

GRAND RIVER | SOLUTIONS

University of Tennessee System-Wide Training

May 2020 Title IX Regulations
Day Two

Jody Shipper

Meet Your Facilitator



Jody Shipper, J.D.

Co-Founder and Managing Director

Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Jody received her J.D. from the University of California, Hastings College of Law and her bachelor's degree from Georgetown University's School of Foreign Service.

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.

Agenda

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**Brief Overview of Title IX
Grievance Procedure**

05

**Conducting an Impartial
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02

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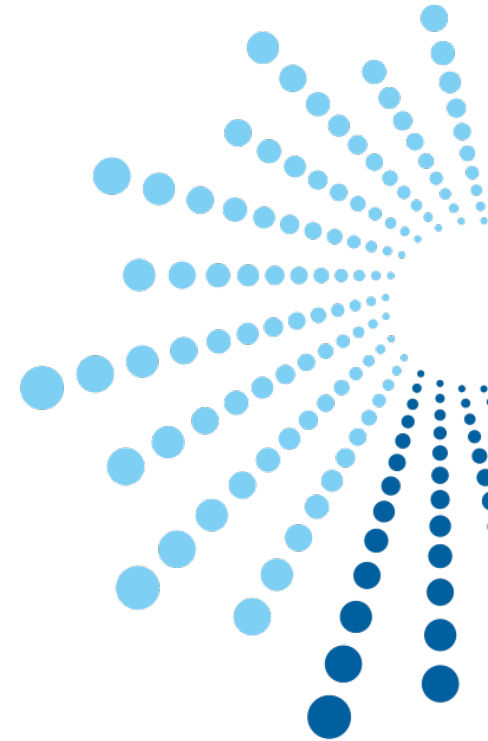
Due Process Considerations

07

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04

The Hearing Process





Brief Overview of Title IX Grievance Procedure

01

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The May 2020 Title IX Regulations Cover A Narrow Scope of Title IX

Discrimination, harassment, retaliation, stalking, DV, sexual assault that does NOT meet the new, detailed definitions

Sexual Harassment, Sexual Assault, DV, Stalking that DOES meet new definitions

NOT defined in regulations

Defined in regulations

Only THESE get the new processes

Section 106.30: Sexual Harassment

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).

BUT WAIT, THERE'S MORE!

1. Definition:

Does this meet the definition?

If yes, continue. If no, not IX

2. Location:

On campus, within the United States;

In building owned/controlled by a recognized student org., in the U.S.;

Part of a program or activity, and within the United States.

If yes to one of the above, continue. If no, not IX

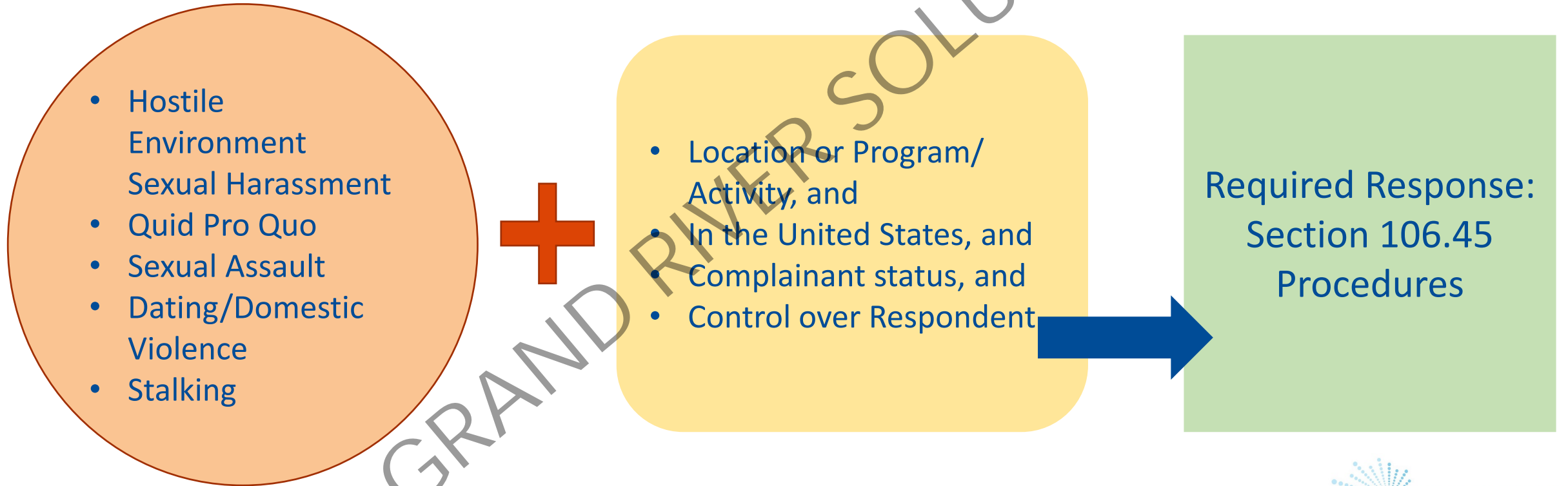
3. The institution has control over the respondent

If yes, continue. If no, not IX

4. Complainant is accessing or attempting to access a university program or activity, in the U.S.

If yes, use New Title IX Process

Title IX Application Post May 2020 Regulations





Overview of Procedures:

Mandatory Response

Supportive Measures

Formal Complaint

Mandatory Dismissal

Investigation

Hearing *****

Appeal

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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



REPORT
SUMMARIZING
RELEVANT
EVIDENCE AND
10 DAY REVIEW
OF REPORT PRIOR
TO HEARING

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

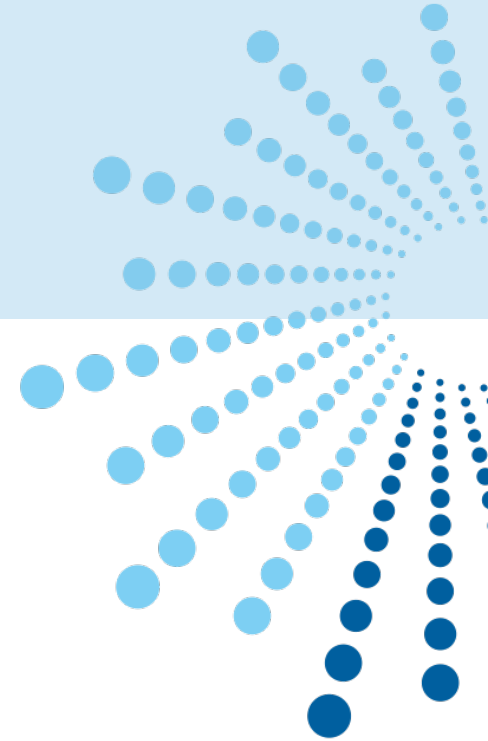
Written decision must be issued that includes finding and sanction

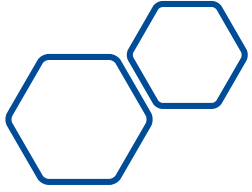


Pre-Hearing Tasks

02

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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) Pre- Hearing Tasks



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



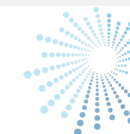
Develop questions of your own



Anticipate the party's questions



Anticipate challenges or issues





Due Process Considerations

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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

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

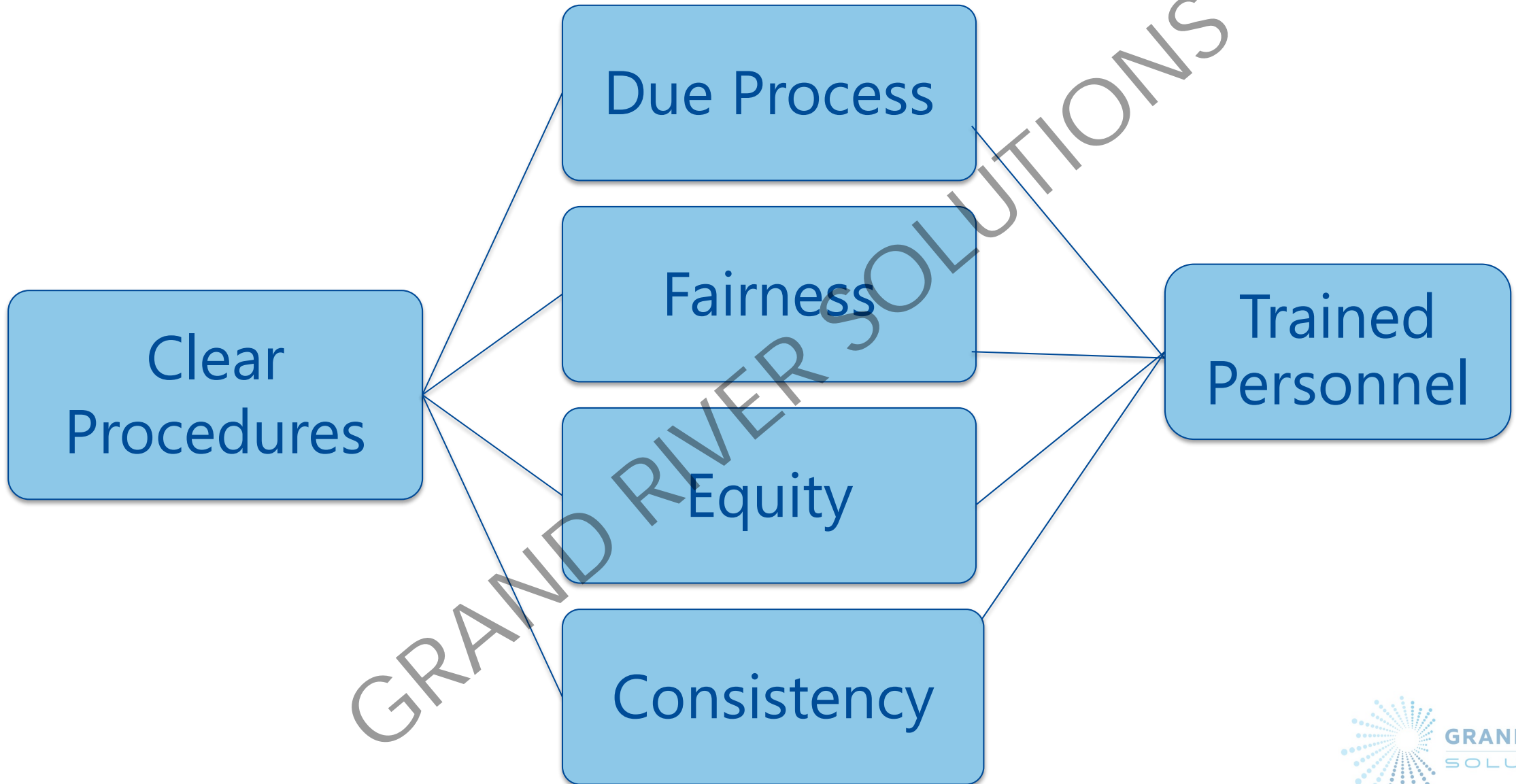
- The roles of all participants

The Evidence

- Relevancy, Exclusions, Timing of submission, how to submit, who decides, etc.

The Outcome

- Deliberations; Notice; manner and method communicated.





The Hearing Process

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Hearing Participants

Complainant

Respondent

Advisor

Adjudicator(s) or Panelist(s)

Investigator

Witnesses

Hearing

Coordinator/Officer

Decision-Maker

Administrative Staff

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 Conundrum: Rules of a Courtroom Do Not Apply

- Is **Cross-examination** limited to questioning only on matters that were raised during **direct examination**. NO?
- Badgering a witness
- Asked and answered
- Unduly Harassing
- Leading questions

Can the Hearing Officer Exclude Questions?

“A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant”

“The Department purposefully designed these final regulations to allow recipients to retain flexibility to adopt rules of decorum that prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner.”

Form of the Question

So you're really saying that . . .

Why did you . . . ?

Isn't it true that (followed by long statement)

A statement, not a question: Is there a question in there?

Asking that a Question be Rephrased

- Party or witness cannot understand the question
- Advisor struggling to form a question
- Compound questions
- Abusive, disrespectful, intimidating questions

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 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

Other Decisions

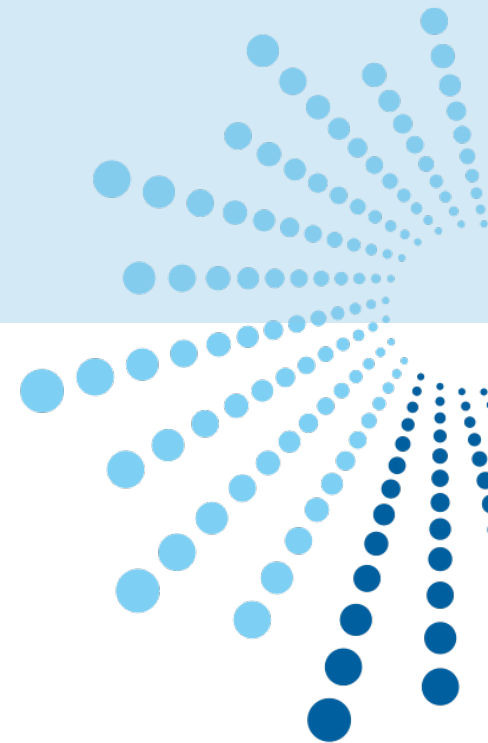
- Will you include Opening, Closing, or Impact Statements? NOT required, but you need to decide.
- How will questioning take place? Direct cross examination, indirect?
- How will questions be submitted?
- Will there be any restrictions on questions that can be asked, such as due to relevancy, already asked and answered, unduly harassing?
- If done remotely, how will the technology be set up?
- If in person, room set-up and who is in the room?



Conducting an Impartial Process

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Prejudging

- “Believe all victims”?
- Is bringing forward a case a “judgment”?
- Avoiding any presumption of responsibility

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Bias? Conflict of Interest

- Being anti-rape
- The investigator once took a women's studies course
- The appeals officer wrote on Facebook last week that if a boy is accused, he definitely did at least *something* wrong
- The Title IX Coordinator went to the same college as the Complainant's mother
- The Title IX Coordinator's daughter works for the Complainant's mother

Credibility Versus Reliability

- Logic
- Plausibility
- Consistent/inconsistent
- Ability to observe
- Ability to recall
- Corroboration

Does the demeanor of the person ever matter?

Where does bias fit in?

The Dangers of Assessing Credibility

Cultural cues that you do not recognize

A person just “seems believable”

Their story makes sense to me

I know how to spot a liar

Gesture #4: Denying Eye Contact



Denying eye contact is often a sign of discomfort.

Usually people make eye contact for about half of the conversation, so if you notice their eyes constantly wavering, especially during a touchy subject, you may be dealing with a liar.

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Deliberations

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Weighing the Evidence & Making A Determination

- 1) Evaluate the evidence collected to determine what factually is more likely to have occurred, and then
- 2) Analyze whether the conduct that happened constitutes a violation of the school's policies

Final Report

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



Policy Analysis

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



Report, Method 1

- Determine the material facts
 - Break policy into elements
- Determine which material facts are:
 - Undisputed – consistent, detailed and plausible, and/or agreed upon by the parties [e.g. X and Y attended a fraternity party on April 5, 2019]
 - Disputed – unsupported by documentary or other evidence, or are facts about which an element of doubt remains [e.g. X alleged that Y kissed her without her consent around 1 am at the party, and Y asserted he never kissed X and went home early]

For Those Facts that are in Dispute

Why are some facts are accepted, and others rejected? SHOW YOUR WORK

“While Y maintained that he never kissed X and went home early, witnesses 2, 3, and 4 corroborated that Y was at the party until 3 a.m. In addition, a photo was submitted by witness 4 showing Y kissing X. Therefore, I find that Y’s version of events cannot be credited as true.”



Appeals

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Appeals: Mandatory Grounds

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Permissible Grounds for Appeal

- Non-appearance by a party or witness
- Non-appearance by an advisor
- Party or witness appears but declines to answer some (or all) questions
- Questions that were deemed relevant/not relevant
- Bias

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Let's Practice



Which
questions will
you allow?

Say hi!

Pick a scribe

Discuss

- Which are relevant?
- Groups 1 & 2: Complainant
- Groups 3 & 4: Respondent
- Groups 5 & 6: Witnesses

Report Out

Groups 1 & 2: Complainant

Groups 3 & 4: Respondent

Groups 5 & 6: Witnesses

Asking to rephrase or reframe?



Can you rephrase the question?



Disrespectful, abusive, intimidating?

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Questions?



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