Hearings in a Post Regulatory World

Day One

Chantelle Cleary Botticelli | October 2022
Meet Your Facilitator

Chantelle Cleary Botticelli is a nationally-recognized subject-matter expert in Title IX and related fields. She has more than 15 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

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

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

Core Values
- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity
Agenda

1. Title IX Requirements for Hearings
2. Process Participants
3. Pre-Hearing Tasks
4. The Hearing
5. After The Hearing
6. Practical Application
Title IX Requirements For Hearings
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.”
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

AND... Only Covered, IF:

**Place of Conduct**
- On campus **OR**
- Campus Program, Activity, Building, **AND**
- In the United States

**Required Identity**
- Complainant participating/attempting to participate in Program or Activity, **AND**
- Control over Respondent
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
Procedural Requirements for Hearings

- Must be live, but can be conducted remotely
- Cannot compel participation of parties or witnesses
- 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
- Written decision must be issued that includes finding and sanction
The Requirement of Impartiality
Section 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, or facilitator of informal resolution not to have a conflict of interest or bias:

• For or against complaints or respondents generally, or
• An individual complainant or respondent
What Constitutes Bias?

Conduct a fact-specific, objective inquiry based in common sense to determine bias.

Includes:

- Decision-making that is grounded in stereotypes
- Different treatment based on a person's sex or other protected characteristic
- A decision based on something other than the facts
Impermissible Bias

Making a decision, determination, or finding that is based on something other than the evidence and specific facts of the case.
Conflict of Interest
Avoiding Prejudgment of the Facts

Requires that the Title IX professional refrain from making a judgement on individual facts, the allegations, or whether a policy violation occurred until they have had the opportunity to consider all of the evidence.
Hearing Technology: Requirements and Considerations

If hearings cannot be in person, or if someone chooses to participate remotely, must have a remote participation platform available.

All hearings must be recorded.

Participants must be able to communicate during the hearing
- The parties with the decision maker(s)
- The parties with their advisors
Purpose of the Hearing

1. Review and Assess Evidence
2. Make Findings of Fact
3. Determine Responsibility/Findings of Responsibility
4. Determine Sanction and Remedy
# Evaluating the Evidence

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
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<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 rely 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>
Trauma-informed practices provide tools/techniques for engaging with the Complainant, Respondent, and Witnesses.

- Format/Structure of the Hearing
- Format of Questions
- Approach to Clarification
Process Participants
# The Participants

## The Parties

<table>
<thead>
<tr>
<th>Complainant</th>
<th>Respondent</th>
</tr>
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<tbody>
<tr>
<td>An individual who is alleged to be the victim of conduct that could constitute sexual harassment.</td>
<td>An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</td>
</tr>
</tbody>
</table>
There are two types of advisors:

- Advisor (throughout whole process)
- Hearing Advisor (hearing, for purposes of asking questions)
The Participants

Advisors

- Can be anyone, including a lawyer, a parent, a friend, and a witness
- No particular training or experience required (institutionally appointed advisors will be trained)
- Advisors should help the Parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith
- May not speak on behalf of their advisee or otherwise participate, except that the advisor will conduct cross examination at the hearing.
- Can accompany their advisees at all meetings, interviews, and the hearing
- Can appear without their advisee
- Advisors are expected to advise their advisees without disrupting proceedings
The Participants
The Investigative Team

• Submits to questioning by the Decisionmaker(s) and the parties (through their Advisors).
• Can be present during the entire hearing process, but not during deliberations.
The Participants
The Hearing Panel

- Multiple people
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Prepares the written deliberation statement
- Assists in preparing the Notice of Outcome
The Participants
The Hearing Chair

- Is a voting member of the Panel
- Facilitates and moderates the hearing
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
The Participants

The Hearing Facilitator/Coordinator

- Manages the recording, witness logistics, party logistics, curation of documents, separation of the parties, and other administrative elements of the hearing process
- Non-Voting
- Optional, not required
Pre-Hearing Tasks: Hearing Panel & Chair

What should be done in advance of the hearing
Pre-Hearing Meetings

Review the Logistics for the Hearing

Set expectations

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

Parties may provide witness list and proffer of evidence (limited to evidence presented during investigation)
<table>
<thead>
<tr>
<th>Task</th>
<th>Description</th>
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<tbody>
<tr>
<td>Review evidence and report</td>
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<tr>
<td>Review applicable policy and procedures</td>
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<tr>
<td>Preliminary analysis of the evidence</td>
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<tr>
<td>Determine areas for further exploration</td>
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<tr>
<td>Develop questions of your own</td>
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<tr>
<td>Anticipate the party’s questions</td>
<td></td>
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<tr>
<td>May convene a pre-hearing meeting</td>
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<tr>
<td>Anticipate challenges or issues</td>
<td></td>
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<tr>
<td>Prepare the script</td>
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Common Areas of Exploration

- Credibility?
- Clarification on timeline?
- Thought process?
- Inconsistencies?
The Hearing: Process
Order of the Proceedings

01 Introductions and instructions by the Chair; Opening Statements

02 Opening Statements

03 Presentation of information and questioning of the parties and witnesses

04 Closing Statements

05 Deliberation & Determination
Opening Introductions and Instructions by the Chair

The University has a script for this portion of the proceedings, and it should be used. Introduction of the participants. Overview of the procedures. Overall goal: manage expectations. Be prepared to answer questions.
Opening Statements

- The opening statements are limited to 7 minutes.
- The parties may be assisted by their advisors in preparing the statement.
- The parties can read a prepared statement, but may not submit the written statement, unless the Panel asks for it.
- Complainant first, Respondent second.
Presentation of Information
<table>
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<tr>
<th>01</th>
<th>02</th>
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<tr>
<td>The Hearing Panel conducts initial round of questioning</td>
<td>Cross examination by the parties advisors</td>
<td>Follow up by the Hearing Panel</td>
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Closing Statements

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- The parties may be assisted by their advisors in preparing the statement.
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The Hearing: Practice
Format of Questioning

Generally, questions will focus on information contained in the investigative report.

Questions will be posed orally.

Questions must be relevant.

Chair will make rulings on relevancy of questions asked before a response can be provided.
What constitutes a relevant question?

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

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

“Evidence is relevant if:
• (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
• (b) the fact is of consequence in determining the action.”
Columbia Defines relevance as:

"Those questions that tend to prove or disprove an element of the allegations"
Irrelevant and Impermissible Questions

- Information protected by an un-waived legal privilege
- Medical treatment and care
- Unduly repetitious or duplicative questions
- Information that otherwise irrelevant
- Complainant’s prior sexual history, with limited exceptions.
When Questioning....

- Be efficient.
- Explore areas where additional information or clarity is needed.
- Listen to the answers.
- Be prepared to go down a road that you hadn't considered or anticipated exploring.
- Take your time. Be thoughtful. Take breaks if you need it.
Foundational Questions to Always Consider Asking

<table>
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<tr>
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<th>Answer</th>
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<tbody>
<tr>
<td>Were you interviewed?</td>
<td></td>
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<tr>
<td>Did you see the interview notes?</td>
<td></td>
</tr>
<tr>
<td>Did the notes reflect your recollection at the time?</td>
<td></td>
</tr>
<tr>
<td>As you sit here today, has anything changed?</td>
<td></td>
</tr>
<tr>
<td>Did you review your notes before coming to this hearing?</td>
<td></td>
</tr>
<tr>
<td>Did you speak with any one about your testimony today prior to this hearing?</td>
<td></td>
</tr>
</tbody>
</table>
Common Areas of Where Clarity or Additional Information is Needed

- Credibility
- Reliability
- Timelines
- Inconsistencies

- Details about the alleged misconduct
- Facts related to the elements of the alleged policy violation
- Relevancy of Certain Items of Evidence
- Factual Basis for Opinions
Questioning to Assess Reliability

- Inherent plausibility
- Logic
- Corroboration
- Other indicia of reliability
Questioning to Assess Credibility

No formula exists, but consider asking questions about the following:

- opportunity to view
- ability to recall
- motive to fabricate
- plausibility
- consistency
- character, background, experience, and training
- coaching
Credibility Versus Reliability

Reliability

• 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.
Opinion Evidence

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?
Is it authentic?

Never assume that an item of evidence is authentic.

Question the person who offered the evidence.
Request originals.
Obtain originals from the source.
Have others review and comment on authenticity.
Are there other records that would corroborate?
What are the “Hard” Questions

- Details about the sexual contact
- Inconsistent evidence/information
- Alcohol or drug consumption
- Seemingly inconsistent behaviors
- What they were wearing
- Probing into reports of lack of memory
How to Ask the Hard Questions

Lay a foundation for the questions

• Explain why you are asking it
• Share the evidence that you are asking about, or that you are seeking a response to

Be deliberate and mindful in your questions:

• Can you tell me what you were thinking when....
• Help me understand what you were feeling when...
• Are you able to tell me more about...
Special Considerations for Questioning the Investigator

- The Investigator’s participation in the hearing is as a fact witness;
- Questions directed towards the Investigator shall be limited to facts collected by the Investigator pertinent to the Investigation;
- Neither the Advisors nor the Decision-maker(s) should ask the Investigator(s) their opinions on credibility, recommended findings, or determinations;
- The Investigators, Advisors, and parties will refrain from discussion of or questions about these assessments. If such information is introduced, the Chair will direct that it be disregarded.
# Special Considerations for Questioning the Investigator

- Ask questions about how they conducted their investigation (if not in the report).
- Explore the investigator’s decision making (if not in the report).
- Seek clarity about evidence collected: Where it came from, Authenticity of the evidence.
- Ask factual questions that will assist in evaluation of the evidence.
- If bias is not in issue at the hearing, the Chair should not permit irrelevant questions of the investigator that probe for bias.
Special Considerations for Panels

If a panel, decide in advance who will take the lead on questioning

Go topic by topic

Ask other panelists if they have questions before moving on

Do not speak over each other

Pay attention to the questions of other panelists

Ok to take breaks to consult with each other, to reflect, to consult with the TIXC or counsel
The Decision Maker's Role in Advisor Questioning
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
The Role of the Decision Maker During Questioning by the Advisors

After the Advisor poses a question, the proceeding will pause to allow the Chair to consider it.

Chair will determine whether the question will be permitted, disallowed, or rephrased. The Chair may explore arguments regarding relevance with the Advisors.

The Chair will limit or disallow questions on the basis that they are irrelevant, unduly repetitious (and thus irrelevant), or abusive.

The Chair will state their decision on the question for the record and advise the Party/Witness to whom the question was directed, accordingly. The Chair will explain any decision to exclude a question as not relevant, or to reframe it for relevance.

The Chair has final say on all questions and determinations of relevance. The parties and their advisors are not permitted to make objections during the hearing. If they feel that ruling is incorrect, the proper forum to raise that objection is on appeal.
When Assessing Relevance, the Decision Maker Can:

- Ask the Advisor why their question is relevant
- Take a break
- Ask their own questions of the party/witness
- Review the hearing record
After the Hearing
Deliberations
Preponderance of the Evidence

• Standard of proof by which determinations of responsibility are made
• "More likely than not"
• It does not mean that an allegation must be found to be 100% true or accurate
• A finding of responsibility = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated
• A finding of not responsible = There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated
Weighing the Evidence & Making a Determination

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

• A "finding of fact"
  • The decision whether events, actions, or conduct occurred, or a piece of evidence is what it purports to be
  • Based on available evidence and information
  • Determined by a preponderance of evidence standard
  • Determined by the fact finder(s)

• For example...
  • Complainant reports that they and Respondent ate ice cream prior to the incident
  • Respondent says that they did not eat ice cream
  • Witness 1 produces a timestamped photo of Respondent eating ice cream

• Next steps?
Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate
Allegation: Fondling

Fondling is the:
- touching of the private body parts of another person
- for the purpose of sexual gratification,
- Forcibly and/or without the consent of the Complainant,
  - including instances where the Complainant is incapable of
giving consent because of their age or because of their
  temporary or permanent mental or physical incapacity.
### Analysis Grid

<table>
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<td>Complainant: drank more than 12 drinks, vomited, no recall Respondent: C was aware and participating Witness 1: observed C vomit Witness 2: C was playing beer pong and could barely stand Witness 3: C was drunk but seemed fine Witness 4: carried C to the basement couch and left her there to sleep it off.</td>
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Apply Preponderance Standard to Each Element

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Did You Also Analyze...?
(if required by policy)

- On campus?
- Program or Activity?
- In a building owned/controlled by a recognized student organization?
- Substantial control over respondent and context?
- Complainant was attempting to access program/activity?
Goals of Sanctions/Discipline

End the harassment, prevent its recurrence, remedy the harm

What steps would be reasonably calculated to end harassment and prevent recurrence?
Sanctioning

State law
System policy
Learning environment
Measures available
The Sanction Does Not Undo the Finding

- No lesser sanction if you disagree with findings
- Sanctioning officer must assume findings are correct
Determining the Proper Sanction

- Consistency
- Foreseeability of repeated conduct
- Past conduct
- Does bias creep in?
- Remorse?
- Victim impact?
Final Report

• The allegations
• Description of all procedural steps
• Findings of fact
• Conclusion of application of facts to the policy
• Rationale for each allegation
• Sanctions and remedies
• Procedure for appeal
The Final Determination Should STAND On Its Own

- Simple and Easy to Comprehend
- Transparent/Clear
- Accurate
- Neutral/Unbiased
- Draw Attention to Significant Evidence and Issues
Practical Application
Scenario 1

Respondent appears at the hearing with Witness 7. Respondent would like Witness 7 to provide information about text messages between them and Complainant that indicate that Complainant has made the allegations up.

- **Can the HP hear from Witness 7 at the hearing?**
Case Study

The Formal Complaint charges Respondent with sexual assault for engaging in sexual contact with Complainant when she was incapacitated by alcohol. Specifically, Complainant alleges that she was at a party with friends when they met Respondent. Complainant reported that prior to the party she pre-gamed with Witness 1 and they split a bottle of prosecco. Complainant stated that while at the party, Respondent and Witness 2 approached her and her friend, Witness 3, and asked if they would be their partners in a round of beer pong. Complainant reported that she paired up with Respondent and they played several rounds. She further alleged that that Respondent was the one who filled their cups. Complainant stated that she “got drunk fast” and her last memory was of Respondent handing her a celebratory shot because they had won the tournament. Her next memory was waking up on a couch in a bedroom that was unfamiliar to her, naked from the waist down. Respondent was on the floor next to her, asleep. He was under a blanket but was also naked.
Witness 1 was interviewed by the investigator and reported that she and Complainant are roommates, but they are not close. Witness 1 is an athlete and tends to hang out with her teammates. She stated that for this reason, they rarely hang-out, but that the night of the alleged incident they did because they were planning on going to the same party. Witness 1 stated that they split a bottle of prosecco, but that Complainant drank most of it because Witness 1 had an early practice the next morning and didn’t want to get “too messed up.” Witness 1 said that they went to the party together, but then went their separate ways. Witness 1 stated that towards the end of the night, she saw Complainant and described her as “a disaster.” She also reported that Respondent was “practically carrying her” and she approached them and offered to take Complainant home. According to Witness 1, Complainant said she was fine, but her words were slurred, and she could barely stand. Witness 1 told Respondent to take care of her and he said, “I’m just going to put her to bed.” She didn’t see either party again that night.

At the hearing, Witness 1 gave testimony that was substantially the same as what she told the investigator.
Witness 2 told the investigators that he is Respondent's best friend and teammate. Witness 2 stated that when looking for partners for the beer pong tournament, Respondent saw Complainant and Witness 3 and suggested that they approach them because Complainant “was hot” and Witness 3 “looked drunk enough to be a good time.” Witness 2 said that Complainant was fine and didn’t appear to be that drunk. He also stated that she made most of the winning shots after several rounds of the game so she couldn’t have been too messed up. When asked who was filling the cups, he said that he wasn’t sure who did it each round, but he definitely saw Complainant fill them on two occasions. After the tournament was over, he helped Witness 3 get home and so didn’t see Complainant and Respondent again that night. He also mentioned that he and Witness 3 are now dating.

At the hearing, Witness 2 testified that Complainant was fine. He also stated that Respondent never filled Complainant’s cup and that Complainant was all over Respondent the entire night.
Witness 3 was Complainant’s best friend at the time of the incident. They are no longer close and Witness 3 is now dating Witness 2.

Immediately following the alleged incident, Witness 3 told the investigators that Complainant was already drunk when she got to the party. She stated that Respondent and Witness 2 asked them to play beer pong and they agreed. She stated that the parties seemed to hit it off immediately. She stated that they won the tournament and so played at least five rounds and that by the end of the game Complainant was the “drunkest she had ever seen her.” Witness 3 stated that Complainant was slurring her words, couldn’t stand on her own, and was really loud, which is not like her. Witness 3 stated that that she was pretty drunk too, but not as bad as Complainant. Witness 3 stated that she left the party with Witness 2.

At the hearing, Witness 3 stated that she may have exaggerated her description of Complainant when she spoke to the investigators. She told the decision makers that although Complainant drank a lot, she wasn’t that out of it, because she had a high tolerance and drank a lot all the time.
Questions?

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