

What Investigators and Decision-Makers Need to Know About Their Obligations Under 2020 Title IX Regulations

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September 22, 2020

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- Author and co-author of nationally-distributed book chapters, papers and articles on Title IX/Clery Act, fair, trauma-informed investigations and/or campus threat assessment
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- Certified FETI® Practitioner (CFP-B)

Topics for Discussion 9/22/20

- Discussion with Investigators
 - “Directly Related” and “Relevance” Concepts
 - Special Evidentiary Issues
 - Investigative Reports
 - Fair, Equitable, Witness-Centered Interview Approaches
- Discussion with Decision-Makers:
 - “Directly Related” and “Relevance” Concepts
 - Special Evidentiary Issues
 - Fair, Equitable, Witness-Centered Questioning Approaches
 - Conducting Hearings

Discussion with Investigators

“Directly Related” and “Relevance” Concepts

“Directly Related” Evidence

2020 Title IX Regulation:

- » 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
- » Including 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
- » So that each party can meaningfully respond to the evidence prior to the conclusion of the investigation

“Directly Related” Evidence

- » In Preamble, Department declines to define “directly related” further, indicating that it “should be interpreted using [its] plain and ordinary meaning.”
- » Department notes that term aligns with (similarly undefined) term in Family Educational Rights and Privacy Act (“FERPA”), which defines covered education records in part as documents that are:
 - “directly related to a student; and
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- » Department ties parties’ right to review directly related information under Title IX regulations with Department’s prior position that students may review FERPA-protected information about other students if necessary to preserve their due process rights

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- » 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
- » Point of information-sharing provision is to promote transparency and allow parties to object to investigator’s conclusion that certain evidence is not relevant, and argue why certain evidence should be given more weight
- » Cautious approach:
 - Read term broadly, withholding or redacting information only where explicitly irrelevant under regulations (see below), or where not related to allegations

“Relevant” Evidence

- » Investigative reports must “summarize 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.”

“Relevant” Evidence

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 - 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

Special Evidentiary Issues

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- » Questions and evidence about a 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
 - concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

Special Evidentiary Issues

- » Information protected under a legally recognized privilege
 - (e.g., privileged communications between a party and their physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in a treatment capacity, or privileged communications between a party and their attorney),
- » are not considered unless the information is relevant
 - and the person holding the privilege has waived the privilege

Special Evidentiary Issues

- » If a party or witness does not submit to cross-examination at the live hearing,
 - the hearing officer will not rely on any Statement of that party or witness in reaching a determination regarding responsibility
- » The hearing officer will not draw an inference about the determination regarding responsibility based solely on a party or witness's absence from the live hearing or refusal to answer cross-examination or other questions
- » Nonetheless, investigators should summarize information from parties and witnesses as it is provided, because how this rule will be applied will not be established definitively until the hearing

Investigative Reports

Summarizing “Relevant” Evidence

- » Again, 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
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Investigative Reports

» Regulation:

- “Prior to completion of the investigative report, the [school] must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and
- the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.”

Investigative Reports

» Regulation:

- Investigative reports must “fairly summarize relevant evidence”
- “at least 10 days prior to a hearing . . . send to each party and the party’s advisor, if any, the
- investigative report in an electronic format or a hard copy, for their review and written response.”

» Investigator does not need to revise investigative report in light of this written response from parties

Witness-Centered Interview Concepts

Traditional Interview Techniques

- Often focus on “who, what, when, where, why”
- Often focus on what questioner thinks they need, e.g.:
 - Developing a chronology
 - Fitting facts into policy violation elements framework
- Questioner’s determinations and (worse yet) pre-determinations of what is relevant, and what is not, can be controlling
 - Questioner often interrupts witness to seek immediate clarification
- Common questioning techniques:
 - Leading questions
 - Yes/no or choice questions
 - Paraphrasing for “clarification”
- “Why did you/why didn’t you” questions that can discourage participation

“Malleability of Memory”

Elizabeth Loftus, Ph.D., “Planting misinformation in the human mind: A 30-year investigation of the malleability of memory,” *Learning & Memory* (2005) (reviews 30 years of research)

- Summarizes research on “misinformation effect”, whereby study subjects report that they “remember” observing details in scenarios that were not actually there, because researchers intentionally misinformed them that those details were there
- Subjects found to be more susceptible to effect where:
 - Relatively more time had passed between observation and test
 - Subject self-reported they often had lapses in memory and attention
- Article notes that in the “real world”, “misinformation” that contaminates memory can come from:
 - Witnesses’ talking to each other
 - Leading questions or suggestive techniques
 - Media coverage

“Creating False Memories”

Elizabeth Loftus, Ph.D., “Creating False Memories,”
Scientific American (Vol. 277 #3, pp. 70-75)

- Loftus and others did “lost in the mall” experiments in which adult study subjects were asked to “try to remember” events that subjects were told a family member had told the researchers about
- Subjects were given three one-paragraph descriptions of events that had actually happened to the subjects in childhood, as reported by relatives, and one description of a “lost in the mall” event that had not actually happened

“Creating False Memories”

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- 29 percent “remembered”, either partially or fully, the false event
- Takeaways per researchers:
 - “Memories are more easily modified . . . when the passage of time allows the original memory to fade.”
 - “Corroboration of an event by another person can be a powerful technique for instilling a false memory.”
- Potential application to interview/investigation context:
 - Questioners should take care to avoid questioning approaches that could undermine a witness’s recollection of authentic memories
 - **Leading, yes/no choice, and paraphrasing questions can potentially have such an effect**

National event focuses on trauma and memory

“This Kavanaugh hearing is a blown-up politicized version of exactly what Title IX investigators face every day.”

Unidentified commenter quoted in “The Kavanaugh-Ford Hearing and Campus Sexual Assault: 3 Parallels”, *Chronicle of Higher Education* (Sept. 27, 2018) (available at:

<https://www.chronicle.com/article/The-Kavanaugh-Ford-Hearing-and/244662>).

“Cognitive Interview” technique and trauma/memory issues were discussed during hearing

Putting Discussion in Context

- This discussion concerns potential effects of trauma that some people may experience in some situations
- No part of discussion should be misunderstood to suggest that all individuals will experience trauma, emotionally or physically, in a certain, “dose-dependent” way
- Scientific theories about the potential effects of trauma should never be used to determine responsibility for misconduct in a specific investigation

Potential Effects of Trauma

- During sexual assault or other traumatic event, individual may experience a threat to survival
- Body may summon energy to fight/flee/freeze
- May result in shock, “dissociation,” and / or other involuntary responses during and after violence
- Memory of traumatic event may be fragmented/impaired due to neurobiological factors

HPA Axis - Limbic system

- Hippocampus
 - During stress or trauma, it signals the
- Pituitary
 - Master gland – controls hormonal manufacturing
- Adrenals
 - Sit on top of the kidneys and make numerous hormone models in doses that reflect the signals from the pituitary

Hypothalamus Pituitary-Adrenal Axis Hormones

- **Catecholamines**
 - Neurotransmitters such as norepinephrine that influence behavior
 - e.g., fight, flight or freeze
- **Cortisol and adrenaline** - increase energy
- **Endogenous opioids** - block pain and/or emotion
- **Oxytocin** - promotes feelings of well-being

Note: Types and amounts of hormones created in the HPA Axis vary greatly between individuals

Potential Effects of HPA Axis Substances on Memory

- Structures in brain involved in encoding memory (e.g., hippocampus) may be sensitive to HPA axis substances
- HPA axis substances may interfere with or affect encoding of memory

Potential Effects of Trauma on Memory

- Memories for traumatic incident are no more or less likely to be inaccurate than memories for a non-traumatic event
- Central details may be remembered very well, but peripheral details less so

Potential Effects of Trauma on Memory

- Be very thoughtful about how much, if any, weight to place on witness's affect and other presentation given potential effects of trauma, stress, alcohol, cultural factors, etc.
 - Recognize that presentation may not necessarily be “evidence”

Potential Effects of Trauma on Memory

- Generally in interviews we expect to hear information generated by the cerebral cortex – organized, chronological.
- With individual who has experienced trauma, the information recalled regarding traumatic incidents may not be organized and/or chronological.
- Shouldn't prejudge by assuming that disorganized reporting is necessarily evidence of EITHER:
 - false reporting, or
 - existence of trauma

Example Interview Concepts

- The following slides are intended to orient participants to interview concepts and approaches that differ from the traditional “who, what, when, where, why” approach
- This presentation does not endorse a particular concept
- Instead, this discussion is intended to encourage investigators to:
 - think critically about how traditional interview approaches may facilitate or interfere with a witness’ recollection of authentic memory, and
 - consider how alternative interview approaches might promote better sharing of information,
 - while meeting institutional needs to conduct an investigation that is demonstrably balanced, thorough, and fair to all parties

“The Cognitive Interview” (1992)

- **Fisher and Geiselman, “Memory-Enhancing Techniques for Investigative Interviewing: The Cognitive Interview” (1992)**
- Used primarily by law enforcement
- Extensively studied for effectiveness
 - See “THE COGNITIVE INTERVIEW: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years,” 16 Psych. Pub. Pol. and L. 340 (Nov. 2010)
- Language of book is “couched in terms of police investigations” because that is context in which authors did practical aspects of their research, but authors suggest that “[n]on-police investigators . . . [can] simply modify the general concepts to make them compatible with their particular investigative conditions.” (p. 4)
- Approach not designed for Title IX/Clery context and I wouldn't recommend following it per se in Title IX/Clery cases
- I'm discussing it here to demonstrate its commonality with the Forensic Experiential Trauma Interview

“The Cognitive Interview” (1992)

- Suggests based on psychological research that some “memory-related” problems may be due not to a witness’s not having certain stored memories, but rather by “inappropriate retrieval”
- Certain interviewing approaches may “indirectly control the [witness’s] retrieval plan, and the more efficiently they guide the [witness] to search through memory the more information they will uncover.” (p. 14)
- CI encourages the investigator to understand that the witness, not the investigator, should be the “central character in the interview,” (p. 15)
- CI “not intended as a recipe”
 - Investigator should “use good judgment and change directions as unexpected conditions arise”
 - CI offered as “a general guiding principle . . . to be used in concert with sound judgment and the flexibility to respond to the unanticipated.” (p. 15)

“The Cognitive Interview” (1992)

“Dynamics of the Interview” (Chapter 3)

- Examples given are, frankly, dated and gender-stereotypical
 - male pronouns are used to describe the police officer
 - investigators and interviewees are usually referred to as women
- Submits that most effective interviewers ask the least questions and encourage the witness do most of the talking (p. 20)
- **Advocates encouraging witness to take active role in interview by:**
 - **Using open-ended questions**
 - **Not interrupting witnesses in middle of open-ended narrative (pp. 20-21)**

“The Cognitive Interview” (1992)

“Dynamics of the Interview” (Chapter 3)

- Suggests interviewer should “**avoid making judgmental comments and asking confrontational questions**” unless “certain” there is deception involved (p. 26)
- Encourages interviewer to obtain all that can be obtained through open-ended questions before addressing inconsistencies and conflicting information, which can be done “later in the interview” (p. 26)

“The Cognitive Interview” (1992)

“Overcoming Eyewitness Limitations” (Chapter 4)

- Chapter includes many suggested techniques for, and generalized statements about, police investigations that would not translate well to neutral, Title IX/Clery investigative interview context, but general observations of note include (at pp. 41, 44-45)
 - Encouraging witnesses to **share details as they come to mind**, rather than requiring witnesses to respond only to the questions asked or stick to a chronology or what they might think are more central details
 - Encouraging witnesses to share, rather than suppress or edit out, potentially inconsistent statements, **then following up later for clarification**
 - Encouraging witnesses to **take their time** and **share as much detail as they can**

“The Cognitive Interview” (1992)

“Mechanics of Interviewing” (Chapter 6)

- Not all aspects of law enforcement-focused discussion and examples would translate well to neutral, Title IX/Clery investigative context, but some noteworthy general concepts include:
 - **Use neutral questions rather than leading questions**
 - **Avoid negative wording** (e.g., “You don’t know X, do you?”)
 - **Avoid compound questions**
 - **Avoid unnecessarily complex questions**
 - **Avoid jargon and technical terminology**
 - **Generally use open-ended rather than closed questions, and only used closed questions strategically, once basic answers to closed questions were established through responses to open-ended questions**
 - **Pace questioning slowly and allow pauses between questions to encourage witnesses to speak more freely**
 - **Inquiring about touch, smell and taste sensory impressions**

“The Cognitive Interview” (1992)

- “THE COGNITIVE INTERVIEW: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years,” 16 Psych. Pub. Pol. and L. 340 (Nov. 2010) reviewed numerous studies of CI and noted among many other observations that:
 - When used under laboratory conditions, interviews conducted using CI and modified CI produced more recollection of correct details when compared to other specified interview techniques
 - Research on effectiveness of CI when used in interviews that occurred long after an event was lacking



CERTIFIED **FETI**®

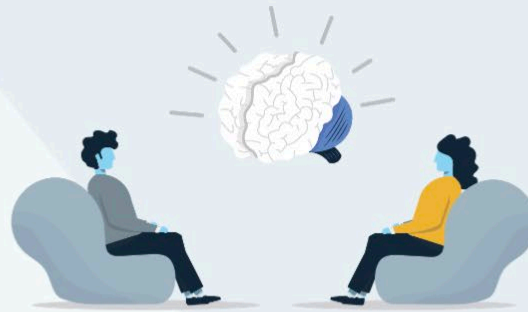
What is Certified FETI® ?

www.CertifiedFeti.com

These slides are only authorized to provide general information on what a Forensic Experiential Trauma Interview® is. Use of these slides to instruct, in any way, on how to conduct a Forensic Experiential Trauma Interview® is strictly prohibited.

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WHAT IS FETI®?

The Forensic Experiential Trauma Interview® is a science and practice-based interviewing methodology informed by the current research on the neurobiology of trauma and memory.

FETI provides interviewers with a framework to maximize the opportunities for information collection and accurately document the interview in a neutral, equitable, and fair manner.

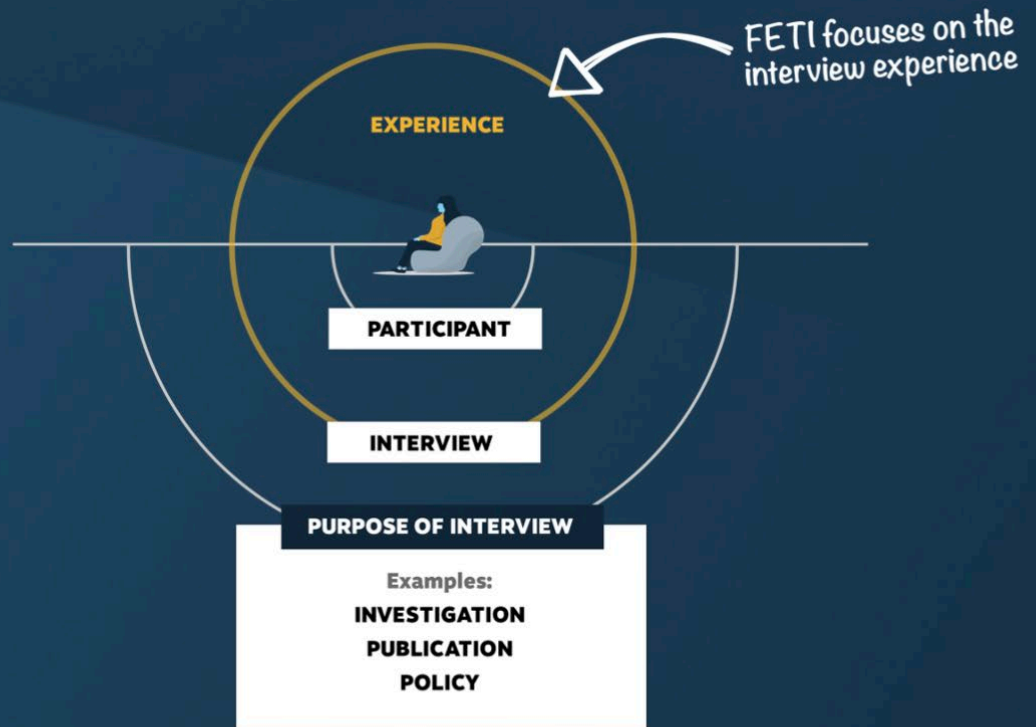


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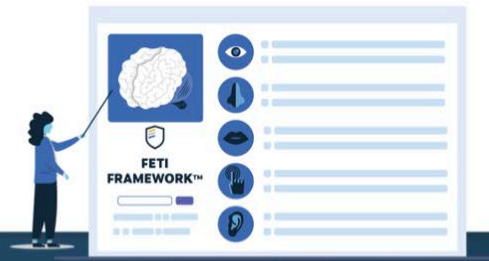
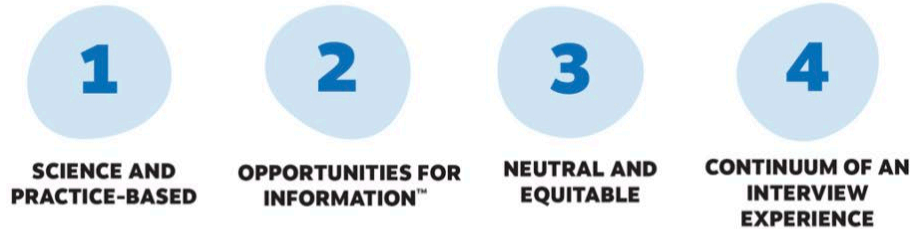
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ONE METHODOLOGY

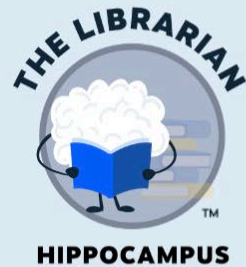
One way of interviewing for all situations and all participants.



THE FETI FRAMEWORK™



A key part of the Methodology includes the FETI Framework™, which outlines the skills, abilities and information necessary to conduct a Forensic Experiential Trauma Interview.



ON SCIENCE AND TRAUMA

Any life event has the potential to be stressful or traumatic. Information on neuroscience and brain-based responses informs the FETI® Methodology to provide a better understanding of how high-stress or trauma may affect behavior and memory.

Certified FETI® courses do not train any individual to connect an interview participant's behavior to trauma, stress or any other experience that may be perceived to cause influence on a person's actions.





GOAL OF A FETI[®] INTERVIEW

To obtain what the participant is
ABLE TO tell the interviewer.



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The FETI Framework™ provides interviewers with instruction on how to

COLLECT THE DOTS

NOT

CONNECT THE DOTS™

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CERTIFIED FETI[®] METRICS

The following provides a synopsis of the metrics when evaluating a FETI[®] Interview:



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- ✓ The interviewer demonstrates appropriate neutrality and equity. For example, the interviewer is not aligned with or supporting any side and remains impartial and unbiased, not assumptive or judgmental.
- ✓ The interviewer opens the interview with empathy. This can be as simple as expressing appreciation (e.g. 'Thank you for being willing to speak with me today') or a more in-depth exploration of the System of Security™ taught in the Introduction to FETI[®] course.
- ✓ The interview is accurately documented using the participant's exact words and not a synopsis of what was said.

(CONTINUED)





CERTIFIED FETI[®] METRICS

- ✓ The interviewer demonstrates compassion and genuine empathy to the participant. For example, it would be appropriate for the interviewer to say to the participant, “I appreciate you being willing to speak with me.”
- ✓ The interviewer uses Brain-Based Cues[®] throughout the interview. Brain-Based Cues[®] shorten and simplify the way an interviewer provides opportunities for the participant to share information about aspects of their experience.
- ✓ The interviewer maintains their appropriate role during the entire interview. For example, the interviewer does not attempt to “connect the dots” and focuses only on “collecting the dots”.
- ✓ An interviewer does not ask compound, leading, assumptive, minimizing, sequencing, yes/no or why questions during any part of the interview.





CERTIFIED FETI[®] METRICS

- ✓ The interviewer utilizes Unidirectional Interviewing™ during the entire interview. Unidirectional Interviewing™ assists an interviewer with understanding the difference between an interview and a conversation allowing for information to come from the participant without interruption or input from the interviewer. This includes not paraphrasing, changing the participants words, confronting or providing the participant with advice, opinion or personal information from the interviewer.
- ✓ The interviewer is intentional about their Interviewer Person™ which includes tone, facial expression, empathic listening, physical presentation, mindset and body language.
- ✓ The focus of a “successful” interview is solely on the knowledge, skills and abilities of the interviewer and not on the information that was provided by the interviewee.



CERTIFIED FETI[®]

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WHAT FETI[®] IS **NOT**

The following are examples of approaches that are not consistent with the Certified FETI[®] Methodology:

- ❌ The interviewer asks the participant to recall information in a specific sequential order.
- ❌ The interviewer asks the participant to imagine something during the interview.
- ❌ The interviewer sympathizes or offers platitudes to the participant during the interview. For example, saying “I’m sorry this happened to you.”
- ❌ The interviewer uses rapport techniques such as theme building, or finding common interests, complimenting the participant, or identifying similar experiences to create connection

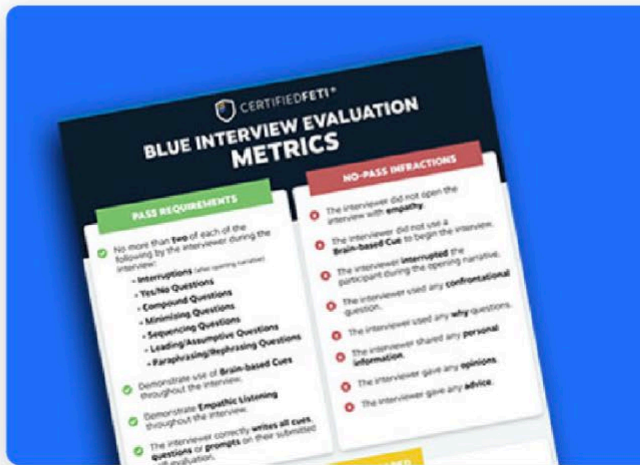
WHAT FETI[®] IS **NOT**

- ✘ The interviewer offers opinions to the participant during the interview. For example, 'You're so brave for being here', 'I believe you', 'What happened isn't your fault' or 'You're doing the right thing by speaking with me'.
- ✘ The interviewer draws conclusions or assesses credibility during the interview based on the information provided by the interviewee.
- ✘ The focus of a "successful" interview is on the information provided by the interviewee.
- ✘ The interviewer enters an interview with a predetermined list of questions about what they think is needed from the interviewee.
- ✘ The interviewer provides intervention or problem-solving during the interview. For example, 'Next time you should ...' or 'Is it possible you could have ...'



READ THE FULL PAPER ON THE FETI METHODOLOGY

You can download and read the full introductory paper at www.certifiedfeti.com/intro-paper



DOWNLOAD LATEST CERTIFIED FETI METRICS

You can download the Certified Evaluation Blue Metrics sheet at www.certifiedfeti.com/metrics

Ensuring that Witness-Centered Investigation and Adjudication Approaches are Applied in a Manner that is Demonstrably Impartial, Thorough, and Fair to All Parties



NACUA NOTES

J. Nolan, “Promoting Fairness in Trauma-Informed Investigation Training”

- National Association of College and University Attorneys (“NACUA”) NACUANOTE, February 8, 2018, Vol. 16 No. 5
 - cited once in Title IX regulations Preamble

Updated Holland & Knight white paper version available at:

<https://www.hklaw.com/en/insights/publications/2019/07/fair-equitable-trauma-informed-investigation-training>

- cited 8 times in Title IX regulations Preamble

Interviewing and Questioning for Clarification

- Following witness-centered approaches may yield better information, but:
 - It is crucial to interview and question witnesses for clarification
- Promotes accuracy and fairness
- If done appropriately, should not alienate witnesses
- Examples of how to present evidence, statements of other witnesses to parties

Fair, Witness-Centered Approach

Investigators should seek clarification on crucial points, but starting with a more open-ended, witness-centered approach can:

- Yield more, and more accurate, information
- Better encourage witness participation
- Be less likely to interfere with authentic memory

Fair, Witness-Centered Approach

- Even witnesses who do not appear to have experienced trauma (e.g., many respondents), may be experiencing substantial stress due to investigation and interview setting
- Same open-ended questioning approach is just as effective when used with respondents
 - And should be used if used with complainants, to promote neutrality
- As with complainants, should not rely unduly on “presentation as evidence”

Fair, Witness-Centered Approach

- Like complainants, respondents can be provided opportunity for open-ended narrative
- Sensory information can be gathered from respondents
- Avoiding leading questions, yes/no questions, paraphrasing, etc. is important for respondent questioning as well
- Neutral, open-ended questioning approach may be used with both parties

Discussion with Decision-Makers

“Directly Related” and “Relevance” Concepts

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 - and the person holding the privilege has waived the privilege

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- » If a party or witness does not submit to cross-examination at the live hearing,
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Conducting Hearings

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- Discretion to control hearings
- Rules of Decorum
- Role of Hearing Panel Chair and other panel members

Conducting Hearings

Technology to be Used in Live Hearings

- Discussion of:
 - Technology options, and
 - Respective responsibilities for operating technology

Conducting Hearings

Advisors

- Each party may have an advisor of their choice present at the hearing.
- The advisor does not participate in the hearing except for the limited purpose of conducting cross-examination on behalf of that party.
- Advisors may be, but are not required to be, attorneys.
- If a party does not have an advisor of their choice present at a hearing, the University will, without fee or charge to the party, provide an advisor of the University's choice,
 - for the sole and limited purpose of conducting cross-examination on behalf of that party

Conducting Hearings

Advisors

- At a time and in a manner deemed appropriate by the hearing officer, the advisor for each party will be permitted to ask the other party and any witnesses all relevant cross-examination questions and follow-up questions, including those challenging credibility.
- Except for that limited role, advisors may not participate actively in the hearing and may not speak or otherwise communicate on the part of their advisee.
 - However, the advisor may request to consult privately in a non-disruptive manner with their advisee during the hearing and/or at a recess in the hearing.

Conducting Hearings

Advisors

- The University reserves the right to take appropriate action regarding any advisor who disrupts the process,
- or who does not abide by the restrictions on their participation as determined in the sole discretion of the hearing officer,
- which may include exclusion of the advisor from the hearing
- and the appointment of an alternate University-provided advisor.

Conducting Hearings

Conduct of the Hearing and Relevance

- Only relevant cross-examination and other questions may be asked of a party or witness
- Before a complainant, a respondent, or a witness answers a cross-examination or other question, the hearing officer will first determine
 - whether the question is relevant and
 - explain any decision to exclude a question as not relevant

Written Determinations

Written Determinations

- » The Hearing Outcome will include:
 - Identification of the section(s) of the Policy alleged to have been violated;
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including but not limited to, as applicable, the notification to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of definitions of Prohibited Conduct in the Policy to the facts;”

Written Determinations

» The Hearing Outcome will include:

- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility; and
- Identification of the University's procedures and permissible bases for the complainant and respondent to appeal

Thank You!



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