Title IX in a Post Regulatory World

Jody Shipper
Meet Your Facilitator

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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.
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.
Narrowed jurisdiction and expansive procedural requirements
To Start: What Is Covered by the New Regs?

- New Sex Harass
- Stalking/basis of sex
- DV basis of sex
- Quid Pro Quo EE/Student

IF ... § 106.30

NOT § 106.30
DEFINITIONS

NOT IN §106.45
PROCESS
What is Covered by Title IX

- Achievement Awards
- Athletics
- Benefits
- Financial Aid
- Leaves of absence and re-entry policies
- Opportunities to join groups
- Pay rates
- Recruitment
- Retention Rates
- Safety
- Screening Exams
- Sign-on Bonuses
- Student and Employee Benefits
- Thesis Approvals
- Vocational or College Counseling
- Research opportunities
What (Mis)Conduct is Covered by the New Regulations’ Processes?

- Sexual Harassment*
  - 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?
Does the Complaint Allege:

1. sexual harassment in which the harassment was so severe and pervasive that it denied the complainant equal access to an educational program or activity, or denied the employee the equal ability to continue their work;

2. Dating Violence, Domestic Violence, Stalking, or Sexual Assault;

3. A complaint of quid pro quo sexual harassment by an employee respondent against a student.
If yes, keep going
Did the conduct occur:

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

2. The incident(s) occurred in any building owned or controlled by a student organization that is officially recognized by the institution, and within the United States;

3. The incident(s) was part of one of the school’s programs or activities, such as part of a field trip or team athletic event, and within the United States.
If yes, keep going
Who is the Accused?

Is the Respondent:

1. A student (whether applicant, admitted, or currently enrolled), or
2. An employee (applicant, hired but not yet working, or employed).
3. Someone else that the institution may have control over (ie, a contractor, an alum, or a vendor)
If yes, keep going
Fourth Question
Is the Complainant:
1. a student (whether applicant, admitted, or currently enrolled); or
2. An employee (applicant, hired but not yet working, or employed),
3. Or someone who is otherwise still accessing or attempting to access a university program or activity, within the United States.

Who Experienced the Conduct?
A Sample Decision-Tree

I. Nature of Complaint:
   A complaint of sexual harassment in which the harassment was so severe and pervasive that it denied the complainant equal access to an educational program or activity, or denied the employee the equal ability to continue their work;
   A complaint of Dating Violence, Domestic Violence, Stalking, or Sexual Assault;
   A complaint of quid pro quo sexual harassment by an employee respondent against a student.
   If yes to one of the above, continue. If no, please see (name of basic sex harass policy).

2. Location:
   The incident(s) occurred at school, within the United States;
   The incident(s) occurred 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).
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

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
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.”
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

• 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

Harassment, Discrimination, Title IX OTHER, retaliation, Title VII, bullying

New regs process

VAWA
Mandatory Response to Each Report

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

1. Discuss support measures

2. Explain that support measures are available without filing formal complaint

3. Explain options for resolution and how to file
Outreach

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
Complaint . . . or FORMAL Complaint?
Mandatory Investigation

• Complaint filed, SIGNED, requests investigation
• Coordinator files, SIGNS, starts investigation
But Do You START the Investigation?

Does it meet the elements? If not, DISMISS

Trying to do some pre-investigation to identify respondent.
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
Overview of Formal Resolution Process
How to Proceed?

Remedies-based
- No formal process

Alternative/Informal
- Signed agreement
- Voluntary
- What records?

Investigation/Hearing
- All requirements of 106.45
Overview of Investigation

- Trained investigator collects information
- Investigator shares evidence “directly related” to allegations with parties
- Parties have 10 days to respond
- Investigator creates summary of “relevant” evidence and shares with parties
- Parties have 10 days to respond
Narrowed Jurisdiction and Expansive Procedural Requirements

The Post Regulatory Scope of Title IX
First Question

Does the Complaint Allege:

1. sexual harassment in which the harassment was so severe and pervasive that it denied the complainant equal access to an educational program or activity, or denied the employee the equal ability to continue their work;

2. Dating Violence, Domestic Violence, Stalking, or Sexual Assault;

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

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

What Happened?
If yes, keep going
Did the conduct occur:

1. The incident(s) occurred at school, within the United States;
2. The incident(s) occurred as part of a recognized program in a building under the school’s control, and within the United States;
3. The incident(s) was part of one of the school’s programs or activities, such as part of a field trip or team athletic event, and within the United States.
If yes, keep going
Third Question

Who is the Accused?

Is the Respondent:

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

Who Experienced the Conduct?

Is the Complainant:

1. a student (whether applicant, admitted, or currently enrolled); or
2. An employee (applicant, hired but not yet working, or employed),
3. Or someone who is otherwise still still accessing or attempting to access a university program or activity, within the United States.
Apply the 106.45 Procedures
What do we do about misconduct that does not fall within this narrow scope, Jody?
Apply other applicable institutional policy or procedures.
The Procedural Requirements of the Investigation
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.
Advisor of Choice

- The advisor can be anyone, including an attorney;
- Institutions cannot place restrictions on who can serve;
- No training required;
- Institution must provide advisor for the purposes of cross examination, only.
Written notification of meetings and sufficient time to prepare
Equal opportunity to present evidence
Evidence review
Review draft report
“Directly Related” and “Relevant Evidence”
What is Directly Related Evidence?

- Directly Related
- “All relevant evidence”
- “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act
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
• “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant.
  • unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  • if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”
• “require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”
• Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition
The Investigator
The Investigator

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.
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
Conducting the Investigation
Essential steps of an investigation

- Notice of formal investigation
- Initial Interviews
- Evidence Collection
- Report writing
The Process: Developing an Investigative Strategy

1. Receive Report
2. Develop a timeline
3. Identify Witnesses
4. Identify Potential Evidence
5. Develop Strategy to Collect Evidence
Investigation Timeline

Prior
History/Interactions
• Between the Parties
• Of the Parties

Pre-Assault
• Pre-Meditation
• Manipulation
• Attempt to Isolate

Assault
• Consent
• Type of Contact

Post Assault
• Behaviors
• Communications
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
- Interim 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

1. Start by eliciting a narrative
2. Listen
3. Interview for clarification
4. Listen
5. Avoid leading questions, questions that blame, interrogating

GRAND RIVER SOLUTIONS
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?
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/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.
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
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

Objective Facts

What You See

Facts Confirming Your Belief

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?

Summary of evidence: 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.
You can trust it

It is convincing

Credible, or Reliable?
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.
Credibility: Old Style

- Corroboration
- Inconsistencies
- Insufficient explanation of inconsistencies
- The logic of person’s narrative
- Inherent plausibility
- Demeanor
- Past record
- Motive to falsify
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
Pre-Hearing Preparation of Participants
The Parties and their Advisors, and the Witnesses

Pre-hearing instructions

• Via conference or meeting
• In writing

Set expectations

• Format
• Roles of the parties
• Participation
• Evidence
• Decorum
• Impact of not following rules
The Hearing
Logistics and the Physical Space

- Scheduling participants
- Reserving space
- Provision of accommodations
- Requests for delays: adjournments

- 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 interruptions
- Poor behavior?
- Recording
**Procedural Requirements for Hearings**

- Must be live, but can be conducted remotely
- No Compelling participation
- Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters
- Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution
- Decision maker determines relevancy of questions and evidence offered
- Exclusion of Evidence if no cross examination
- Written decision must be issued that includes finding and sanction
What do we need to do all of this?

- Space
- Technology
- Clear & Comprehensive Procedures
- Staff
- Expertise and Confidence
The Infrastructure for Compliance
Purpose of the Hearing

- Review and Assess Facts
- Make Findings of Fact
- Determine Responsibility / Findings of Responsibility
- Determine Sanction and Remedy

Why does it matter?
The Essential Elements of All Hearings

- Clear Procedures
- Due/Fair Process
- Fair, Equitable, and Neutral
- Consistency
- Trauma Informed
- Well Trained Personnel
Hearing Elements

- Providing advisors
- Live cross examination by advisors
- Exclusions of evidence if no cross-examination
- No compelling attendance
- Only ONE communication about hearing and sanction
## Clear Procedures

### The Process
- Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings, impact statements, etc.

### The Players
- The roles of all participants

### The Evidence
- Relevancy, Exclusions, Timing of submission, how to submit, who decides, etc.

### The Outcome
- Deliberations; Notice; manner and method communicated.
Clear Procedures

Due Process

Fairness

Equity

Consistency

Trained Personnel
Roles and Responsibilities

People, Functions, and Impartiality
## Hearing Participants

<table>
<thead>
<tr>
<th>Role</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complainant</td>
<td>the person bringing the complaint</td>
</tr>
<tr>
<td>Respondent</td>
<td>the person against whom the complaint has been filed</td>
</tr>
<tr>
<td>Advisor</td>
<td>will conduct cross examination; role varies depending on school</td>
</tr>
<tr>
<td>Adjudicator(s) or Panelist(s)</td>
<td>role varies depending on when in the process the hearing occurs and responsibility of the officer</td>
</tr>
<tr>
<td>Investigator</td>
<td>summarizes the investigation, answers questions</td>
</tr>
<tr>
<td>Witnesses</td>
<td>present in the room only when answering questions</td>
</tr>
<tr>
<td>Hearing Coordinator/Officer</td>
<td>coordinates all aspects of the hearing, ensures a fair and equitable hearing process, acts as a resource for all participants</td>
</tr>
<tr>
<td>Decision-Maker</td>
<td>makes decision as to whether policy was violated</td>
</tr>
<tr>
<td>Administrative Staff</td>
<td>assists with the logistical coordination of the people, the space, technology, etc.</td>
</tr>
</tbody>
</table>
Other Considerations

Panel

- Number of panelists?
- Can you have a panel of one?
- Must finding be unanimous?
- Internal, external, or some combination?
Who is NOT in the Hearing?

- General Counsel
- Parents
- Student newspaper
- Interested faculty
- Title IX Coordinator
The Players

Hearing Advisors

- Will conduct examination/cross
- Roles
- Training/Qualifications
- Communicating their role
- Enforcing their role
The Players
Support Person

- Optional
- Silent
- Roles
- Communicating their role
- Enforcing their role
The Players
The Coordinator/Chair

- Oversees the Process
- Maintains order/decorum
- Supports the panel
- Makes ruling
- Voting or non-voting
- Writes the decision
- Trained
The Players
The Decision Maker

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

- Fact finders
- Number of panelists?
- Composition?
- Makes the finding
- Unanimous?
- Pool?
- Recruitment and retention
You Need to Determine:

The Process
- Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings, impact statements, etc.

The Players
- The roles of all participants

The Evidence
- Relevancy, exclusions, timing of submission, how to submit, and WHO DECIDES?

The Outcome
- Deliberations; Notice; manner and method communicated.
Who Will Have These Roles?

- Overseer of the Process?
- Maintain order during hearing?
- Makes decisions about evidence, scope of hearing
- Makes decisions about witnesses
- Makes decisions about questions to be asked
- Makes decisions about procedural elements
- Who is voting or non-voting participant?
- Who writes the decision?
Other Considerations

Panel

- Number of panelists?
- Can you have a panel of one?
- Must finding be unanimous?
- Internal, external, or some combination?
The Players
Advisors/Support Folks

- Roles
- Participations
- Communicating their role
- Enforcing their role
Hearing Logistics
Opening
Instructions by the Chair

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

*This should be scripted and used consistently.*
Opening Statements

- Permitted, but not required
- Policy should include purpose and scope
- If permitted, consider
  - Requiring submission prior to hearing
  - Word limit
  - Time limit
Testimony

Procedures should be clear about:

- **Order of/parties and witnesses**
  - Could simply leave this up to the decision maker

- **Order of examination**
  - Questioning by the decision maker
  - Cross examination by the advisor
  - Will the advisor be permitted to question their own party?
  - Will there be a second round of questioning?

- **Consistency is essential. Consider putting this all in your procedures.**
Cross Examination
Who does it?

- Must be conducted by the advisor
- If party does not appear or does not participate, advisor can appear and cross
- If party does not have an advisor, institution must provide one
Cross Examination
Permissible Questions

- Questions must be relevant
- Not relevant
  - Duplicative questions
  - Questions that attempt to elicit information about
    - Complainants prior sexual history
    - Privileged information
    - Mental health
Cross Examination
Role of the Decision Maker

- Rulings by Decision Maker required
  - Explanation only required where question not permitted
Cross Examination
Impact of Not Appearing

• Exclusion of all statements of that party
• Exception- DOE Blog
• What if a party or witness appears, but does not answer all questions
Closing Statements

- Permitted, but not required
- Policy should include purpose and scope
- If permitted, consider
  - Time limit
  - Submission in writing after the hearing
Common Challenges

• Non-appearance by a party or witness
• Non-appearance by an advisor
• Party or witness appears but declines to answer some (or all) questions
• Disruptions
• Maintaining Decorum
Tips for Increasing Efficiency

01  Be prepared

02  Have an experienced chair

03  Have back up plans for technology issues

04  Require pre-hearing written submissions
    • of opening statements
    • of questions in advance
Being Trauma-Informed

Training your panel/adjudicators
- Asking questions
- Asking “why”
- Filtering questions of the parties

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

The attraction of prurient interests
Other Decisions

- Will you include Opening, Closing, or Impact Statements? NOT required, but you need to decide.
- How will questioning take place? Direct cross examination, indirect?
- How will questions be submitted?
- Will there be any restrictions on questions that can be asked, such as due to relevancy, already asked and answered, unduly harassing?
- If done remotely, how will the technology be set up?
- If in person, room set-up and who is in the room?
Options

- Report contains only facts gathered
- Report contains factual findings
- Report contains factual findings and recommendation regarding policy
Required Content of Report
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
After the Hearing
Deliberations
Weighing the Evidence & Making A Determination

1) Evaluate the evidence collected to determine what factually is more likely to have occurred, and then

2) Analyze whether the conduct that happened constitutes a violation of the school’s policies
Investigative Report: Form

Develop or adopt a template and use it consistently

Written Summary

Appendices
## Report Content: Background

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**
### Content: Jurisdiction

<table>
<thead>
<tr>
<th>State</th>
<th>Cite</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>• In this section state the institutions jurisdictional grounds:</td>
<td>• Cite the jurisdictional elements in the policy</td>
<td>• If there are several grounds for jurisdiction, state them.</td>
</tr>
</tbody>
</table>
Optional, But A Good Idea

- 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: List the Witnesses

- List those who were interviewed
- List those who were not interviewed
- List those who appeared at hearing
Example of a Detailed List:

<table>
<thead>
<tr>
<th>Witness Name</th>
<th>Witness identified by:</th>
<th>Information offered</th>
</tr>
</thead>
<tbody>
<tr>
<td>John Doe</td>
<td>Reporting Party</td>
<td>Mr. Doe is the Reporting Party's best friend. He was with the Reporting Party the night of the reported incident.</td>
</tr>
<tr>
<td>Jane Doe</td>
<td>Investigators</td>
<td>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.</td>
</tr>
</tbody>
</table>
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.
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
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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