Hearings in the New Era

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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.
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.
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
02 The Infrastructure for Compliance
03 Roles and Responsibilities
04 Pre-Hearing Tasks
05 Hearings Logistics
06 Evidentiary Issues
07 Post-Hearing
08 Practice
Narrowed jurisdiction and expansive procedural requirements
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

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.
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
Title IX Application Post May 2020 Regulations

Type of Conduct
- Hostile Environment
- Sexual Harassment
- Quid Pro Quo
- Sexual Assault
- Dating/Domestic Violence
- Stalking

Ed Program or Activity
- On campus
- Campus Program, Activity, Building, and
- In the United States

Required Identity
- Complainant is participating or attempting to participate in the Ed Program or activity

Apply 106.45 Procedures

Required Response: Section 106.45 Procedures
Conduct Falling Outside the Scope of Title IX

- Apply other institutional policies and procedures
- Ensure that those policies and procedures are complaint with VAWA/Clery, other intersecting federal and state laws
<table>
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<tr>
<th>Institution must respond when it has:</th>
<th>“Actual knowledge”</th>
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<td><strong>“Actual knowledge”</strong></td>
<td>When “an official of the recipient who has authority to institute corrective measures” has notice, e.g., Title IX Coordinator</td>
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<td>of “sexual harassment” (as newly defined)</td>
<td><strong>includes locations, events, or circumstances over which the recipient exercised substantial control</strong> over the respondent and the context in which the sexual harassment occurred</td>
</tr>
<tr>
<td>that occurred within the school’s “education program or activity”</td>
<td>Fact specific inquiry focused on control, sponsorship, applicable rules, etc.</td>
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<td>against a “person in the United States” (so, not in study abroad context)</td>
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Procedural Requirements for Investigations

- **Notice to Both Parties**
- **Equal Opportunity to Present Evidence**
- **An Advisor of Choice**
- **Written Notification of Meetings, etc., and Sufficient Time to Prepare**
- **Opportunity to Review All Evidence, and 10 Days to Submit a Written Response to the Evidence Prior to Completion of the Report**
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
Purpose of the Hearing

- Review and Assess Facts
- Make Findings of Fact
- Determine Responsibility/Findings of Responsibility
- Determine Sanction and Remedy

Why does it matter?
The Essential Elements of All Hearings

- Clear Procedures
- Due/Fair Process
- Fair, Equitable, and Neutral
- Consistency
- Trauma Informed
- Well Trained Personnel
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.
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
Roles and Responsibilities

People, Functions, and Impartiality
## Hearing Participants

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

The Sanctioner

➢ Attends the hearing?
➢ Training required
Who is NOT in the Hearing?

- General Counsel
- Parents
- Student newspaper
- Interested faculty
- Title IX Coordinator
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
Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution must receive training on how to serve impartially, including avoiding prejudgment 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

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

1. Not influenced by bias or conflict of interest
2. Committed to decisions based on an objective consideration of all the facts and evidence
3. Reliable and accurate
4. Legitimate
5. Truth Seeking
Pre-Hearing Tasks

What should be done in advance of the hearing
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
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
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
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?
Closing Statements

• 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 of 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
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.
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
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...

- 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.
After the Hearing
Deliberations
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

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<td>Witness 1- observed C vomit</td>
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<td>Witness 2- C playing beer pong and could barely stand</td>
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<td>Witness 3- C drunk but seemed fine</td>
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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
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

Responded 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?
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