Hearings in the New Era
Tuskegee University

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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.

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Vision
We exist to help create safe and equitable work and educational environments.

Mission
Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values
- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity
Today’s Agenda

01 Brief Review
02 Hearing Participants
03 Pre-Hearing Tasks
04 Conducting the Hearing
05 The Regulations in Practice
06 Post-Hearing

May 10, 2021
Brief Review
Title IX Regulations

- Narrowed the scope of Title IX’s protections
- New Definition of Sexual Harassment
- New Procedural Requirements for responding to reports of Sexual Harassment
  - Investigation
  - Adjudication
# Procedural Requirements for Hearings

- Must be live, but can be conducted remotely
- Participation cannot be compelled
- 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 advisor 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, rationale, and sanction, as well as information on right to appeal
What do we need to do all of this?

- Space
- Technology
- Clear & Comprehensive Procedures
- Staff
- Expertise and Confidence
Purpose of the Hearing

Why does it matter?

Review and Assess Facts

Make Findings of Fact

Determine Responsibility / Findings of Responsibility

Determine Sanction and Remedy
The Essential Elements of All Hearings

- 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, 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.
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

Apply trauma-informed practices to ALL participants
Hearing Participants

Roles and Responsibilities
<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</td>
</tr>
<tr>
<td>Witnesses</td>
<td>present in the room only when answering questions</td>
</tr>
<tr>
<td>Hearing Chair</td>
<td>coordinates all aspects of the hearing, ensures a fair and equitable hearing process;</td>
</tr>
<tr>
<td>Decision-Maker</td>
<td>makes decision as to whether policy was violated</td>
</tr>
<tr>
<td>Hearing Facilitator</td>
<td>assists with the logistical coordination of the people, the space, technology, etc.</td>
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</tbody>
</table>
The Decision Makers

- Fact finders
- Will question the parties and the witness at the hearing
- Can be a single person, or a panel
- Cannot be Title IX Coordinator, Investigator, or Appeal Person
The Hearing Chair

• Oversees the process
• Maintains order/decorum
• Supports the panel
• Makes ruling
• Must be a Decision Maker
• Where there is a panel, the Chair will often take the lead in writing the decision
The Hearing Facilitator

- Provides administrative support to the DM
- Coordinates the technology
- Coordinates the schedule
- Can be anyone, including the Title IX Coordinator
Hearing Advisors

• May not participate in the hearing other than to conduct cross examination

• No required training/qualifications

• The College cannot restrict who serves. It can be anyone, including an attorney or a witness.

• Communicate their role

• Enforce their role
The Title IX Hearing Committee

In cases involving faculty or other employees of the University, the decision maker's determination on responsibility will be provided to the committee and they will determine sanction or other restrictions. The Committee's decision on sanction must be included in the final report.
Pre-Hearing Tasks
Hearing Logistics

- Scheduling participants
- Reserving space
- Provision of accommodations
- Requests for delays; adjournments
- Hearing Instructions and Guidelines
Considerations for the Physical Space

- Room location and setup
- 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
Hearing Instructions

- Rules of Decorum
- Enforcing Rules of Decorum
- Pre-Hearing Checklist
- Pre-Hearing Informational Letter
- Develop the Hearing Script
Other Considerations

Absent Advisor

Communicating During the Hearing

Breaks

Formality, Order and Gate-Keeping

Handling Disruptions and Interruptions

Recording
Hearing Participant Preparation
The Parties and their Advisors, and the Witnesses

Pre-hearing instructions
- Via conference or meeting
- In writing

Set expectations
- Format
- Roles of the parties
- Participation
- Evidence
- Decorum
- Impact of not following rules
The Decision Maker(s)

- Review evidence and report
- Review applicable policy and procedures
- Preliminary analysis of the evidence
- Determine areas for further exploration
- Develop questions of your own
- Anticipate the party's questions
- Anticipate challenges or issues
Conducting the Hearing
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 law permits but does not require openings
• If permitted, consider:
  • Designating purpose and scope
  • Requiring submission prior to hearing
  • Word limit
  • Time limit
Testimony

• 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
  - Complainant's prior sexual history
  - Privileged information
  - Mental health
Cross Examination
Role of the Decision Maker

Rulings by Decision Maker required after each question is asked by the advisor

Explanation only required where question not permitted

Can allow advisors to make case as to why question should be asked, but not required
The Department declines to define "relevant," indicating that the term "should be interpreted using [its] plain and ordinary meaning."

See, e.g., Federal Rule of Evidence 401: Test for Relevant Evidence:

- "Evidence is relevant if:
  a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
  b) the fact is of consequence in determining the action."
When Assessing Relevance, the Decision Maker Can:

- Ask the advisor why their question is relevant
- Take a break
- Ask their own questions of the party/witness
- Review the hearing record
Evidence That is Not “Relevant”

• “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
Evidence That Might Be Relevant

Character Evidence

Polygraph Evidence

Prior Bad Act Evidence
Cross Examination
Impact of Not Participating

- Exclusion of all statements of made by the party or witness
- Exception where the statements constitute the prohibited conduct alleged
Closing Statements

• Permitted, but not required
• If permitted, consider:
  • Scope and purpose
  • Time limit
  • Submission in writing after the hearing
Tips for Increasing Efficiency

01 Be prepared

02 Have an experienced chair

03 Have backup plans for technology issues

04 Require pre-hearing written submissions
   • of opening statements
   • of questions in advance
Common Challenges

- Non-appearance by a party or witness
- Non-appearance by an Advisor
- Party attempts to offer evidence for the first time at the hearing
- Party or witness appears but declines to answer some (or all) questions
- Maintaining decorum
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
Relevance is Not...

- Strength of the evidence
- Believability of the evidence
- Based on type of evidence: circumstantial, direct
- Based on complicated rules of court
Assessing Authenticity

Never assume that an item of evidence is authentic.

Ask questions, request proof.

Investigate the authenticity, if necessary.
Assessing Reliability

- Inherent plausibility
- Logic
- Corroboration
- Past record
- Other indicia of reliability
Assessing Credibility

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.
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.
A credible witness may give unreliable testimony.
After the Hearing
Deliberations
# Types of Evidence

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<th>Description</th>
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<tr>
<td><strong>Direct Evidence</strong></td>
<td>Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.</td>
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<tr>
<td><strong>Circumstantial Evidence</strong></td>
<td>Evidence based on inference and not on personal knowledge or observation.</td>
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<tr>
<td><strong>Corroborating Evidence</strong></td>
<td>Evidence that differs from but strengthens or confirms what other evidence shows</td>
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Frequently Gathered Evidence

- Testimony
- Text Messages
- Social Media posts and 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?
  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!
Weighing the Evidence & Making A Determination

1. Evaluate the relevant evidence collected to determine what weight, if any, you will afford that item of evidence in your final determination;
2. Apply the standard of proof and the evidence to each element of the alleged policy violation;
3. Make a determination as to whether or not there has been a policy violation.
Preponderance of the Evidence

More likely than not

Does not mean 100% true or accurate

A finding of responsibility = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated

A finding of not responsible = There was not 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
Allegation: Fondling

Fondling is the:
• touching of the private body parts of another person
• for the purpose of sexual gratification,
• without the consent of the victim,
• including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity.
Touching of the private body parts of another person | For the purpose of sexual gratification | Without consent due to lack of capacity
--- | --- | ---
Undisputed: Complainant and Respondent agree that there was contact between Respondent’s hand and Complainant’s vagina. | Respondent acknowledges and admits this element in their statement with investigators. “We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants…” | Complainant: drank more than 12 drinks, vomited, no recall. Respondent: C was aware and participating. Witness 1: observed C vomit. Witness 2: C was playing beer pong and could barely stand. Witness 3: C was drunk but seemed fine. Witness 4: carried C to the basement couch and left her there to sleep it off.
Apply Preponderance Standard to Each Element

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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
The Regulations in Practice
Scenario 1

During the hearing, Witness 1 appears. Witness 1 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 provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations.

• The Investigator determines the report is irrelevant. Must the Investigator share the report with the decision maker?
Scenario 2B

Respondent 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.

• Can the Decision Maker consider the answers to other questions during the hearing? The report?
Scenario 2C

Respondent 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.

• 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.

- Can the DM consider evidence of the inner thigh injuries?
- 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.

- Can the DM hear from Witness 7 at the hearing?
Questions?

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