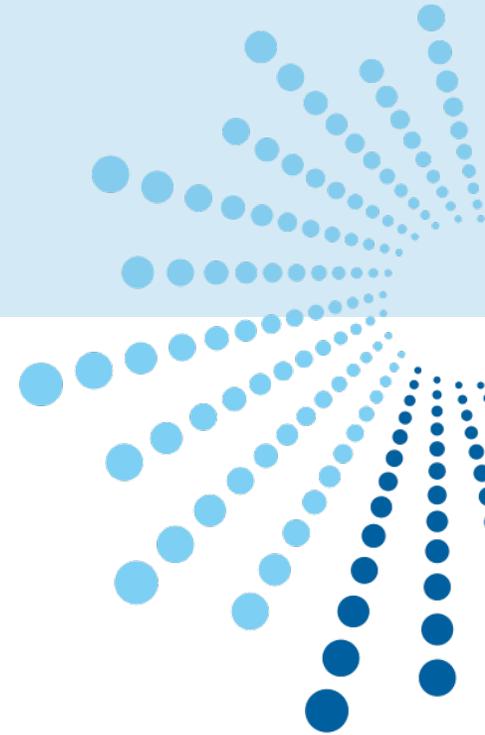
Social Media



Essential Elements of a Quality Report

7b

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Essential Elements

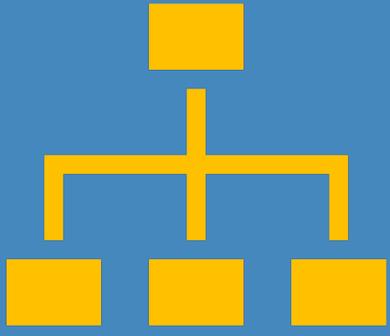
Intentionally organized to enhance comprehension

Factually accurate

Concise

Without editorial or opinion

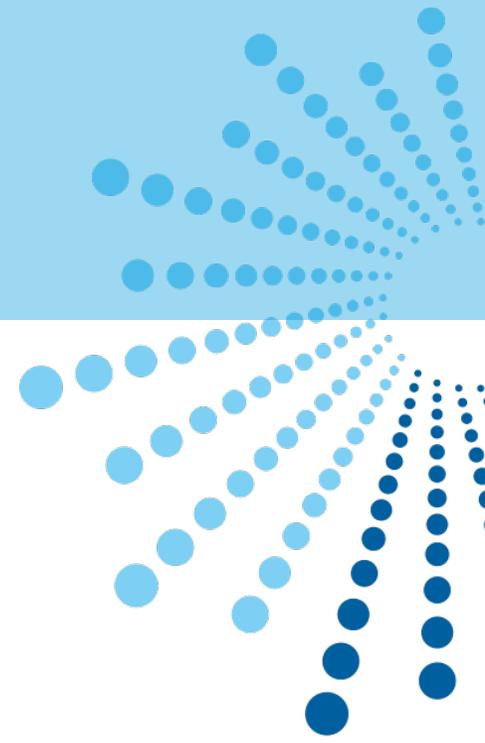
Consistent format



Structure of the Report

7c

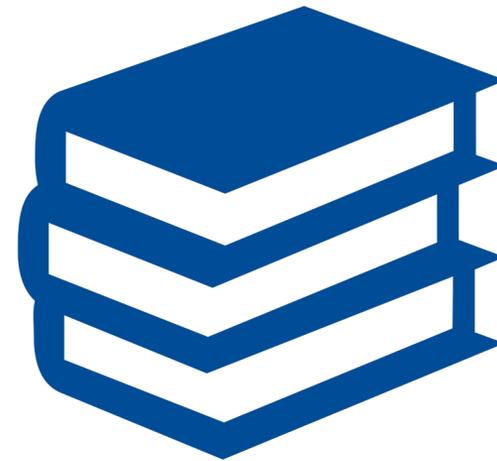
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Report and Record



Summary of the Evidence



Compilation of the Evidence

The Record



Compilation of the evidence.



Organized intentionally and consistently.



Divided into appendices.



Is attached to the report.



Includes a procedural timeline.

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

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Report Structure

Identify Investigators

1. Identify the investigators by name
2. State that they have been properly trained
3. List trainings, or cite documents in the record that detail investigators prior training

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Report Structure

Objective of the Investigation & Report

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



Report Structure

Prohibited Conduct Alleged

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

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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.

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Report Structure Conclusion

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

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Questions?

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