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Skidmore College's Adjudication of SGBM Matters: Title IX Hearings

Day 1

Chantelle Cleary
Senior Consultant

Meet Your Facilitator



Chantelle Cleary, J.D.
Senior Consultant

Chantelle Cleary is a nationally-recognized subject-matter expert in Title IX and related fields. She has more than 10 years of experience in the investigation and adjudication of sexual and interpersonal violence. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Prior to joining Grand River Solutions, Chantelle served as the Director for Institutional Equity and Title IX at Cornell University, and before that as the Assistant Vice President for Equity and Compliance and Title IX Coordinator at the University at Albany. In these roles, she provided direct, hands-on experience in the fields of Title IX, civil rights, employment law, and workplace and academic investigations. Her responsibilities included focusing on diversity efforts, sexual assault prevention and training, affirmative action, and protecting minors on campus.

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

01

Regulatory Overview

02

The Infrastructure for Compliance

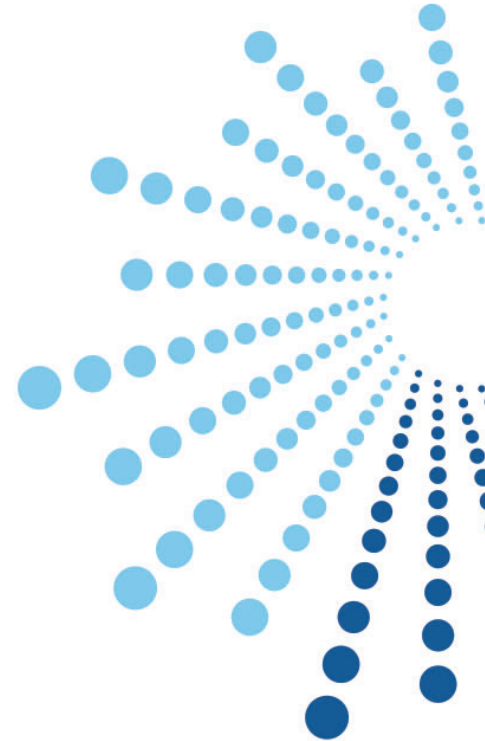
03

Roles and Responsibilities

04

Pre-Hearing Tasks

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Regulatory Overview

The Procedural Requirements in Post Regulatory
Title IX Hearings

01

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Title IX of the Education Amendments Act of 1972

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Title IX Applies to All Forms of Sex Discrimination

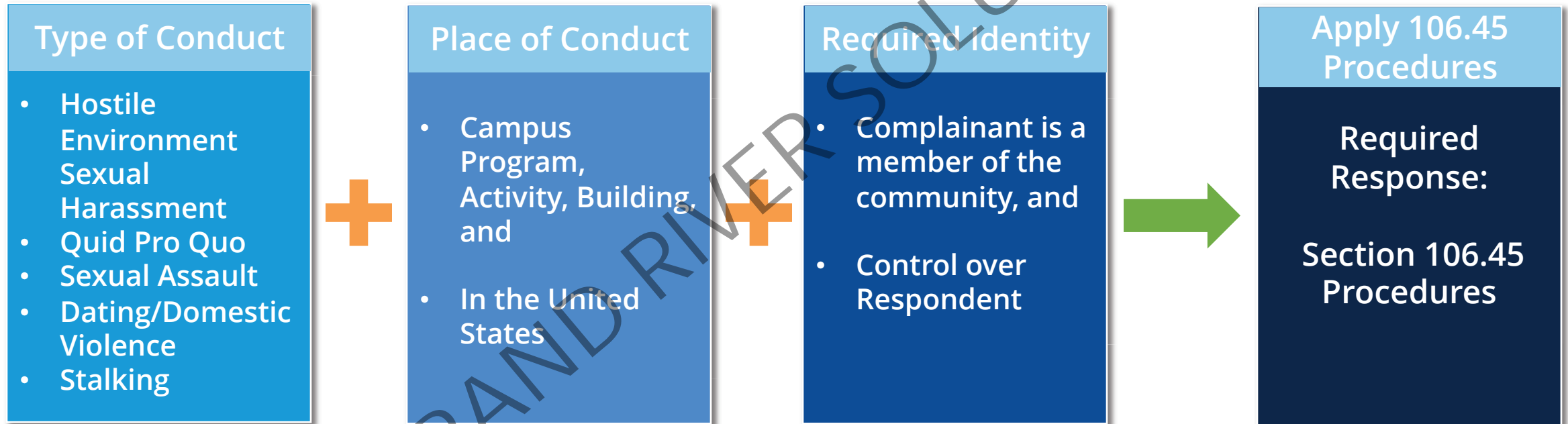
- Sexual Harassment
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment
- Retention Rates
- Safety
- Screening Exams
- Sign-on Bonuses
- Student and Employee Benefits
- Thesis Approvals
- Vocational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

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

- Sexual Harassment
- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment

**Conduct Constituting
Sexual Harassment
as Defined in
Section 106.30**

Title IX Application Post May 2020 Regulations





Apply the Title IX 106.45 Procedures

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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



**Skidmore College
Title IX Policy for Students
2020-2021**

**Skidmore's
Policy**



Skidmore College: Live Hearing Format and Logistics

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Live Hearings Required

In
Person

Remote

Hybrid

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Hearing Technology: Requirements and Considerations



If hearings cannot be in person, or if someone chooses to participate remotely, must have a remote participation platform available.



All hearings must be recorded.



Participants must be able to communicate during the hearing

The parties with the decision maker(s)
The parties with their advisors

Considerations for All Hearings

Scheduling

Time Limits

Breaks

Formality,
Order and
Gate-Keeping

Handling
disruptions
and
interruptions

Requests or
need for
adjournment



Special Considerations for In Person Hearings

- Arrival of participants
- Space for participants
- Movement of participants
- Administrative support
- Set up of the room
- Ability to consult
 - The parties with their advisors
 - The decision makers with each other

Special Considerations for Remote Hearings

- Arrival of participants
- Administrative support
- Recording
- Cameras
- Back up technology
- Plans if technology fails
- Ability to consult
 - The parties with their advisors
 - The decision makers with each other

Special Considerations for Hybrid Hearings

- Arrival of participants
- Administrative support
- Space with technology
- Recording
- Cameras
- Back up technology
- Plans if technology fails
- Ability to consult
 - The parties with their advisors
 - The decision makers with each other



Roles and Responsibilities

The Players, their Roles, and Impartiality

03

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Hearing Participants

Complainant	the person bringing the complaint
Respondent	the person against whom the complaint has been filed
Advisor	will conduct cross examination; role varies depending on school
Investigator	summarizes the investigation, answers questions
Witnesses	present in the room only when answering questions
Hearing Coordinator/Officer	coordinates all aspects of the hearing, ensures a fair and equitable hearing process, acts as a resource for all participants
Decision-Maker	makes decision as to whether policy was violated
Hearing Administrator	assists with the logistical coordination of the people, the space, technology, etc.

The Players

The Parties

- Must be permitted to participate fully.
- Must be permitted to participate remotely.
- Cannot compel participation.
- Can choose to have their advisor appear in their absence for the purposes of conducting cross-examination.

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The Players

The Investigator

- May provide testimony about their investigation.
- Must provide testimony where the information is based on their own personal observations or experiences.
- Must submit to cross if testimony is provided.

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The Players

Hearing Advisors

- The parties are each permitted two advisors of their choosing.
- One advisor will conduct cross.
- The other can advise the party, but may not otherwise participate.
- No required Training/Qualifications



The Players

The Coordinator/Chair

- Oversees the Process
- Maintains order/decorum
- Supports the panel
- Makes ruling
- Is a decision maker
- Writes the decision
- Required to be trained

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The Players

The Decision Makers

- Fact finders
- Up to three-person panel
- Decision must be....
- Required to be trained
- Cannot be Title IX Coordinator, Investigator, Appeals person



Who is
NOT
in the
Hearing?

General Counsel

Parents

Student newspaper

Interested faculty

Title IX Coordinator

Impartiality

WHAT DOES THIS *REALLY* MEAN?

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Impartiality : Avoiding Prejudgment and Bias

“The Department’s interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what “men” or “women” do or do not do.”

Impartiality : Avoiding Prejudgment and Bias

- Practical application of these concepts in investigations:
 - Do not rely on cultural “rape myths” that essentially blame complainants
 - Do not rely on cultural stereotypes about how men or women purportedly behave
 - Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases
 - 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
 - Employ interview and investigation approaches that demonstrate a commitment to impartiality

Impartiality: Avoiding Bias

- Department also rejected commenters' arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience
- "Department encourages [schools] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased" WHILE
- "exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents"

Impartiality: Avoiding Conflicts of Interest

- Commenters argued that investigators and hearing officers employed by schools have an “inherent conflict of interest” because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors
- Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents
- Department’s response:
 - Department’s authority is over schools, not individual investigators and other personnel, so Department will focus on holding school’s responsible for impartial end result of process, without labeling certain administrative relationships as per se involving conflicts of interest

Impartiality: Avoiding Prejudgment , Bias, and Conflicts of Interest

Bottom line:

- Follow facts of every individual case
- Investigate in manner that will not allow even a perception of prejudgment or bias for or against any party



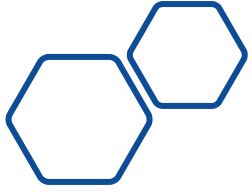
Pre-Hearing Tasks

What should be done in advance of the hearing

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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 Investigator



Review evidence and report



Review applicable policy and procedures



Anticipate the decision maker's questions



Anticipate the party's questions



Anticipate challenges or issues



Be prepared to direct the parties and the decision maker to relevant information in the evidence packet



Be prepared to answer by stating facts only, and without offering opinions



The Advisor



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Consult with your advisee



Determine areas for further exploration



Develop questions for cross



Anticipate the party's questions



Anticipate challenges or issues



Consider the impact of your decisions and develop a strategy



The Decision Maker(s)



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



Develop questions of your own

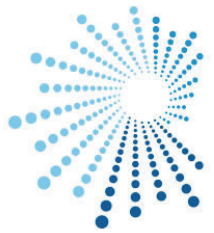


Anticipate the party's questions



Anticipate challenges or issues





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Skidmore College's Adjudication of SGBM Matters: Title IX Hearings

Day 2

Chantelle Cleary
Senior Consultant

Today's Agenda

01

Conducting the Hearing

02

Evidence Assessment and Analysis

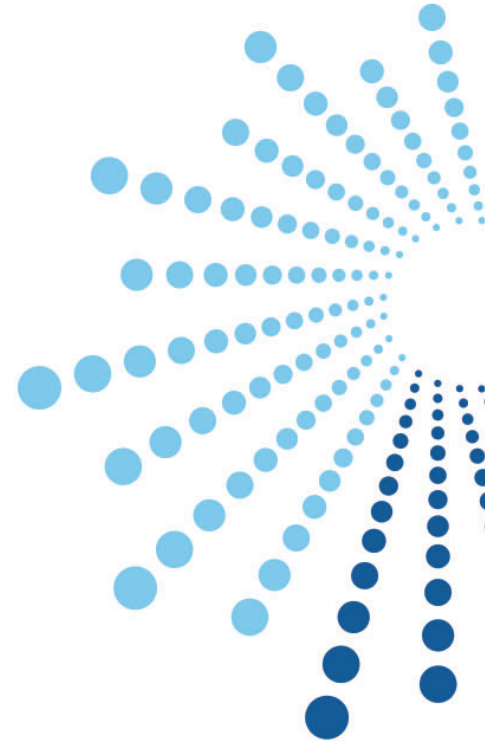
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Post Hearing Tasks

04

Putting it in to Practice

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Conducting the Hearing

01

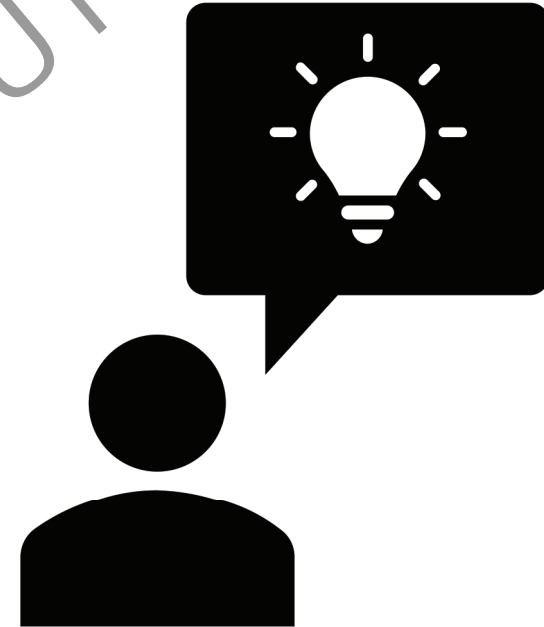
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Opening Instructions by the Chair

- Set the stage
- Reiterate charges
- Reiterate rules and expectations
- Reiterate logistics for the day

This should be scripted and used consistently.



Opening Statements

- The parties will be permitted to give opening statements
- Policy should include purpose and scope
- Consider
 - Requiring submission prior to hearing
 - Word limit
 - Time limit

Opening Statements: Advisor's Role

Assist advisee in developing their opening statement

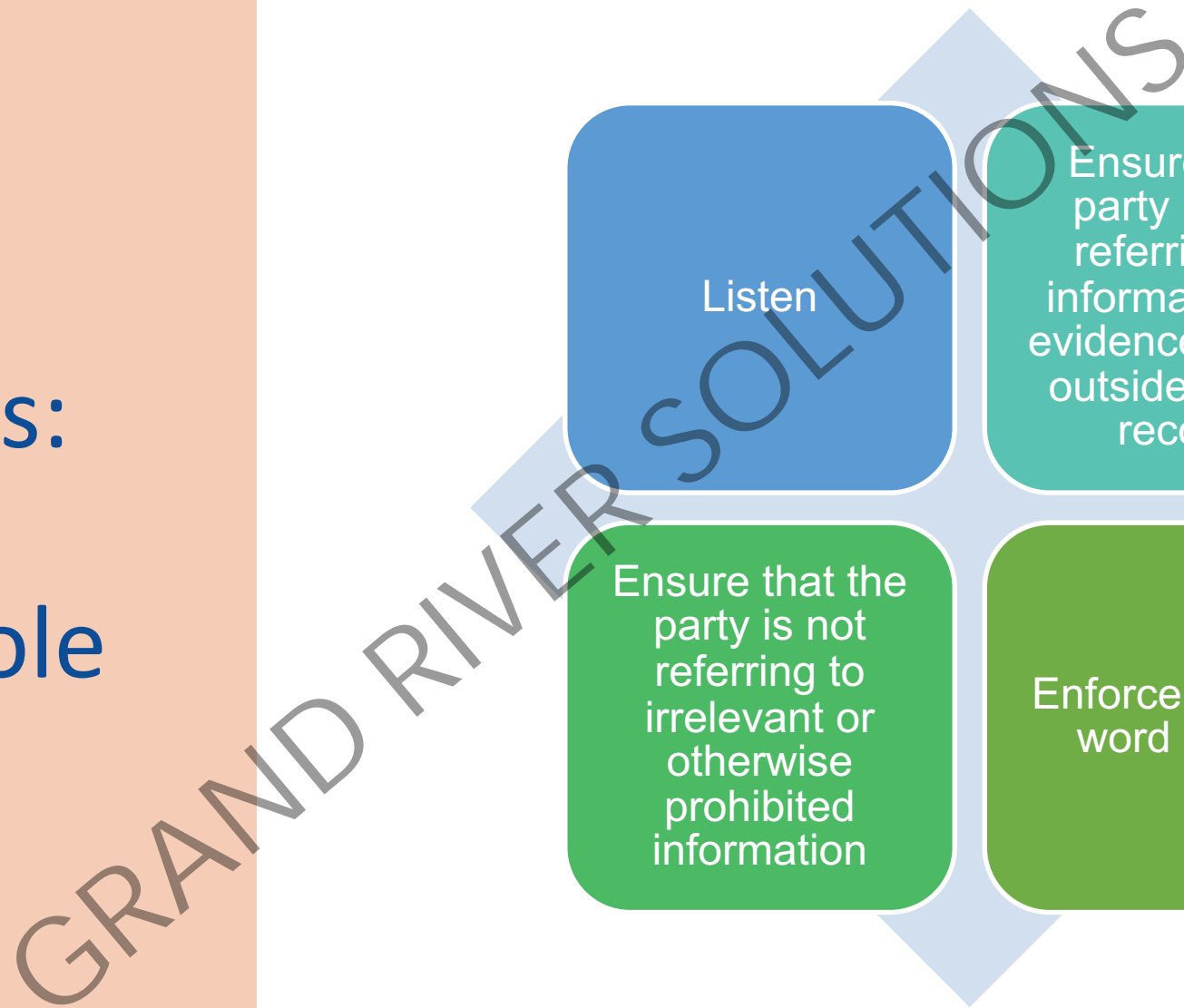
Highlight evidence that the party wants the decision maker to focus on

Consider writing it out in advance

Cannot provide an opening on behalf of an absent party

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Opening Statements: Decision Maker's Role



Testimony of the Parties and Witnesses

01

The Decision Maker will determine the order of testimony

02

The Decision Maker will question first

03

Cross examination will occur next

04

Follow up by the Decision Maker

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

“The Rule requires that schools provide the opportunity for cross-examination, and that party advisors must be permitted to ask all relevant questions (including follow-up questions), and only relevant questions.”

-September 4, 2020 Questions and Answers Regarding the Departments Final Title IX Rule

Cross Examination: Impermissible Questions

- Questions that seek to illicit irrelevant information
 - Complainant's prior sexual history
 - Information protected by an un-waived legal privilege
 - Medical treatment and care
- Duplicative questions
- Information that is irrelevant

Cross Examination:

n:

Impact of
Not
Submitting
to Cross
Examination

Exclusion of all statements of
that party or witness

Cross Examination: Exceptions to the Exclusionary Rule



Statements that consist of or are made in the course of the prohibited conduct



When cross examination is waived or not conducted

Cross Examination: Common Questions/Areas of Focus

- Confirming accuracy of prior statements of the witnesses or party
- Highlighting inconsistencies in prior statements or with other items of evidence
- Challenging reliability of testimony
- Challenging authenticity of evidence submitted by the party or witness

Cross Examination

Role of the Decision Maker

The decision maker will determine whether a question posed during cross examination is relevant and permissible.

When the decision maker determines that a question is relevant, the party/witness must answer it.

When the decision maker determines that a question is irrelevant, they must state their reason.

Closing Statements

- The parties will be permitted to give closing statements
- Policy should include purpose and scope
- Consider
 - Requiring submission prior to hearing
 - Word limit
 - Time limit

Closing Statements: Advisor's Role

Assist advisee
in developing
their closing
statement

Highlight
evidence that
the party wants
the decision
maker to focus
on

Bullet points

May not
provide a
closing on
behalf of an
absent party

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Opening Statements: Decision Maker's Role

Listen

Ensure that party is not referring to information or evidence that is outside of the record

Ensure that the party is not referring to irrelevant or otherwise prohibited information

Enforce time or word limits

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Common Challenges during hearings

- Non-appearance by a party or witness
- Non-appearance by an advisor
- Party or witness appears but declines to answer some (or all) questions
- Technology fails
- Disruptions
- Maintaining Decorum
- A novel issue is raised

Seek to minimize harm

Decision Makers./Advisors

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

Preparing parties

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

Tips for Increasing Efficiency

01

Be prepared

02

Practice

03

Have back up
plans for
technology
issues

04

Debrief



Evidence: Consideration, Exclusion, and Evaluation

02

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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

Evidence May Include...

Testimony

Text Messages

Social Media posts and communication

Emails

Surveillance

Videos

Photographs

Police Body Camera Footage

Swipe Records

Medical Records

Phone Records

Audio Recordings

Admissibility of Evidence: What Can the Decision Maker Consider?

The Title IX Rule does not adopt the Federal Rules of Evidence for hearings conducted under Title IX. For instance, with respect to which evidence may be introduced, the Rule uses “relevance” as the sole admissibility criterion. See § 106.45(b)(1)(ii) (the recipient’s grievance process must provide for objective evaluation of all relevant evidence, including evidence that is inculpatory and exculpatory).

Admissibility of Evidence: What is Excluded

- a party's treatment records, without the party's prior written consent
- information protected by a legally recognized privilege
- questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions
- statements of a party or witness who does not submit to cross-examination

Some Other Evidentiary Issues

- SANE reports
- Police reports
- Character evidence
- Polygraph examinations
- Prior bad acts/Past conduct of complainant, respondent

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

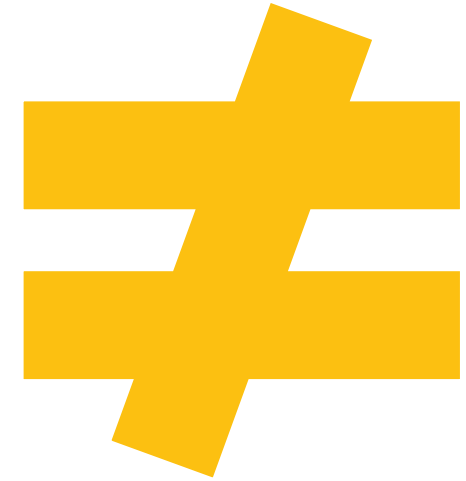
Assists in coming to the conclusion – it is “of consequence”

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



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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

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.

Being Convinced

It Is True, or Biased Conclusion?

**A credible witness may give
unreliable testimony**

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Post Hearing Tasks

Deliberations and Developing the Written Decision

03

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Deliberations

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Weighing the Evidence & Making A Determination

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

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



Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate
- Apply the facts to the elements
- Make a finding on each element using the preponderance standard



Allegation: Fondling


Fondling is the:

1. touching of the private body parts of another person
2. for the purpose of sexual gratification,
3. without the consent of the victim,
 1. including instances where the victim is incapable of giving consent because of their age or **because of their temporary or permanent mental incapacity.**

Analysis Grid

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed- Complainant and Respondent Agree that there was contact between Respondent's hand and Complainant's vagina.</p>	<p>Respondent acknowledges and admits this element in their statement with investigators.</p> <p>"we were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</p>	<p>Complainant- drank more than 12 drinks, vomited, no recall Respondent- C was aware and participating Witness 1- observed C vomit Witness 2- C playing beer pong and could barely stand Witness 3- C drunk but seemed fine Witness 4- carried C to the basement couch and left her there to sleep it off.</p>

Apply Preponderance Standard to Each Element

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed- Complainant and Respondent Agree that there was contact between Respondent's hand and Complainant's vagina.</p> 	<p>Respondent acknowledges and admits this element in their statement with investigators.</p> <p>“we were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants...”</p> 	<p>Complainant- drank more than 12 drinks, vomited, no recall Respondent- C was aware and participating</p> <p>Witness 1- observed C vomit Witness 2- C playing beer pong and could barely stand Witness 3- C drunk but seemed fine Witness 4- carried C to the basement couch and left her there to sleep it off.</p> 

Final Report

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





The Regulations in Practice

04

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Scenario 1

During the hearing, Witness 1 appears. Witness one answers all relevant questions by the decision maker, the Complainant's advisor, and the Respondent's advisor. After cross by both advisors, the Decision maker asks a second round of questions. Witness 1, who is now tired and frustrated, refuses to answer any of the Decision Maker's follow up questions.

Can the Decision Maker rely upon/consider the statements of Witness 1?



Scenario 2A

Respondent's provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations.

A. The investigator determines the report is irrelevant. Must the investigator share the report with the decision maker?



Scenario 2B

Respondent's provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations. The polygrapher appears and declines to answer all questions posed on cross by Complainant's advisor.

B. Can the decision maker consider the answers to other questions during the hearing? The report?



Scenario 2C

Respondent's provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations. The polygrapher appears and answers all relevant questions on cross.

B. Must the Decision Maker find Respondent not responsible because of the findings in the report?



Scenario 3

Complainant provides records of a sexual assault forensic exam. In the record, the nurse notes that Complainant had bruising on her inner thighs and abrasions on her cervix. The nurse does not appear at the hearing.

Complaint testifies and fully submits to cross. In her testimony she states that she saw bruises on her inner thighs and that the nurse told her about the injuries to her cervix.

1. **Can the DM consider evidence of the inner thigh injuries?**
2. **Can the DM consider evidence of the injuries to C's cervix?**



Scenario 4

Respondent appears at the hearing with Witness 7. Respondent would like Witness 7 to provide information testimony about text messages between them and Complainant that indicate that Complainant has made the allegations up.

1. **Can the DM hear from Witness 7 at the hearing?**

Questions?



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