May 2020 Final Title IX Regulations

Jody Shipper
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.
Agenda

01 Regulatory Overview
02 Notice
03 Meeting the Definition of Sexual Harassment
04 The Procedural Requirements of the Investigation
05 The Investigator
06 Conducting the Investigation
07 Evaluating the Evidence
08 The Investigation Report
09 Pre-Hearing Tasks
10 Hearing, Deliberations, & Appeal
Regulatory Overview
The May 2020 Title IX Regulations Cover A Narrow Scope of Title IX

- Sex Discrimination
- 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

Conduct Constituting Sexual Harassment as Defined in Section 106.30
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?
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

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.”
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
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
The Investigator, Coordinator, Hearing Officer, Appeals Officer
All Who Carry Out a Role

- 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
Avoiding Prejudgment

- Practical application of these concepts in investigations:
- Do not rely on cultural “rape myths”
- Do not rely on cultural stereotypes about how men or women purportedly behave
- Do not rely on gender-specific research data or theories
- 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
Impartiality and Bias

- Past personal or professional experience
- Common sense approach to evaluating whether a particular person serving in a Title IX role is biased
- No generalizations
Impartiality: Avoiding Prejudgment, Bias, and Conflicts of Interest

Bottom line:

• Follow facts of every individual case
• Investigate in a consistent manner
• Must allow challenges for conflict of interest
Protecting the Safety of Victims

- If investigation and/or hearing may prompt safety concerns; separate rooms for hearing, security
- Involvement of threat assessment teams when appropriate
- Safety planning for exits
- The need for decision-makers to have an understanding of the complexities of dating/domestic violence, including identification of primary aggressors
Protecting the Safety of Victims

- Victim medical information: only when the patient has waived privilege
- Protecting address, contact information
- When exchanging evidence/evidence review creates a danger
Someone Made a Complaint!
Mandatory Response to Each Report

• All reports, or those within scope of the Regs?
• What about responsible employees?
Title IX Coordinator Must Discuss:

- 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
Options on How to Proceed

- Remedies-based
  - No formal process
- Alternative/Informal
  - Signed agreement
  - Voluntary
  - What records?
- Title IX Process
  - Investigation
  - Hearing?
  - All requirements of 106.45
- Not Title IX Process
  - Investigation
  - Hearing?
What do we do about misconduct that does not fall within this narrow scope, Jody?
Apply other applicable institutional policy or procedures.
Actual Knowledge

Notice of sexual harassment or allegations of sexual harassment to a recipient’s:

• Title IX Coordinator; or
• Any official of the recipient who has authority to institute corrective measures on behalf of the recipient
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(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).
Mandatory Investigation Requires Formal Complaint

- Complaint filed, SIGNED, requests investigation
- Coordinator files, SIGNS, starts investigation
Complaint . . . or **FORMAL** Complaint?
But What If . . .

- Multiple complaints against one respondent?
- One respondent, allegations falling under two different policies?
- I can’t tell if this will ultimately be severe, pervasive
- Was there a denial of equal access?
- A Formal Complaint that isn’t a Formal Complaint?
# 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
But where does the case go now, Jody?
The Procedural Requirements of an Informal/Alternative Resolution
Notice Requirements

• The specific allegation and the specific conduct that is alleged to have occurred;
• The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations;
• Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared;
• A statement indicating that the decision to accept a complaint does not presume that the conduct at issue has occurred, and that the Respondent is presumed not responsible, unless and until, at the conclusion of the formal investigation and adjudication processes, there is a determination of responsibility.
• An explanation that each party may be accompanied by an Advisor (add any others who may accompany, such as support person) of their choice, who may be a parent, friend, or attorney.
• The date and time of the initial meeting with the Title IX Coordinator, with a minimum of (how many days) notice
Informal Resolution

- Request in writing
- Title IX Coordinator may determine not appropriate
- At any time before conclusion of hearing
- Voluntary
- Completes the process – cannot have a do-over
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.
Equal Opportunity to Present Evidence
Written Notification of Meetings and Sufficient Time to Prepare
Evidence Review

- Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint

- 10 days to provide a written response
Investigative Report and Review

- After reviewing and considering the comments on the evidence, the investigator will generate a report that summarizes the relevant evidence.

- That report will be shared with the parties and they will have 10 more days to comment.
“Directly Related” and “Relevant Evidence”
Do We Have to Worry About FERPA?

- FERPA: Privacy of student education records
- How to protect due process/fairness if either party cannot see all of the evidence?
- Dept. of Ed has determined that in the event of conflict between Title IX and FERPA, “the requirements of Title IX override any conflicting FERPA provisions”
Directly Related Evidence

- Regulations do not define “Directly Related” Evidence.
- Preamble states it should be interpreted using its plain and ordinary meaning.
- Term is broader than:
  - “all relevant evidence” as otherwise used in Title IX regulations, and
  - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act.
- Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.
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
Evidence that will not be considered:

- Rape Shield Protections
- Privileged Information
Who Decides?

- Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance:
  - Subject to parties’ right to argue upon review of “directly related” evidence that certain information not included in investigative report is relevant and should be given more weight.

- Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:
  - Each party’s right to argue their case, and
  - Fact that decisions regarding responsibility will be made at hearing, not investigation stage.
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
- Supportive 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
The Investigation Report

Narrowed Jurisdiction and Expansive Procedural Requirements
The Investigation Report

- Must summarize the relevant evidence.
- The Department is clear that it “takes no position...on such elements beyond what is required in these final regulations; namely, that the investigative report must fairly summarize relevant evidence.”
Investigative Report: Form

- Develop or adopt a template and use it consistently
- Written Summary
- Appendices
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
In this section state the institutions jurisdictional grounds:

- Cite the jurisdictional elements in the policy
- If there are several grounds for jurisdiction, state them.
Investigative Report Content: Identification of the Investigators

- 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: Objective of the Investigation and the Report

- This is a statement that sets forth the objective of the investigation, and
- The objective of the report
Investigative Report Content: List the Witnesses

- List those who were interviewed
- List those who were not interviewed
- Simple list
- Detailed list
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>
The final Title IX regulations require that all evidence obtained as part of the investigation that is directly related to the allegations in the formal complaint be shared with the parties and “made available at any hearing to give each party equal opportunity to refer to such evidence during the hearing including for the purposes of cross-examination.”

In this section, list the Evidence or Refer to Appendices.
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.
In this section, include a summary of all relevant evidence. This section can be organized in several ways. 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.
Pre-Hearing Tasks
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 and prepare for the party’s questions
- Anticipate challenges or issues
The Hearing
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?
Procedural Requirements for Hearings

- Must be live, but can be conducted remotely
- No Compelling participation
- Standard of proof must be the same for student and employee matters
- Cross examination must be permitted, 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
<table>
<thead>
<tr>
<th>The Essential Elements of All Hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clear Procedures</td>
</tr>
<tr>
<td>Due/Fair Process</td>
</tr>
<tr>
<td>Fair, Equitable, and Neutral</td>
</tr>
<tr>
<td>Consistency</td>
</tr>
<tr>
<td>Trauma Informed</td>
</tr>
<tr>
<td>Well-Trained Personnel</td>
</tr>
</tbody>
</table>
Clear Procedures

The Process
• Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings,

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.
Logistics of the Hearing
What do we need to do with all of this?

- Space
- Technology
- Clear & Comprehensive Procedures
- Staff
- Expertise and Confidence
Considerations for the Physical Space

- 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 interruption
- Poor behavior?
- Recording
Cross Examination Questions

How will this work?

• Submitted in advance?
• Submit one by one?
• Each one is vocalized, approved/denied, then asked?
• Submit cross-exam questions by email or chat during hearing?
Roles and Responsibilities
Role of the Advisor

- Review evidence and report
- Review applicable policy and procedures
- Determine key elements of policy
- Facts most favorable to advisee
- Highlight key facts for Decision-Maker by asking questions
- No legal arguments, objections
- Foundational questions?
Hearing Participants

- Complainant
- Respondent
- Advisor
- Adjudicator(s) or Panelist(s)
- Investigator
- Witnesses
- Hearing Coordinator/Officer
- Decision-Maker
- Administrative Staff
Other Considerations
Panel

- Number of panelists?
- Can you have a panel of one?
- Must finding be unanimous?
- Internal, external, or some combination?
<table>
<thead>
<tr>
<th>Who is NOT in the Hearing?</th>
</tr>
</thead>
<tbody>
<tr>
<td>General Counsel</td>
</tr>
<tr>
<td>Parents</td>
</tr>
<tr>
<td>Student newspaper</td>
</tr>
<tr>
<td>Interested faculty</td>
</tr>
<tr>
<td>Title IX Coordinator</td>
</tr>
</tbody>
</table>
The Players
Hearing Advisors

- Will conduct cross examination
- 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 rulings
- 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
Hearing Procedures
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
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
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
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?
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.
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
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?
Reliable, or Credible?

You can trust it

It is convincing
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:
- 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
Being Convinced
It Is True, or Biased Conclusion?

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
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
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?

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

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