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# Hearings in the New Era: *Are You Ready?*

## Day Two

Jody Shipper and Chantelle Cleary



# Overview of the Day

1. Pre-Hearing Preparation
2. Testimony and Cross Examination
3. Things that go boom

# Pre-Hearing



# Rapid Fire Recap

The investigation is complete and it is time to schedule the hearing.

*Using the chat box, share your “To Do” List for coordinating the hearing.*

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# Rapid Fire Recap

You and your team did a great job scheduling the hearing and arranging all of the logistics.

It is now one week prior to the hearing. You have already received and reviewed the report and record and you will be meeting with the rest of the panel (or spending some quite time by yourself) to prepare for the hearing.

*Use the chat box to share what you plan to discuss/think about during the prehearing meeting.*

# Break Out!

Say hi!

Pick a scribe

Discuss

- All groups: Areas or topics that you would like to explore further in the hearing
- Groups 1-2: Follow up questions for Complainant
- Groups 3 and 4: Follow up questions for Respondent
- Group 5 and 6: Follow up questions for the witnesses

Email your responses to Jody and Chantelle

- [jody@grandriversolutions.com](mailto:jody@grandriversolutions.com)
- [chantelle@grandriversolutions.com](mailto:chantelle@grandriversolutions.com)

# The Hearing

# Break Out! (again)



Say hi again

Select a member of your group  
to take notes and to report out  
to the whole group



Discuss the following



# Break Out! (again)

The hearing is well underway, opening instructions have been provided and the parties have delivered opening statements. It is time for testimony. The parties have each provided a list of proposed questions.

In your break-out groups, discuss the list of proposed questions and whether or not you will permit them during the hearing. If you are not going to permit them, indicate the reason for your ruling. At the conclusion of the breakout, one member of each group will be asked to discuss one or two (your choice) of the proposed questions.

# Report Out

# Things That Go Boom!

We would like you to take a few minutes to think about the one thing that keeps you up at night, and if you're comfortable, share that privately with Chantelle/Jody in the chat. Chantelle will pick some of your fears, will share them with the group and Jody will share some thoughts about what you might do if those nightmares become a reality!

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# Questions?

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# May 2020 Final Title IX Regulations

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

01

Regulatory Overview

06

Conducting the Investigation

02

Notice

07

Evaluating the Evidence

03

Meeting the Definition of  
Sexual Harassment

08

The Investigation Report

04

The Procedural Requirements  
of the Investigation

09

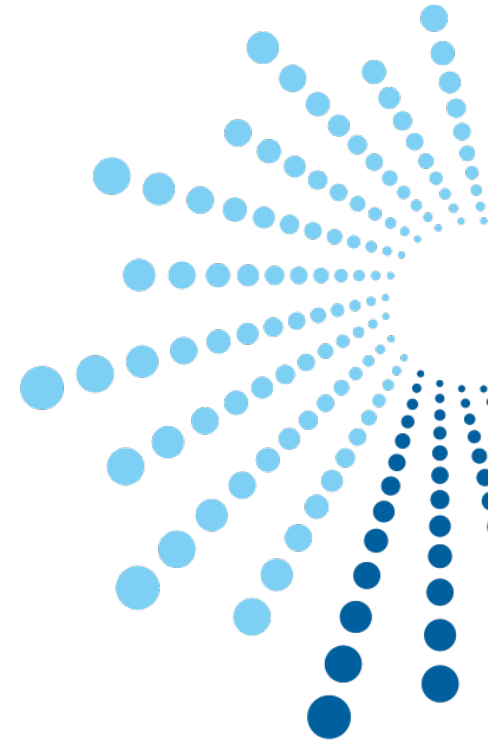
Pre-Hearing Tasks

05

The Investigator

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Hearing, Deliberations, & Appeal





# Regulatory Overview

01

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

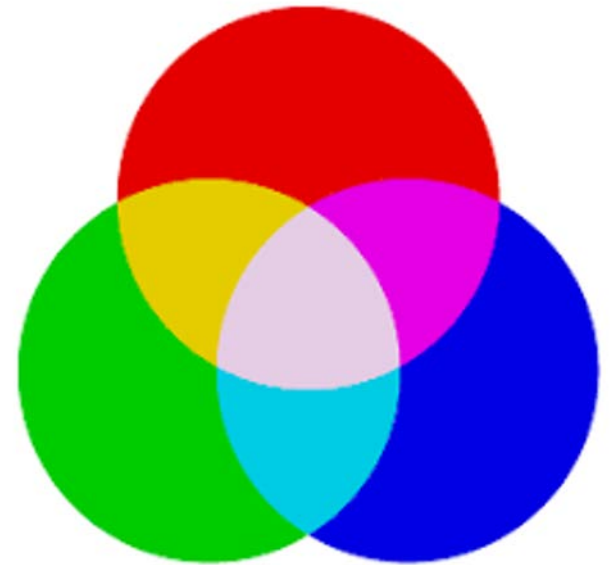
- o Sex Discrimination
- o Achievement Awards
- o Athletics
- o Benefits
- o Financial Aid
- o Leaves of absence and re-entry policies
- o Opportunities to join groups
- o Pay rates
- o Recruitment
- o Retention Rates
- o Safety
- o Screening Exams
- o Sign-on Bonuses
- o Student and Employee Benefits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

Conduct Constituting  
Sexual Harassment as  
Defined in  
Section 106.30

# 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 (on basis of sex)\*
- Domestic Violence (on basis of sex)\*
- Stalking (on basis of sex)\*

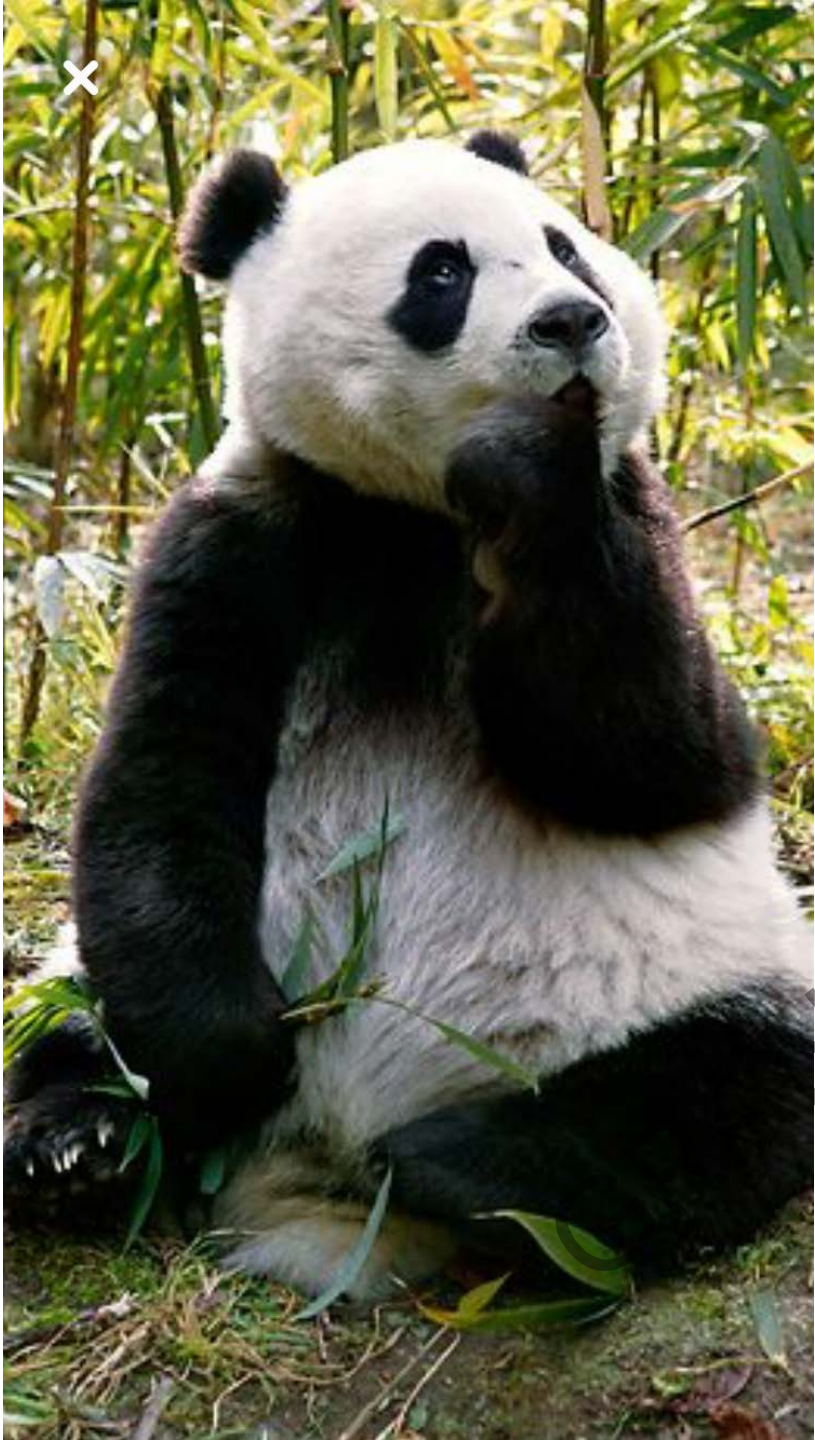
\* Using 106.30 definitions



# It Was Bad, But Not (New) Title IX Bad

**Sexual harassment, DV, Stalking,  
Discrimination Retaliation:**

**If it does not meet § 106.30 definition, then  
not mandated to use §106.45 process**



# What are the § 106.30 Definitions?

# 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
- (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).

# Definition of Sexual Harassment Quid Pro Quo

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;

Meaning: You do this for me, I'll do that for you. Quid Pro Quo

Not covered here: A student leader tells another student, "If you won't go out with me, I'll make sure you never get into the glee club."



# Elements of this Definition of Sexual Harassment

1. Unwelcome conduct (subjective and objective)
2. Severe
3. Pervasive
4. Objectively offensive
5. Effective denial of equal access to school's education program or activity

# What is Severe and Pervasive?

Severe: How much does it take?

Pervasive: How many times?

# Objectively Offensive

OBJECTIVELY, a reasonable person in a similar position would agree that it is severe, pervasive, and offensive based on totality of circumstances, from perspective of a reasonable person in the same or similar circumstances

SUBJECTIVELY, the complainant found it to be unwelcome

I tell a joke to a friend who thinks it is really funny. The joke is highly sexual and crass. Objectively, is it offensive? Subjectively?

# Effectively Denies *Equal* Access to a Program or Activity

- It was harder to feel really comfortable there
- I found it really annoying
- Their mere presence upset me too much to study
- I no longer felt safe enough to go to class

# 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.

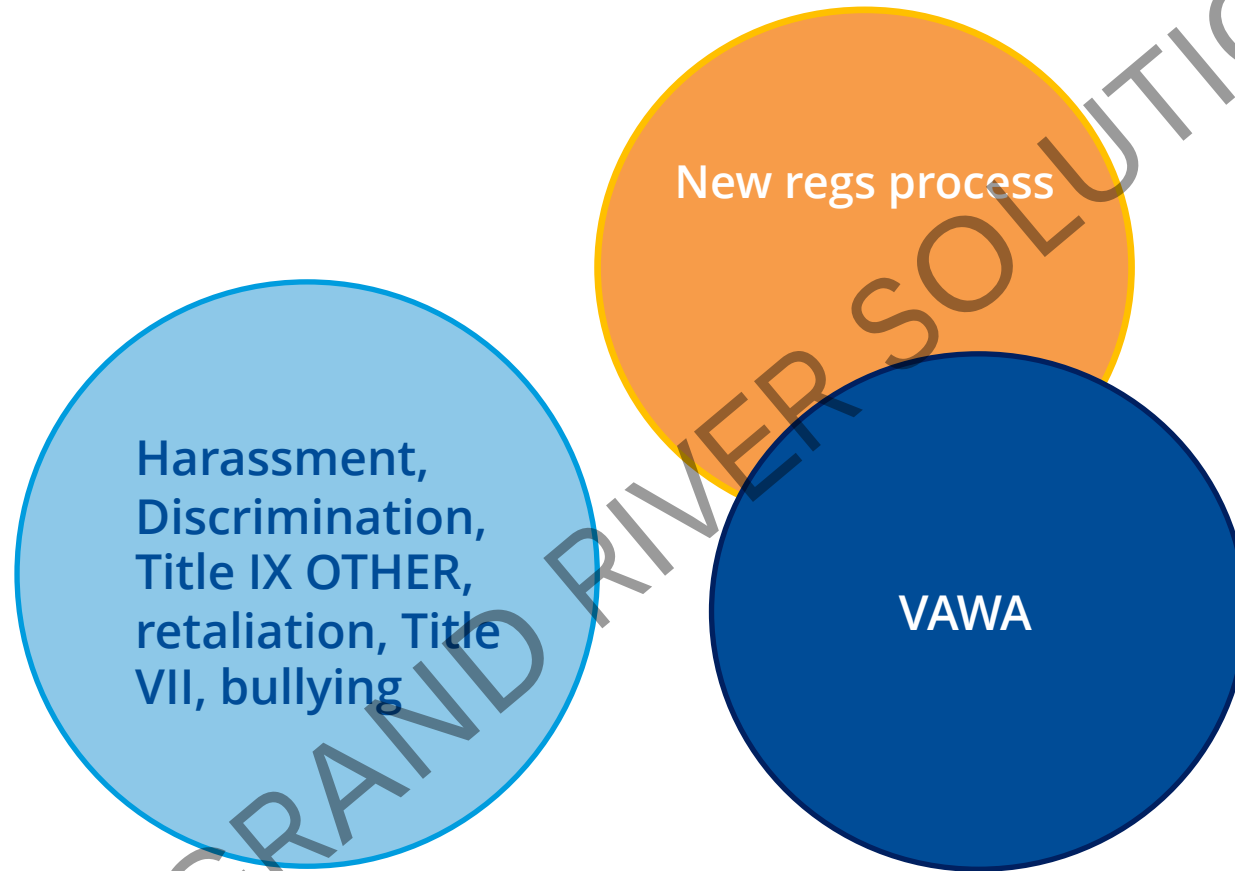
# Dating Violence

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.

# Note: They Do Not Match Up





02

# The Investigator, Coordinator, Hearing Officer, Appeals Officer

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# 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

# Protecting the Safety of Victims

- ❖ If investigation and/or hearing may prompt safety concerns; separate rooms for hearing, security
- ❖ Involvement of threat assessment teams when appropriate
- ❖ Safety planning for exits
- ❖ The need for decision-makers to have an understanding of the complexities of dating/domestic violence, including identification of primary aggressors



# Protecting the Safety of Victims

- ❖ Victim medical information: only when the patient has waived privilege
- ❖ Protecting address, contact information
- ❖ When exchanging evidence/evidence review creates a danger



# Someone Made a Complaint!

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# Mandatory Response to Each Report



- All reports, or those within scope of the Regs?
- What about responsible employees?

# Title IX Coordinator Must Discuss:

Rights, resources, options

Discuss support measures

Can have support without filing formal complaint

Options for resolution and how to File

What the process will look like (*optional step*)

# Supportive Measures

Interim, not  
forever

Interim also  
includes “before  
investigation”

Equitable ≠  
Equal

# Not Punitive

- No default
- Case by case
- Document the connection to preserving equal access
- Document reason for any requested measures not implemented



# Emergency Removal of Student

- High threshold
- Not a determination of responsibility
- Whether or not grievance is underway
- Individualized
- Immediate threat (physical)
- Opportunity to challenge



# Options on How to Proceed

## Remedies-based

- No formal process

## Alternative/Informal

- Signed agreement
- Voluntary
- What records?

## Title IX Process Investigation/Hearing

- All requirements of 106.45

## Not Title IX Process

- Investigation
- Hearing?

*What do we do  
about misconduct  
that does not fall  
within this narrow  
scope, Jody?*

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**Apply other applicable  
institutional policy or  
procedures.**

# Actual Knowledge

Notice of sexual harassment or allegations of sexual harassment to a recipient's:

- Title IX Coordinator; or
- Any official of the recipient who has authority to institute corrective measures on behalf of the recipient

## A Sample Decision-Tree

### 1. 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 e incident(s) occurred in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution, 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).

# Mandatory Investigation Requires Formal Complaint

- Complaint filed, SIGNED, requests investigation
- Coordinator files, SIGNS, starts investigation

# Complaint . . . or *FORMAL* Complaint?



# But What If . . .

- Multiple complaints against one respondent?
- One respondent, allegations falling under two different policies?
- I can't tell if this will ultimately be severe, pervasive
- Was there a denial of equal access?
- A Formal Complaint that isn't a Formal Complaint?



# Dismissing Complaints

## MANDATORY

- Not sexual harassment
- Did not occur in program or activity
- Not against person in the U.S.

## DISCRETIONARY

- Complainant withdraws complaint
- Respondent no longer enrolled/employed
- School unable to collect sufficient info

*But where does  
the case go now,  
Jody?*

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# The Procedural Requirements of an Informal/Alternative Resolution

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# Notice Requirements

- The specific allegation and the specific conduct that is alleged to have occurred;
- The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations;
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
- A statement indicating that the decision to accept a complaint does not presume that the conduct at issue has occurred, and that the Respondent is presumed not responsible, unless and until, at the conclusion of the formal investigation and adjudication processes, there is a determination of responsibility.
- An explanation that each party may be accompanied by an Advisor (add any others who may accompany, such as support person) of their choice, who may be a parent, friend, or attorney.
- The date and time of the initial meeting with the Title IX Coordinator, with a minimum of (how many days) notice

# Informal Resolution



Request in writing



Title IX Coordinator may determine not appropriate



At any time before conclusion of hearing



Voluntary



Completes the process – cannot have a do-over



# The Procedural Requirements of the Investigation

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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



# Notice Requirements

- Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:
  - the identities of the parties involved in the incident, if known,
  - the conduct allegedly constituting sexual harassment under § 106.30,
  - and the date and location of the alleged incident, if known.
- The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.
- The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process



# Equal Opportunity to Present Evidence

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# Written Notification of Meetings and Sufficient Time to Prepare

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# Evidence Review

- Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
- 10 days to provide a written response



# Investigative Report and Review

- After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence.
- That report will be shared with the parties and they will have 10 more days to comment

# **“Directly Related” and “Relevant Evidence”**

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# Do We Have to Worry About FERPA?



- FERPA: Privacy of student education records
- How to protect due process/fairness if either party cannot see all of the evidence?
- Dept. of Ed has determined that in the event of conflict between Title IX and FERPA, "the requirements of Title IX override any conflicting FERPA provisions"



# Directly Related Evidence

- Regulations do not define “Directly Related” Evidence
- Preamble states it should be interpreted using its plain and ordinary meaning.
- Term is broader than:
  - “all relevant evidence” as otherwise used in Title IX regulations, and
  - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act
- Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source

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



Evidence  
That Will  
Not Be  
Considered

- Rape Shield Protections
- Privileged Information



# Who Decides?

- Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
  - Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight
- Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:
  - Each party's right to argue their case, and
  - Fact that decisions regarding responsibility will be made at hearing, not investigation stage

# Essential steps of an investigation



Notice of formal investigation



Initial Interviews



Evidence Collection

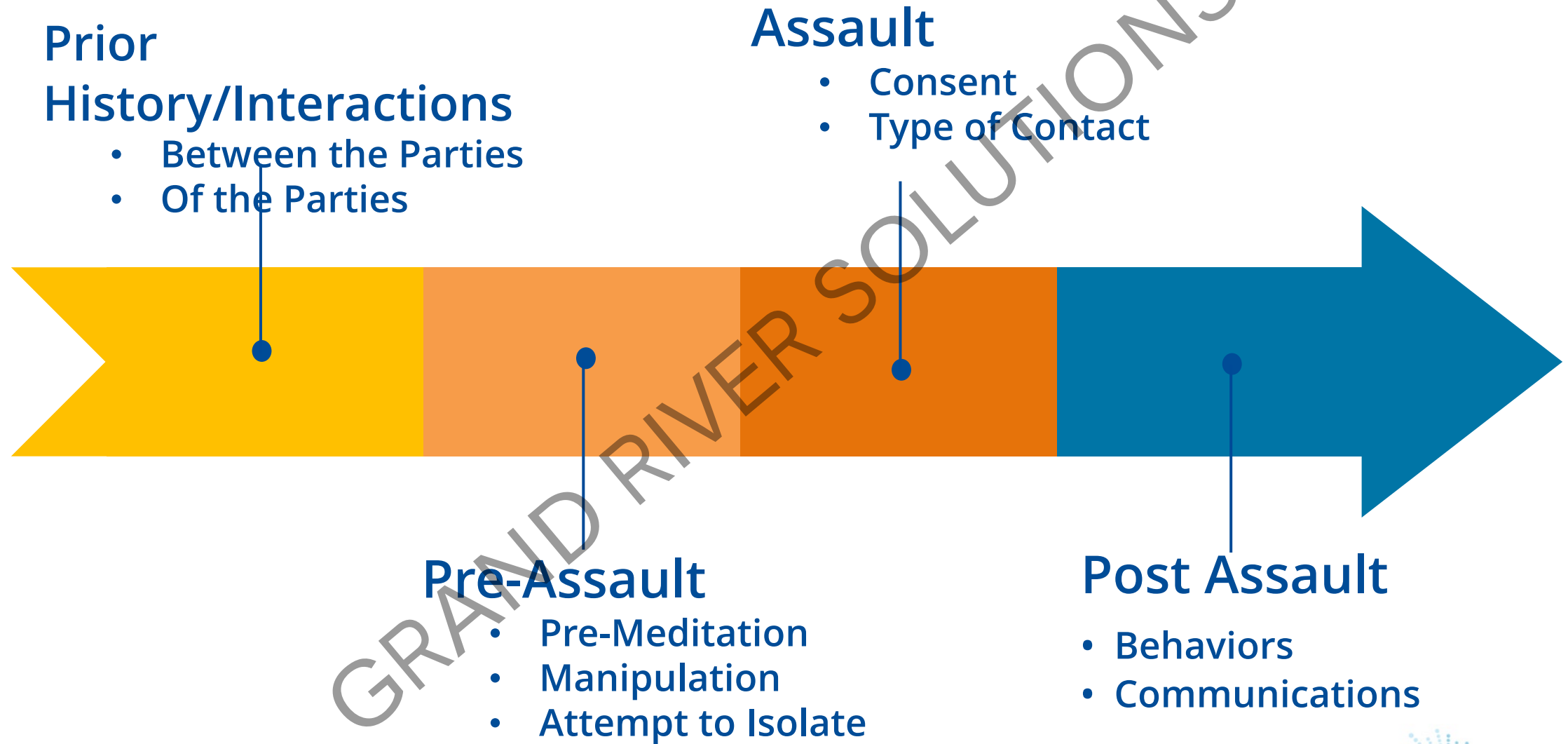


Report writing

# The Process: Developing an Investigative Strategy



# Investigation Timeline



# Identify and Interview Parties/Witnesses

## Interview Objectives



### Connect

- Build rapport
- Build trust
- Empower
- Listen



### Safety Assessment

- Physical and Emotional
- Safety of the Victim/Respondent
- Safety of the Community



### Services

- Police/Campus
- Medical care
- Supportive action



### Evidence Preservation

- Text Messages
- Photographs
- Names and contact info for witnesses

# Prior to the Interview



Secure an appropriate meeting location



Allow for enough time to conclude the meeting



Prepare yourself for the meeting



If interviewing a party, inform them of their right to have an advisor present.

# Set Expectations

## What they should expect of you

- That you are neutral
- That you will listen, what they are saying is important to you
- That you will keep the information they share private
- What you will do with recording/notes
- That you may have to ask difficult questions

## What you expect of them

- Honesty
- That they will seek clarity if needed (give them permission to do so)
- That they won't guess or fill in blanks

# Investigative Interviews





# The Investigation Report

Narrowed Jurisdiction and Expansive Procedural Requirements

08



# The Investigation Report

- Must summarize the relevant evidence.
- The Department is clear that it “takes no position...on such elements beyond what is required in these final regulations; namely, that the investigative report must fairly summarize relevant evidence.”

# Investigative Report: Form

- Develop or adopt a template and use it consistently
- Written Summary
- Appendices

# Investigative Report Content: Overview

In this section, provide a very brief overview of the case. Include:

- the names of the parties,
- the applicable policy(ies)
- the prohibited conduct alleged,
- the date, time, and location of the conduct,
- a brief description of the alleged misconduct

# Investigative Report Content: Jurisdiction

In this section state the institutions jurisdictional grounds:

- Cite the jurisdictional elements in the policy
- If there are several grounds for jurisdiction, state them.

# Investigative Report Content: Identification of the Investigators

Identify the  
investigator(s)

Include a  
statement that  
indicates that  
they have been  
properly trained.

Include  
information  
about the  
training the  
investigator  
received.

# Investigative Report Content: Objective of the Investigation and the Report

- This is a statement that sets forth the objective of the investigation, and
- The objective of the report



# Investigative Report Content: List the Witnesses

- List those who were interviewed
- List those who were not interviewed
- Simple list
- Detailed list



# Example of a Detailed List:

| Witness Name | Witness identified by: | Information offered                                                                                                                                                              |
|--------------|------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| John Doe     | Reporting Party        | Mr. Doe is the Reporting Party's best friend. He was with the Reporting Party the night of the reported incident.                                                                |
| Jane Doe     | Investigators          | Jane Doe is the Responding Party's roommate. It is believed that she saw the Reporting Party leave the Responding Party's residence immediately following the reported incident. |



# Investigative Report Content: Evidence Collected

The final Title IX regulations require that all evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint be shared with the parties and “made available at any hearing to give each party equal opportunity to refer to such evidence during the hearing including for the purposes of cross-examination.”

In this section, list the Evidence or Refer to Appendices.



# Appendices



Compilation of the evidence.



organized intentionally and consistently



are attached to the report.



Includes the procedural timeline.

# Examples of Appendices

Appendix A: witness testimony only (e.g., transcripts, statements summaries, etc.);

Appendix B: relevant documentary evidence (e.g., text messages, SANE reports, photographs, etc.);

Appendix C: the remaining evidence deemed irrelevant, but directly related to the allegations in the formal complaint;

Appendix D: the procedural timeline.

# Investigative Report Content: Summary of the Evidence

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In this section, include a summary of all relevant evidence. This section can be organized in several ways. It is important that, however organized, the evidence is summarized clearly and accurately, and without opinion or bias. In this section, the writer should cite the evidence and information in the Appendices.

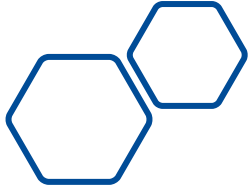


# Pre-Hearing Tasks

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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)



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 and prepare for the party's questions



Anticipate challenges or issues





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# The Hearing

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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

# Procedural Requirements for Hearings

Must be live, but can be conducted remotely

No Compelling participation

Standard of proof must be the same for student and employee matters

Cross examination must be permitted, 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

# The Essential Elements of All Hearings

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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,

## 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.

# Logistics of the Hearing

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What do we  
need to do  
with all of  
this?



Space



Technology



Clear & Comprehensive  
Procedures



Staff



Expertise and Confidence

# Considerations for the Physical Space

- Room location and set-up
  - Entrances, exits, and proximity
- Privacy screens & partitions
- Technology
- Hallway control
- Space for extra visitors

# 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  
interruption

Poor  
behavior?

Recording

# 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?

# Roles and Responsibilities

# 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 Participants

Complainant

Respondent

Advisor

Adjudicator(s) or Panelist(s)

Investigator

Witnesses

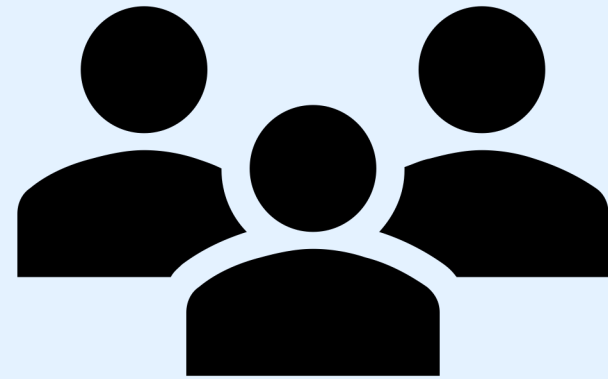
Hearing Coordinator/Officer

Decision-Maker

Administrative Staff

# 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

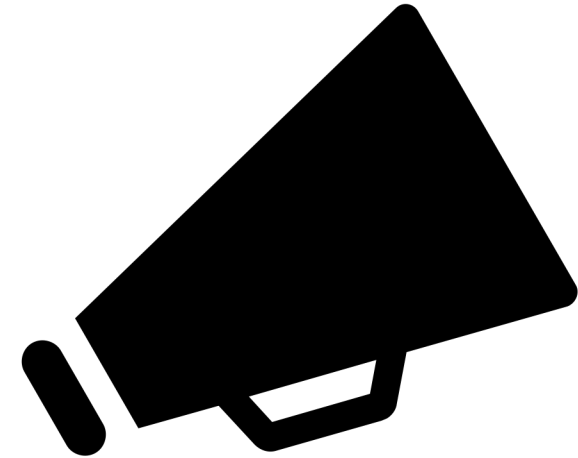
Interested faculty

Title IX Coordinator

# The Players

## Hearing Advisors

- Will conduct 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 rulings
- Writes the decision
- Trained



# The Players

## The Decision Maker

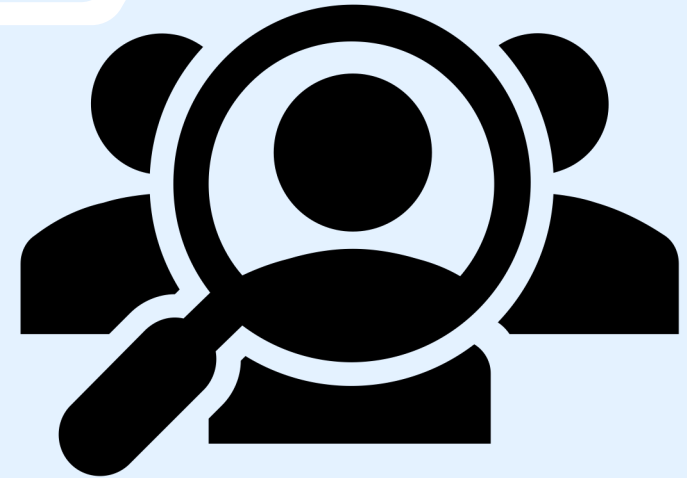
- May be Hearing Chair or on panel
- Determines whether policy was violated
- Cannot be investigator, Title IX Coordinator, or Appeals Officer



# The Players

## The Panel

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



# Hearing Procedures

# 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

## 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

# Deliberations

# Weighing the Evidence & Making A Determination

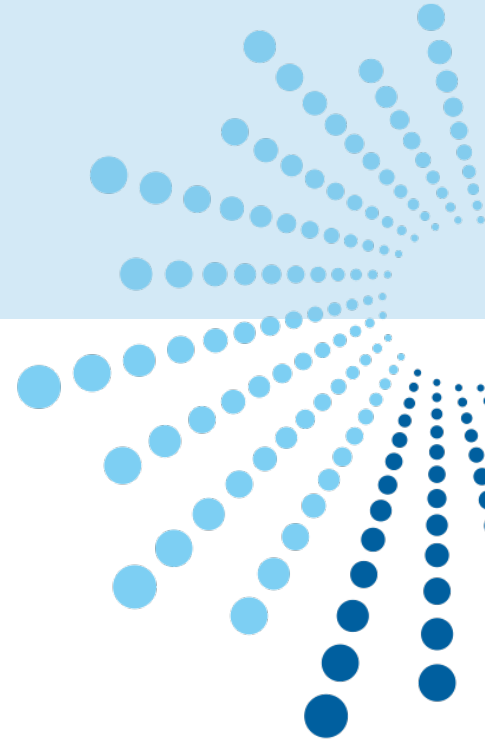
- 1) Evaluate the evidence collected to determine what factually is more likely to have occurred, and then
- 2) Analyze whether the conduct that happened constitutes a violation of the school's policies



# Evaluating Evidence

07

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# 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

# Evaluating the Evidence

Is it relevant?

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/reliable?

Is the evidence worthy of belief?



What weight, if any, should it be given?

Weight is determined by the finder of fact!

# 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.

## How we Review and Weigh Evidence

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

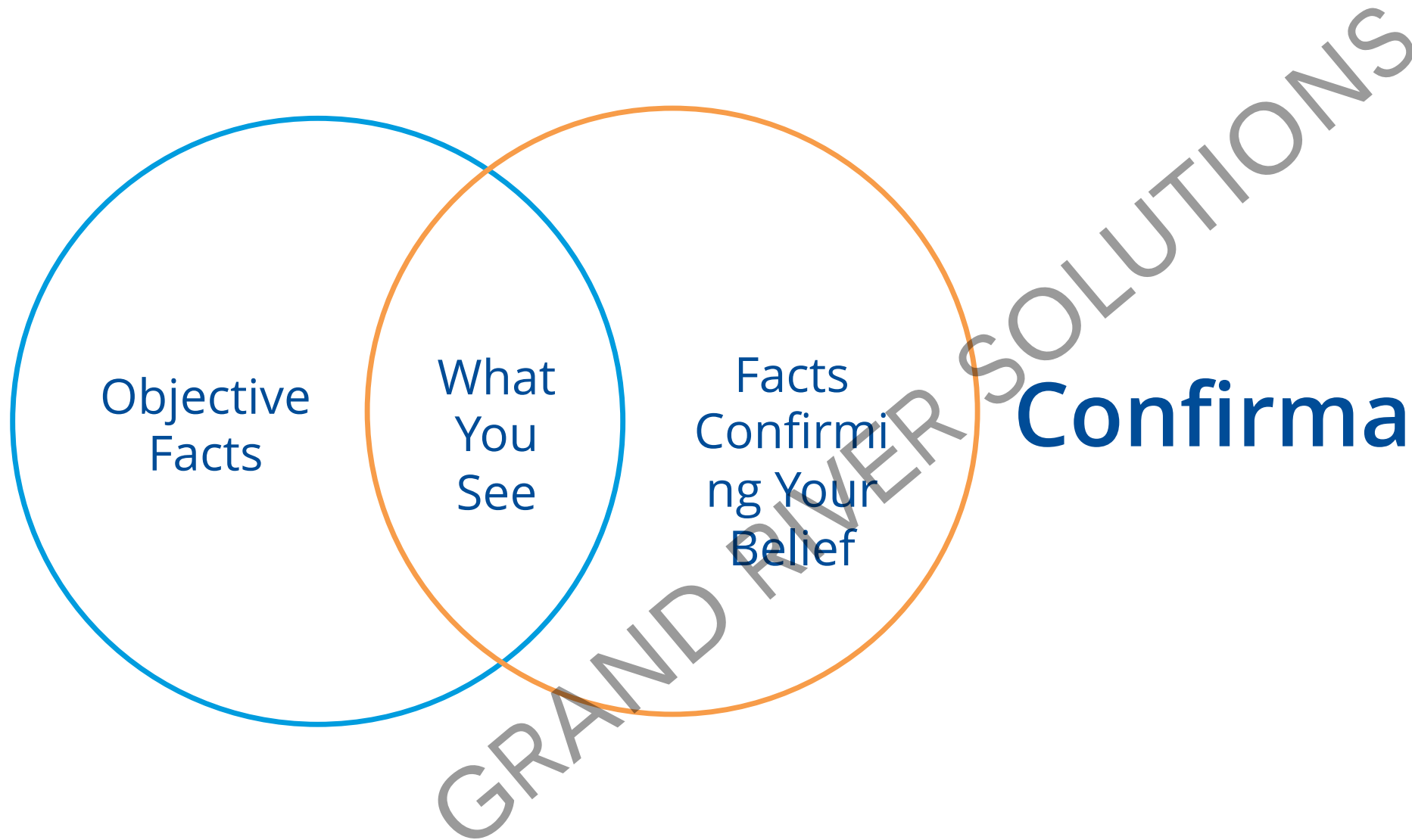
- opportunity to view
- ability to recall
- motive to fabricate
- plausibility
- consistency
- character, background, experience, and training
- coaching own bias and limited experience

# 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

# Affinity Bias





# Confirmation Bias

# Other Forms of Bias

- Adultification Bias
- The Halo Effect / Horns Effect
- Beauty Bias
- Height = Leadership, Strength
- Stereotype threat
- Inattentional Bias / Examiner's Bias



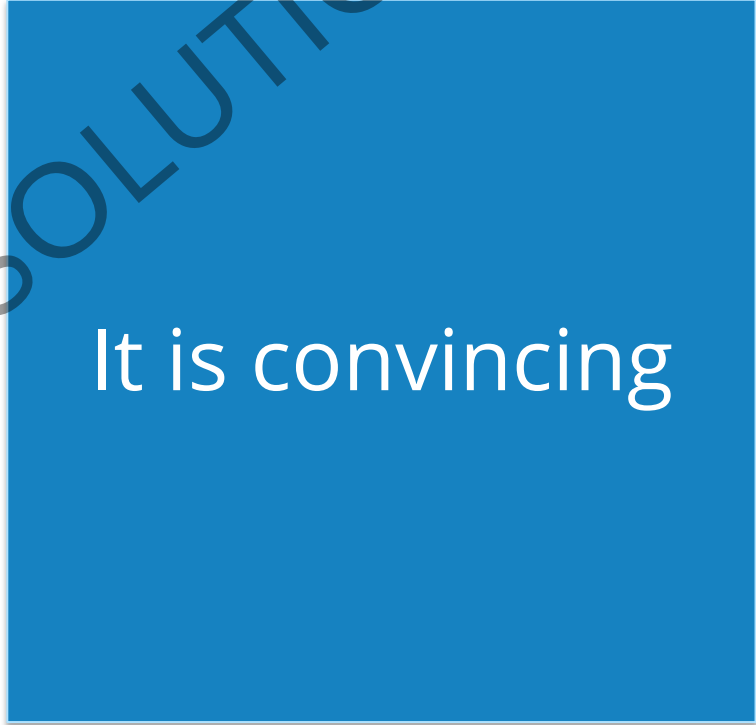
# How Might Bias Show Up in an Investigation?

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# Reliable, or Credible?



You can  
trust it



It is convincing

# 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:

- 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.

# Credibility: Old Style

- Corroboration
- Inconsistencies
- Insufficient explanation of inconsistencies
- The logic of person's narrative
- Inherent plausibility
- Demeanor
- Past record



# Being Convinced

It Is True, or Biased Conclusion?

**A credible witness may give  
unreliable testimony**

# I Just *KNOW* They Are Not Telling the Truth

- Bias
- Can you really spot a liar?
- Understanding clues that are culturally different from your own

HOW TO  
SPOT A  
LIAR

# 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



# 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.



Appealing  
sanctions?

Other grounds for  
appeal? Your  
discretion

# Questions?



Email Us:

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Follow Us:

 @GrandRiverSols  
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# May 2020 Final Title IX Regulations

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

01

Regulatory Overview

06

Conducting the Investigation

02

Notice

07

Evaluating the Evidence

03

Meeting the Definition of  
Sexual Harassment

08

The Investigation Report

04

The Procedural Requirements  
of the Investigation

09

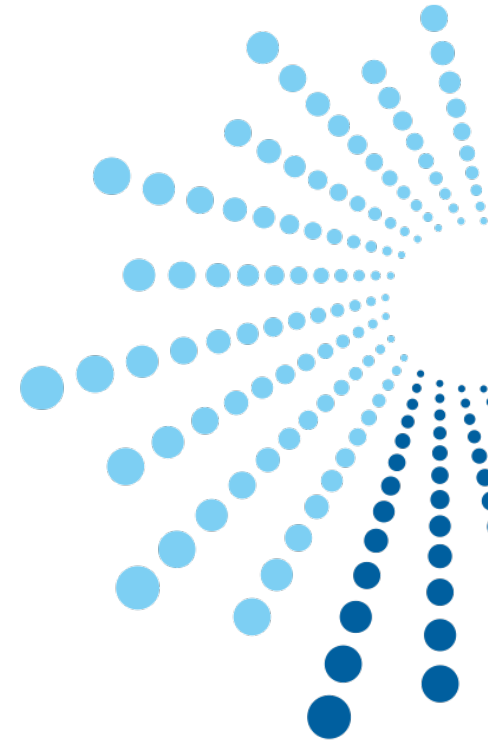
Pre-Hearing Tasks

05

The Investigator

10

Hearing, Deliberations, & Appeal





# Regulatory Overview

01

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

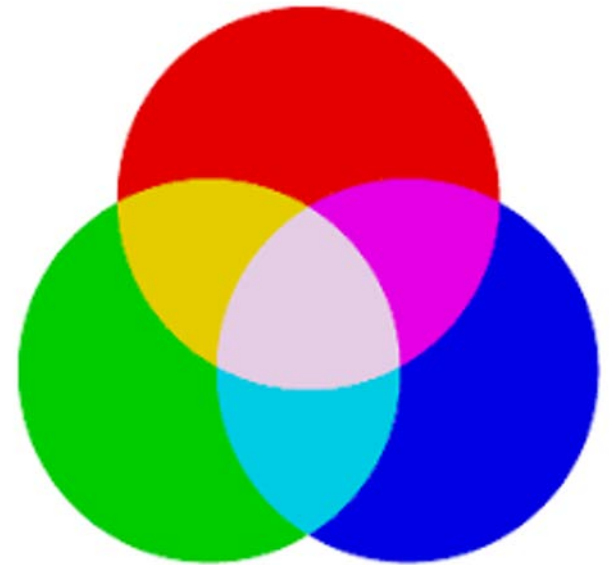
- o Sex Discrimination
- o Achievement Awards
- o Athletics
- o Benefits
- o Financial Aid
- o Leaves of absence and re-entry policies
- o Opportunities to join groups
- o Pay rates
- o Recruitment
- o Retention Rates
- o Safety
- o Screening Exams
- o Sign-on Bonuses
- o Student and Employee Benefits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

Conduct Constituting  
Sexual Harassment as  
Defined in  
Section 106.30

# 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 (on basis of sex)\*
- Domestic Violence (on basis of sex)\*
- Stalking (on basis of sex)\*

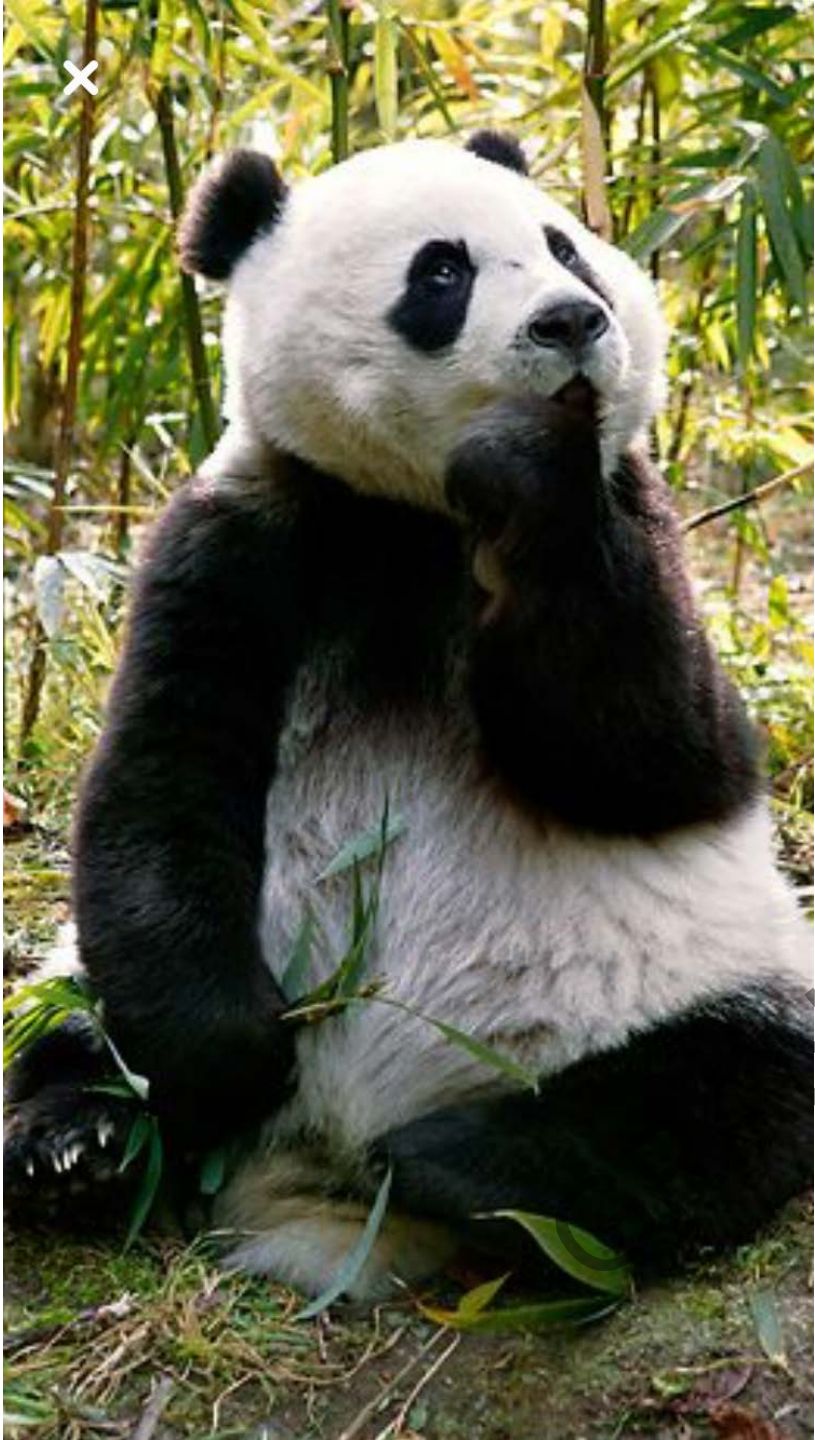
\* Using 106.30 definitions



# It Was Bad, But Not (New) Title IX Bad

**Sexual harassment, DV, Stalking,  
Discrimination Retaliation:**

**If it does not meet § 106.30 definition, then  
not mandated to use §106.45 process**



# What are the § 106.30 Definitions?

# 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
- (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).

# Definition of Sexual Harassment Quid Pro Quo

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;

Meaning: You do this for me, I'll do that for you. Quid Pro Quo

Not covered here: A student leader tells another student, "If you won't go out with me, I'll make sure you never get into the glee club."



# Elements of this Definition of Sexual Harassment

1. Unwelcome conduct (subjective and objective)
2. Severe
3. Pervasive
4. Objectively offensive
5. Effective denial of equal access to school's education program or activity

# What is Severe and Pervasive?

Severe: How much does it take?

Pervasive: How many times?

# Objectively Offensive

OBJECTIVELY, a reasonable person in a similar position would agree that it is severe, pervasive, and offensive based on totality of circumstances, from perspective of a reasonable person in the same or similar circumstances

SUBJECTIVELY, the complainant found it to be unwelcome

I tell a joke to a friend who thinks it is really funny. The joke is highly sexual and crass. Objectively, is it offensive? Subjectively?

# Effectively Denies *Equal* Access to a Program or Activity

- It was harder to feel really comfortable there
- I found it really annoying
- Their mere presence upset me too much to study
- I no longer felt safe enough to go to class

# 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.

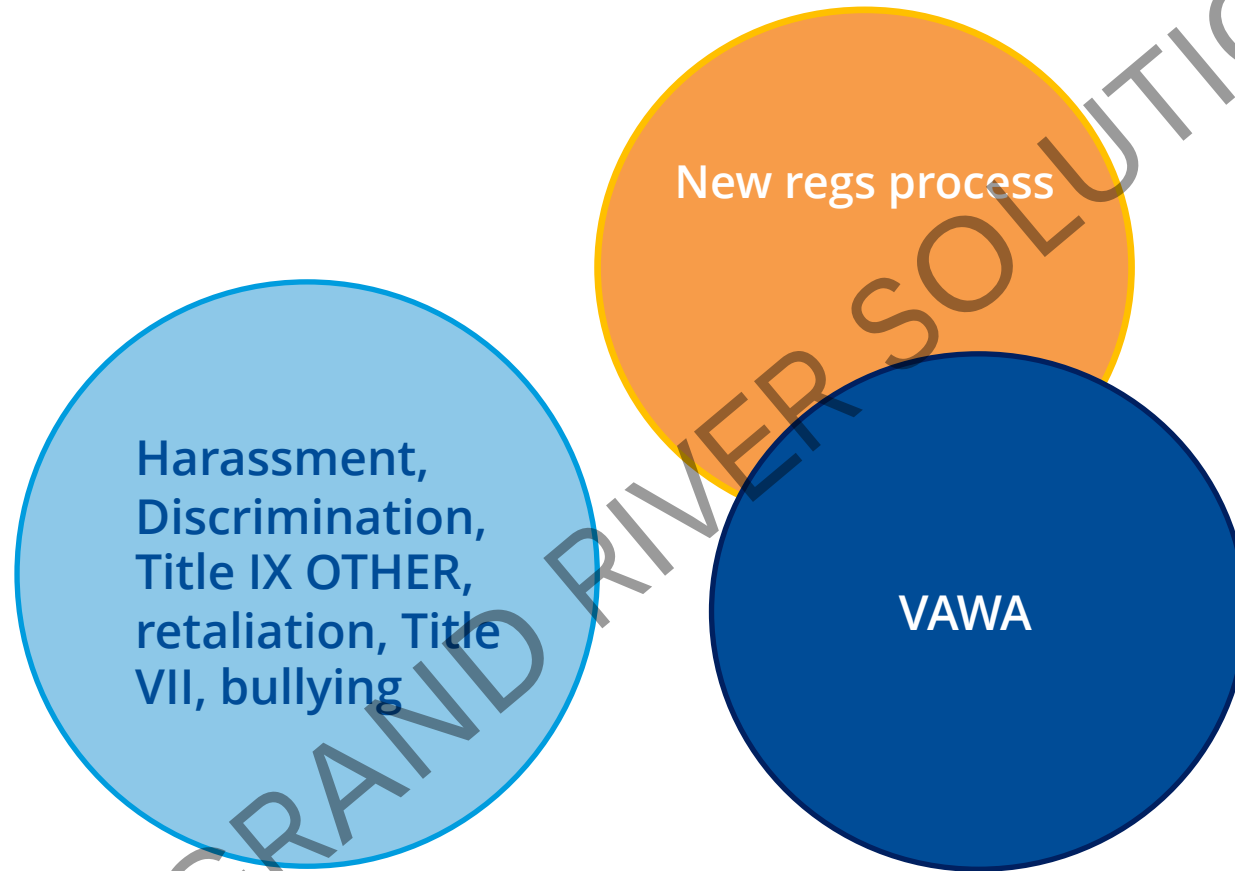
# Dating Violence

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.

# Note: They Do Not Match Up





02

# The Investigator, Coordinator, Hearing Officer, Appeals Officer

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# 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

# Protecting the Safety of Victims

- ❖ If investigation and/or hearing may prompt safety concerns; separate rooms for hearing, security
- ❖ Involvement of threat assessment teams when appropriate
- ❖ Safety planning for exits
- ❖ The need for decision-makers to have an understanding of the complexities of dating/domestic violence, including identification of primary aggressors



# Protecting the Safety of Victims

- ❖ Victim medical information: only when the patient has waived privilege
- ❖ Protecting address, contact information
- ❖ When exchanging evidence/evidence review creates a danger



# Someone Made a Complaint!

02

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# Mandatory Response to Each Report



- All reports, or those within scope of the Regs?
- What about responsible employees?

# Title IX Coordinator Must Discuss:

Rights, resources, options

Discuss support measures

Can have support without filing formal complaint

Options for resolution and how to File

What the process will look like (*optional step*)

# Supportive Measures

Interim, not  
forever

Interim also  
includes “before  
investigation”

Equitable ≠  
Equal

# Not Punitive

- No default
- Case by case
- Document the connection to preserving equal access
- Document reason for any requested measures not implemented



# Emergency Removal of Student

- High threshold
- Not a determination of responsibility
- Whether or not grievance is underway
- Individualized
- Immediate threat (physical)
- Opportunity to challenge



# Options on How to Proceed

## Remedies-based

- No formal process

## Alternative/Informal

- Signed agreement
- Voluntary
- What records?

## Title IX Process Investigation/Hearing

- All requirements of 106.45

## Not Title IX Process

- Investigation
- Hearing?

*What do we do  
about misconduct  
that does not fall  
within this narrow  
scope, Jody?*

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**Apply other applicable  
institutional policy or  
procedures.**

# Actual Knowledge

Notice of sexual harassment or allegations of sexual harassment to a recipient's:

- Title IX Coordinator; or
- Any official of the recipient who has authority to institute corrective measures on behalf of the recipient

## A Sample Decision-Tree

### 1. 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 e incident(s) occurred in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution, 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).

# Mandatory Investigation Requires Formal Complaint

- Complaint filed, SIGNED, requests investigation
- Coordinator files, SIGNS, starts investigation

# Complaint . . . or *FORMAL* Complaint?



# But What If . . .

- Multiple complaints against one respondent?
- One respondent, allegations falling under two different policies?
- I can't tell if this will ultimately be severe, pervasive
- Was there a denial of equal access?
- A Formal Complaint that isn't a Formal Complaint?



# Dismissing Complaints

## MANDATORY

- Not sexual harassment
- Did not occur in program or activity
- Not against person in the U.S.

## DISCRETIONARY

- Complainant withdraws complaint
- Respondent no longer enrolled/employed
- School unable to collect sufficient info

*But where does  
the case go now,  
Jody?*

---

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# The Procedural Requirements of an Informal/Alternative Resolution

04

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# Notice Requirements

- The specific allegation and the specific conduct that is alleged to have occurred;
- The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations;
- Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
- A statement indicating that the decision to accept a complaint does not presume that the conduct at issue has occurred, and that the Respondent is presumed not responsible, unless and until, at the conclusion of the formal investigation and adjudication processes, there is a determination of responsibility.
- An explanation that each party may be accompanied by an Advisor (add any others who may accompany, such as support person) of their choice, who may be a parent, friend, or attorney.
- The date and time of the initial meeting with the Title IX Coordinator, with a minimum of (how many days) notice

# Informal Resolution



Request in writing



Title IX Coordinator may determine not appropriate



At any time before conclusion of hearing



Voluntary



Completes the process – cannot have a do-over



# The Procedural Requirements of the Investigation

04

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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



# Notice Requirements

- Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:
  - the identities of the parties involved in the incident, if known,
  - the conduct allegedly constituting sexual harassment under § 106.30,
  - and the date and location of the alleged incident, if known.
- The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
- The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section.
- The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process



# Equal Opportunity to Present Evidence

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# Written Notification of Meetings and Sufficient Time to Prepare

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# Evidence Review

- Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
- 10 days to provide a written response



# Investigative Report and Review

- After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence.
- That report will be shared with the parties and they will have 10 more days to comment

# **“Directly Related” and “Relevant Evidence”**

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# Do We Have to Worry About FERPA?



- FERPA: Privacy of student education records
- How to protect due process/fairness if either party cannot see all of the evidence?
- Dept. of Ed has determined that in the event of conflict between Title IX and FERPA, "the requirements of Title IX override any conflicting FERPA provisions"



# Directly Related Evidence

- Regulations do not define “Directly Related” Evidence
- Preamble states it should be interpreted using its plain and ordinary meaning.
- Term is broader than:
  - “all relevant evidence” as otherwise used in Title IX regulations, and
  - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act
- Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source

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



Evidence  
That Will  
Not Be  
Considered

- Rape Shield Protections
- Privileged Information



# Who Decides?

- Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
  - Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight
- Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:
  - Each party's right to argue their case, and
  - Fact that decisions regarding responsibility will be made at hearing, not investigation stage

# Essential steps of an investigation



Notice of formal investigation



Initial Interviews



Evidence Collection

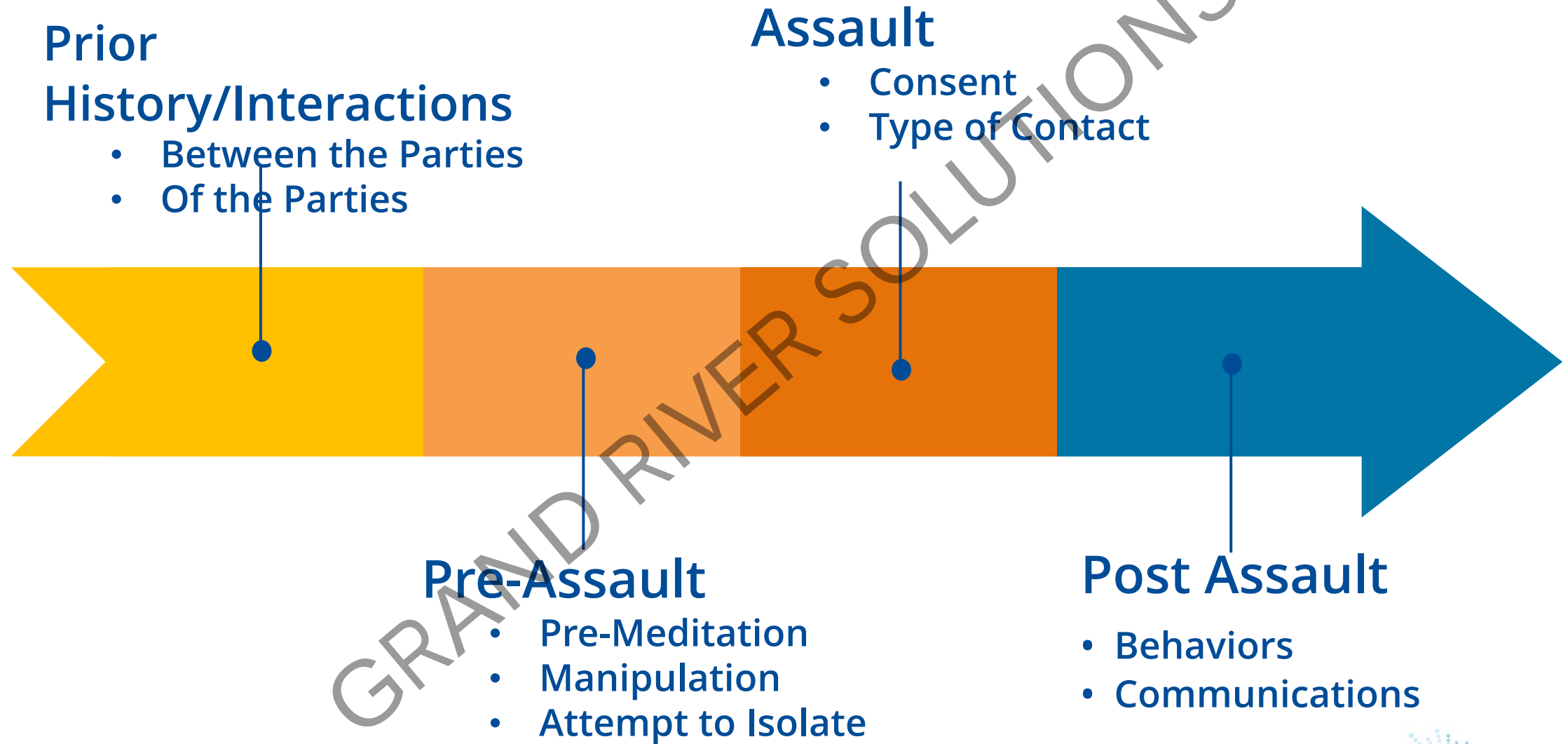


Report writing

# The Process: Developing an Investigative Strategy



# Investigation Timeline



# Identify and Interview Parties/Witnesses

## Interview Objectives



### Connect

- Build rapport
- Build trust
- Empower
- Listen



### Safety Assessment

- Physical and Emotional
- Safety of the Victim/Respondent
- Safety of the Community



### Services

- Police/Campus
- Medical care
- Supportive action



### Evidence Preservation

- Text Messages
- Photographs
- Names and contact info for witnesses

# Prior to the Interview



Secure an appropriate meeting location



Allow for enough time to conclude the meeting



Prepare yourself for the meeting



If interviewing a party, inform them of their right to have an advisor present.

# Set Expectations

## What they should expect of you

- That you are neutral
- That you will listen, what they are saying is important to you
- That you will keep the information they share private
- What you will do with recording/notes
- That you may have to ask difficult questions

## What you expect of them

- Honesty
- That they will seek clarity if needed (give them permission to do so)
- That they won't guess or fill in blanks

# Investigative Interviews





# The Investigation Report

Narrowed Jurisdiction and Expansive Procedural Requirements

08

# The Investigation Report

- Must summarize the relevant evidence.
- The Department is clear that it “takes no position...on such elements beyond what is required in these final regulations; namely, that the investigative report must fairly summarize relevant evidence.”

# Investigative Report: Form

- Develop or adopt a template and use it consistently
- Written Summary
- Appendices

# Investigative Report Content: Overview

In this section, provide a very brief overview of the case. Include:

- the names of the parties,
- the applicable policy(ies)
- the prohibited conduct alleged,
- the date, time, and location of the conduct,
- a brief description of the alleged misconduct

# Investigative Report Content: Jurisdiction

In this section state the institutions jurisdictional grounds:

- Cite the jurisdictional elements in the policy
- If there are several grounds for jurisdiction, state them.

# Investigative Report Content: Identification of the Investigators

Identify the  
investigator(s)

Include a  
statement that  
indicates that  
they have been  
properly trained.

Include  
information  
about the  
training the  
investigator  
received.

# Investigative Report Content: Objective of the Investigation and the Report

- This is a statement that sets forth the objective of the investigation, and
- The objective of the report



# Investigative Report Content: List the Witnesses

- List those who were interviewed
- List those who were not interviewed
- Simple list
- Detailed list



# Example of a Detailed List:

| Witness Name | Witness identified by: | Information offered                                                                                                                                                              |
|--------------|------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| John Doe     | Reporting Party        | Mr. Doe is the Reporting Party's best friend. He was with the Reporting Party the night of the reported incident.                                                                |
| Jane Doe     | Investigators          | Jane Doe is the Responding Party's roommate. It is believed that she saw the Reporting Party leave the Responding Party's residence immediately following the reported incident. |

# Investigative Report Content: Evidence Collected

The final Title IX regulations require that all evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint be shared with the parties and “made available at any hearing to give each party equal opportunity to refer to such evidence during the hearing including for the purposes of cross-examination.”

In this section, list the Evidence or Refer to Appendices.



# Appendices



Compilation of the evidence.



organized intentionally and consistently



are attached to the report.



Includes the procedural timeline.

# Examples of Appendices

Appendix A: witness testimony only (e.g., transcripts, statements summaries, etc.);

Appendix B: relevant documentary evidence (e.g., text messages, SANE reports, photographs, etc.);

Appendix C: the remaining evidence deemed irrelevant, but directly related to the allegations in the formal complaint;

Appendix D: the procedural timeline.

# Investigative Report Content: Summary of the Evidence

---

In this section, include a summary of all relevant evidence. This section can be organized in several ways. It is important that, however organized, the evidence is summarized clearly and accurately, and without opinion or bias. In this section, the writer should cite the evidence and information in the Appendices.

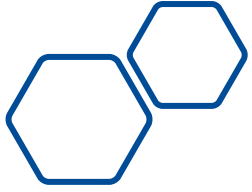


# Pre-Hearing Tasks

09

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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)



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 and prepare for the party's questions



Anticipate challenges or issues





10

# The Hearing

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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

# Procedural Requirements for Hearings

Must be live, but can be conducted remotely

No Compelling participation

Standard of proof must be the same for student and employee matters

Cross examination must be permitted, 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

# 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,

## 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.

# Logistics of the Hearing

What do we  
need to do  
with all of  
this?



Space



Technology



Clear & Comprehensive  
Procedures



Staff



Expertise and Confidence

# Considerations for the Physical Space

- Room location and set-up
  - Entrances, exits, and proximity
- Privacy screens & partitions
- Technology
- Hallway control
- Space for extra visitors

# 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  
interruption

Poor  
behavior?

Recording

# 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?

# Roles and Responsibilities

# 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 Participants

Complainant

Respondent

Advisor

Adjudicator(s) or Panelist(s)

Investigator

Witnesses

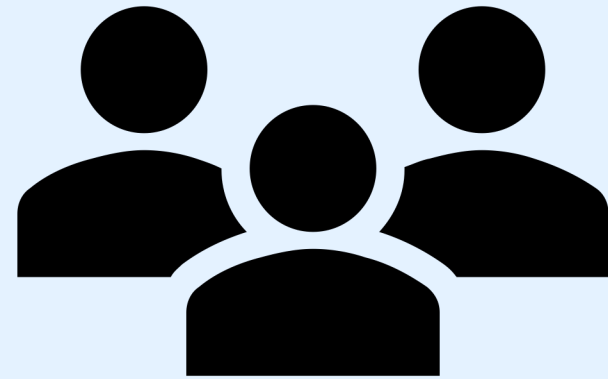
Hearing Coordinator/Officer

Decision-Maker

Administrative Staff

# 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

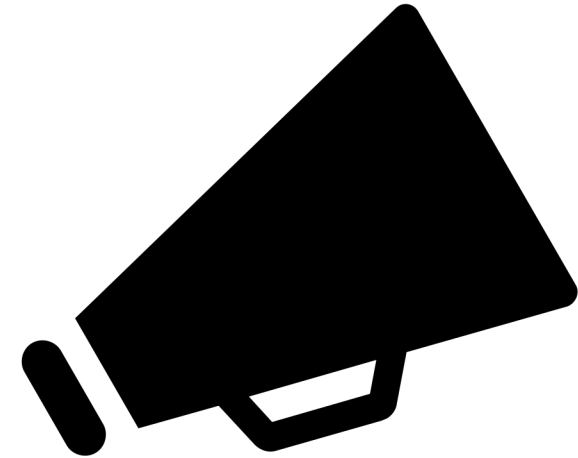
Interested faculty

Title IX Coordinator

# The Players

## Hearing Advisors

- Will conduct 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 rulings
- Writes the decision
- Trained



# The Players

## The Decision Maker

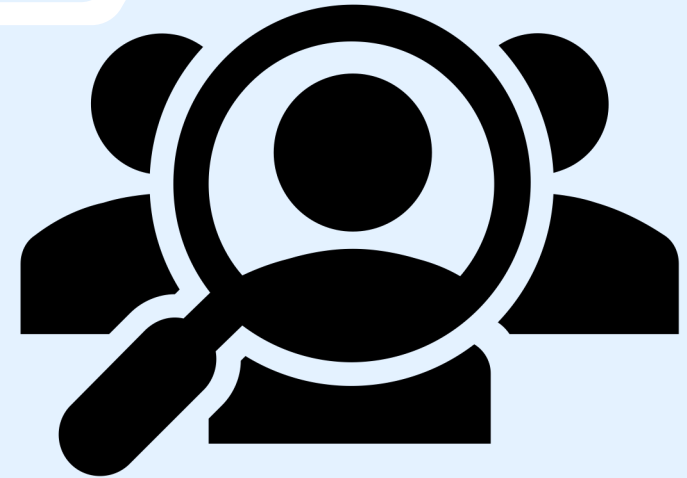
- May be Hearing Chair or on panel
- Determines whether policy was violated
- Cannot be investigator, Title IX Coordinator, or Appeals Officer



# The Players

## The Panel

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



# Hearing Procedures

# 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

## 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

# 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



# Evaluating Evidence

07

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# 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

# Evaluating the Evidence

Is it relevant?

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/reliable?

Is the evidence worthy of belief?



What weight, if any, should it be given?

Weight is determined by the finder of fact!

# 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.

## How we Review and Weigh Evidence

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

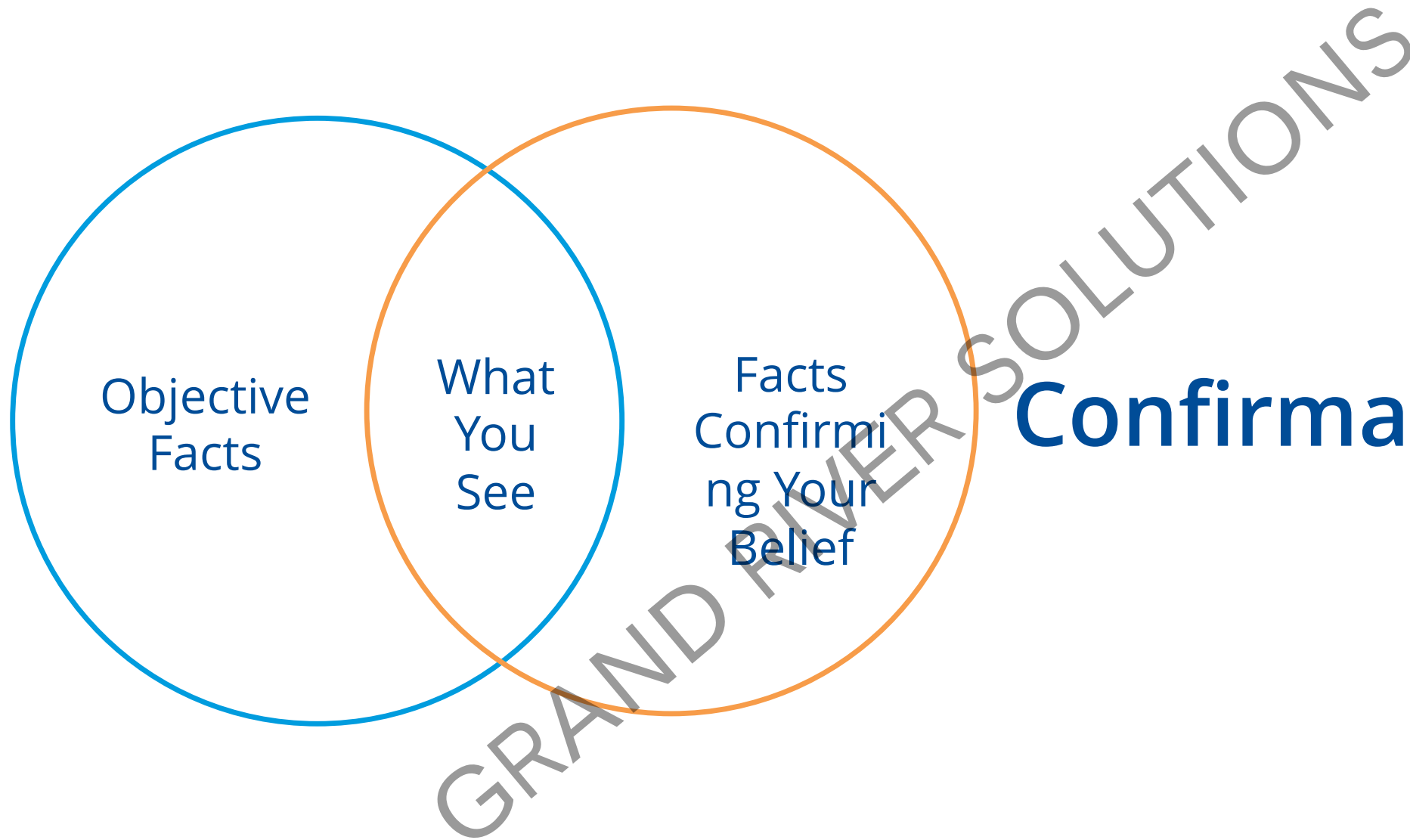
- opportunity to view
- ability to recall
- motive to fabricate
- plausibility
- consistency
- character, background, experience, and training
- coaching own bias and limited experience

# 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

# Affinity Bias





# Confirmation Bias

# Other Forms of Bias

- Adultification Bias
- The Halo Effect / Horns Effect
- Beauty Bias
- Height = Leadership, Strength
- Stereotype threat
- Inattentional Bias / Examiner's Bias



# How Might Bias Show Up in an Investigation?

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# Reliable, or Credible?



You can  
trust it



It is convincing

# 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:

- 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.

# Credibility: Old Style

- Corroboration
- Inconsistencies
- Insufficient explanation of inconsistencies
- The logic of person's narrative
- Inherent plausibility
- Demeanor
- Past record



# Being Convinced

It Is True, or Biased Conclusion?

**A credible witness may give  
unreliable testimony**

# I Just *KNOW* They Are Not Telling the Truth

- Bias
- Can you really spot a liar?
- Understanding clues that are culturally different from your own

HOW TO  
SPOT A  
LIAR

# 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



# 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.



Appealing  
sanctions?

Other grounds for  
appeal? Your  
discretion

# Questions?



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## TRANSCRIPT



**Learner ID:** 9753  
**Name:** Jill Moffitt

**Generated On:** 6/30/2023 11:20:15 AM

**TERM:** 2020-2021

| Module                                                                                                 | Competencies                                    | Mandated Training Topic                                                                | Level        | Hours | Date Completed |
|--------------------------------------------------------------------------------------------------------|-------------------------------------------------|----------------------------------------------------------------------------------------|--------------|-------|----------------|
| 2020-2021: Privacy, Confidentiality, and Privilege in Disclosures of Sexual and Interpersonal Violence | Foundations of Practice, Law                    | Laws, Policies, and Procedures*, Working with Reporting Individuals*, Confidentiality* | Basic        | 0.5   | 6/30/2021      |
| 2020-2021: Accountability                                                                              | Conduct Theory, Foundations of Practice, Law    | Laws, Policies, and Procedures*, Accountability*                                       | Basic        | 0.25  | 6/30/2021      |
| 2020-2021: What is Affirmative Consent?                                                                | Foundations of Practice, Law                    | Laws, Policies, and Procedures*, Consent*                                              | Basic        | 0.25  | 6/30/2021      |
| 2020-2021: Social Media Part 1: Apps                                                                   | Content Area Expertise                          | Working with Reporting Individuals*, Evidence*                                         | Intermediate | 0.5   | 6/29/2021      |
| 2020-2021: What does Title IX tell us about Title VII?                                                 | Content Area Expertise, Law                     | Laws, Policies, and Procedures*, Title IX: Sexual Harassment                           | Intermediate | 0.25  | 6/29/2021      |
| 2020-2021: Due Process Part Two: Application                                                           | Conduct Theory, Foundations of Practice, Law    | Due Process-Fair Process*                                                              | Basic        | 0.25  | 6/28/2021      |
| 2020-2021: Due Process Part One: Theory and History                                                    | Conduct Theory, Foundations of Practice, Law    | Due Process-Fair Process*                                                              | Basic        | 0.5   | 6/28/2021      |
| 2020-2021: Evidence in the Student Conduct Process                                                     | Content Area Expertise, Foundations of Practice | Evidence*, Title IX: Relevant Evidence                                                 | Basic        | 0.5   | 6/23/2021      |



# TRANSCRIPT

|                                                                                              |                              |                                                                                                                                                                                         |       |     |           |
|----------------------------------------------------------------------------------------------|------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------|-----|-----------|
| 2020-2021: What is Severe, Persistent, and Objectively Offensive Title IX Sexual Harassment? | Law                          | Laws, Policies, and Procedures*, Types of Sexual and Interpersonal Violence*, Title IX: Sexual Harassment                                                                               | Basic | 0.5 | 6/23/2021 |
| 2020-2021: Determining Relevance in Title IX Hearings                                        | Foundations of Practice, Law | Laws, Policies, and Procedures*, Title IX: Investigation & Grievance Procedures, Title IX: Relevant Evidence                                                                            | Basic | 0.5 | 6/23/2021 |
| 2020-2021: Relevance and Decorum in a Title IX Hearing                                       | Foundations of Practice, Law | Working with Reporting Individuals*, Working with Witnesses and Bystanders*, Working with Accused Persons*, Title IX: Investigation & Grievance Procedures, Title IX: Relevant Evidence | Basic | 0.5 | 6/23/2021 |
| 2020-2021: Cross-Examination in a Title IX Hearing                                           | Foundations of Practice, Law | Working with Reporting Individuals*, Working with Witnesses and Bystanders*, Working with Accused Persons*, Title IX: Investigation & Grievance Procedures                              | Basic | 0.5 | 6/22/2021 |
| 2020-2021: Online Harassment                                                                 | Content Area Expertise, Law  | Laws, Policies, and Procedures*, Title IX: Sexual Harassment                                                                                                                            | Basic | 0.3 | 6/22/2021 |

Total: 5.3 Hours