Advanced Title IX Investigator Training and Certification

Welcome & Faculty Introductions

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March 24 – 25, 2021

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RESOURCES

Welcome to Zoom and its features:

A. Mics (keep muted please)
B. Camera (option to keep on or off)
C. Chat Box
   - Use to ask questions or respond
   - Send Rabia a private message for anonymous questions
   - To find downloadable files during the presentation
   - To send private messages to each other or host
D. Recording (for quality purposes only – not for distribution)
E. Participant List with Emoji's
   - Change name option (hover over your name, select "more" then "rename" to change your name)

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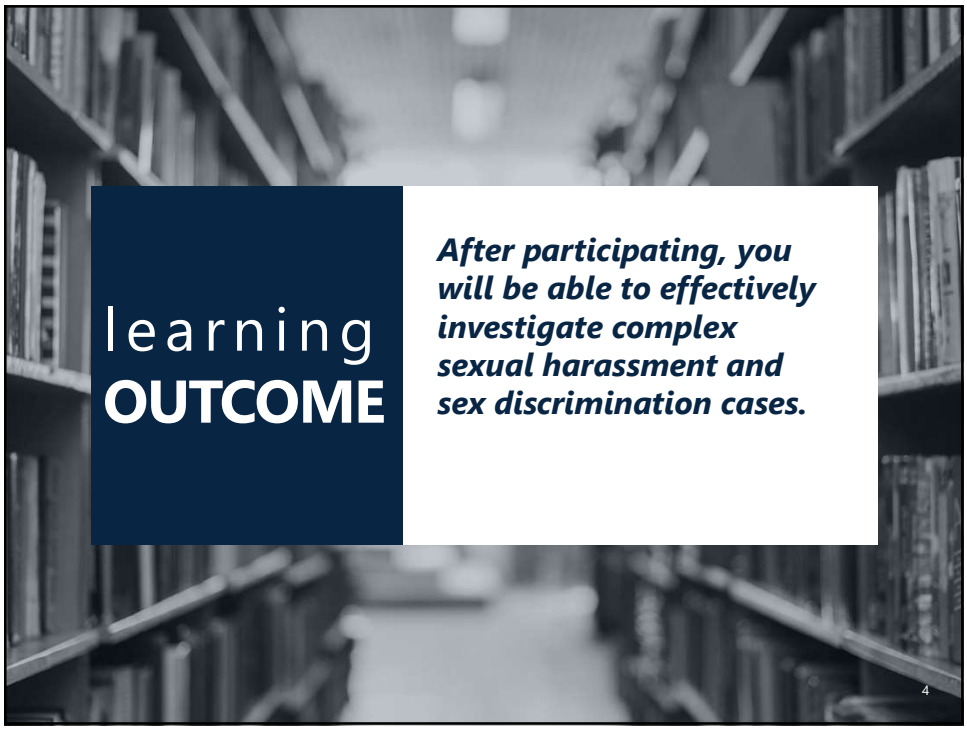

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AGENDA

March 24, 2021

1. The New Era of Title IX Investigations
2. Intro of the Five Stages of Investigation and Scenario
3. Stage 1: Prepare
4. Stage 2: Gather
5. Autonomy, Neutrality, and Objectivity
6. Day One Q&A & Networking Reception

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AGENDA

March 25, 2021

1. Understanding Witness Testimony Challenges
2. Confronting Interviewing Challenges
3. Small Group Activity: Mock Interviews
4. Stages 3&4: Compile and Assess for Relevance
5. Stage 5: Drafting the Investigation Report
6. Testifying at the Hearing
7. Final Q&A and Conference Wrap up

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Welcome AI Members!

Agnes Scott College
Alamo Colleges District
Baylor University
Case Western Reserve University
Clarke University
Colorado State University – Pueblo
Eastern Kentucky University
El Camino Community College District
Fayetteville State University
Flagler College
Grand Valley State University
Humboldt State University
Kentucky State University
Iowa Wesleyan University
Lee College
Loyola University Chicago
Macalester College
Marquette University
Mills College
Morgan State University
North Carolina State University
North Hennepin Community College
Northwest College
Norwich University
Saint Leo University
Sam Houston State University
San Jose State University
State Technical College of Missouri
The Alamo Colleges
Tri County Technical College
Troy University
Truckee Meadows Community College
University of California, Santa Barbara
UH Maui College
University of Denver
University of Nevada, Las Vegas
University of Nevada, Reno
University of Phoenix
Western Carolina University
Wichita State University
Yavapai College

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Meet Your Expert Faculty

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#1

The New Era of Title IX Investigations

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Investigative Process: 30,000-foot overview

Grievance Process (generally)

- The filing of a formal complaint of sexual harassment triggers the grievance process set forth in §106.45.
- The § 106.45 grievance process includes:
  - Investigation conducted by a neutral, objective investigator(s)
  - Live-hearing providing for cross-examination by the advisor for both parties
  - Appeal

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Investigative Process – 1 to 3

1. Formal complaint filed.
2. Title IX Coordinator assigns a trained neutral/unbiased investigator to investigate the allegations.
3. Notice of Allegations sent to Parties. §106.45(b)(2)

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Investigative Process – 4, 5, and 6

4. Investigator requests and conducts interviews with the complainant and respondent.
   - Interviews may be conducted virtually!
5. Investigator requests and obtains physical evidence.
6. The parties have equal opportunity to present witnesses and evidence.
   - The investigator may independently identify and interview witnesses and obtain evidence other than offered by the parties.

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Investigative Process – 7 and 8

7. When the investigator finishes gathering the available evidence, the investigator compiles all the information *"directly related to"* the allegations raised in the formal complaint into the "Investigative File." §106.45(b)(5)(vi)
8. The investigator sends the parties and their advisor the "Investigative File" for review and response.
   - Party written responses are attached to the Investigative File and shared with other party and their advisor.
   - If responses offer new evidence, investigator may want to give the other party a brief period of time to respond—but only to the new evidence.

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Investigative Process – 9 and 10

9. Investigator drafts an "Investigative Report" that fairly summarizes the relevant evidence and sends it to the parties and their advisors for review and response.
   - Parties may submit a written response to the Investigative Report, which will be shared with the other party and their advisor and attached to the Investigative Report. §106.45(b)(5)(vii).
10. Down the road… Investigator likely testifies at the hearing. May be called as a witness by either party or decision-maker(s).

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Investigative Process – Drop the Mic!

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RESOURCE
Rights of the Parties within the Investigative Process
(*see* handout)
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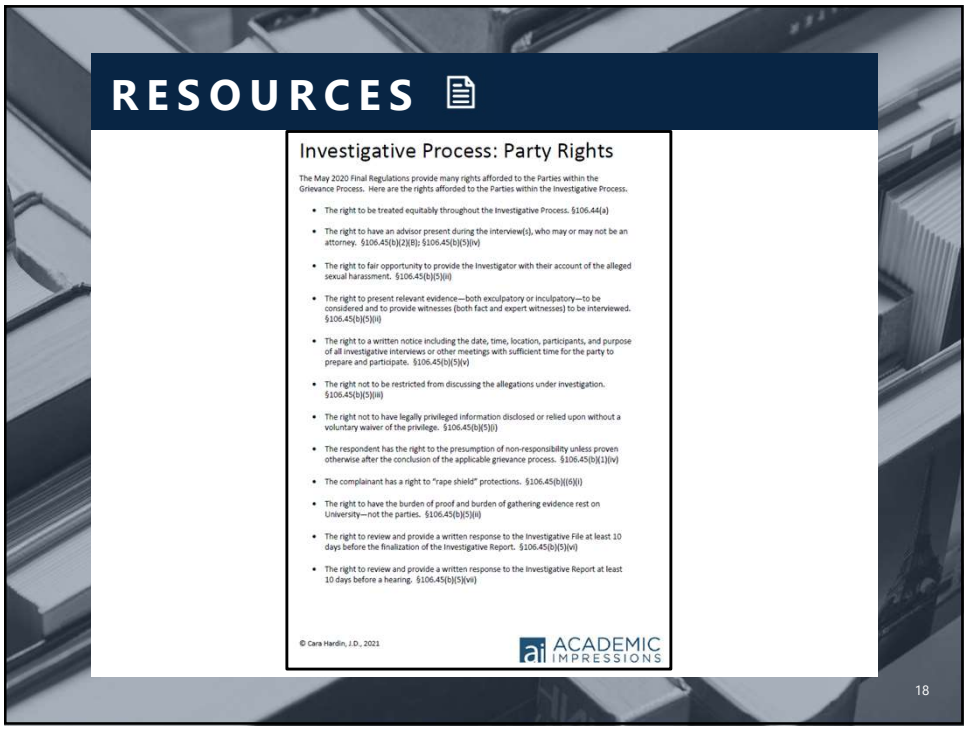
RESOURCES
Investigative Process: Party Rights
The May 2020 Final Regulations provide many rights afforded to the Parties within the Grievance Process. Here are the rights afforded to the Parties within the Investigative Process.
• The right to be treated equitably throughout the Investigative Process. §106.44(a)
• The right to have an advisor present during the interview(s), who may or may not be an attorney. §106.45(b)(2)(B); §106.45(b)(5)(iv)
• The right to fair opportunity to provide the Investigator with their account of the alleged sexual harassment. §106.45(b)(5)(iii)
• The right to present relevant evidence—both exculpatory or inculpatory—to be considered and to provide witnesses (both fact and expert witnesses) to be interviewed. §106.45(b)(5)(ii)
• The right to a written notice including the date, time, location, participants, and purpose of all investigative interviews or other meetings with sufficient time for the party to prepare and participate. §106.45(b)(5)(v)
• The right not to be restricted from discussing the allegations under investigation. §106.45(b)(5)(iii)
• The right not to have legally privileged information disclosed or relied upon without a voluntary waiver of the privilege. §106.45(b)(5)(i)
• The respondent has the right to the presumption of non-responsibility unless proven otherwise after the conclusion of the applicable grievance process. §106.45(b)(1)(iv)
• The complainant has a right to "rape shield" protections. §106.45(b)((6)(i)
• The right to have the burden of proof and burden of gathering evidence rest on University—not the parties. §106.45(b)(5)(iii)
• The right to review and provide a written response to the Investigative File at least 10 days before the finalization of the Investigative Report. §106.45(b)(5)(vi)
• The right to review and provide a written response to the Investigative Report at least 10 days before a hearing. §106.45(b)(5)(vii)
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#2

Introduction of the Five Stages of the Investigation and Scenario

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CHAT

What does it mean to "investigate?"

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Investigative Process: Evidence

To investigate a formal complaint is to gather the information (evidence) pertaining to the allegations in the formal complaint, including:

- Inculpatory information that tends to show the allegations are true, and
- Exculpatory information that tends to show the allegations are not true.

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Examples of Evidence

Example of inculpatory evidence:

After the alleged sexual misconduct occurred, the respondent sent a text message to the complainant stating, "I'm sorry, I should have listened when you said no."

Example of exculpatory evidence:

The respondent is tall with short hair. The video from the scene of the alleged misconduct shows that the perpetrator is short with long hair.

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Investigative Process: Five Stages

1. Prepare
2. Gather
3. Compile
4. Assess for relevance
5. Summarize relevant evidence

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Scenario

FACT PATTERN

On October 31, 2020, Hall Director Mazie Martin contacted the Title IX Coordinator to report an incident potentially falling under the University's Sexual Harassment and Discrimination Policy (the "Policy"). Mazie explained that Foster-Harper resident, Alex Ahart, approached her about an altercation she observed involving another Foster-Harper resident, Bailey Benson. Alex shared the following information with Mazie.

On October 31, 2020, around 6:15 p.m., Alex walked from his residence hall room to the bathroom on the 5th-floor of Foster-Harper. As Alex passed the 5th-floor study room, Alex saw a physical altercation between Bailey and another student. Specifically, Alex saw Bailey on the ground, with the other student on top of Bailey. Alex made eye contact with the student. This caused the student to jump off Bailey. Alex said that Bailey was crying. Alex kept walking, unsure of what to think, went to the bathroom, and a couple of hours later contacted Mazie. Alex does not know the name of the student who was on top of Bailey but thinks it might have been Bailey's romantic partner.

The Title IX Coordinator contacted Bailey, who said that the altercation involved Bailey's ex-romantic partner, Quinn Quimby. Bailey told the Title IX Coordinator Quinn physically assaulted Bailey in the study room. During their meeting with the Title IX Coordinator, Bailey shared additional concerns about Quinn's behavior that occurred after they broke up.

The Title IX Coordinator discussed Bailey's rights under the Sexual Harassment and Discrimination Policy (the "Policy"), including Bailey's right to file a sexual harassment formal complaint and supportive measures designed to preserve or restore equal access to university education programs or activities.

On November 2, 2020, Bailey filed a formal complaint against Quinn Quimby, alleging that Quinn engaged in dating violence and hostile environment sexual harassment against them. Specifically,

- Bailey alleges that on October 31, 2020, Quinn placed Bailey in a chokehold, forced Bailey to the

***See* Chat to download fact pattern**

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QUESTIONS?

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Stage 1: Prepare

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Stage 1: Prepare (Steps 1-3)

I. Thoroughly review Notice of Allegations

II. Who is involved? (Students, faculty, staff?)

III. What Title IX/policy offense(s) are you investigating?

- Quid Pro Quo Sexual Harassment
- Hostile Environment Sexual Harassment
- Sexual Assault
  - Rape, sodomy, fondling, incest, statutory rape
- Dating violence
- Domestic violence
- Stalking
- Sex Discrimination

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Stage 1: Prepare (Step 4)

IV. What are the "elements" of the offense(s) at issue?

"Carnal knowledge"

Example: Rape

1. The penetration of any sort
2. Of the penis and the vagina (attempt to do the same)
3. Without complainant's consent → Check policy definition for consent
4. Including instances where the complainant is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Under legal age of consent or incapacitation (see policy for definition of incapacitation)

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Fact Pattern

What offense(s) are implicated within the fact pattern?

Let's break down the elements of those offense(s).

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Stage 1: Prepare (Step 5)

V. Evidence available pre-interviews

- Email reporting misconduct (i.e., from Hall Director, RA, Campus Safety)
- Campus video footage
- Campus access-card record
- Police reports

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Fact Pattern

What evidence may be available pre-interviews?

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Stage 1: Prepare (Steps 6-7)

VI. Interview list

- Complainant
- Respondent
- Witnesses

VII. What information are you seeking from each person?

VII. Order of interviews

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Fact Pattern

- **Preliminary interview list (will be updated as you progress)**
- **What information are you seeking from each person?**
- **Order of the interviews?**

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Stage 1: Prepare (Step 8)

VIII. Create Investigator Log

FICTICIOUS STATE UNIVERSITY – TITLE IX OFFICE

INVESTIGATOR INVESTIGATION LOG

Complainant: Bailey Benson

Title IX Coordinator: Carmen Sandiego

Respondent: Quinn Quimby

Investigator: Cara Hardin, Title IX Deputy Coordinator

Date	Recorded By	Notes
3/15/21	CBH	Received and reviewed Notice of Allegations.
3/16/21	CBH	Emailed parties Notices of Interview and calendar appointments for Microsoft Teams video meeting.
3/17/21	CBH	Received email from Complainant with the selection of and contact information for their advisor. Sent advisor (copied Complainant) information about the advisor role within the Investigative Process.
3/20/21	CBH	Interview with Complainant. Advisor present. Reviewed investigative process. Conducted questioning and requested/obtained physical evidence.
3/21/21	CBH	Emailed interview transcript to Complainant and their advisor for review, edit, and approval.
3/25/21	CBH	Interview with Respondent. No advisor present. Reviewed investigative process, including right to an advisor. Conducted questioning and requested/obtained physical evidence.
3/26/21	CBH	Emailed interview transcript to Respondent for review, edit, and approval.
3/28/21	CBH	Respondent emailed redlined additions and clarifications within interview transcript.

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Stage 1: Prepare (Step 9)

IX. Outline party/witness interviews

Complainant's interview outline

- Build rapport
- How know the respondent?
- What happened?
  - Where?
  - When?
  - How? Penetration of genitalia?
  - Consent? (Actions/words? Incapacitation? Force?)
  - Response to conduct?
- Witnesses (Eyewitnesses? Who saw before and right after? Who talk to before and right after?)
- Physical evidence (Electronic communications? Pictures? SANE report? Police report?)

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Fact Pattern

- **Homework**
  - **Think about or start drafting interview outlines for Complainant and Respondent**

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Stage 1: Prepare (Step 10)

X. What additional information would the decision-maker need to assist in deciding Responsibility during the deliberation process?

- If it exists, do your best to obtain it.

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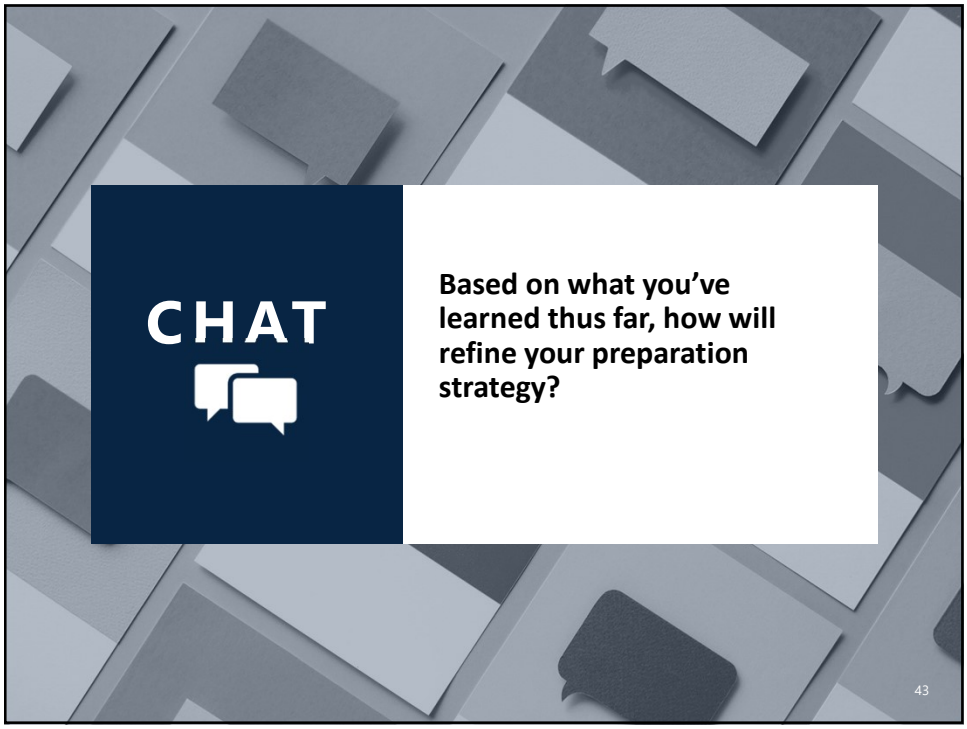

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Stage 2: Gather

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Stage 2: Gather - Evidence

- Testimonial Evidence
  - Party/witness interviews
    - Expert witnesses
  - Party/witness statements within electronic or other type of communications
- Non-testimonial evidence
  - Documents
  - Photographs
  - Video
  - Screenshots of electronic or other communications
  - Police reports
  - SANE reports (need signed release to obtain and rely on)

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Stage 2: Gather – Party/Witness Interviews

Party/witness interviews

1. Build rapport
2. Effective questioning
3. Identifying and obtaining physical evidence

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Stage 2: Gather – Building Rapport

1. Build rapport
   - Identify mutual interests or commonalities between the investigator and the interviewee
   - Attentive
   - Transparent about the investigation process and the investigator's role within it
   - Provide control
   - Answer questions

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Rapport Building Demos

1. **What went well?**
2. **What could be improved?**

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Stage 2: Gather – Effective Questioning

2. Effective questioning
   - The funnel method

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Closed v. Open-Ended Questions

Closed Questions		Open-Ended Questions
You went to the party with the Complainant and your roommate	→	Who went with you to the party?
You said "no" when the Respondent kissed you.	→	How did you respond when the Respondent kissed you?
After you said "no," you shoved the Respondent to the ground	→	What happened next?

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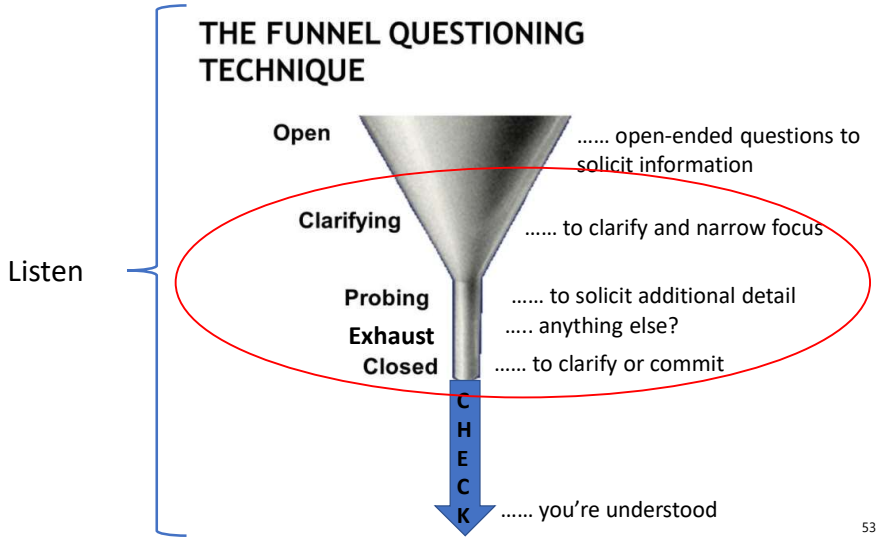
Stage 2: Gather – The Funnel



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Stage 2: Gather – Pitfalls to Avoid

2. Effective questioning

<u>Interviewing pitfalls</u>

- Careful not to ask an open-ended question in a leading/closed manner.

  "Did you go to the police right after you left Respondent's apartment?"

  "Were you scared when your partner's hands were around your neck?"

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Stage 2: Gather – Avoid compound questions

2. Effective questioning

Interviewing pitfalls

- Avoid compound questions

  "Describe what you saw, what you heard, and what you did?"

  One question at a time: *"What did you see?"*

  "What did you hear?"

  "What did you do?"

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Stage 2: Gather – Interview Pitfalls

2. Effective questioning

Interviewing pitfalls

- Failing to clarify complex answers.
  - *"Tell me if I understand you correctly, you said…"*
  - *"I am not sure that I understand, what does that mean?"*
- Assuming you know what the witness means.

  "I talked to Jane last night."

- Assumptions about what happened, generally.

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Example:

Inaccurate Assumption

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Stage 2: Gather – Pitfalls, cont.

2. Effective questioning

Interviewing pitfalls

- Failing to use understandable ("normal") language.

  "Are you and Jane intimate with one another?"

  "Did your fingers penetrate Jane's labia majora?"

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Stage 2: Gather – Pitfalls, cont.

2. Effective questioning

Interviewing pitfalls

- Interrupting the witness.
- Harmful spoken or body language in response to answers to questions.

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Stage 2: Gather – Example #1

Possible Investigator Reactions to an Interviewee Response

Actual Thought vs. **Professional Speak**

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Stage 2: Gather – Example #2

Possible Investigator Reactions to an Interviewee Response

Actual Thought vs. **Professional Speak**

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Stage 2: Gather – Example #3

Possible Investigator Reactions to an Interviewee Response

Actual Thought vs. **Professional Speak**

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Stage 2: Gather – Example #4

Possible Investigator Reactions to an Interviewee Response

Actual Thought vs. **Professional Speak**

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Stage 2: Gather – Obtaining Narratives/Evidence

2. Effective questioning

a. Obtain a narrative (facts may not be relayed chronologically)
   - Can allow the interviewee to choose where to begin

b. Start with most critical or damning evidence
   - A photograph
   - Video

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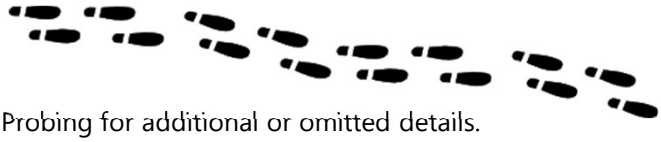
Stage 2: Gather – Advanced Questioning

2. Effective questioning

- Clarifying and additional exploratory questioning that follows the trail of information…



- Probing for additional or omitted details.
- Refreshing the memory of a party/witness.
- Addressing interviewing challenges (stay tuned…)
- The "catch-all"

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Effective Questioning Demos

1. **What went well?**
2. **What could be improved?**

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Stage 2: Gather – Trauma (Part 1)

2. Effective questioning
   - Identifying potential trauma in response to alleged misconduct and what to do with it.
   - Trauma-informed interviewing techniques.

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Stage 2: Gather – Trauma (Part 2)

"*Trauma* is defined as an event that combines fear, horror, or terror with actual or perceived lack of control."

- Trauma is subjective. What may be traumatic to one person may not be to another.

Source: Understanding the Neurobiology of Trauma and Implications for Interviewing Victims, Wilson, Lonsway, Archambault, Hopper, November 2016

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Stage 2: Gather – Trauma (Part 3)

The neurobiology of trauma

What does trauma look like during the event (Defense Circuitry)?

- **Fight**
- **Flight**
- **Freeze**
- **Dissociation**
- **Tonic immobility**

"When the defense circuitry takes over, the part of the brain that makes logical choices is impaired."

Source: Understanding the Neurobiology of Trauma and Implications for Interviewing Victims, Wilson, Lonsway, Archambault, Hopper, November 2016

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Stage 2: Gather – Trauma (Part 4)

The neurobiology of trauma

What does trauma look like during post-event?

- Memory loss
- Intense emotional reaction (or not)
- Trouble focusing
- Lack of linear memory
- Confused

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Stage 2: Gather – Trauma Informed Interviewing (con't)

- What is the relevant evidentiary value of a possible trauma response? Impact corroboration, maybe? What about credibility? CAUTION
- The presence of trauma (fight, flight, freeze, disassociation, etc.) does not prove that the misconduct occurred nor does the lack of trauma provide a reason to disbelieve.
- However, we know that if there is evidence of trauma in response to alleged misconduct, it could explain a gap in memory or the interviewee's odd response to the misconduct or a period of hyper-focus.

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Stage 2: Gather – Trauma Informed Interviewing (con't)

W2: Asked if Complainant was okay
Complainant: "Yeah, I think so, I have to use the bathroom."
W2: "Did he [Respondent] touch you?"
Complainant: "I don't think so, because I don't feel sad." *See* Exhibits 4 & 14.
W2: "Are you sure nothing happened and you are ok?"
Complainant: "I don't know."
W2: "Why, what do you think happened?"
Complainant: "He violated me."
W2: "Did he hurt you?"
Complainant: "I think so."

When the Complainant said she was violated she became "upset" and began to cry.

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Stage 2: Gather – Trauma Informed Interviewing (Part 1)

What are trauma-informed interviewing techniques?

- Building rapport is the first step in interviewing victims in a trauma-informed way.
  - Acknowledge the difficult situation
  - Explain process and investigator's role
- Set forth expectations for interview:
  - Investigator will ask detailed questions (may be personal)
  - May ask clarifying questions
  - No judgments will be made
  - There is no wrong answer

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Stage 2: Gather – Trauma Informed Interviewing (Part 2)

- Provide some control to victim (water, breaks, etc.)
- Use a conversational approach rather than a rapid series of questions
  - "Where would you like to start?"
  - "What happened?"
  - "Tell me about . . ."

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Stage 2: Gather – Trauma Informed Interviewing (Part 2)

What are trauma-informed interviewing techniques?

- Be cognizant of "sensory" responses: sight, sound, smell, feelings
- Be aware of sensitive questioning to avoid victim blaming and rape myth beliefs.
  - Both of these practices can function to re-victimize the survivor.
  - Explain your reasoning behind difficult questions.

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Stage 2: Gather – Trauma Informed Interviewing (part 2)

2. Effective questioning
   - Trauma-informed interviewing techniques are helpful with any party or witness, not just complainants.
   - Result is to obtain better information and to have the interviewee leave the interview feeling respected rather than victimized by the interview experience.

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Stage 2: Gather – The Expert Witness

2. Effective questioning
   - The expert witness

An expert witness is a person who has specialized or scientific knowledge, skill, experience, or proficiency in a particular field that is relevant to the case.

- Expert witnesses are *supposed* to provide independent, impartial, and an unbiased opinion about evidence in the case

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Stage 2: Gather – Expert Witness Intro

I. INTRODUCTION

- Name and profession
- Qualifications - What makes this person an "expert?"
  - Education
  - Special Training
  - Experience
  - License/Certification
  - Publications
  - Teaching or speaking experience
  - Experience as an expert witness
    - Ever testified as an expert witness?
    - Ever been disqualified as an expert witness?

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Stage 2: Gather – Expert Witness Assignment

II. EXPERT'S ASSIGNMENT

- What have you been asked to do/examine/compare in the case?
- Are you receiving compensation for your opinion and testimony? If so, how much and by whom?
- Did you reach an opinion?
- What information did you receive and rely on to make an opinion?
- What techniques, methodology, or process did you use on the information received?
- Is this the type of information relied on by experts in their field?

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Stage 2: Gather – Expert's Opinion

III. EXPERT'S OPINION

- What is your opinion?
- How did you arrive at your opinion?
- Did you make any assumptions based on the information? If you change your assumption, does your opinion change?
- Why are you sure of your opinion?
- Are there alternative techniques or methods that could result in a different opinion?

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Stage 2: Gather – Physical Evidence

3. Identifying and obtaining physical evidence

Examples of how physical evidence can be critical to your case:

- ✓ The text message that the Respondent allegedly sent to the Complainant's roommate admitting to the misconduct.
- ✓ The medical report noting the injury that the Complainant claims to have sustained during the alleged misconduct.
- ✓ Campus building access report that shows the Complainant was not in the library on the date and time of the alleged misconduct.

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Stage 2: Gather – Examples

Party/witness interviews

3. Identifying and obtaining physical evidence
   - Ask parties/witnesses if physical evidence available and, if so, can you have it.
   - Investigators should have access to campus access card records and video surveillance camera footage.

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Stage 2: Gather

Party/witness interviews

3. Identifying and obtaining physical evidence
   - Documents from third-party sources
   - Boots on the ground!

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QUESTIONS?

ACADEMIC IMPRESSIONS

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ACADEMIC IMPRESSIONS

#5

Autonomy, Neutrality, and Objectivity

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Stage 5: Autonomy, Neutrality, and Objectivity

- 34 C.F.R. 106.45(b)(1)(iii)

Requires that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate the informal resolution process may not have a conflict of interest or bias either for or against complainant, respondent, or individual parties.

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Stage 5: Regulations and Investigators

As the Final Regulations apply to Investigators:

Investigators are neutral, objective, and impartial. An impartial investigation performed by a bias and conflict-free investigator is the substantive foundation of the entire grievance process.

Note: The Regulations establish a low floor without defining what the terms "impartial investigation, bias and conflict free".

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Stage 5: Bias

BIAS

AUTONOMY

NEUTRALITY

OBJECTIVITY

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Stage 5: Bias defined

Defined as: *An inclination toward (or away from) one way of thinking, many times, based on how you were raised.*

- Examples:
  - Assuming that Complainants or Respondents are generally more likely to tell the truth
  - Assuming the Complainant "had it coming" based on what they were wearing, how much they had to drink, or because they were at a fraternity party

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Stage 5: Bias (con't)

As an investigator:

- Not on anyone's side
- Presumption of non-responsibility
- You are helping the decision-maker(s) decide responsibility/non-responsibility based on reliable and relevant evidence
- You are an advocate for the process – not either party
- Credibility is determined by specific factors, not a party's status as a complainant or respondent.

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Stage 5: Autonomy

Defined as: *Independence or Freedom*

- Are you able to conduct the investigation without internal or external interference or influence?
  - High profile cases
  - Media influence

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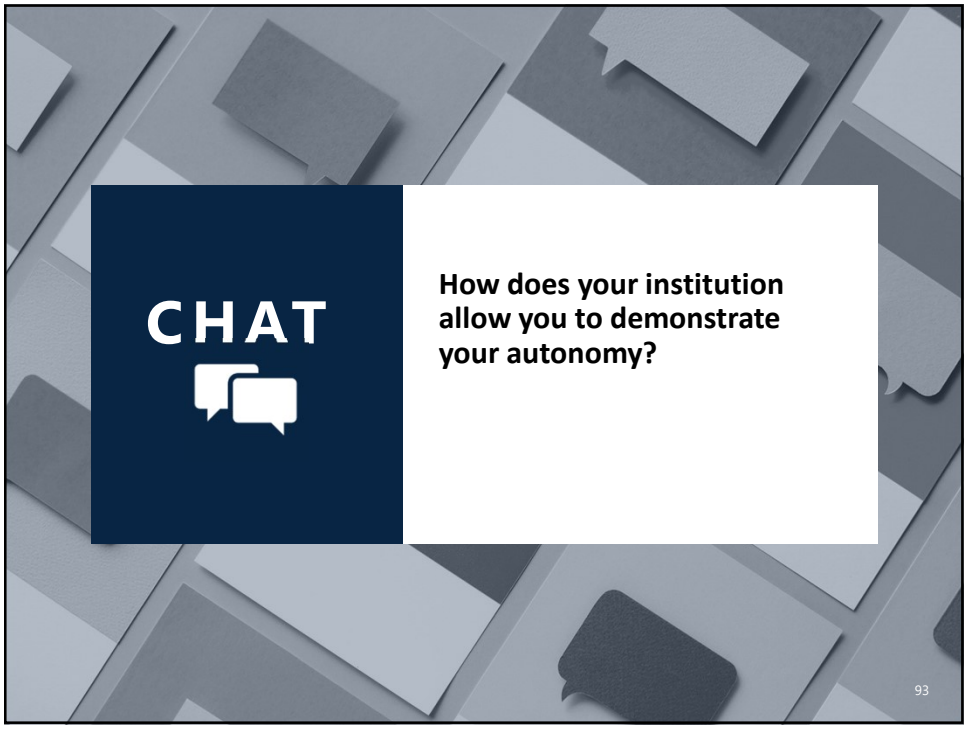

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Stage 5: Neutrality

Defined as: *Not aligned with or supporting a side or position.*

- Understand and respect the rights of both parties
- Facts are presented as gathered – allow parties and witnesses to review and revise their statements
- Questioning conducted using non-judgmental language:
  - "Do you remember how much you drank before you went to the house party?"
  - Not: "Were you thinking about how much you were drinking before you left your residence hall room?"

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Stage 5: Appearance of Neutrality

- Meeting with one party more than the other without explanation
  - Does your policy address this?
- Number of witnesses on either side does not determine outcome
- Perception of neutrality throughout the university

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Stage 5: Objectivity

Defined as: *Not being influenced by personal feelings, interpretations, or prejudice.*

- How do you act or respond to a party or witness you find obnoxious, conceited, or generally unlikable?
- How do you act or respond to a party or witness you find likable?

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Stage 5: Conflicts of Interest

- Exist when the investigator has a personal or professional interest in the matter, and prevent the investigator from discharging their duties in a fair, neutral, and impartial manner
- Arise depending upon the investigator's relationship to a party, or witness

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Stage 5: Strategies

- We all have biases
  - Evaluate/Recognize when you are having a biased or stereotypical thought
  - Identify the reasons behind the thought
  - Replace the biased/stereotypical thought with a non-stereotypical response

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Stage 5: Strategies (con't)

- Improve Decision Making
  - Slow down
  - Ask: What assumptions have I made about the gender identity, religious beliefs, athletic status?
  - What evidence supports the conclusions I draw and how have I challenged the "unsupported" assumptions
- Practice - and be present.

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