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

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Chantelle Cleary is a nationally-recognized subject-matter expert in Title IX and related fields. She has more than 10 years of experience in the investigation and adjudication of sexual and interpersonal violence. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Prior to joining Grand River Solutions, Chantelle served as the Director for Institutional Equity and Title IX at Cornell University, and before that as the Assistant Vice President for Equity and Compliance and Title IX Coordinator at the University at Albany. In these roles, she provided direct, hands-on experience in the fields of Title IX, civil rights, employment law, and workplace and academic investigations. Her responsibilities included focusing on diversity efforts, sexual assault prevention and training, affirmative action, and protecting minors on campus.
**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

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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.
Procedural Requirements for Hearings

- Must be live, but can be conducted remotely
- You may not compel participation
- Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters
- Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution
- Decision maker determines relevancy of questions and evidence offered
- Exclusion of Evidence if no cross examination
- Written decision must be issued that includes finding and sanction
“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.
"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
Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance.

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

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

- Each party’s right to argue their case, and
- Fact that decisions regarding responsibility will be made at hearing, not investigation stage.
The Investigator

- Can be the Title IX Coordinator, although that is disfavored
- Must be trained in accordance with the requirements in the regulations
- Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest
The Requirement of Impartiality
Section 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution not to have a conflict of interest or bias.

1. For or against complainants or respondents generally, or
2. An individual complainant or respondent
Impermissible Bias

Making a decision, determination, or finding that is based on something other than the evidence and specific facts of the case.
What Constitutes Bias?

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

Includes:
- Decision-making that is grounded in stereotypes
- Different treatment based on a person’s sex or other protected characteristic
- A decision based on something other than the facts
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
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.

Format/Structure of the Interview

Format of Questions

Approach to Clarification
Trauma Informed Practices are Designed to:

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<tr>
<td>01</td>
<td>Encourage thorough and complete investigations</td>
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<tr>
<td>02</td>
<td>Assist with recollection</td>
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<td>03</td>
<td>Assist with recounting</td>
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<td>04</td>
<td>Reduce potential for false information</td>
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<tr>
<td>05</td>
<td>Minimize unnecessary re-traumatization</td>
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<tr>
<td>06</td>
<td>Reduce Bias</td>
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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.
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
- 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.

- Inconsistencies
- Lack of Detail
- Non-Linear
- Fragmented
- New Information

Not Credible
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
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.
The Investigation Continues....
Developing an Investigative Strategy
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
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
Title IX Hearing Requirements: The Impact on Investigations

EVIDENCE COLLECTION

INVESTIGATE THE EVIDENCE
Considerations for Evidence Collection in a Post-Regulatory World

- Testimony
- Text Messages
- Social Media Posts
- Medical Records
- Public Safety/Police Records
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
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 will lead to 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

Start by eliciting a narrative
Listen
Interview for clarification
Listen
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?
“I felt an animal. I think it was dead. I was terrified that he hurt it. I thought he would do the same to me.”

“Help me understand why you keep rubbing your wrists like that?”
Capture the Entire Experience

- 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.
And The After

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: 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?
Questions?

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Follow Us:
@GrandRiverSols
Grand River Solutions
Day Two Agenda

01 Evidence Collection and Assessment

02 Practice

03 The Investigative Report and Record
Quick Review!
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

<table>
<thead>
<tr>
<th>Details about the sexual contact</th>
<th>Seemingly inconsistent behaviors</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inconsistent evidence/information</td>
<td>What they were wearing</td>
</tr>
<tr>
<td>Alcohol or drug consumption</td>
<td>Probing into reports of lack of memory</td>
</tr>
</tbody>
</table>
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 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

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
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
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Evidence That is Not “Relevant”

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• 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
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“require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition.
Assessing 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?
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.
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
Barriers to Evidence Assessment

- Authenticity/Technology
- Colluding witnesses
- Colluding parties
- Totally different versions
Practice
The Case of Mary and John
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**
- “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
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
Intended Recipients

The Parties

The Advisors

The Decision Maker

The Appeal Panel

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Other Recipients?

- Friends of the parties
- Parents
- Law enforcement
- Attorneys
- Judges
- Media
- Social media
Essential Elements

- Intentionally organized to enhance comprehension
- Factually accurate
- Concise
- Without editorial or opinion
- Consistent format
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
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
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

<table>
<thead>
<tr>
<th>Simple List</th>
<th>Detailed List</th>
</tr>
</thead>
<tbody>
<tr>
<td>List those witnesses that were interviewed</td>
<td>List witnesses that were identified, but not interviewed</td>
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</tbody>
</table>

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## 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
Report Structure
Summary of Evidence

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