

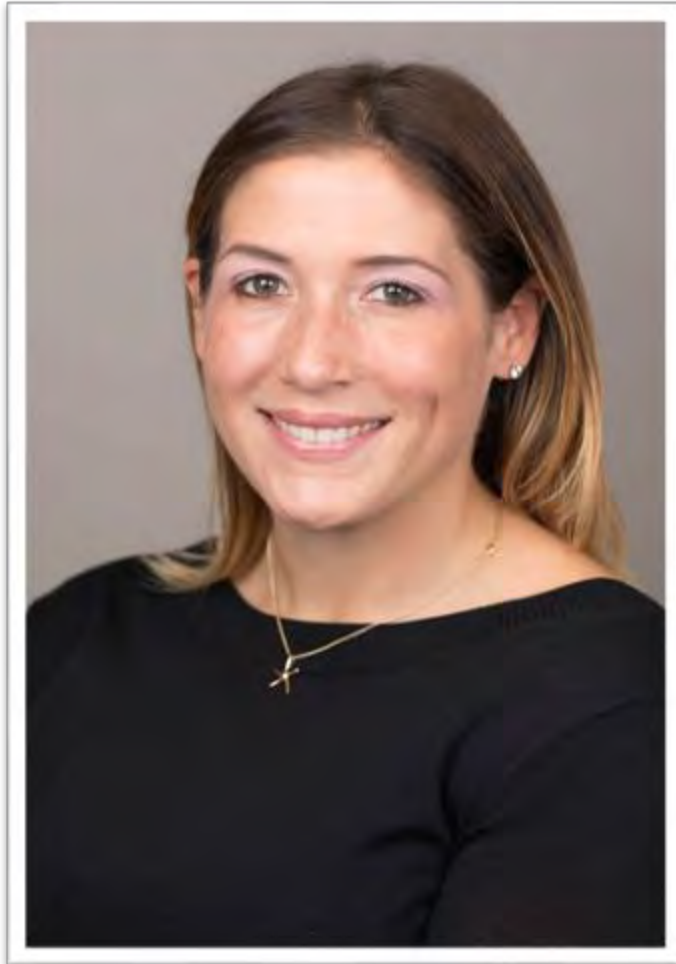


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# Hearings in the New Era

Chantelle Cleary  
Senior Consultant  
December 2020

## Meet Your Facilitator



**Chantelle Cleary, J.D.**  
Senior Consultant

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.



# About Us

Grand River Solutions provides Title IX, equity, and Clery Act consulting services. Together, our experts have decades of direct, on-campus experience at both small and large, public and private institutions. This practical expertise derived from years of hands-on experience enables our team to offer customized solutions unique to your educational institution's needs. Grand River has a suite of creative, cost-effective and compliant solutions to help schools meet their needs in innovative ways.



# Oregon ORS §350.253

Training required for Hearing Officers (and others) must include best practices for:

- Utilizing trauma-informed principles or student-centered frameworks;
- Addressing bias and increasing accessibility for students through the use of an anti-oppression framework;
- Principles related to providing trauma-informed and culturally responsive processes and procedures;
- Being gender-responsive, but not reliant on gender stereotypes; and
- Recognizing and accounting for the unique needs of individuals who identify as lesbian, gay, bisexual, transgender, gender nonconforming or gender nonbinary.

As used in this section:

“Anti-oppression,” “culturally responsive,” “gender-responsive” and “trauma-informed” shall be defined by each institution of higher education in consultation with the recognized student government of the institution.

# Today's Agenda

01

**Regulatory Overview**

05

**Hearings Logistics**

02

**The Infrastructure for Compliance**

06

**Evidentiary Issues**

03

**Roles and Responsibilities**

07

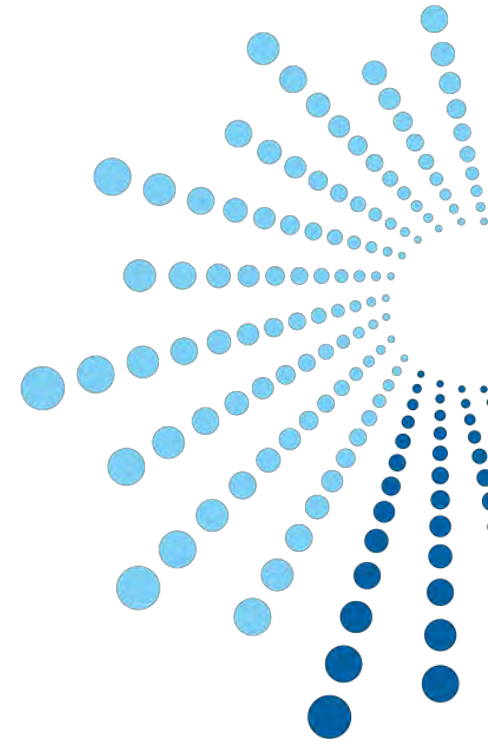
**Post-Hearing**

04

**Pre-Hearing Tasks**

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**Practice**



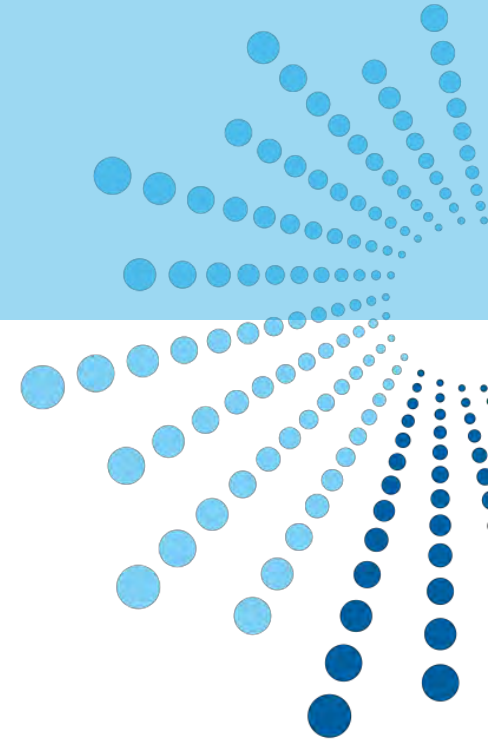


# Regulatory Overview

Narrowed jurisdiction and expansive procedural requirements

01

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## Title IX of the Education Amendments Act of 1972

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

# Sexual Harassment: *Section 106.30*

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).



A dark gray map of the United States is shown in the background, with state boundaries visible. The text 'Covered Geography' is overlaid on the map in a large, white, sans-serif font.

# Covered Geography

Includes locations, events, or circumstances over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

- ✓ On campus or in a building owned or controlled
- ✓ Off-campus incident that occurs as part of the institution's operations
- ✓ Institution exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
- ✓ the incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution



# Not Covered

- **Off campus conduct, even if it has an impact on the educational program or activity;**
- **Conduct that occurs outside of the United States.**



# Covered Individuals

Eligibility for Title IX's Protections

**“At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.” 34 C.F.R. § 106.30**

Applicant

Accepted/Hired

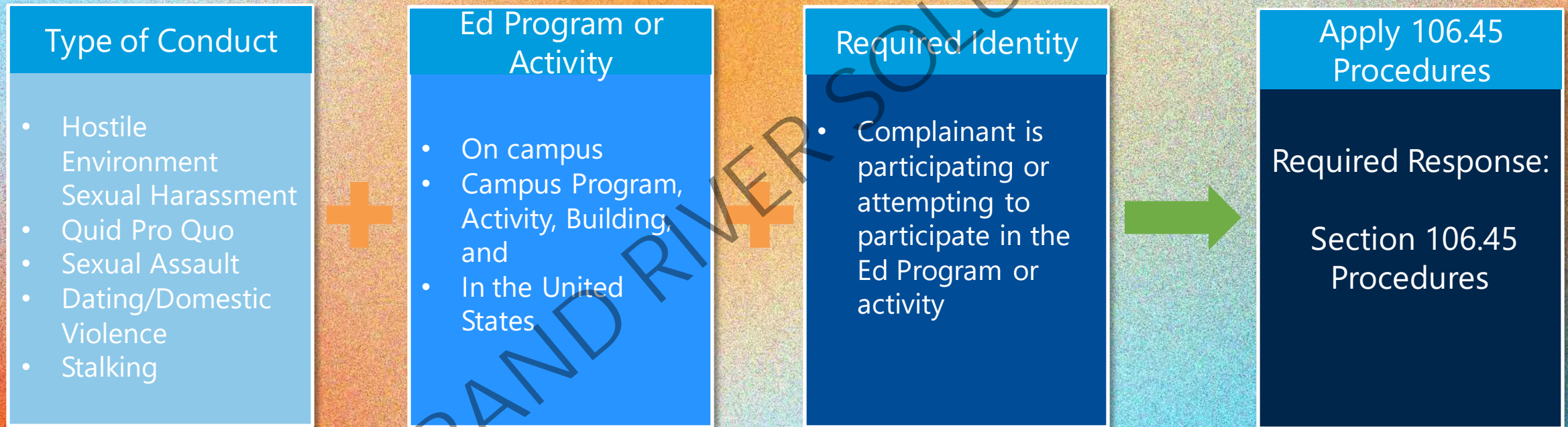
Enrolled/Employed



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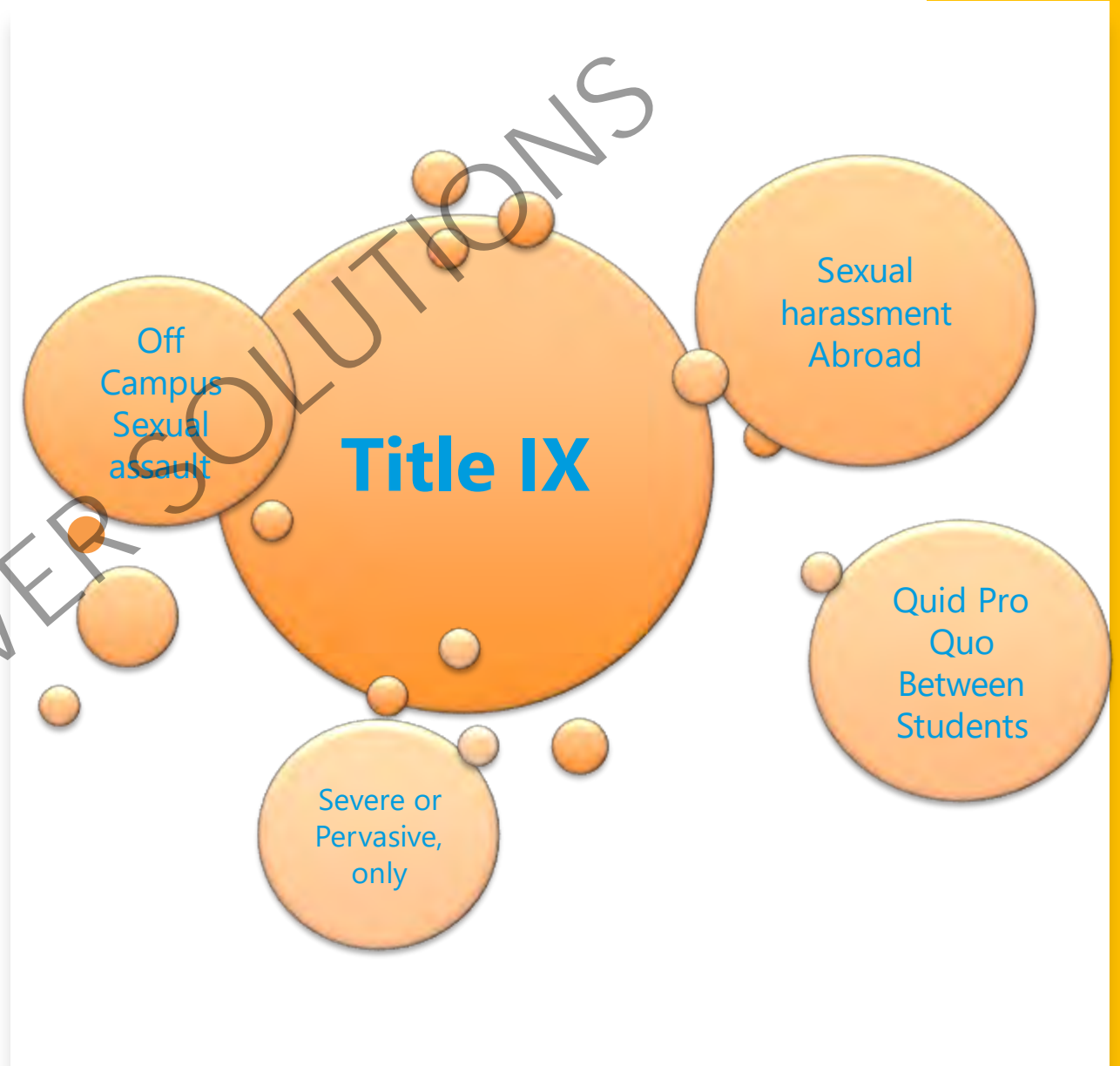
# Title IX Application Post May 2020 Regulations





# Conduct Falling Outside the Scope of Title IX

- Apply other institutional policies and procedures
- Ensure that those policies and procedures are compliant with VAWA/Clery, other intersecting federal and state laws



# Actual Notice

## A Narrowed Scope of Institutional Responsibility

Institution **“Actual knowledge”**  
must  
respond  
when it  
has:

**“Actual knowledge”**

When “an official of the recipient who has authority to institute corrective measures” has notice, e.g., Title IX Coordinator

**of “sexual harassment” (as newly defined)**

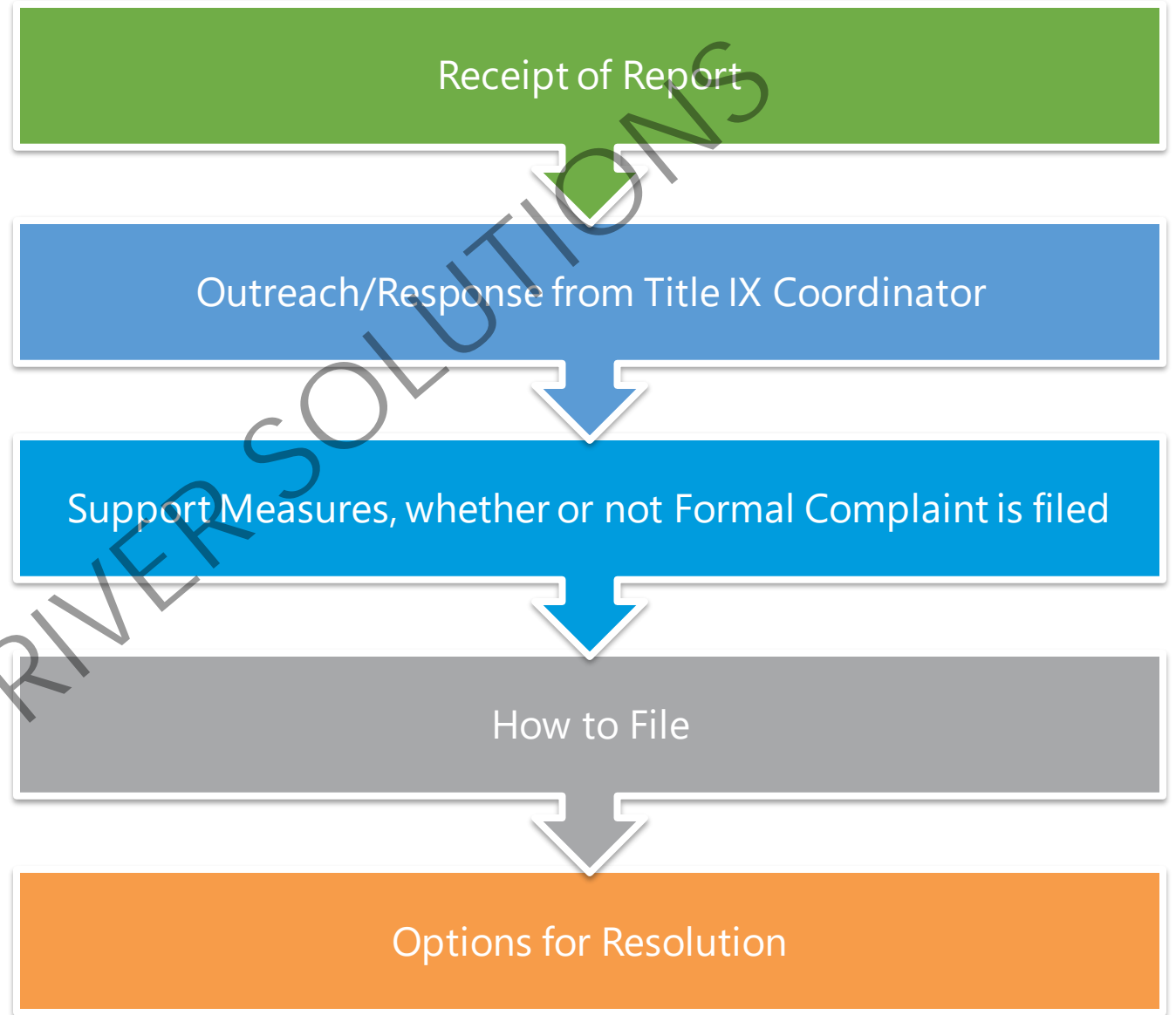
**that occurred within the school’s “education program or activity”**

“includes locations, events, or circumstances over which the recipient exercised substantial control” over the respondent and the context in which the sexual harassment occurred

Fact specific inquiry focused on control, sponsorship, applicable rules, etc.

**against a “person in the United States” (so, not in study abroad context)**

# Initial Response 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

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# Procedural Requirements for Hearings

Must be live, but can be conducted remotely

No Compelling 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

**What do we  
need to do  
all of this?**



Space



Technology



Clear & Comprehensive Procedures



Staff



Expertise and Confidence



# The Infrastructure for Compliance

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# Purpose of the Hearing

Why does it matter?

Review and  
Assess Facts



Make  
Findings of  
Fact



Determine  
Responsibility/  
Findings of  
Responsibility



Determine  
Sanction  
and Remedy

# The Essential Elements of All Hearings

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Clear Procedures

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Due/Fair Process

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Fair, Equitable, and Neutral

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Consistency

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Trauma Informed

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Well Trained Personnel

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# Clear Procedures

## The Process

- Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings, impact statements, etc.

## The Players

- The roles of all participants

## The Evidence

- Relevancy, exclusions, timing of submission, how to submit, who decides, etc.

## The Outcome

- Deliberations; notice; manner and method communicated.

Clear  
Procedures

Due Process

Fairness

Equity

Consistency

Trained  
Personnel

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# Considerations for the Physical Space

- Room location and set-up
  - Entrances, exits, and proximity
- Privacy screens & partitions
- Technology
- Hallway control
- Space for extra visitors



# Hearing Room Configuration

Investigator & Hearing  
Coordinator

Hearing Officer

Witness

Respondent &  
Advisor

Complainant &  
Advisor

# Remote Participation

- In whole or in part?
- Communication considerations
  - Chat function or emails
- Private consultation between parties and advisors
  - Use of breakout rooms
  - Communication considerations
- Practice runs
- Connectivity Considerations

# Other Considerations

Time Limits

Breaks

Formality,  
Order and  
Gate-Keeping

Handling  
disruptions and  
interruptions

Poor behavior?

Recording

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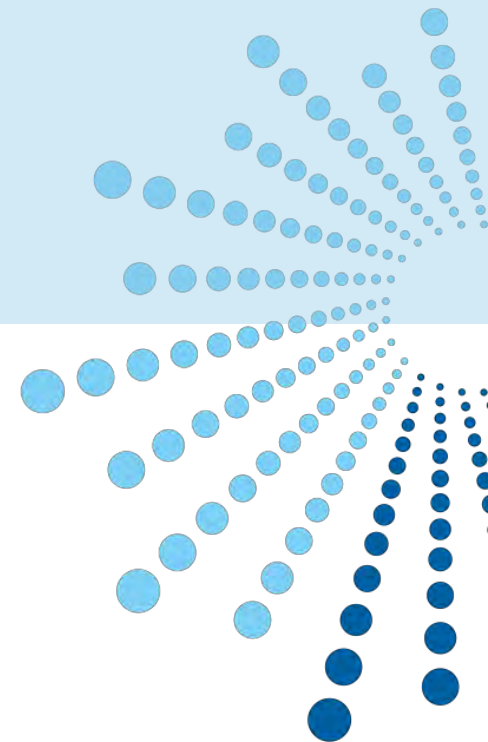


# Roles and Responsibilities

People, Functions, and Impartiality

03

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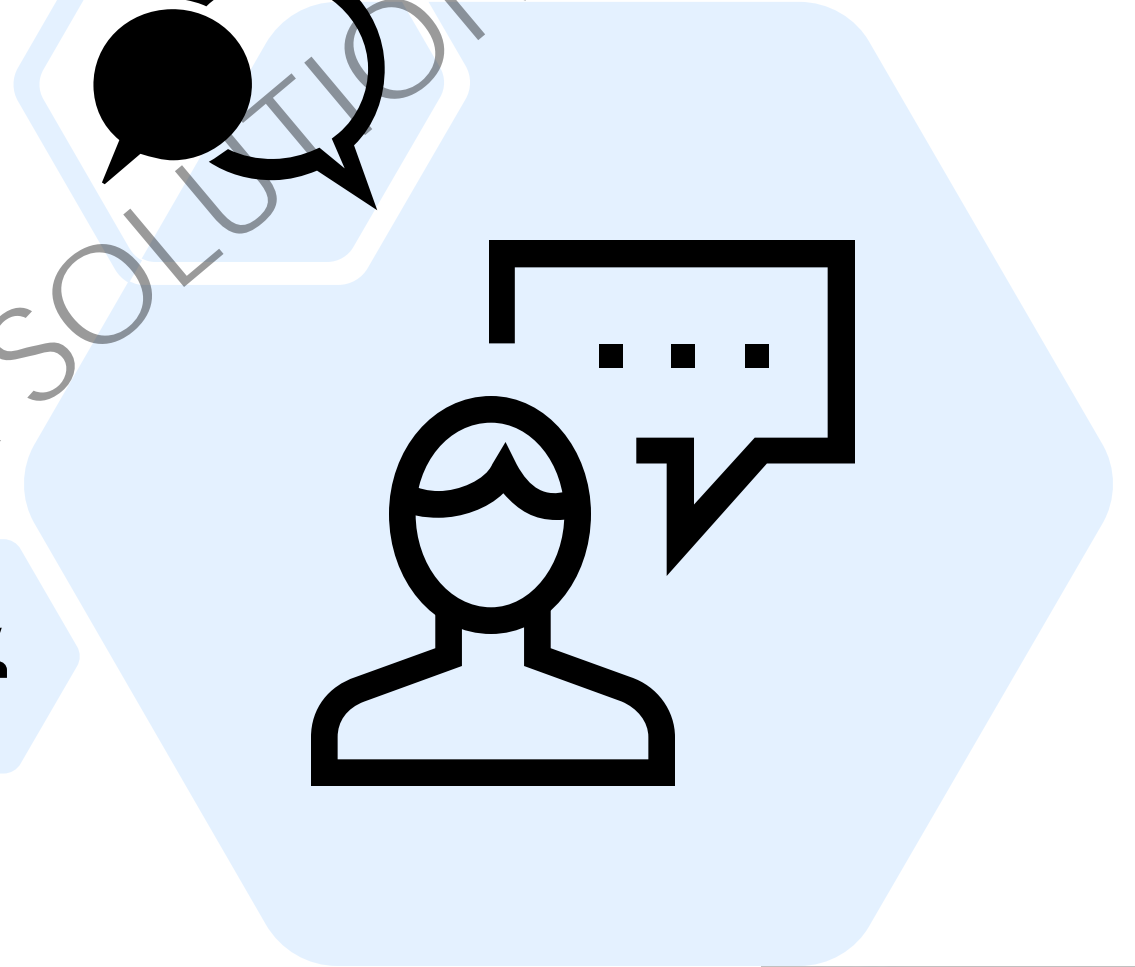
# Hearing Participants

Complainant	the person bringing the complaint
Respondent	the person against whom the complaint has been filed
Advisor	will conduct cross examination; role varies depending on school
Investigator	summarizes the investigation, answers questions
Witnesses	present in the room only when answering questions
Hearing Coordinator/Officer	coordinates all aspects of the hearing, ensures a fair and equitable hearing process, acts as a resource for all participants
Decision-Maker	makes decision as to whether policy was violated
Administrative Staff	assists with the logistical coordination of the people, the space, technology, etc.

# The Players

## Hearing Advisors

- Will conduct examination/cross
- Roles
- Training/Qualifications
- Communicating their role
- Enforcing their role



# The Players

## Support Person

- Optional
- Silent
- Roles
- Communicating their role
- Enforcing their role

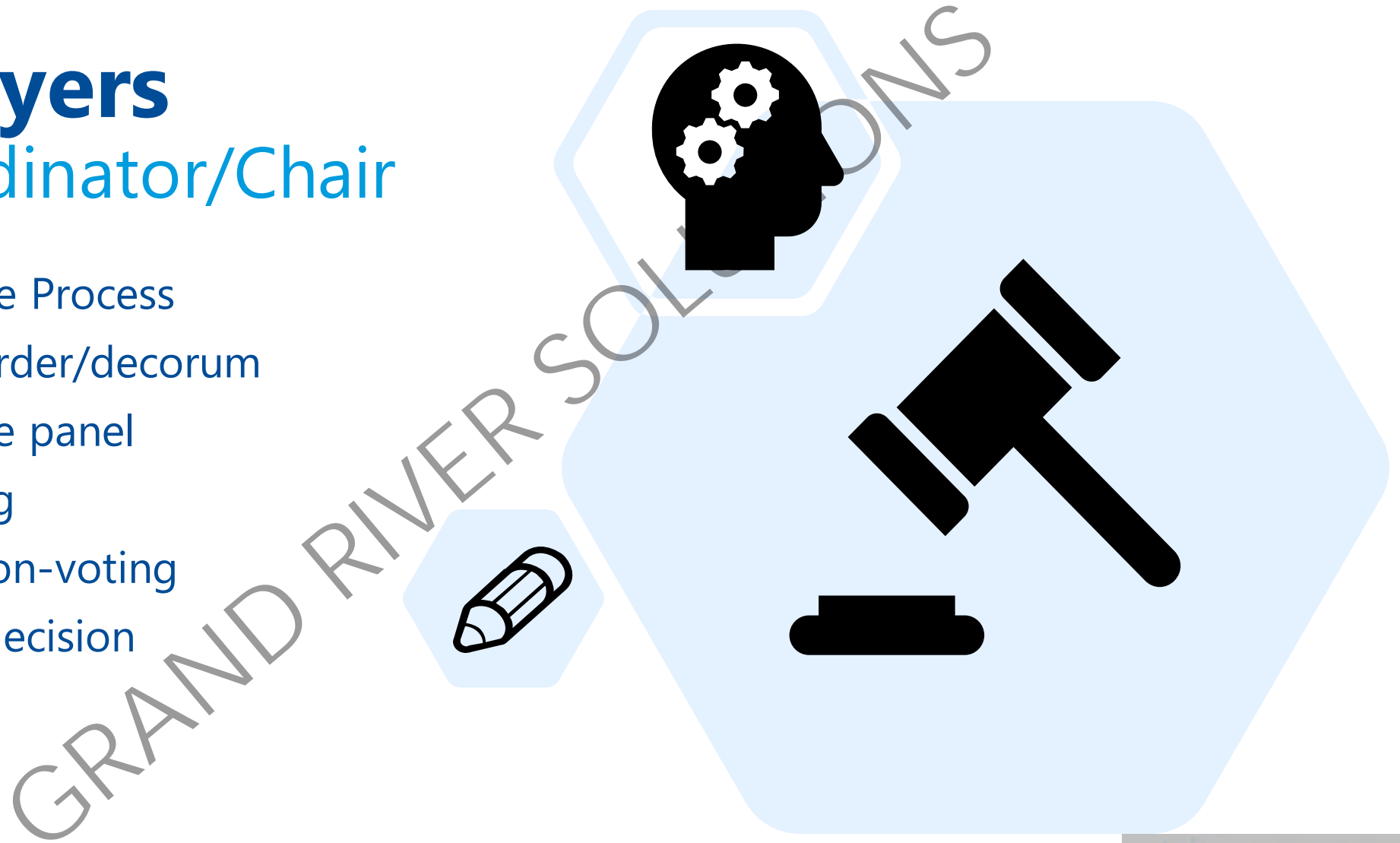
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# The Players

## The Coordinator/Chair

- Oversees the Process
- Maintains order/decorum
- Supports the panel
- Makes ruling
- Voting or non-voting
- Writes the decision
- Trained





# The Players

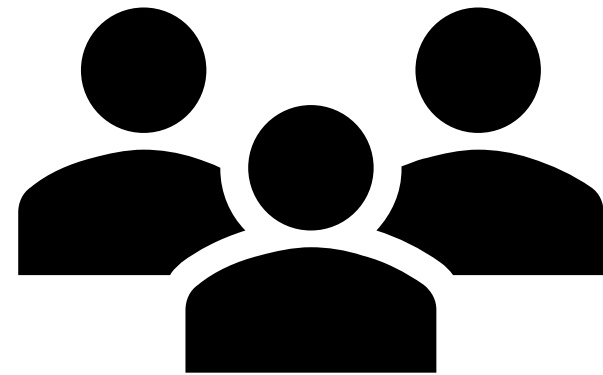
## The Decision Makers

- Fact finders
- Can not be Title IX Coordinator, investigator, or appeal person
- One person or a panel?  
Number of panelists?
- Recruitment and retention



# Other Considerations Panel

- Number of panelists?
- Must finding be unanimous?
- Internal, external, or some combination?
- Recruitment and Retention
- Training



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# The Players

## The Sanctioner

- Attends the hearing?
- Training required



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Who is  
NOT  
in the  
Hearing?

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General Counsel

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Parents

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Student newspaper

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Interested faculty

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Title IX Coordinator

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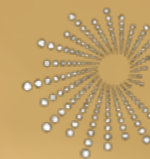
# The Requirement of Impartiality

“

## Final Rule §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
- ”

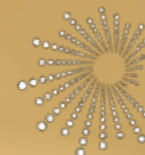






## Final Rule §106.45(b)(1)(iii)

Title IX Coordinator, investigator, **decision maker**, or facilitator of informal resolution must receive training on...how to serve impartially, including avoiding prejudice of the facts at issue, conflict of interest, and bias. This training material may not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.



# Impermissible Bias

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

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# What Constitutes Bias?

Fact specific, objective inquiry based in common sense

Includes:

- Decision making that is grounded in stereotypes
- Different treatment based on a person sex or other protected characteristic

A person in dark clothing and brown shoes is walking on a light-colored sidewalk. The letters 'ST' are painted in large, dark blue characters on the ground. In the foreground, there is a large, semi-transparent orange octagon with a white border. Inside the octagon, the words 'Conflict of Interest' are written in white, bold, sans-serif font. A diagonal watermark reading 'GRAND RIVER SOLUTIONS' is overlaid across the center of the image.

**Conflict  
of  
Interest**

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# 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.

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# An Impartial Grievance Process Is...

Not influenced by bias or conflict of interest

Committed to decisions based on an objective consideration of all of the facts and evidence

Reliable and accurate

Legitimate

Truth Seeking

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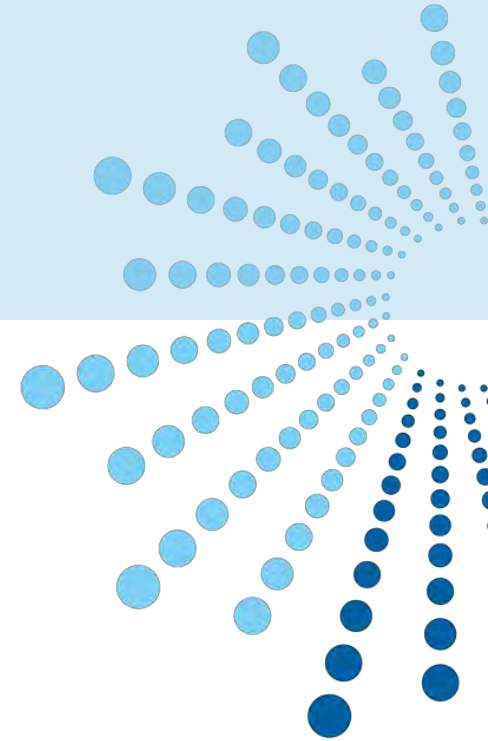


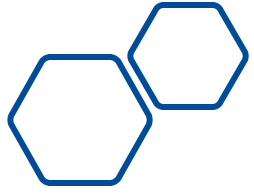
# Pre-Hearing Tasks

What should be done in advance of the hearing

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# Logistics

Scheduling participants

Reserving space

Provision of accommodations

Requests for delays; adjournments



# The Parties and their Advisors, and the Witnesses

## Pre-hearing instructions

- Via conference or meeting
- In writing

## Set expectations

- Format
- Roles of the parties
- Participation
- Evidence
- Decorum
- Impact of not following rules

# The Decision Maker(s)



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



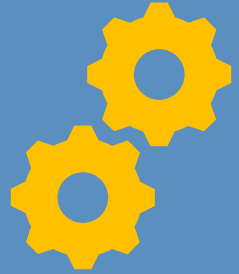
Develop questions of your own



Anticipate the party's questions



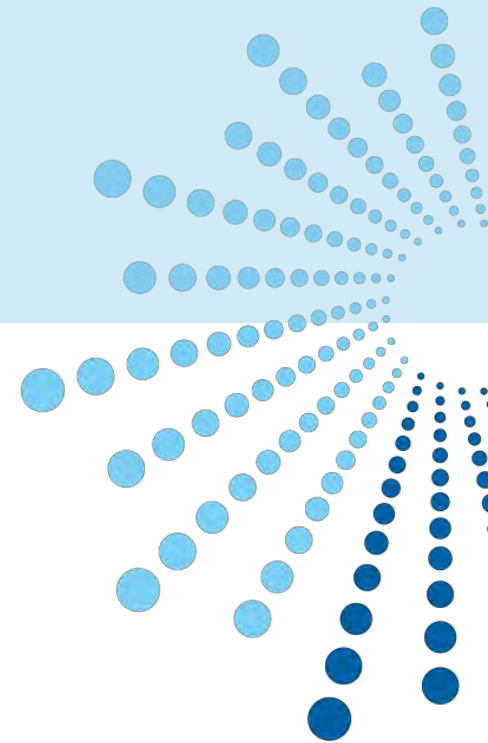
Anticipate challenges or issues



# Conducting the Hearing

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# Opening Instructions by the Chair

- Set the stage
- Reiterate charges
- Reiterate rules and expectations
- Reiterate logistics for the day

*This should be scripted and used consistently.*



# Opening Statements

- Permitted, but not required
- Policy should include purpose and scope
- If permitted, consider
  - Requiring submission prior to hearing
  - Word limit
  - Time limit

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# Testimony

Procedures should be clear about:

- Order of/parties and witnesses
  - Could simply leave this up to the decision maker
- Order of examination
  - Questioning by the decision maker
  - Cross examination by the advisor
  - Will the advisor be permitted to question their own party?
  - Will there be a second round of questioning?
- Consistency is essential. Consider putting this all in your procedures.



# Cross Examination

## Who does it?

- Must be conducted by the advisor
- If party does not appear or does not participate, advisor can appear and cross
- If party does not have an advisor, institution must provide one

# Cross Examination

## Permissible Questions

- Questions must be relevant
- Not relevant
  - Duplicative questions
  - Questions that attempt to elicit information about
    - Complainants prior sexual history
    - Privileged information
    - Mental health

# Cross Examination

## Role of the Decision Maker

- Rulings by Decision Maker required
  - Explanation only required where question not permitted

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# Cross Examination

## Impact of Not Appearing

- Exclusion of all statements of that party
- Exception- DOE Blog
- What if a party or witness appears, but does not answer all questions?

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# Closing Statements

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- Permitted, but not required
- Policy should include purpose and scope
- If permitted, consider
  - Time limit
  - Submission in writing after the hearing

# Common Challenges

- Non-appearance by a party or witness
- Non-appearance by an advisor
- Party attempts to offer evidence for the first time at the hearing.
- Party or witness appears but declines to answer some (or all) questions
- Disruptions
- Maintaining Decorum



# Tips for Increasing Efficiency

01

Be prepared

02

Have an  
experienced chair

03

Have back up plans  
for technology  
issues

04

Require pre-hearing  
written submissions

- of opening statements
- of questions in advance

# Being Trauma-Informed

## Training your panel/adjudicators

- Asking questions
- Asking “why”
- Filtering questions of the parties

## Preparing parties

- Reviewing the investigation report
- Sharing their story again
- Answering questions again

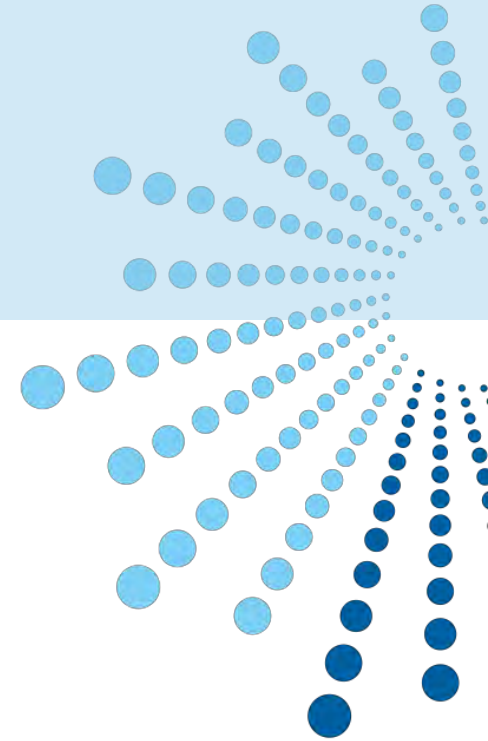
Apply trauma informed practices to ALL participants



# Evidentiary Issues

06

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# 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

”

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# 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

# Frequently Gathered Evidence

Testimony

Text Messages

Social Media  
posts and  
communications

Emails

Surveillance

Videos

Photographs

Police Body  
Camera Footage

Swipe Records

Medical Records

Phone Records

Audio  
Recordings

# Some Other Evidentiary Issues

- Character evidence
- Polygraph examinations
- SANE reports
- Articles from journals
- Past conduct of complainant, respondent
- Unlawfully obtained evidence

**EVIDENCE**



# 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?

Is it convincing?



Is it reliable?

Can you trust it or really on it?



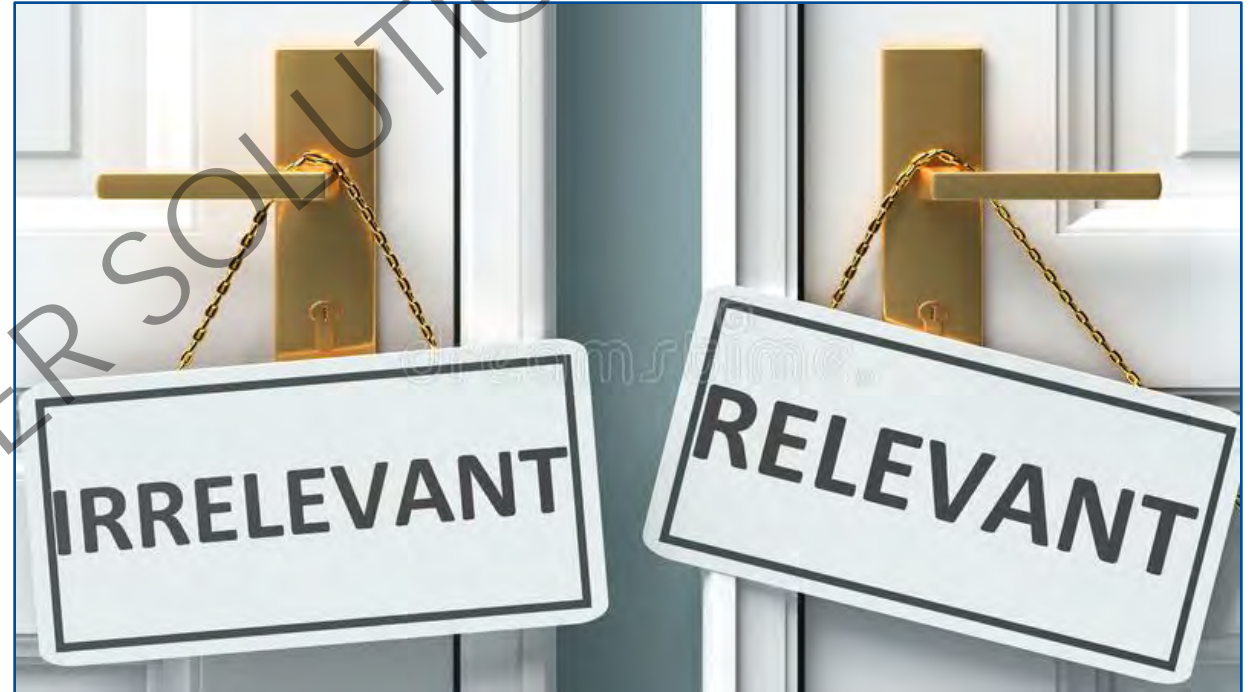
What weight, if any, should it be given?

Weight is determined by the finder of fact!

Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence



# Relevance is Not...



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Strength of the evidence

Believability of the evidence

Based on type of evidence: circumstantial, direct

Based on complicated rules of court



# 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.



# Assessing Reliability

Inherent plausibility

Logic

Corroboration

Past record

Other indicia of reliability

# Assessing Credibility

**No formula exists, but consider the following:**

- opportunity to view
- ability to recall
- motive to fabricate
- plausibility
- consistency
- character, background, experience, and training
- coaching
- Your own bias and limited experience

# Credibility Versus Reliability

## Reliable Evidence

- I can trust the consistency of the person's account of their truth.
- It is probably true and I can rely on it.

## Credibility

- I trust their account based on their tone and reliability.
- They are honest and believable.
- It might not be true, but it is worthy of belief.
- It is convincingly true.
- The witness is sincere and speaking their real truth.



A credible witness may  
give unreliable  
testimony.

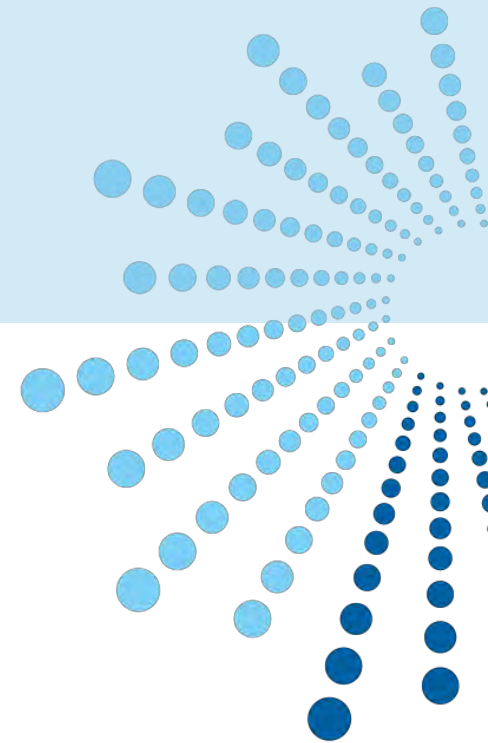
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# After the Hearing

07

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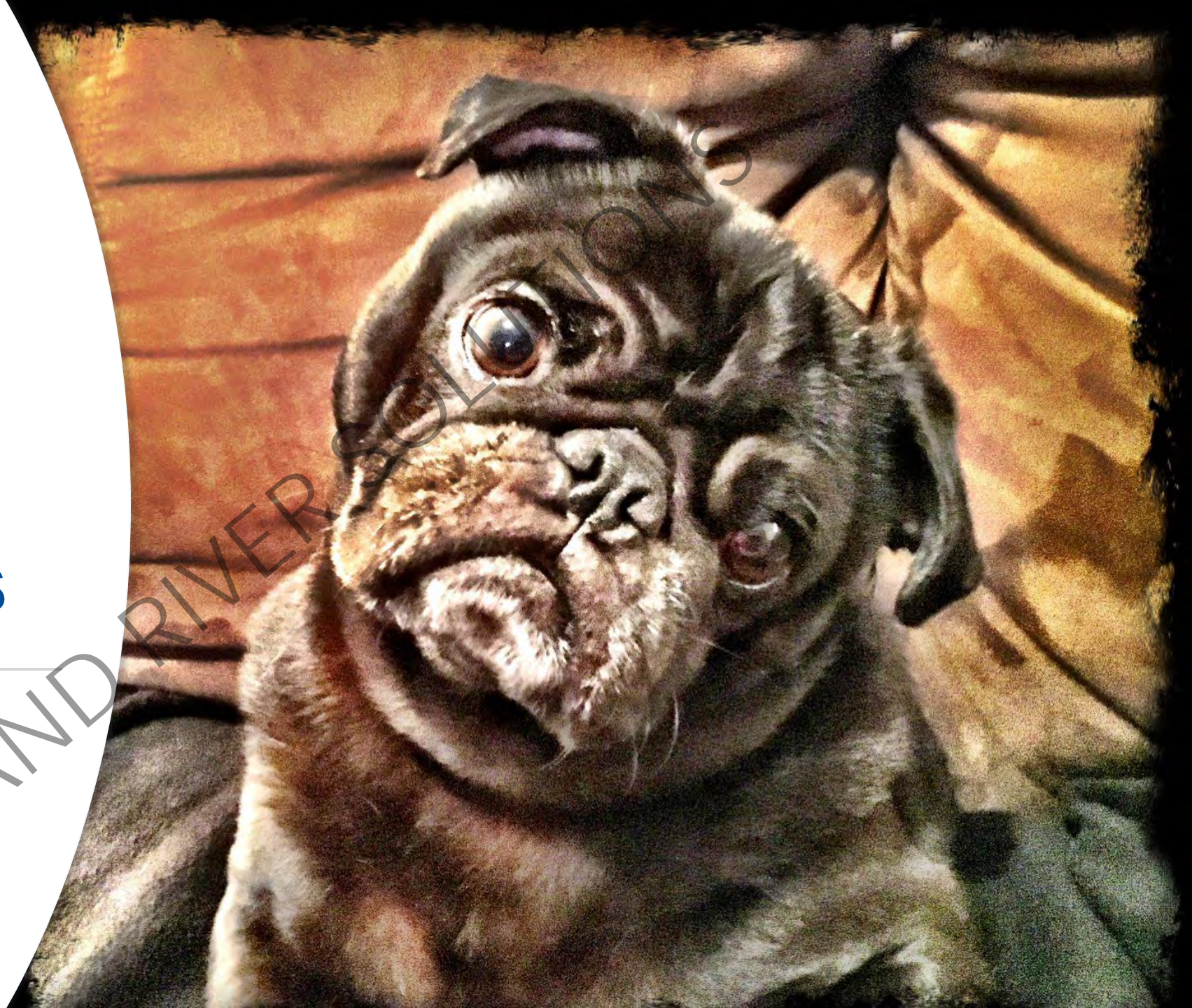




# Deliberations

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# Weighing the Evidence & Making A Determination

- 1) Evaluate the relevant evidence collected to determine what weight, if any, you will afford that item of evidence in your final determination;
- 2) Apply the standard of proof and the evidence to each element of the alleged policy violation;
- 3) Make a determination as to whether or not there has been a policy violation.

# Preponderance of the Evidence

- More likely than not
- Does not mean 100% true or accurate
- A finding of responsibility = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated
- A finding of not responsible = There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated



# Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate



# Allegation: Fondling

**Fondling** is the:



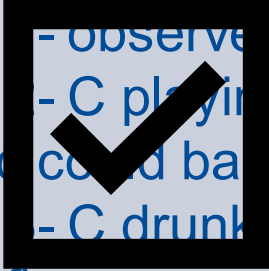
1. touching of the private body parts of another person
2. for the purpose of sexual gratification,
3. without the consent of the victim,
  1. including instances where the victim is incapable of giving consent because of their age or **because of their temporary or permanent mental incapacity.**



# Analysis Grid

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed- Complainant and Respondent Agree that there was contact between Respondent's hand and Complainant's vagina.</p>	<p>Respondent acknowledges and admits this element in their statement with investigators.</p> <p>"we were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</p>	<p>Complainant- drank more than 12 drinks, vomited, no recall            Respondent- C was aware and participating            Witness 1- observed C vomit            Witness 2- C playing beer pong and could barely stand            Witness 3- C drunk but seemed fine            Witness 4- carried C to the basement couch and left her there to sleep it off.</p>

# Apply Preponderance Standard to Each Element

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed- Complainant and Respondent Agree that there was contact between Respondent's hand and Complainant's vagina.</p> 	<p>Respondent acknowledges and admits this element in their statement with investigators.</p> <p>“we were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants...”</p> 	<p>Complainant- drank more than 12 drinks, vomited, no recall Respondent- C was aware and participating</p> <p>Witness 1 - observed C vomit Witness 2 - C playing beer pong and could barely stand Witness 3 - C drunk but seemed fine Witness 4- carried C to the basement couch and left her there to sleep it off.</p> 

# Final Report

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation- Show your work!
- Sanctions and Remedies
- Procedure for appeal

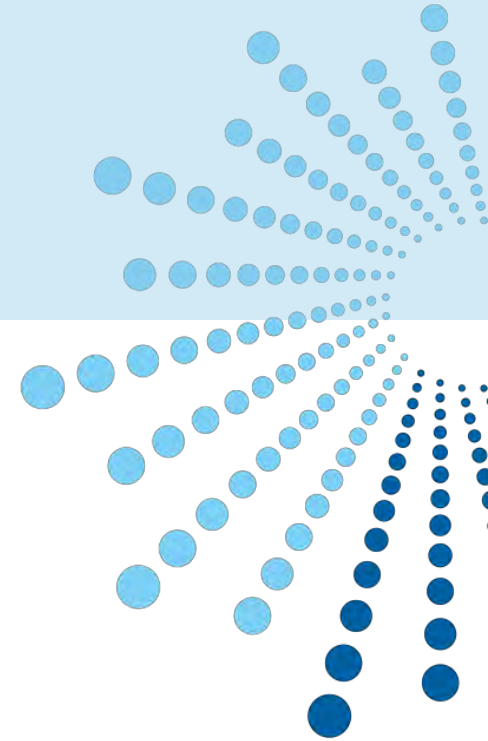




# The Regulations in Practice

08

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## Scenario 1

During the hearing, Witness 1 appears. Witness one answers all relevant questions by the decision maker, the Complainant's advisor, and the Respondent's advisor. After cross by both advisors, the Decision maker asks a second round of questions. Witness 1, who is now tired and frustrated, refuses to answer any of the Decision Maker's follow up questions.

**Can the Decision Maker rely upon/consider the statements of Witness 1?**



## Scenario 2A

Respondent's provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations.

**A. The investigator determines the report is irrelevant. Must the investigator share the report with the decision maker?**



## Scenario 2B

Respondent's provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations. The polygrapher appears and declines to answer all questions posed on cross by Complainant's advisor.

**B. Can the decision maker consider the answers to other questions during the hearing? The report?**





## Scenario 2C

Respondent's provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations. The polygrapher appears and answers all relevant questions on cross.

**B. Must the Decision Maker find Respondent not responsible because of the findings in the report?**



## Scenario 3

Complainant provides records of a sexual assault forensic exam. In the record, the nurse notes that Complainant had bruising on her inner thighs and abrasions on her cervix. The nurse does not appear at the hearing.

Complaint testifies and fully submits to cross. In her testimony she states that she saw bruises on her inner thighs and that the nurse told her about the injuries to her cervix.

1. **Can the DM consider evidence of the inner thigh injuries?**
2. **Can the DM consider evidence of the injuries to C's cervix?**



## Scenario 4

Respondent appears at the hearing with Witness 7. Respondent would like Witness 7 to provide information testimony about text messages between them and Complainant that indicate that Complainant has made the allegations up.

1. **Can the DM hear from Witness 7 at the hearing?**

# Questions?

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