



# Title IX's Requirements

01

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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



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# 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





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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.



# 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.

## Common Characteristics of Disclosures by a Trauma Brain

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Inconsistent

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Non-linear

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Fragmented

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Lack of detail

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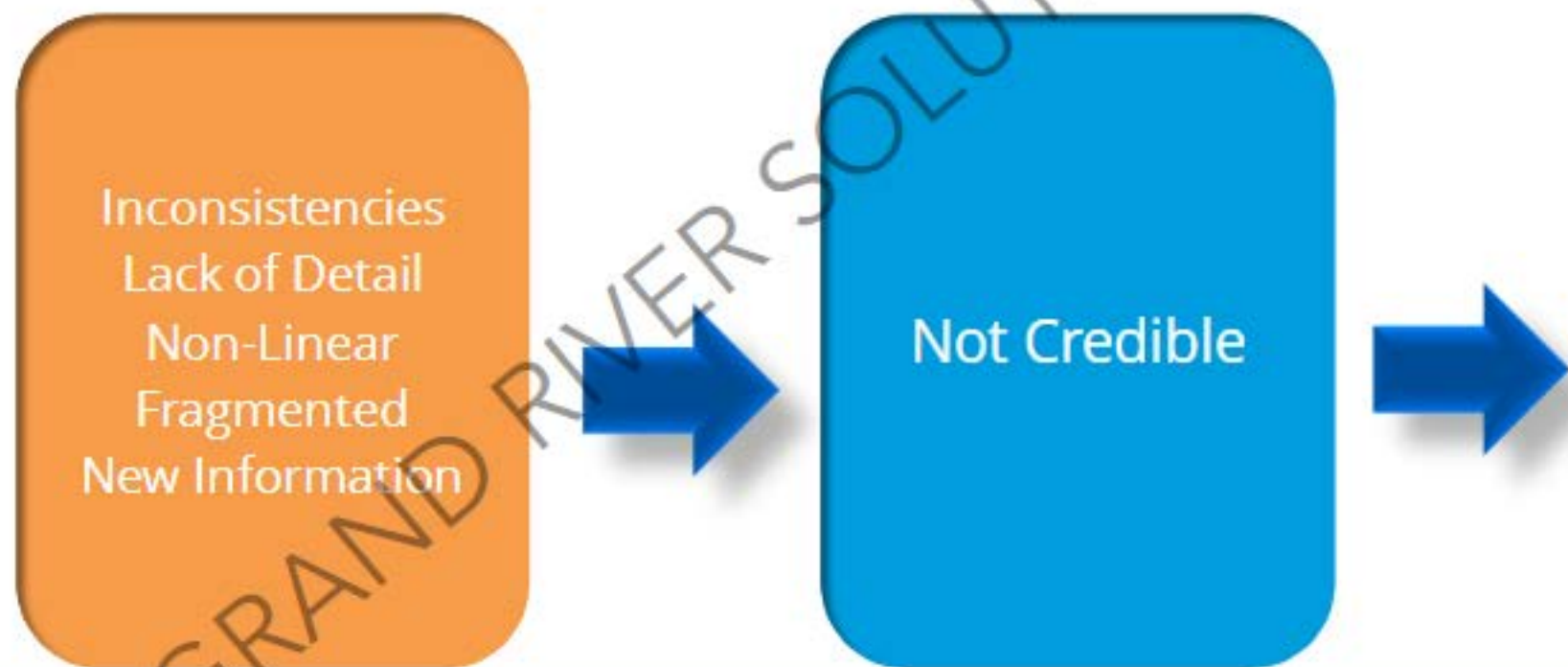
New information

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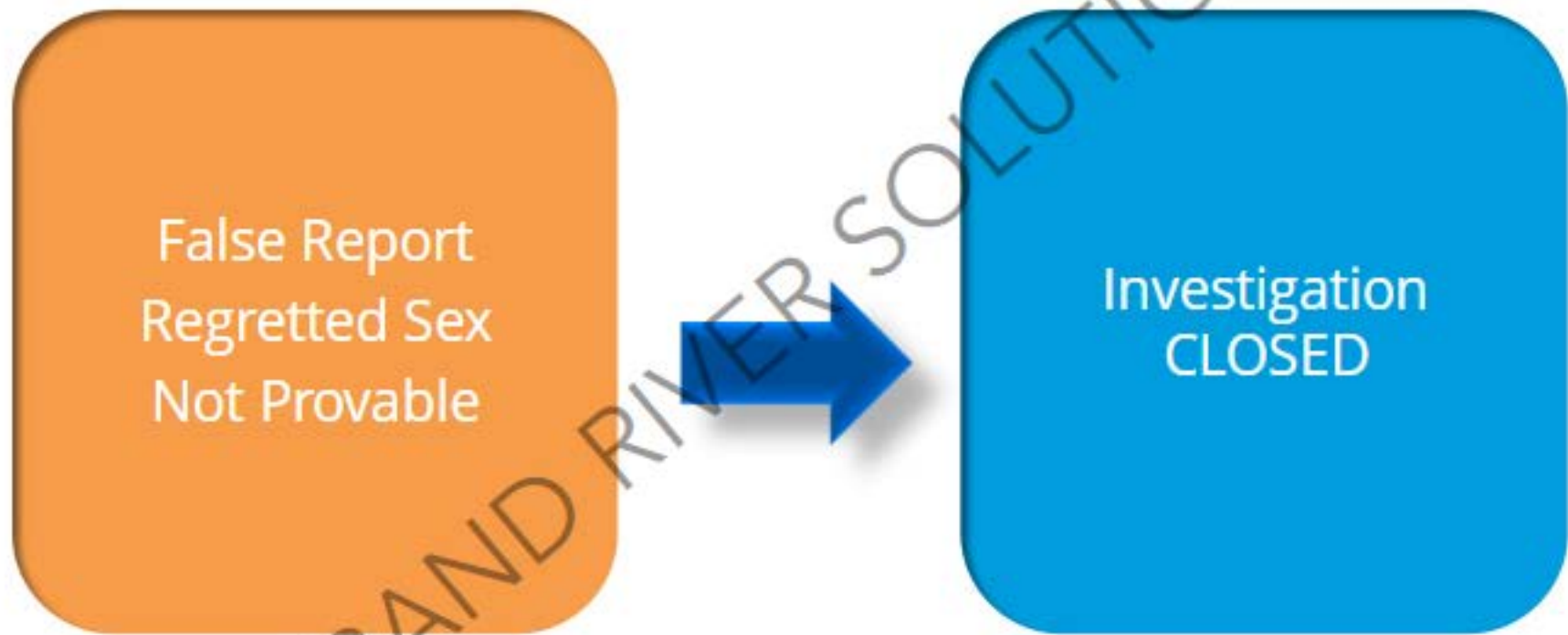
Affect is unexpected



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...





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



# The Future

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

This is essential to a fair and thorough investigation.

When presented with the following characteristics in a disclosure,

Inconsistencies  
Lack of Detail  
Non-Linear  
Fragmented  
New Information

An investigator who understands trauma will....







**Continue their  
investigation.**



# Developing an Investigative Strategy

04

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# Essential Steps of an Investigation



Notice of Formal Investigation



Initial Interviews



Evidence Collection



Evidence Review



Additional Evidence Collection/Follow Up Interviews



Report Writing



# Understand the Scope of the Investigation

Review the formal complaint

Ask questions if unsure

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# 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





# 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





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# Investigative Interviews

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# 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

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# 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

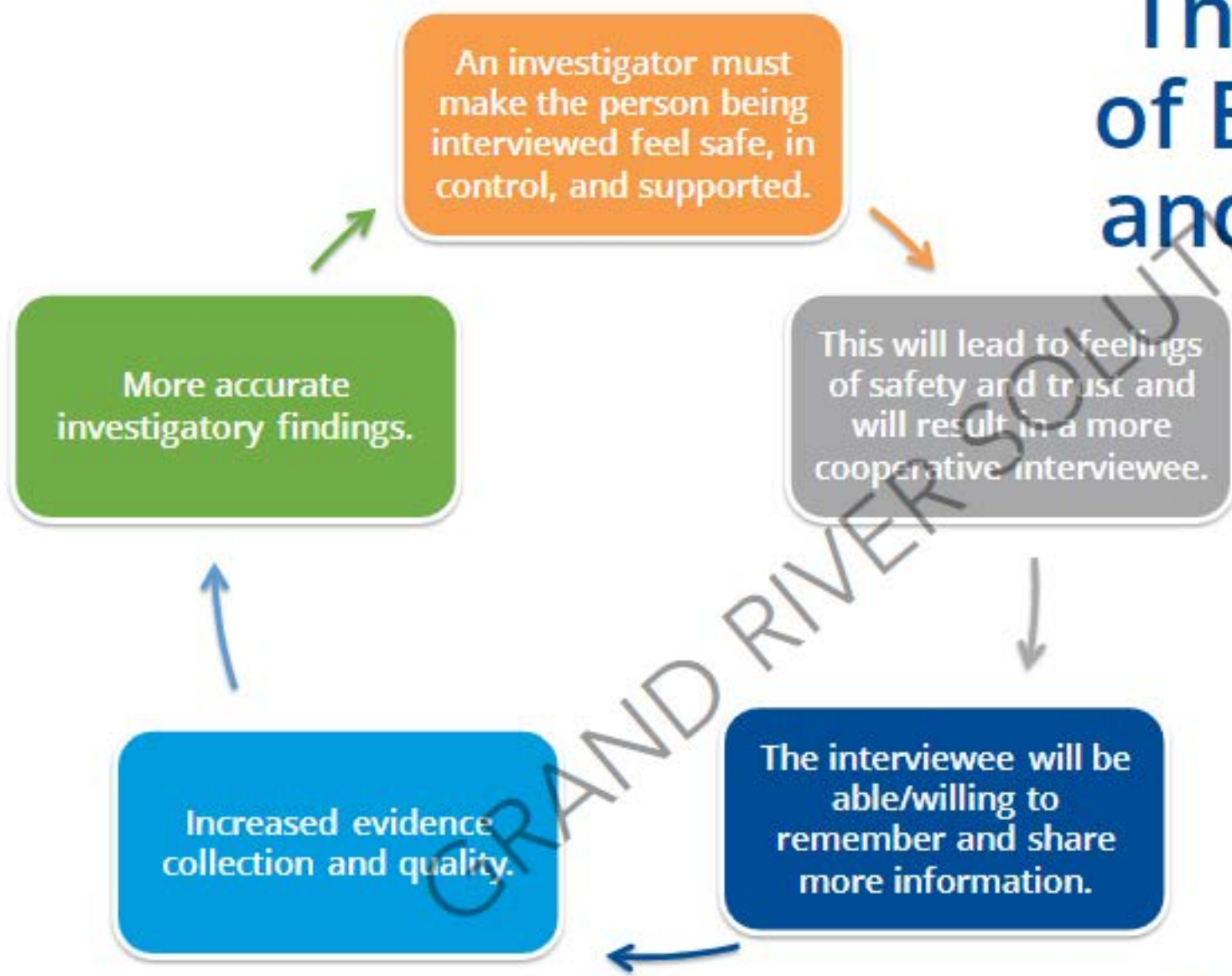
## What they should expect of you

- 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

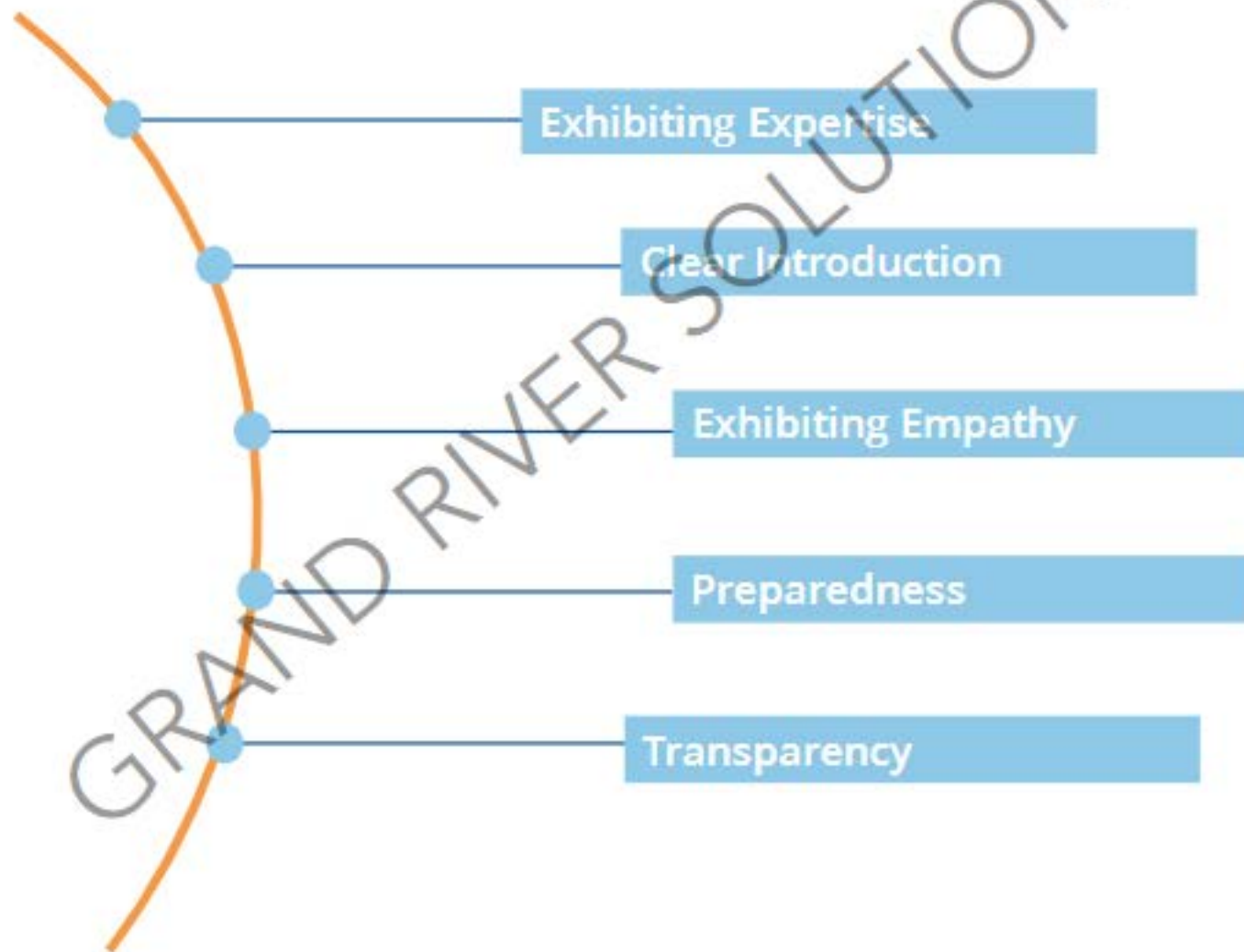
- Honesty
- That they will seek clarity if needed (give them permission to do so)
- That they won't guess or fill in blanks

# The Importance of Empowerment and the Power of Empathy



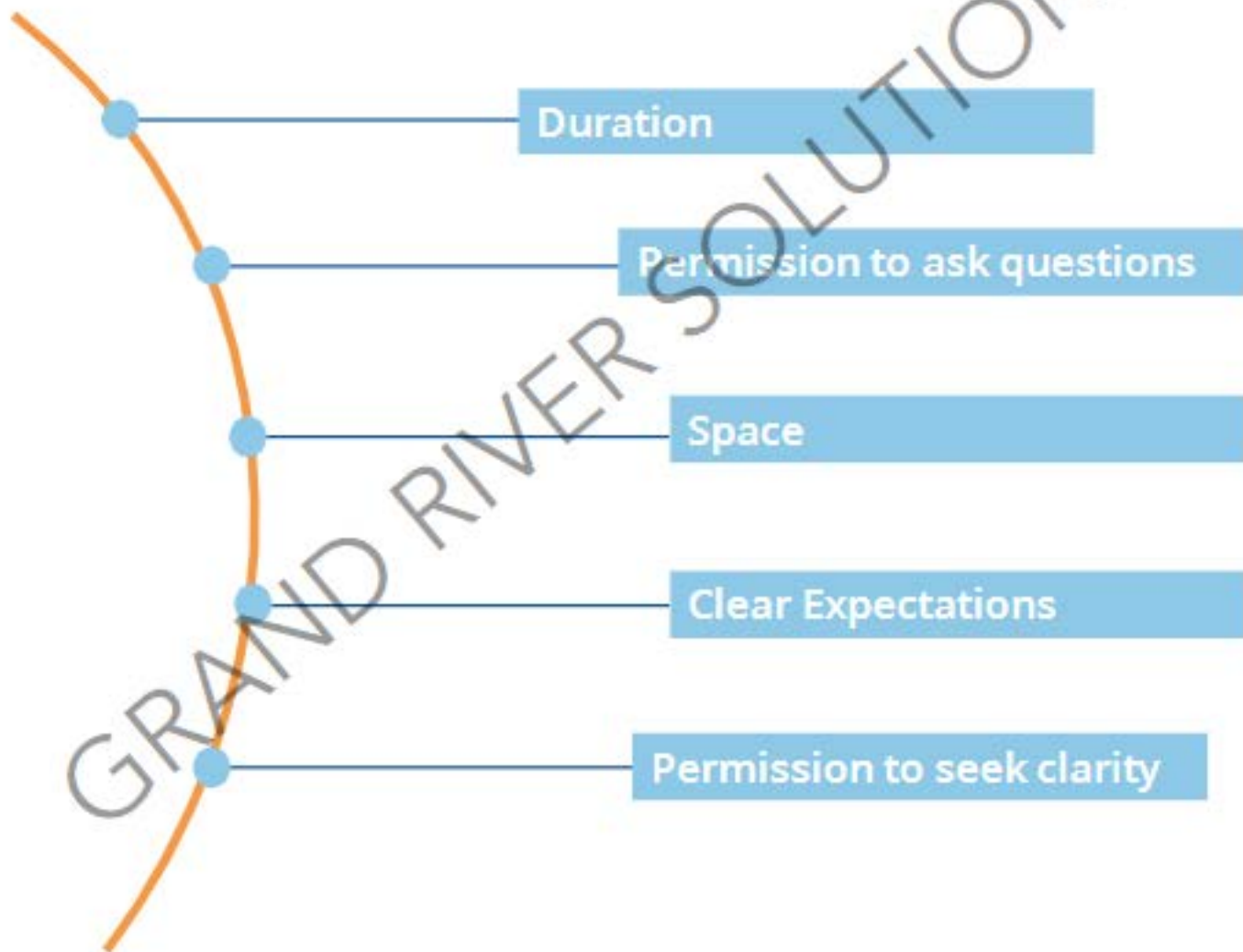


# Rapport and Trust





# Empowerment





# Investigative Interviews



# Start the interview by eliciting a narrative...

Where would you like to begin?

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

Allow the person to speak uninterrupted. This takes patience.

What are you able to tell me about your experience?



Next, ask questions that are intended to clarify and more deeply explore the information and details provided by the person in their narrative.

### Do Ask:

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

### Avoid:

- Interrogation
- Questions that blame
- Questions that imply doubt
- Leading questions



## 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?

## The Before

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 After

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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 complainant and respondent



# 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 and prohibition  
against retaliation.





## After the Interview: Actions

Memorialize the Interview in writing.

Notes  
Summary  
Transcript

Provide opportunity for the party or witness to review it.

Provide opportunity for party or witness to provide a response.

Incorporate the response.

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# 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

Do not avoid asking the hard questions.

# The “Hard” Questions

Details about the  
sexual contact

Seemingly  
inconsistent  
behaviors

Inconsistent  
evidence/information

What they were  
wearing

Alcohol or drug  
consumption

Probing into reports  
of lack of memory

# How to Ask the Hard Questions

Lay a foundation for the questions.

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

Be deliberate and mindful in your questions:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...

# Evidence

“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.

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# Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.



Is it authentic?

Is the item what it purports to be?



Is it credible/reliable?

Is the evidence worthy of belief?



What weight, if any, should it be given?

Weight is determined by the finder of fact!

# A Thorough Investigation Permits the Decision Maker to Assess



Relevance



Credibility



Reliability



Authenticity



Weight

# “Relevant” Evidence

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

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

“Evidence is relevant if:

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



# Opinion Evidence

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When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?

# Opinion Evidence: Try it!

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

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

"Taylor was wasted. Like totally messed up. There is no way they could have given permission for sex"





# Assessing Authenticity

Investigating the products of the Investigation

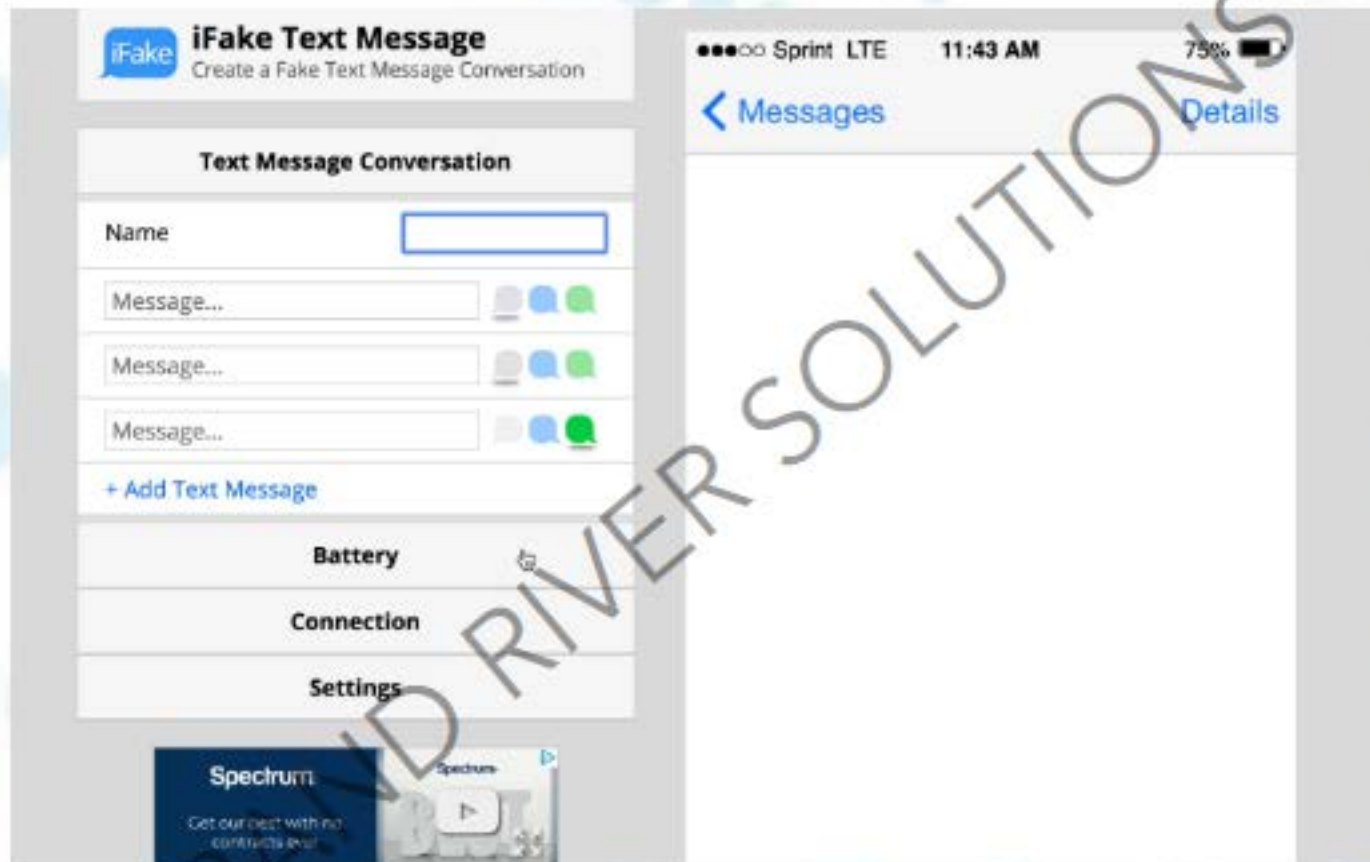
Never assume that an item of evidence is authentic.

Ask questions, request proof.

Investigate the authenticity if necessary.

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# Is it authentic?

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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



# Barriers to Evidence Assessment

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

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# The Investigative Report and Record

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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

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

## Irrelevant Evidence

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





# Redactions

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# Additional Requirements



Share the report with the parties and their advisors



In electronic format or hard copy



At least 10 days prior to the hearing

# The Purpose of the Report

**To allow for advance Review**

**To allow for advance Preparation**

- By the Decision Maker
- By the Parties

**Reduce likelihood of bias in final outcome**

# Intended Recipients

The Parties

The Advisors

The Decision Maker

The Appeal Panel

## Other Recipients?

Friends of  
the parties

Parents

Law  
enforcement

Attorneys

Judges

Media

Social media

# Essential Elements

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Intentionally organized to enhance comprehension

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Factually accurate

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Concise

---

Without editorial or opinion

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Consistent format

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# Report and Record

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Summary of the Evidence



Compilation of the Evidence



# The Record

```
graph LR; A[The Record] --> B[Compilation of the evidence]; A --> C[organized intentionally and consistently]; A --> D[Divided into Appendices]; A --> E[Is attached to the report]; A --> F[Includes a procedural timeline];
```

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

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1. Cite Jurisdictional Elements

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2. State all grounds for Jurisdiction

# Report Structure

## Identify Investigators

1. Identify the investigators by name

2. State that they have been properly trained

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

# Report Structure

## Objective of the Investigation & Report

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

# Report Structure

## Prohibited Conduct Alleged

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

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

# Report Structure

## List Witnesses

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List those witnesses that were interviewed

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List witnesses that were identified, but not interviewed

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Simple List

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Detailed List

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# 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

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

# Report Structure

## Conclusion

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

# Questions?



Leave Us Feedback:



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