Conducting Fair and Thorough Trauma-Informed Investigations

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June 2023
About Us

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

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

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

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

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

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

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

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

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

Apply 106.45 Procedures

Required Response:
Section 106.45 Procedures

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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 directly related evidence, and 10 days to submit a written response to the evidence prior to completion of the report
- Report summarizing relevant evidence and 10 day review of report prior to hearing
Notice Requirements

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

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

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

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

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

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

Institutions cannot place restrictions on who can serve.

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

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

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

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

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

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

The hearing must occur at least 10 days after the release of the final report.
“Directly Related” and “Relevant Evidence”
Directly Related Evidence

Regulations do not define “Directly Related” Evidence.

Preamble states it should be interpreted using its plain and ordinary meaning.
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 That is Not “Relevant”
Who Decides?

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

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

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

Can be the Title IX Coordinator, although that is disfavored.

The Investigator may not be a decision maker.

Must be trained in accordance with the requirements in the regulations.

Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest.
The Requirement of Impartiality
Section 106.45(b)(1)(iii)
What Constitutes Bias?

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

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

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

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

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

Trauma informed practices must be applied equally to all genders.
The Proper Application of Trauma Informed Practices
Trauma informed practices provide tools/techniques for interviewing and engaging with the Complainant, Respondent, and Witnesses.
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
The Importance of Understanding the Potential Impact of Trauma
An event that is experienced as terrifying, horrifying, or threatening and that is coupled with an actual or perceived lack of control.
Examples of Events that Might Trigger a Traumatic Response

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

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

- False Report
- Regretted Sex
- Not Provable

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

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

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

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

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

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

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

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

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

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

Prior History
- Between the Parties?
- Of the Parties?

Pre-Incident
- Communications?
- Interactions?
- Conduct?

Incident
- Consent?
- Type of Contact?
- Injuries?

Post Incident
- Behaviors?
- Communications?
The Importance of Organization
Investigative Interviews
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
Set Expectations
How do we...

Build Rapport and Trust?

Empower?
Empowerment

- Duration
- Permission to ask questions
- Space
- Clear Expectations
- Permission to seek clarity
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...

Help me understand your experience?

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

What are you able to tell me about your experience?

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

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

**Avoid:**
- Interrogation
- Questions that blame
- Questions that imply doubt
- Leading questions
Capture the Entire Experience

• Ask about the physical and emotional reactions to the incident.
• Conclude with very open-ended questions:
  • What was the most difficult part of this experience for you?
  • Is there something that stands out/that you just can't stop thinking about?
  • Is there anything more that you would like me to know?
At some point during the interview, it is also important to explore the prior history, if any, between the complainant and the respondent, and the history of the parties, individually.
And The After

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

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

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

Discuss submission of evidence.

Explain statement review process.

Explain next steps in the process.

Keep the lines of communication open.

Review available support, privacy requirements, and prohibition against retaliation.
After the Interview: Actions

Memorialize the Interview in writing.
A Note About Witness Summaries

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

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

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

Reflection

Reflect.

Is there something you missed or forgot to ask?

Do you need clarity on any of the information shared?

Has this interview revealed additional evidence that you want to explore or collect?

Has evidence of additional policy violations been shared?
Follow Up Interviews

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

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

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

How to Ask the Hard Questions
What Questions Do You Have for Quinn?

Casey and I have been friends for a few weeks. On Friday night, we were hanging out alone in my room, watching a movie. We started to make out, and I was ok with that. After making out for a while, Casey started touching me down there. Then Casey tried to have sex with me. Casey knew that I didn’t want to have sex but kept trying anyway. Casey was being really coercive, and so I just went along with it. Casey raped me and I want Casey to be held accountable.
When I got to the party, I was already lit. I kept letting Marc get me drinks anyway. At some point, I just kinda don’t remember anything. And then I woke up in Marc's bed and it was morning. I had all my clothes on, but I know someone had sex with me. I could feel it. I just wanted to go, so I did. Before I left Marc woke up and tried to talk to me but I wasn’t hearing it. He looked guilty and I could tell he felt bad
What Questions Do You Have for Cameron?

“Pat and I have been together for about a month and have been intimate for the last two weeks. We went out with my friends on Friday night and Pat got really drunk. At some point we ran into my ex and Pat was really jealous, so we left. When we got back to my place, I thought things were fine. We started hooking up and all of a sudden Pat's mood changed. Pat got really aggressive and choked me. He was so angry and I was so scared.”
Evidence Collection and Assessment
Evidence

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

Black’s Law Dictionary
Types of Evidence

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

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

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

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is it relevant?</td>
<td>Is the evidence important, or of consequence, to the fact-finding process?</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 and can the decision maker rely on it?</td>
</tr>
<tr>
<td>What weight, if any, should it be given?</td>
<td>How important is the evidence to the fact-finding process?</td>
</tr>
</tbody>
</table>
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 That is Not “Relevant”
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
- Have others review and comment on authenticity
- Request originals
- Obtain originals from the source
- Are there other records that would corroborate?
Assessing Credibility and Reliability

No formula exists, but consider the following:

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

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

Relevant Evidence
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:
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
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 Evidence File

Summary of the Evidence

Compilation of the Evidence

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The Evidence File

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

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

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

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

**Appendix D**
The procedural timeline.
Structure of the Report

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

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

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

1. Cite Jurisdictional Elements

2. State all grounds for Jurisdiction
Report Structure

Identify Investigators

1. Identify the investigators by name

2. Investigator's training belongs in file, not in report
Report Structure

Objective of the Investigation & Report

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

2. State the objective of the investigation

3. Briefly state that all procedural steps were followed

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

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

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

List Witnesses

List those witnesses that were interviewed

List witnesses that were identified, but not interviewed

Simple List

Detailed List
# Example of a Detailed List

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

A place to communicate, share, educate, learn

for HIGHER EDUCATION PROFESSIONALS working in
Title IX, Equity & Clery
Thank you!

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