Hearings in the New Era: Are You Ready?
Day One
Jody Shipper and Chantelle Cleary
Jody Shipper, J.D.
Co-founder and Managing Director
Grand River Solutions

Chantelle Cleary, J.D.
Senior Consultant
Grand River Solutions
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

<table>
<thead>
<tr>
<th></th>
<th>01</th>
<th>02</th>
<th>03</th>
<th>04</th>
<th>05</th>
<th>06</th>
<th>07</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Regulatory Overview</td>
<td>The Infrastructure for Compliance</td>
<td>Roles and Responsibilities</td>
<td>Pre-Hearing Tasks</td>
<td>Hearings Logistics</td>
<td>Evidentiary Issues</td>
<td>Post-Hearing</td>
</tr>
</tbody>
</table>
An overview of what is required and what is needed to comply
Regulatory Overview

Narrowed jurisdiction and expansive procedural requirements
What is Covered by Title IX

- 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
What (Mis)Conduct is Covered by the New Regulations’ Processes?

• Sexual Harassment
  o Hostile Environment
• Quid Pro Quo (employee to student)
• Sexual Assault
• Dating Violence
• Domestic Violence
• Stalking
It Was Bad, But Not Title IX Bad

If not 106.30, then no 106.45
I. Nature of Complaint:

A complaint of 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;

A complaint of Dating Violence, Domestic Violence, Stalking, or Sexual Assault;

A complaint of quid pro quo sexual harassment by an employee respondent against a student.

If yes to one of the above, continue. If no, please see (name of basic sex harass policy).

2. Location:

The incident(s) occurred at school, within the United States;

The incident(s) occurred as part of a recognized program in in a building under the school's control, and within the United States;

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.

If yes to one of the above, continue. If no, please see (name of basic sex harass policy).

3. The institution has control over the respondent, meaning the Respondent is a student (whether applicant, admitted, or currently enrolled) or employee (applicant, hired but not yet working, or employed). In addition, the institution may have control over a respondent who is a contractor, an alum, or a vendor under certain circumstances.

If yes to one of the above, continue. If no, please see (name of basic sex harass policy).

4. Complainant is a student (whether applicant, admitted, or currently enrolled) or employee (applicant, hired but not yet working, or employed), or otherwise still accessing or attempting to access a university program or activity, within the United States.

If yes to one of the above, continue. If no, please see (go to basic sex harassment policy).
Definition of 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

Sexual Assault, Dating Violence, Domestic Violence, Stalking

Remember; Jurisdictional elements apply
First Things First...

Before The Investigation

- Notice to College/University
- Outreach/Response from Title IX Coordinator
- Support Measures, whether or not Formal Complaint is filed
- How to File
- Options
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
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?
<table>
<thead>
<tr>
<th>The Essential Elements of All Hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clear Procedures</td>
</tr>
<tr>
<td>Due/Fair Process</td>
</tr>
<tr>
<td>Fair, Equitable, and Neutral</td>
</tr>
<tr>
<td>Consistency</td>
</tr>
<tr>
<td>Trauma Informed</td>
</tr>
<tr>
<td>Well Trained Personnel</td>
</tr>
</tbody>
</table>
# 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
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>Adjudicator(s) or Panelist(s)</td>
<td>role varies depending on when in the process the hearing occurs and responsibility of the officer</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>
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?

- General Counsel
- Parents
- Student newspaper
- Interested faculty
- Title IX Coordinator
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 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
Impartiality

WHAT DOES THIS *REALLY* MEAN?
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
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
- Complainant & Advisor
- Respondent & 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
The Hearing

PART 2
Pre-Hearing Tasks

What should be done in advance of the hearing
Logistics

- Scheduling participants
- Reserving space
- Provision of accommodations
- Requests for delays; adjournments
Pre-Hearing Preparation of Participants
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
<table>
<thead>
<tr>
<th>Task</th>
</tr>
</thead>
<tbody>
<tr>
<td>Review evidence and report</td>
</tr>
<tr>
<td>Review applicable policy and procedures</td>
</tr>
<tr>
<td>Preliminary analysis of the evidence</td>
</tr>
<tr>
<td>Determine areas for further exploration</td>
</tr>
<tr>
<td>Develop questions of your own</td>
</tr>
<tr>
<td>Anticipate the party's questions</td>
</tr>
<tr>
<td>Anticipate challenges or issues</td>
</tr>
</tbody>
</table>
Hearing Logistics
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 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

- **The attraction of prurient interests**
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.
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
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 Credibility and Reliability

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
Assessing Reliability

- Inherent plausibility
- Logic
- Corroboration
- Past record
- Other indicia of reliability
Being Convinced
It Is True, or Biased Conclusion?

A credible witness may give unreliable testimony
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.
After the Hearing
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
What Impacts How We Assess Others

- I saw a woman kick a vending machine. Wow, she is angry. Who would do that?
- Me? I kicked the vending machine because I’m stressed and my kid is hungry and I’m running late, and who wouldn’t kick the vending machine?
- Confusing type of person and situation
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?
Jody Shipper
Jody@grandriversolutions.com

Chantelle Cleary
Chantelle@grandriversolutions.com
©Grand River Solutions, Inc., 2020. Copyrighted material. Express permission to post training materials for those who attended a training provided by Grand River Solutions is granted to comply with 34 C.F.R. § 106.45(b)(10)(i)(D). These training materials are intended for use by licensees only. Use of this material for any other reason without permission is prohibited.