University of Tennessee System-Wide Training
May 2020 Title IX Regulations
Day Two

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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

01 Brief Overview of Title IX Grievance Procedure
02 Pre-Hearing Tasks
03 Due Process Considerations
04 The Hearing Process
05 Conducting an Impartial Process
06 Deliberations
07 Appeals
Brief Overview of Title IX
Grievance Procedure
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

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

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

- Location or Program/Activity, and
- In the United States, and
- Complainant status, and
- Control over Respondent

Required Response: Section 106.45 Procedures
Overview of Procedures:

- Mandatory Response
- Supportive Measures
- Formal Complaint
- Mandatory Dismissal
- Investigation
- Hearing
- Appeal
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
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
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

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
The Hearing Process
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 advance
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
Prejudging

• “Believe all victims”? 

• Is bringing forward a case a “judgment”? 

• Avoiding any presumption of responsibility
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
Deliberations
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: 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
Let’s Practice
Which questions will you allow?

- 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
Can you rephrase the question?

Disrespectful, abusive, intimidating?
Questions?

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