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

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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
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Title IX’s Requirements
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 During the Investigation

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

Institutions cannot place restrictions on who can serve.

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

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

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

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

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

That report will be shared with the parties and they will have 10 more days to comment.
“Directly Related” and “Relevant Evidence”
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.
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
The Proper Application of Trauma Informed Practices
Trauma informed practices provide tools/techniques for interviewing and engaging with the Complainant, Respondent, and Witnesses.

Format/Structure of the Interview

Format of Questions

Approach to Clarification
Trauma Informed Practices are Designed to:

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

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

1. Influence the interpretation of a specific item of evidence;
2. Substitute for missing evidence;
3. To serve as a justification for not doing a full and thorough investigation;
4. Cause a biased belief in the veracity of one or more party.
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
- Disaster
When trauma occurs, there are very real changes in brain function that may affect a person’s ability to make memory and to recount their experience.
Common Characteristics of Disclosures by a Trauma Brain

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

False Report
Regretted Sex
Not Provable

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
Developing an Investigative Strategy
Understand the Scope of the Investigation

- Review the formal complaint
- Ask questions if unsure
The Process
Developing an Investigative Strategy

- Develop Strategy to Collect Evidence
- Identify Potential Evidence
- Identify Witnesses
- Develop a timeline
- Receive Report
Investigation Timeline

Prior History
- Between the Parties
- Of the Parties

Incident
- Consent
- Type of Contact
- Injuries

Pre-Incident
- Communications
- Interactions
- Conduct

Post Incident
- Behaviors
- Communications
The Importance of Organization
Investigative Interviews
Interview Objectives

Connect
Build rapport
Build trust
Empower

Listen
Allow interviewee to share their experience

Clarify
Understand what you have heard
Seek additional information

Evidence Preservation
Text Messages
Photographs
Names and contact info for witnesses
Prior to the Interview

- Secure an appropriate meeting location
- Allow for enough time to conclude the meeting
- If interviewing a party, inform them of their right to have an advisor present.
- Prepare for the meeting:
  - Areas of focus?
  - Other evidence?
  - Go back review what you have
- Provide Written Notice of the Meeting:
  - Advise the parties/witnesses that you will be collecting evidence
Set Expectations

What they should expect of you:
- That you are neutral
- That you will listen, what they are saying is important to you
- That you will keep the information they share private
- What you will do with recording/notes
- That you may have to ask difficult questions
- Patience, respect, and appreciation
- This will not be their only opportunity to speak with you

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 interviewee.

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

Increased evidence collection and quality.

More accurate investigatory findings.
How do we...

Build Rapport and Trust?

Empower?
Rapport and Trust

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

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

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

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?
• 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?
At some point during the interview, it is also important to explore the prior history, if any, between the reporting individual and the accused.
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
- Provide opportunity for the party or witness to review it
- Provide opportunity for party or witness to provide a response
- Incorporate the response
After the Interview: Review

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

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

1. Explain the purpose of the follow up

2. Set the stage for the topics you will be covering

3. Do not avoid asking the hard questions
The “Hard” Questions

- Details about the sexual contact
- Inconsistent evidence/information
- Alcohol or drug consumption
- Probing into reports of lack of memory
- What they were wearing
- Seemingly inconsistent behaviors
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...
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
A Thorough Investigation

is more than evidence collection
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
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?
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

- 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
The Investigative Report and Record
At the conclusion of the investigation, we must create an investigative report that fairly summarizes relevant evidence.
### Relevancy Standard

<table>
<thead>
<tr>
<th>Relevant Evidence</th>
<th>Irrelevant Evidence</th>
</tr>
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<tbody>
<tr>
<td>“Evidence is relevant if:</td>
<td></td>
</tr>
<tr>
<td>(a) it has any tendency to make a fact more or less probable than it would be</td>
<td></td>
</tr>
<tr>
<td>without the evidence; and</td>
<td></td>
</tr>
<tr>
<td>(b) the fact is of consequence in determining the action.”</td>
<td></td>
</tr>
<tr>
<td>Prior sexual history of complainant, with two exceptions</td>
<td></td>
</tr>
<tr>
<td>Legally recognized and un-waived privilege.</td>
<td></td>
</tr>
<tr>
<td>Records related to medical, psychiatric, psychological treatment</td>
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</tbody>
</table>
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
Other Recipients?

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

Objective of the Investigation & Report

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

2. State the objective of the investigation.

3. Briefly state that all procedural steps were followed.

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

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

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

List Witnesses

List those witnesses that were interviewed

List witnesses that were identified, but not interviewed

Simple List

Detailed List
# Example of a Detailed List

<table>
<thead>
<tr>
<th>Witness Name</th>
<th>Witness identified by:</th>
<th>Information offered</th>
</tr>
</thead>
<tbody>
<tr>
<td>John Doe</td>
<td>Reporting Party</td>
<td>Mr. Doe is the Reporting Party's best friend. He was with the Reporting Party the night of the reported incident.</td>
</tr>
<tr>
<td>Jane Doe</td>
<td>Investigators</td>
<td>Jane Doe is the Responding Party's roommate. It is believed that she saw the Reporting Party leave the Responding Party's residence immediately following the reported incident.</td>
</tr>
</tbody>
</table>
Report Structure
Evidence Collected & Summary

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

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