

GRAND RIVER | SOLUTIONS

Title IX in a Post Regulatory World

Jody Shipper

Meet Your Facilitator



Jody Shipper, J.D.

Co-Founder and Managing Director

Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Jody received her J.D. from the University of California, Hastings College of Law and her bachelor's degree from Georgetown University's School of Foreign Service.



About Us

Grand River Solutions provides Title IX, equity, and Clery Act consulting services. Together, our experts have decades of direct, on-campus experience at both small and large, public and private institutions. This practical expertise derived from years of hands-on experience enables our team to offer customized solutions unique to your educational institution's needs. Grand River has a suite of creative, cost-effective and compliant solutions to help schools meet their needs in innovative ways.

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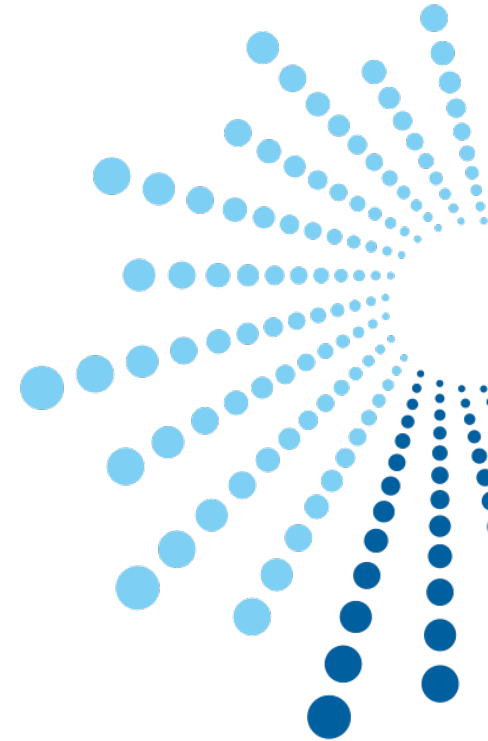
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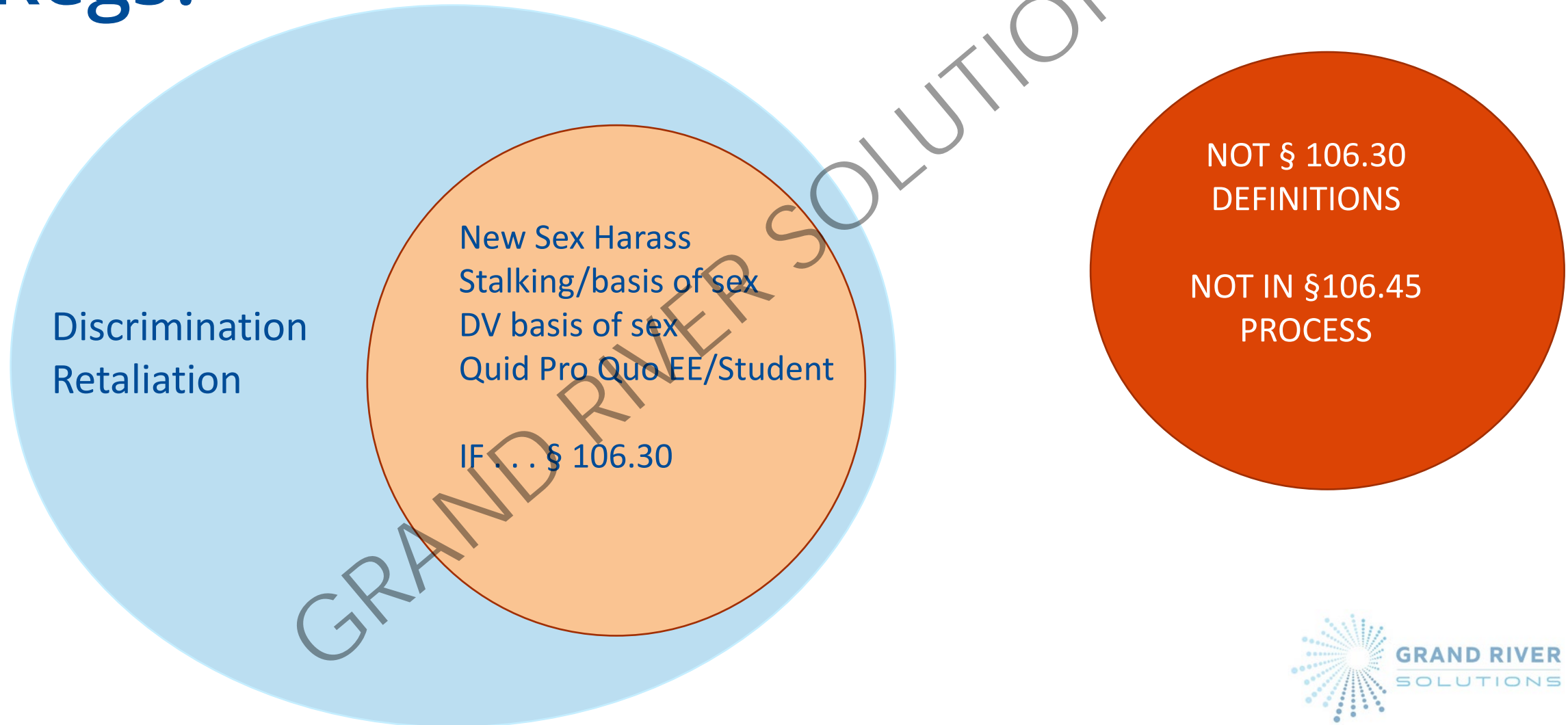
Regulatory Overview

Narrowed jurisdiction and expansive procedural requirements

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To Start: What Is Covered by the New Regs?



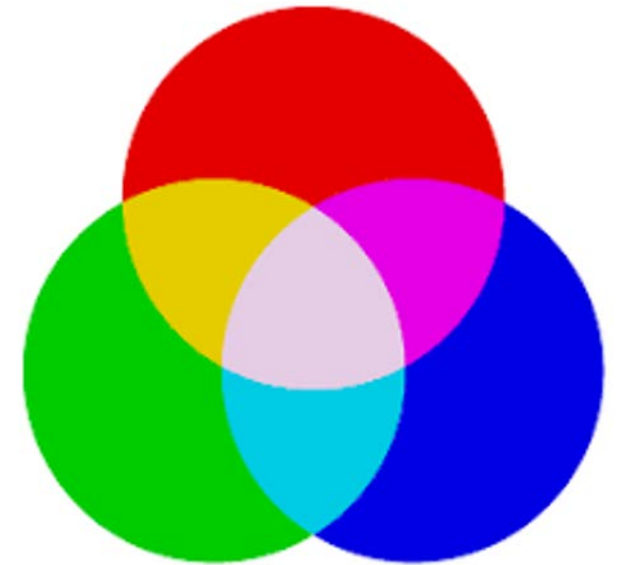
What is Covered by Title IX

- 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?

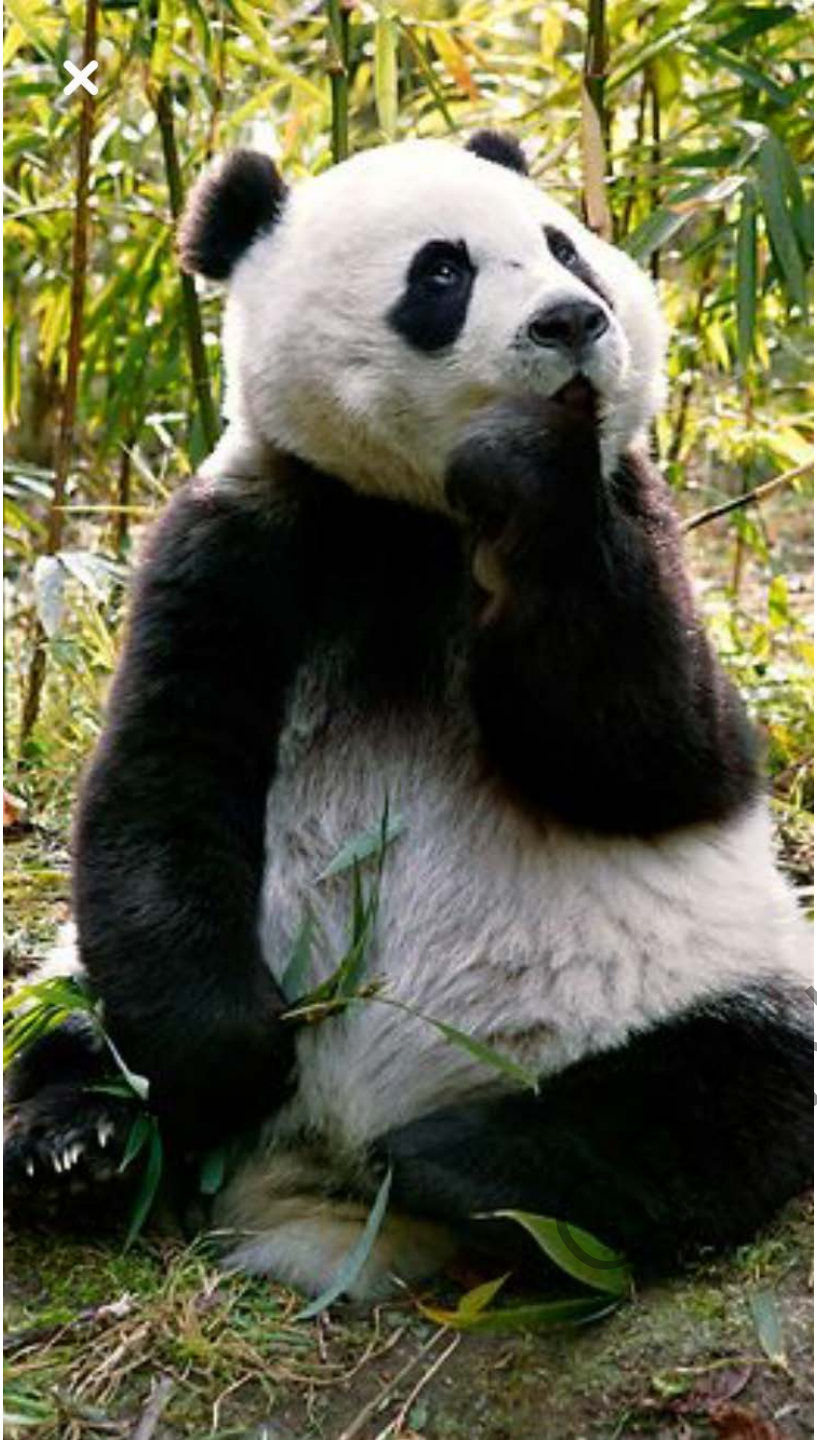
- Sexual Harassment*
 - Hostile Environment*
- Quid Pro Quo (employee to student)*
- Sexual Assault*
- Dating Violence (on basis of sex)*
- Domestic Violence (on basis of sex)*
- Stalking (on basis of sex)*

* 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?

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What Happened?

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

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 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.



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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

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 accessing or attempting to access a university program or activity, within the United States.

A Sample Decision-Tree

1. Nature of Complaint:

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

A complaint of Dating Violence, Domestic Violence, Stalking, or Sexual Assault;

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

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

2. Location:

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

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

The incident(s) was part of one of the school's programs or activities, such as part of a field trip or team athletic event, and within the United States.

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

3. The institution has control over the respondent, meaning the Respondent is a student (whether applicant, admitted, or currently enrolled) or employee (applicant, hired but not yet working, or employed). In addition, the institution may have control over a respondent who is a contractor, an alum, or a vendor under certain circumstances.

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

4. Complainant is a student (whether applicant, admitted, or currently enrolled) or employee (applicant, hired but not yet working, or employed), or otherwise still accessing or attempting to access a university program or activity, within the United States.

If yes to one of the above, continue. If no, please see (go to basic sex harassment policy).

Definition of Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An **employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it **effectively denies** a person equal access to the recipient's education program or activity; or
- (3) "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).

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?

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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

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Sexual Assault Definitions

- 20 U.S.C. 1092(f)(6)(A)(v) – Federal Definitions
- **Sex Offenses Forcible and Non-Forcible**
 - **Forcible:**
 - **Rape, Sodomy, Sexual Assault with an Object, Non-Consensual Fondling**
 - **Non-Forcible: Incest, Statutory Rape**

Domestic Violence

Includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person.

Dating Violence

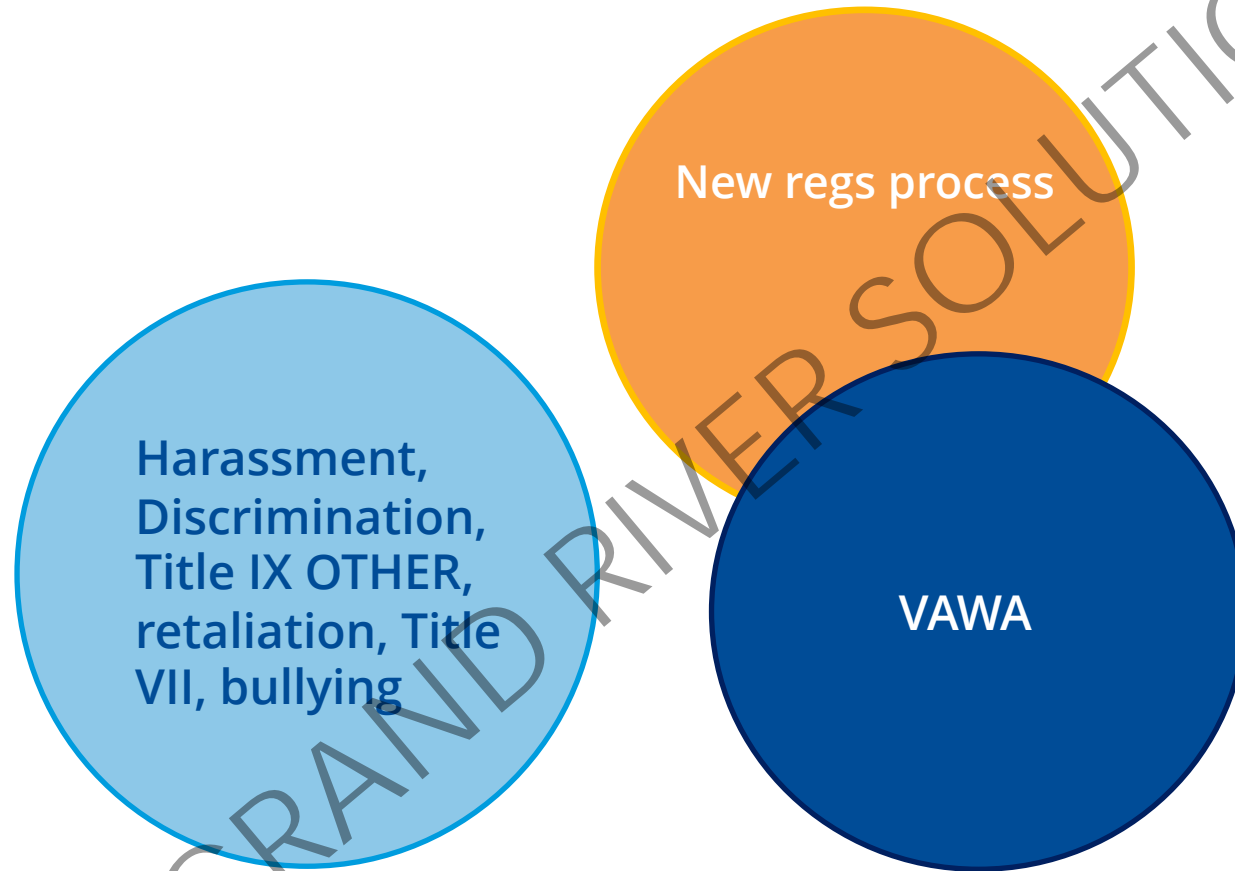
Violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship. (ii) The type of relationship (iii) The frequency of interaction between the persons involved in the relationship.

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.

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Note: They Do Not Match Up



Mandatory Response to Each Report



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

NOTICE

Actual Notice

Connecticut Law

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

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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

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But Do You **START** the Investigation?

Does it meet the elements? If not, **DISMISS**

Trying to do some pre-investigation to identify respondent

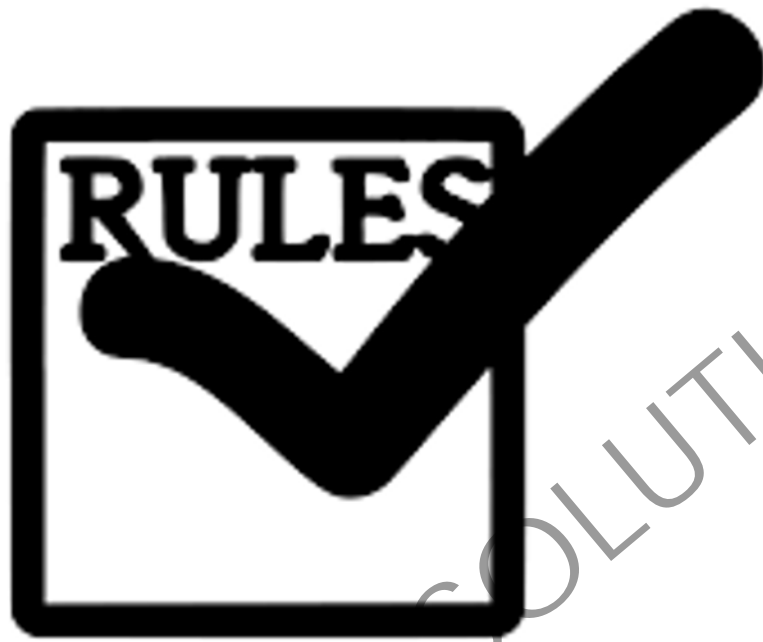
Dismissing Complaints

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

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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**



The Post Regulatory Scope of Title IX

Narrowed Jurisdiction and Expansive Procedural
Requirements

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First Question

What
Happened?

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).



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If yes, keep going

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.



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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)



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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 accessing or attempting to access a university program or activity, within the United States.



Apply the 106.45 Procedures

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

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

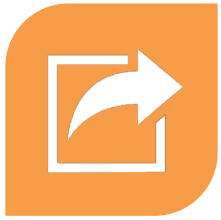


The Procedural Requirements of the Investigation

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Procedural requirements for Investigations



Notice TO BOTH
PARTIES



Equal opportunity
to present evidence



An advisor of
choice



Written notification
of meetings, etc.,
and sufficient time
to prepare



Opportunity to
review ALL
evidence, and 10
days to submit a
written response to
the evidence prior
to completion of
the report



Report
summarizing
relevant evidence
and 10 day review
of report prior to
hearing

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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.

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- Written notification of meetings and sufficient time to prepare
- Equal opportunity to present evidence
- Evidence review
- Review draft report

“Directly Related” and “Relevant Evidence”

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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



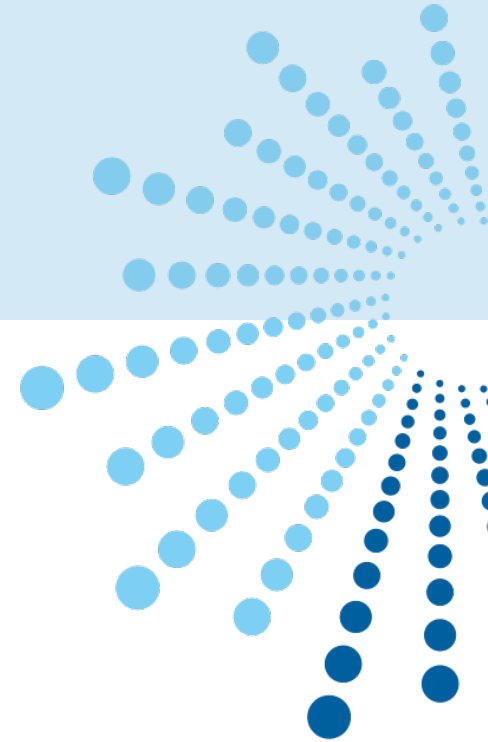
Not Permitted

- “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

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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"

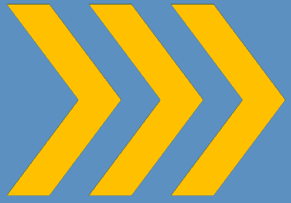
Impartiality: Avoiding Conflicts of Interest

- 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 prejudice or bias for or against any party



Conducting the Investigation

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Essential steps of an investigation



Notice of formal investigation



Initial Interviews



Evidence Collection



Report writing

The Process: Developing an Investigative Strategy



Investigation Timeline

Prior

History/Interactions

- Between the Parties
- Of the Parties

Assault

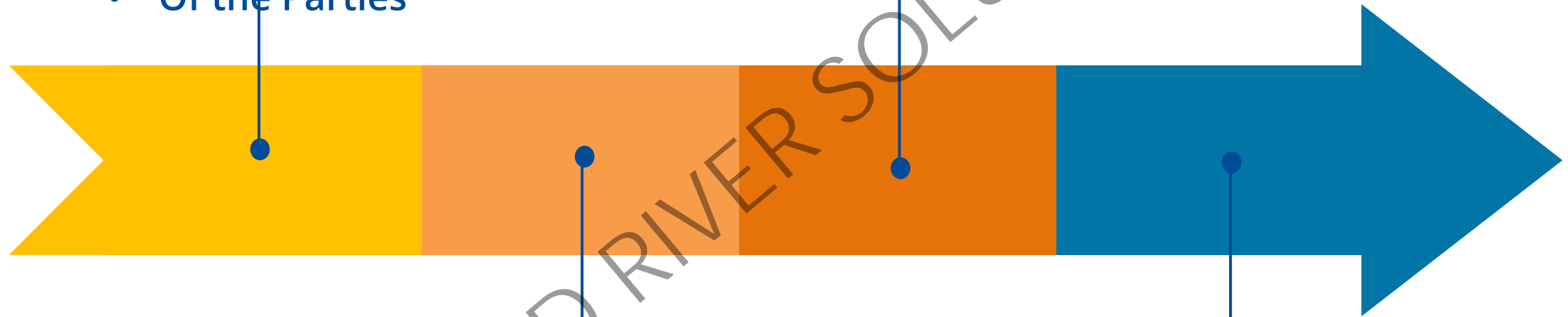
- Consent
- Type of Contact

Pre-Assault

- Pre-Meditation
- Manipulation
- Attempt to Isolate

Post Assault

- Behaviors
- Communications



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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

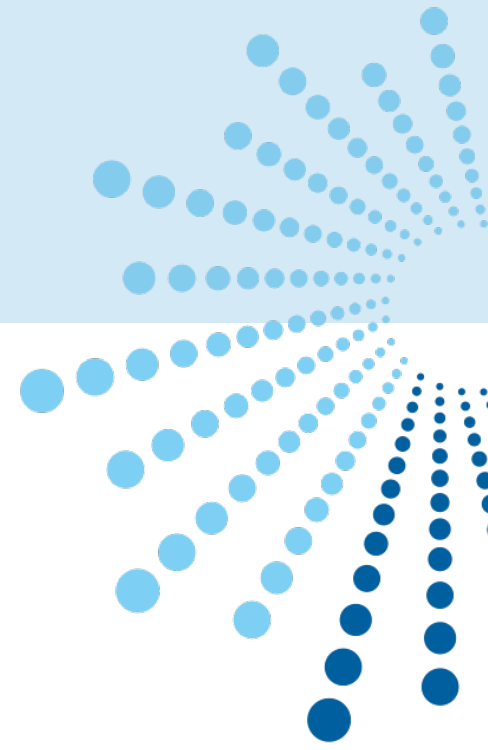
Investigative Interviews





Evidence

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Evidence

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

Black's Law Dictionary

Types of Evidence

Direct Evidence

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

Circumstantial Evidence

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

Corroborating Evidence

Evidence that differs from but strengthens or confirms what other evidence shows

Non-Testimonial Evidence

Text Messages

Social Media posts

Social Media Communications

Emails

Surveillance

Videos

Photographs

Police Body Camera Footage

Swipe Records

Medical Records

Phone Records

Audio Recordings

Evaluating the Evidence

Is it relevant?

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.

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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

How we Review and Weigh Evidence

No formula exists, but consider the following:

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

What Impacts How We Assess Others

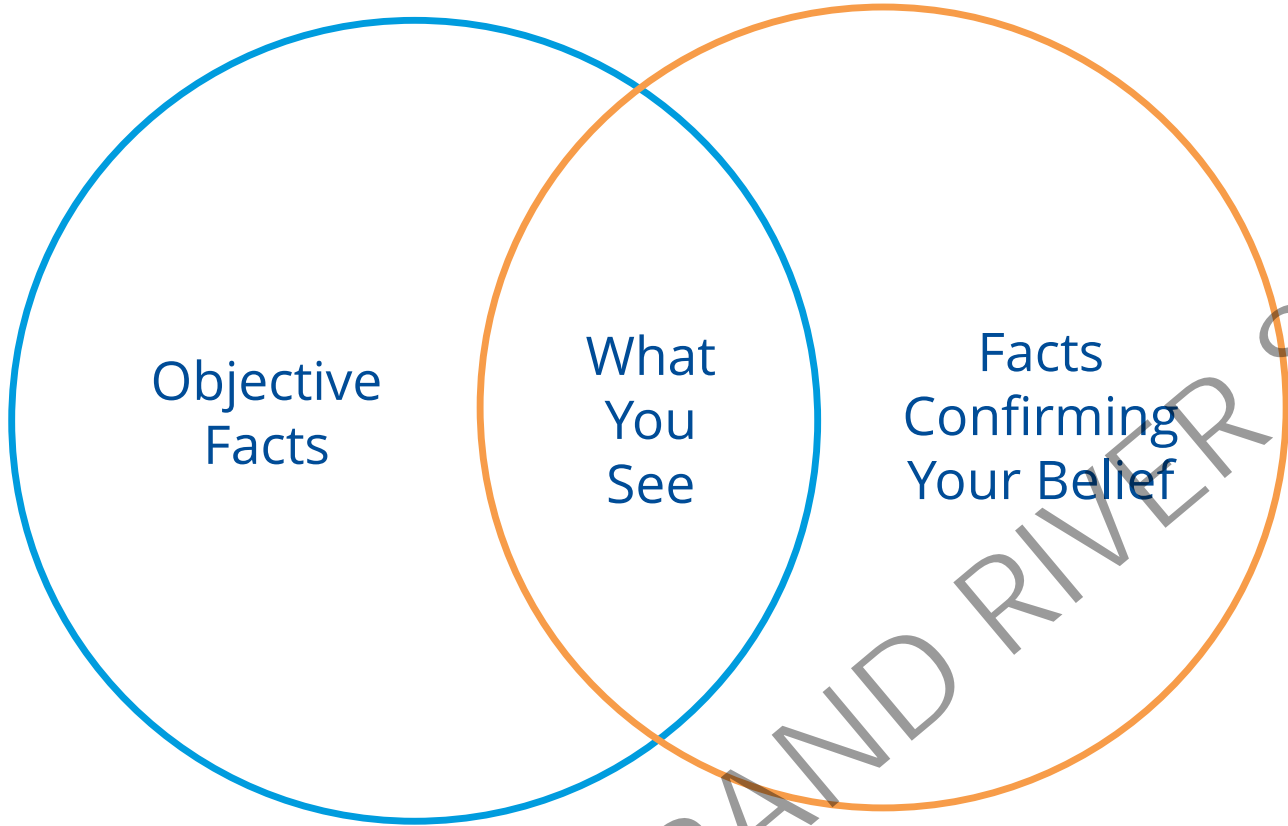
- I saw a woman kick a vending machine. Wow, she is angry. Who would do that?
- Me? / kicked the vending machine because I'm stressed and my kid is hungry and I'm running late, and who wouldn't kick the vending machine?
- Confusing type of person and situation

Affinity Bias



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Confirmation Bias

Other Forms of Bias

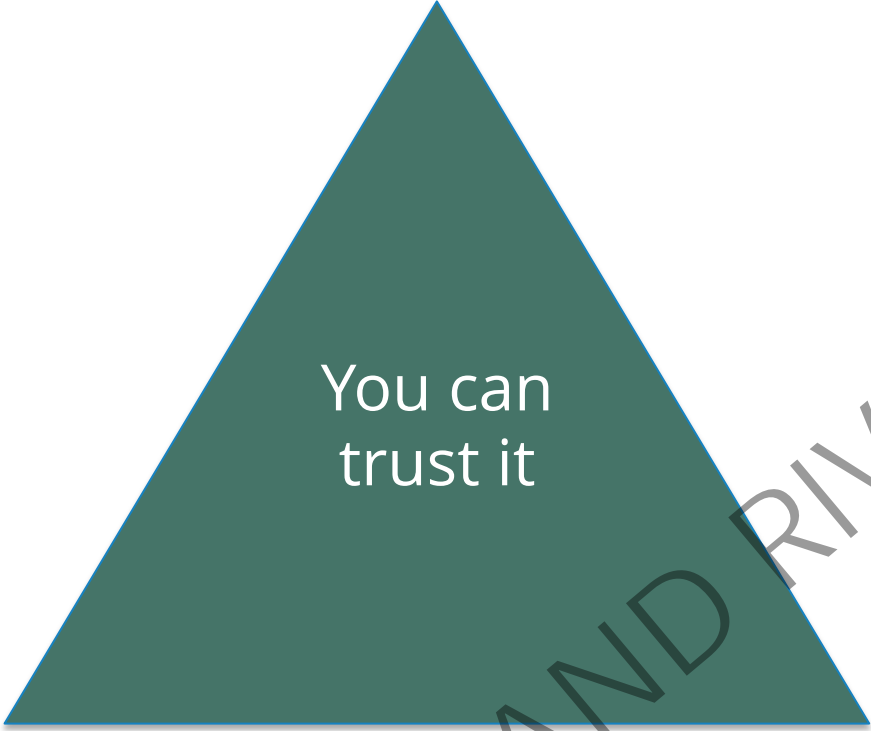
- Adultification Bias
- The Halo Effect / Horns Effect
- Beauty Bias
- Height = Leadership, Strength
- Stereotype threat
- Inattentional Bias / Examiner's Bias



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.

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



Being Convinced

It Is True, or Biased Conclusion?

**A credible witness may give
unreliable testimony**

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I Just *KNOW* They Are Not Telling the Truth

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

HOW TO
SPOT A
LIAR



Pre-Hearing Preparation of Participants

The Parties and their Advisors, and the Witnesses

Pre-hearing instructions

- Via conference or meeting
- In writing

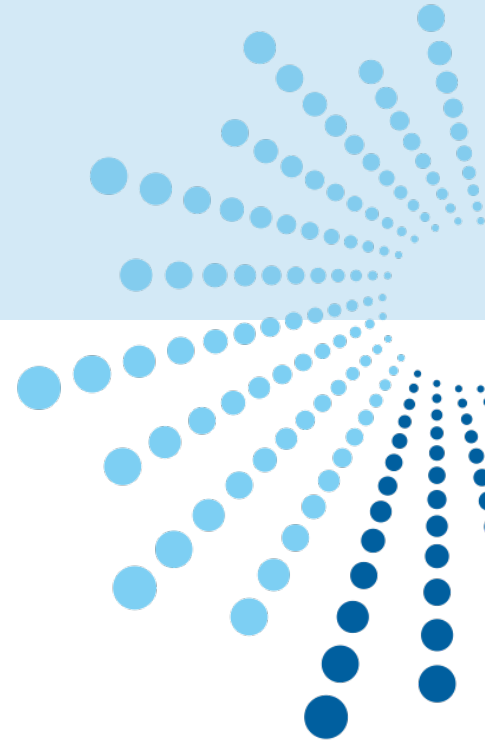
Set expectations

- Format
- Roles of the parties
- Participation
- Evidence
- Decorum
- Impact of not following rules

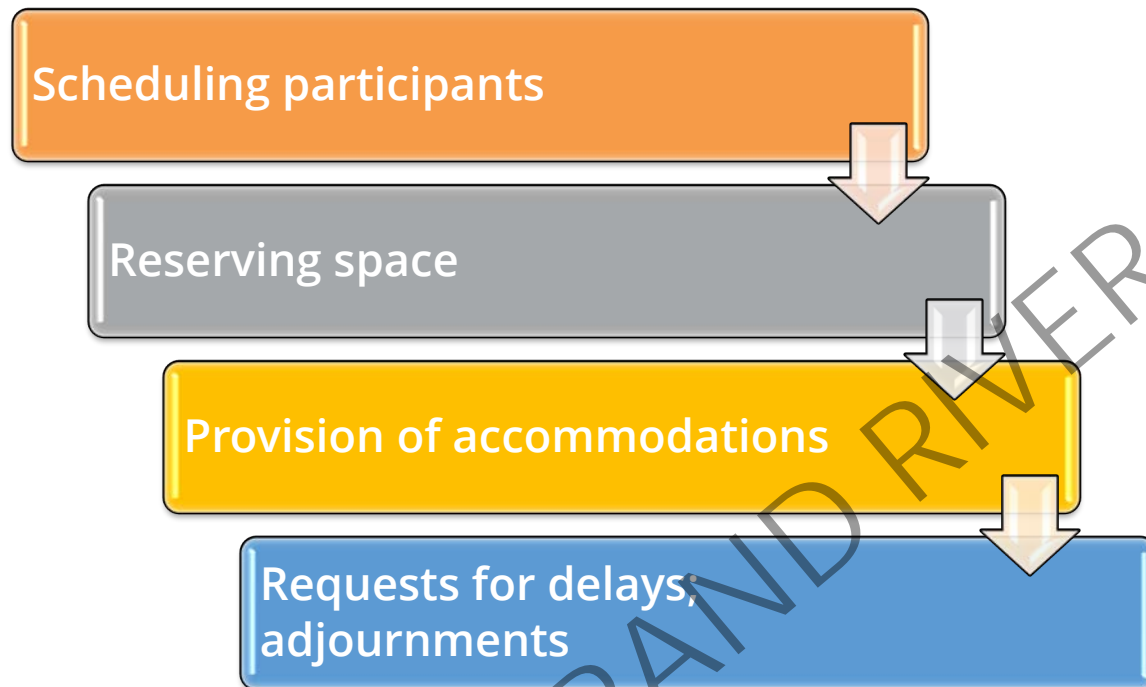


The Hearing

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Logistics and 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

Investigator & Hearing
Coordinator

Hearing Officer

Witness

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
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

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Purpose of the Hearing

Why does it matter?

Review and
Assess
Facts



Make
Findings of
Fact



Determine
Responsibility
/ Findings of
Responsibility



Determine
Sanction
and
Remedy

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

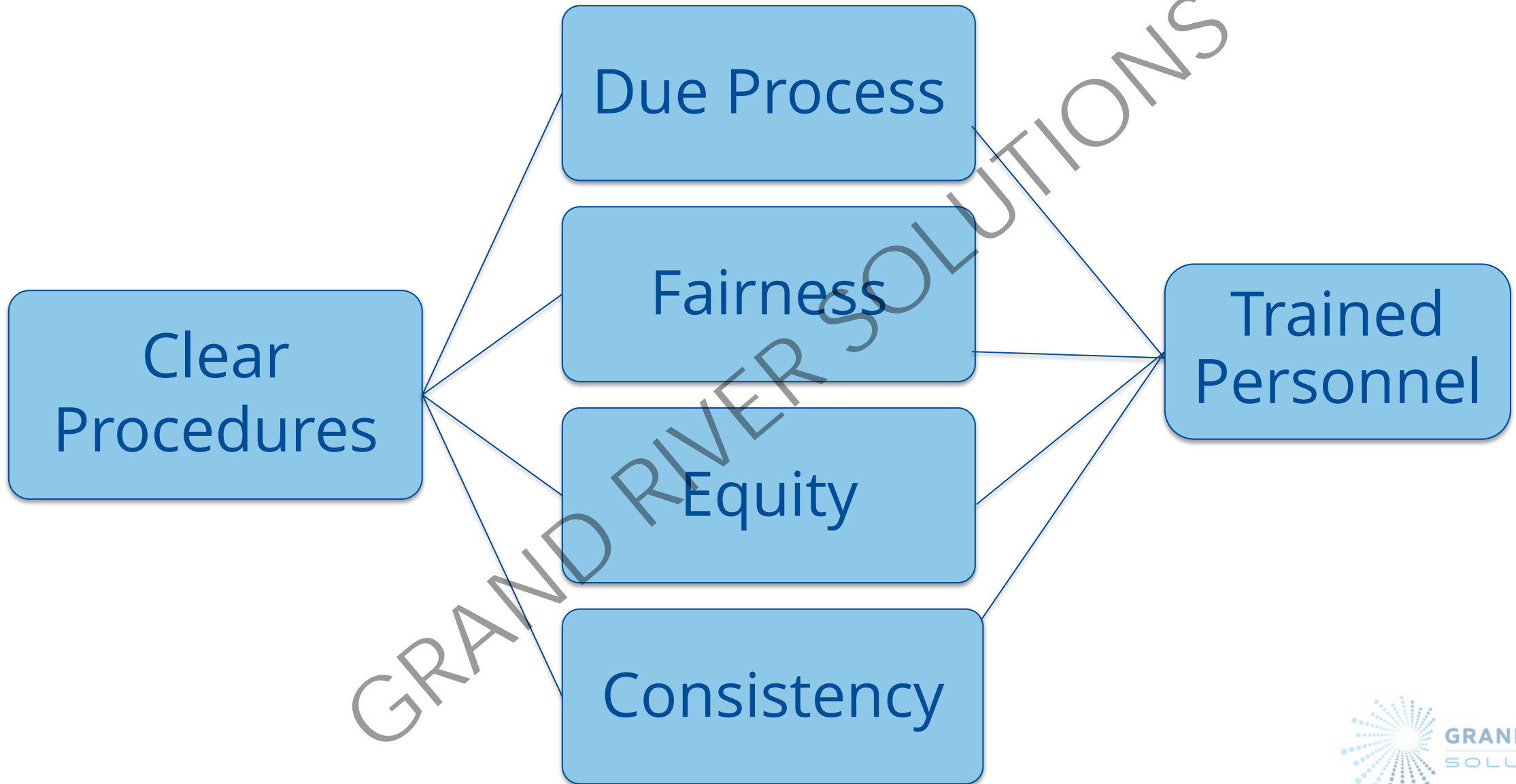
- The roles of all participants

The Evidence

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

The Outcome

- Deliberations; Notice; manner and method communicated.

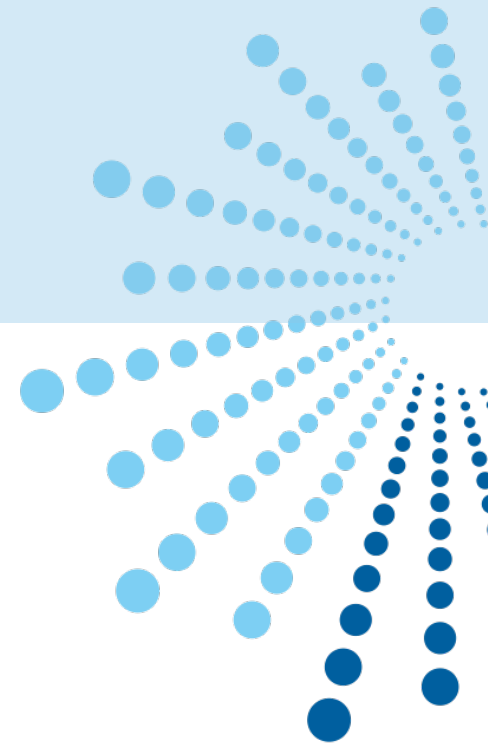




Roles and Responsibilities

People, Functions, and Impartiality

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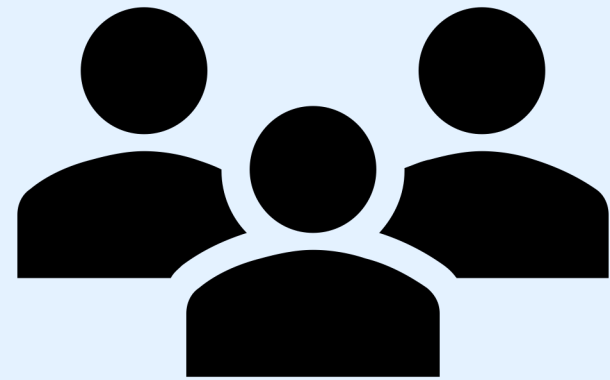


Hearing Participants

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
Adjudicator(s) or Panelist(s)	role varies depending on when in the process the hearing occurs and responsibility of the officer
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
Administrative Staff	assists with the logistical coordination of the people, the space, technology, etc.

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

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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?



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The Players

Advisors/Support Folks

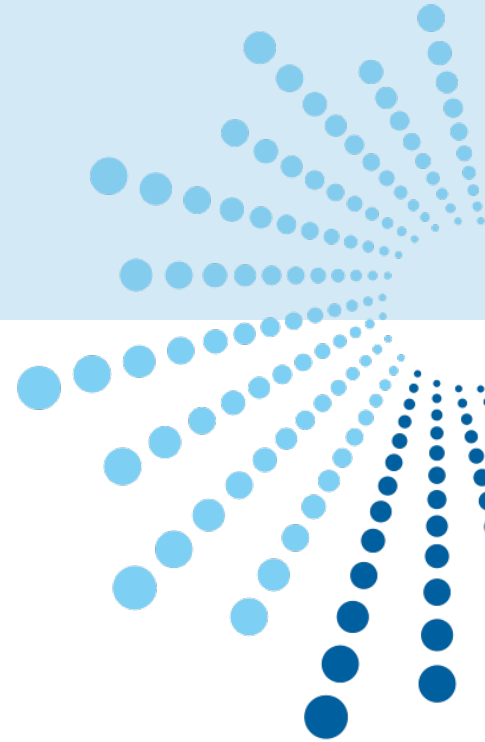


- Roles
- Participations
- Communicating their role
- Enforcing their role



Hearing Logistics

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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.



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Opening Statements

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

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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

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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

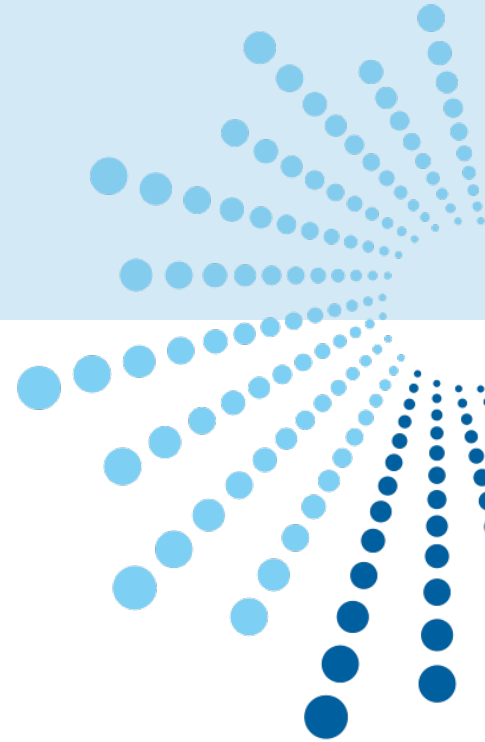
- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and Remedies
- Procedure for appeal





After the Hearing

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Deliberations

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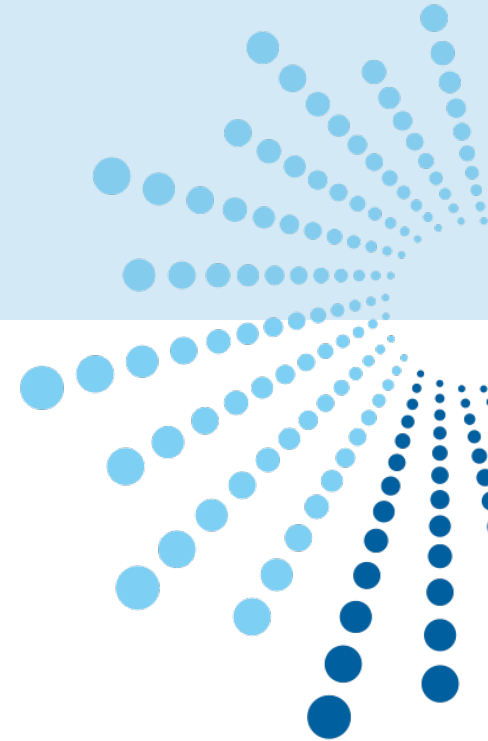
Weighing the Evidence & Making A Determination

- 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



The Report

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Investigative Report: Form



Develop or adopt a template
and use it consistently

Written Summary



Appendices

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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

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Content: Jurisdiction

State

- In this section state the institutions jurisdictional grounds:

Cite

- Cite the jurisdictional elements in the policy

State

- If there are several grounds for jurisdiction, state them.

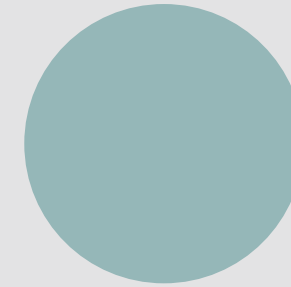
Optional, But A Good Idea



Identify the investigator(s)



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



Include information about the training the investigator received.

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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:

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

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Appendices



Compilation of the evidence.



organized intentionally and consistently



are attached to the report.



Includes the procedural timeline.

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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

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Questions?



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