Title IX Hearings in a Post Regulatory World

Chantelle Cleary
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
05 Hearings Logistics
06 Evidentiary Issues
07 Post-Hearing
Regulatory Overview

Narrowed jurisdiction and expansive procedural requirements
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.”
“...on the basis of sex.”

August 31, 2020 Letter of Notification

“However, with respect to complaints that a school’s action or policy excludes a person from participation in, denies a person the benefits of, or subjects a person to discrimination under an education program or activity, on the basis of sex, the Bostock opinion guides OCR’s understanding that discriminating against a person based on their homosexuality or identification as transgender generally involves discrimination on the basis of their biological sex.”
Title IX Applies to All Forms of Discrimination on the basis of sex

- 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
Section 106.30: 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

Title IX Application Post May 2020 Regulations

All Forms of Sex Discrimination, Retaliation

106.30 Sexual Harassment:
• Hostile Environment
• Quid Pro Quo
• Sexual Assault
• Dating/Domestic Violence
• Stalking
Title IX Application Post May 2020 Regulations

**Type of Conduct**
- Hostile Environment
- Sexual Harassment
- Quid Pro Quo
- Sexual Assault
- Dating/Domestic Violence
- Stalking

**Place of Conduct**
- Campus Program, Activity, Building, and
- In the United States

**Required Identity**
- Complainant is a member of the community, and
- Control over Respondent

**Apply 106.45 Procedures**
Required Response:
Section 106.45 Procedures
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.
Second Question

Where Did the Conduct Occur?

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.
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.
Fourth Question

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)

Who is the Accused?
Apply the 106.45 Procedures
What do we do about misconduct that does not fall within this narrow scope?
And what about state law?
Before The Investigation

First Things First...

Outreach/Response from Title IX Coordinator

Support Measures, whether or not Formal Complaint is filed

How to File

Options for Resolution

Notice to College/University
Procedural Requirements for Investigations

1. **NOTICE TO BOTH PARTIES**
2. **EQUAL OPPORTUNITY TO PRESENT EVIDENCE**
3. **AN ADVISOR OF CHOICE**
4. **WRITTEN NOTIFICATION OF MEETINGS, ETC., AND SUFFICIENT TIME TO PREPARE**
5. **OPPORTUNITY TO REVIEW ALL EVIDENCE, AND 10 DAYS TO SUBMIT A WRITTEN RESPONSE TO THE EVIDENCE PRIOR TO COMPLETION OF THE REPORT**
6. **REPORT SUMMARIZING RELEVANT EVIDENCE AND 10 DAY REVIEW OF REPORT PRIOR TO HEARING**
Procedural Requirements for Hearings

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

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

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.
Clear Procedures

Due Process

Fairness

Equity

Consistency

Trained Personnel
Considerations for the Physical Space

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

- Hearing Officer
- Witness
- Investigator & Hearing Coordinator
- Respondent & Advisor
- Complainant & Advisor
Remote Participation

- In whole or in part?
- Communication considerations
  - Chat function or emails
- Private consultation between parties and advisors
  - Use of breakout rooms
  - Communication considerations
- Practice runs
- Connectivity Considerations
Other Considerations

- Time Limits
- Breaks
- Formality, Order and Gate-Keeping
- Handling disruptions and interruption
- Poor behavior?
- Recording
Roles and Responsibilities

People, Functions, and Impartiality
<table>
<thead>
<tr>
<th>Hearing Participants</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>Investigator</td>
<td>summarizes the investigation, answers questions</td>
</tr>
<tr>
<td>Witnesses</td>
<td>present in the room only when answering questions</td>
</tr>
<tr>
<td>Hearing Coordinator/Officer</td>
<td>coordinates all aspects of the hearing, ensures a fair and equitable hearing process, acts as a resource for all participants</td>
</tr>
<tr>
<td>Decision-Maker</td>
<td>makes decision as to whether policy was violated</td>
</tr>
<tr>
<td>Administrative Staff</td>
<td>assists with the logistical coordination of the people, the space, technology, etc.</td>
</tr>
</tbody>
</table>
Other Considerations

Panel

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

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

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

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

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

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

The Panel

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

WHAT DOES THIS *REALLY* MEAN?
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

- 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
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 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

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

Procedures should be clear about:

- **Order of/parties and witnesses**
  - Could simply leave this up to the decision maker
- **Order of examination**
  - Questioning by the decision maker
  - Cross examination by the advisor
  - Will the advisor be permitted to question their own party?
  - Will there be a second round of questioning?
- **Consistency is essential. Consider putting this all in your procedures.**
Cross Examination
Who does it?

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

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

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

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

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

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

01. Be prepared
02. Have an experienced chair
03. Have back up plans for technology issues
04. Require pre-hearing written submissions
   • of opening statements
   • of questions in advance
Being Trauma-Informed

Training your panel/adjudicators

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

Preparing parties

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

The attraction of prurient interests
Evidentiary Issues
Evidence

“Something (including testimony, documents, tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or non-existence of a fact.”

Black’s Law Dictionary
Types of Evidence

**Direct Evidence**
Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

**Circumstantial Evidence**
Evidence based on inference and not on personal knowledge or observation.

**Corroborating Evidence**
Evidence that differs from but strengthens or confirms what other evidence shows.
Non-Testimonial Evidence

- Text Messages
- Social Media posts
- Social Media Communications
- Emails
- Surveillance
- Videos
- Photographs
- Police Body Camera Footage
- Swipe Records
- Medical Records
- Phone Records
- Audio Recordings
Some Other Evidentiary Issues

- Character evidence
- Polygraph examinations
- SANE reports
- Past conduct of complainant, respondent
# Evaluating the Evidence

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is it relevant?</td>
<td>Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.</td>
</tr>
<tr>
<td>Is it authentic?</td>
<td>Is the item what it purports to be?</td>
</tr>
<tr>
<td>Is it credible?</td>
<td>Is it convincing?</td>
</tr>
<tr>
<td>Is it reliable?</td>
<td>Can you trust it or really on it?</td>
</tr>
<tr>
<td>What weight, if any, should it be given?</td>
<td>Weight is determined by the finder of fact!</td>
</tr>
</tbody>
</table>
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
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.
It Is True, or Biased Conclusion?

A credible witness may give unreliable testimony.
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
Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate
Preponderance of the Evidence

- More likely than not
- Does not mean 100% true or accurate
- A finding = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated
Final Report

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

Email Us
Jody@grandriversolutions.com
Chantelle@grandriversolutions.com
info@grandriversolutions.com

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