

**GRAND RIVER** | SOLUTIONS

# Hearings in the New Era

## Morning Session

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.

# Today's Agenda

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Regulatory Overview

05

Hearings Logistics

02

Who Does the Work?

06

Evidentiary Issues

03

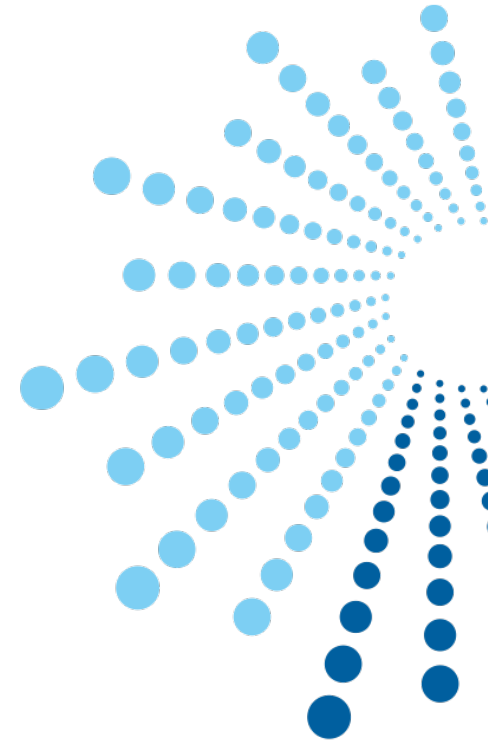
Roles and Responsibilities

07

Post-Hearing

04

Pre-Hearing Tasks





# Regulatory Overview

Narrowed jurisdiction and expansive procedural requirements

01

# 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."

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

- Sex Discrimination
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment
- Retention Rates
- Safety
- Screening Exams
- Sign-on Bonuses
- Student and Employee Benefits
- Thesis Approvals
- Vocational or College Counseling
- Research opportunities

Conduct Constituting  
Sexual Harassment as  
Defined in  
Section 106.30

# 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).



# Sexual Assault Definitions

- 20 U.S.C. 1092(f)(6)(A)(v) – Federal Definitions
- Sex Offenses Forcible and Non-Forcible
  - Forcible:
    - Rape, Sodomy, Sexual Assault with an Object, Non-Consensual Fondling
  - Non-Forcible: Incest, Statutory Rape

# Domestic Violence

Includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person.

# Dating Violence

Violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship (iii) The frequency of interaction between the persons involved in the relationship.

# Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.

# Title IX Application Post May 2020 Regulations

All Forms of Sex  
Discrimination,  
Retaliation

106.30 Sexual  
Harassment:

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

# First Question

What Happened?

## Does the Complaint Allege:

1. sexual harassment in which the harassment was so severe and pervasive that it denied the complainant equal access to an educational program or activity, or denied the employee the equal ability to continue their work;
2. Dating Violence, Domestic Violence, Stalking, or Sexual Assault;
3. A complaint of quid pro quo sexual harassment by an employee respondent against a student.



## Second Question

Where Did the Conduct Occur?

Did the conduct occur:

1. The incident(s) occurred at school, within the United States;
2. The incident(s) occurred in any building owned or controlled by a student organization that is officially recognized by the institution, and within the United States;
3. The incident(s) was part of one of the school's programs or activities, such as part of a field trip or team athletic event, and within the United States.



## Third Question

Who Experienced the  
Conduct?

Is the Complainant:

1. a student (whether applicant, admitted, or currently enrolled); or
2. An employee (applicant, hired but not yet working, or employed),
3. Or someone who is otherwise still accessing or attempting to access a university program or activity, within the United States.





## Fourth Question

Who is the Accused?

Is the Respondent:

1. A student (whether applicant, admitted, or currently enrolled), or
2. An employee (applicant, hired but not yet working, or employed).
3. Someone else that the institution may have control over (ie, a contractor, an alum, or a vendor)





Apply the 106.45  
Procedures



# Who Does the Work?



02

## Key Roles



The Investigator,  
Coordinator, Decision-  
Maker, Appeals Officer

# All Who Carry Out a Role



Must be trained in accordance with the requirements in the regulations



Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest

# Avoiding Prejudgment

- Practical application of these concepts in investigations:
  - Do not rely on cultural “rape myths”
  - Do not rely on cultural stereotypes about how men or women purportedly behave
  - Do not rely on gender-specific research data or theories
  - Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence
  - Avoid any perception of bias in favor of or against complainants or respondents generally

# Impartiality and Bias



Past personal or professional  
experience



Common sense approach to  
evaluating whether a particular  
person serving in a Title IX role is  
biased



No generalizations



## Impartiality: Avoiding Prejudgment, Bias, and Conflicts of Interest

### Bottom line:

- Follow facts of every individual case
- Investigate in a consistent manner
- Must allow challenges for conflict of interest



# All Who Carry Out a Role



Must be trained in accordance with the requirements in the regulations



Must conduct the investigation/hearing/appeal in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest



## Before The 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

What do we  
need to do  
all of this?



Space



Technology



Clear & Comprehensive Procedures



Staff



Expertise and Confidence

# 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

# 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.



# Roles and Responsibilities

People, Functions, and Impartiality

03



# 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
Adjudicator(s) or Panelist(s)	role varies depending on when in the process the hearing occurs and responsibility of the officer
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.

# Other Considerations Panel

- Number of panelists?
- Can you have a panel of one?
- Must finding be unanimous?
- Internal, external, or some combination?



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

# The Players

## Hearing Advisors

- Will conduct cross examination
- 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 Maker

- May be Hearing Chair or on panel
- Determines whether policy was violated
- Cannot be investigator, Title IX Coordinator, or Appeals Officer



# The Players

## The Panel

- Fact finders
- Number of panelists?
- Composition?
- Makes the finding
- Unanimous?
- Pool?
- Recruitment and retention







# Logistics of a Hearing

# 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?

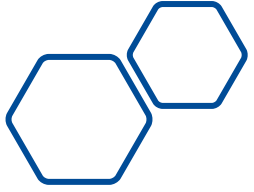
Recording



# Pre-Hearing Tasks

What should be done in advance of the hearing

04



# 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 and/or review those offered



Anticipate challenges or issues

# Role of the Advisor



Review evidence and report



Review applicable policy and procedures



Determine key elements of policy



Facts most favorable to advisee



Highlight key facts for Decision-Maker by asking questions



No legal arguments, objections



Foundational questions?



# Hearing Logistics



05

# 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 Questions

How will this work?

- Submitted in advance?
- Submit one by one?
- Each one is vocalized, approved/denied, then asked?
- Submit cross-exam questions by email or chat during hearing?



# 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
    - Complainant's prior sexual history
    - Privileged information



# Cross Examination

## Role of the Decision Maker

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

# Decorum at the Hearing

- ❖ 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
- ❖ a postsecondary institution recipient may adopt reasonable rules of order and decorum to govern the conduct of live hearings
- ❖ Schools “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.”

# 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

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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 or witness appears but declines to answer some (or all) questions
- Disruptions
- Maintaining Decorum
- A struggling advisor

# Being Trauma-Informed

## Training your panel/adjudicators

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

## Preparing parties

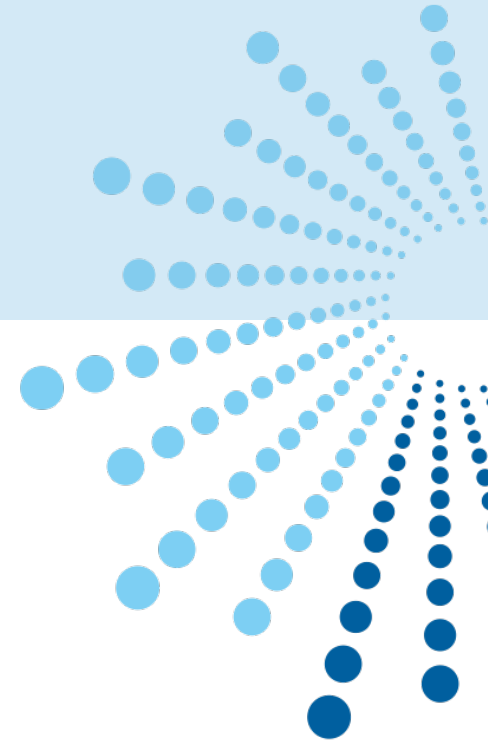
- Reviewing the investigation report
- Sharing their story again
- Answering questions again

## Need to ask the questions



# Evidentiary Issues

06







# 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

# Non-Testimonial Evidence

Text Messages

Social Media posts

Social Media 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**

Logical connection between the evidence and facts at issue

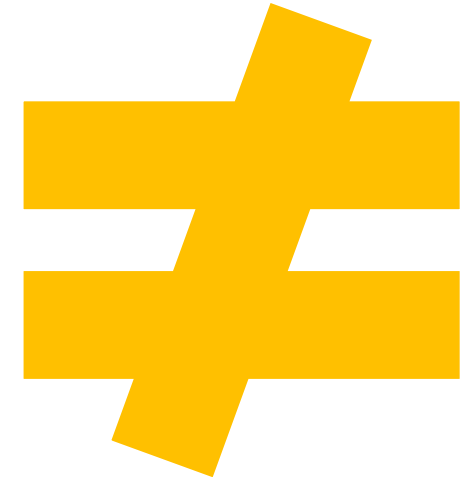
Assists in coming to the conclusion – it is “of consequence”

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 Credibility and Reliability

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

- opportunity to view
- ability to recall
- plausibility
- consistency or ability to explain inconsistencies
- Impact of your own bias and limited experience



# Assessing Reliability

Inherent plausibility

Logic

Corroboration

Past record

Other indicia of reliability

# Reliability Versus Credibility

## 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.

# Being Convinced

It Is True, or Biased Conclusion?

**A credible witness may give  
unreliable testimony**



# After the Hearing



07

# 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

# Policy Analysis

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



# Preponderance of the Evidence

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





# 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



# Questions?



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