

GRAND RIVER | SOLUTIONS

# Title IX in a Post Regulatory World

## Day Two

Chantelle Cleary

# Today's Agenda

01

Hearings in a Post Regulatory World

04

Conducting the Hearing

02

Roles and Responsibilities

05

Evidentiary Issues

03

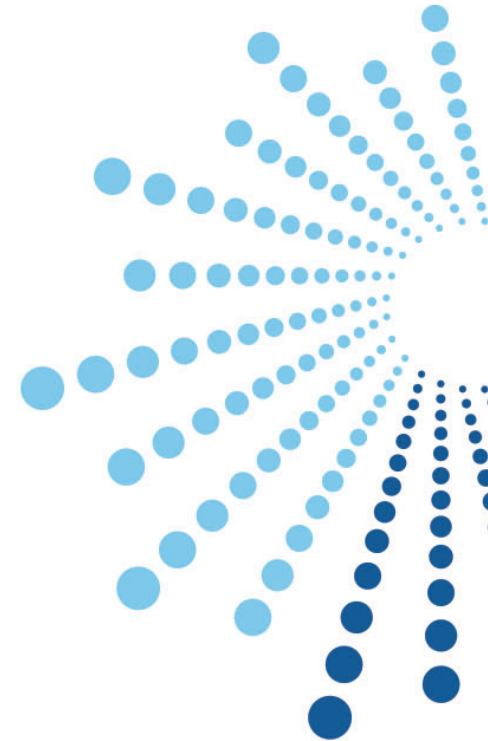
The Hearing

06

Post-Hearing

3A

Pre-Hearing Tasks





# Hearings in a Post Regulatory World

Procedural Requirements, Practical Requirements, and so much more

01

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# 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

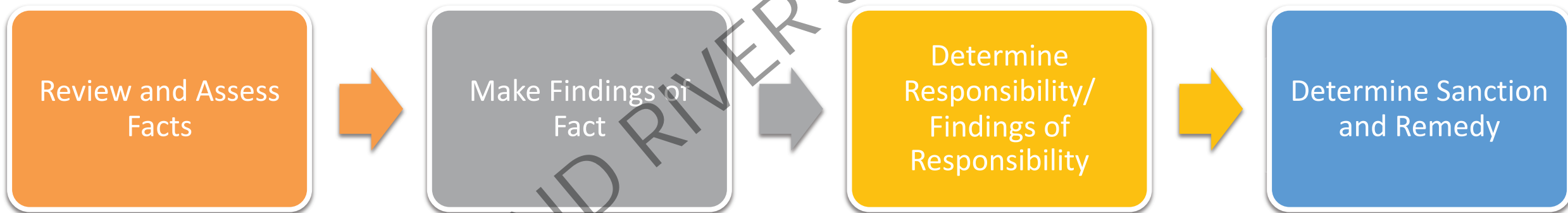


Staff



Expertise and Confidence

# Purpose of the Hearing



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# The Essential Elements of All Hearings

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Clear Procedures

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Due/Fair Process

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Fair, Equitable, and Neutral

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Consistency

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Trauma Informed

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Well Trained Personnel

# Clear Procedures

## The Process

- Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings, impact statements, etc.

## The Players

- The roles of all participants

## The Evidence

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

## The Outcome

- Deliberations; Notice; manner and method communicated.



# Rules of Decorum

- Optional
- Must apply to all participants, equally and consistently
- Expectations should be clear
- Rules should be provided and explained in advance
- Consequences for violating rules should be explicit
- Violations should be addressed and enforced consistently and equally

# Rules of Decorum: Examples

All participants at the live hearing are expected to treat each other and the decision-maker with respect.

Parties and advisors will refer to other parties, witnesses, advisors, and institutional staff using the name and gender used by the person and shall not intentionally mis-name or mis-gender another during when communicating or questioning.

Abusive behavior will not be tolerated and may be grounds for the participant to be removed from the hearing.

Parties and advisors may take no action at the hearing that a reasonable person in the shoes of the affected party would see as intended to intimidate that person (whether party, witness, or official) into not participating in the process or meaningfully modifying their participation in the process.

# Rules of Decorum: Examples

Advisors may not speak on behalf of a party except as necessary to perform direct or cross-examinations.

Advisors may not interrupt the proceedings repeatedly to ask questions or interject; advisors may only participate consistent with the advisor expectations outlined in the procedures.

# Rules of Decorum: Examples

If the decision-maker determines that these rules have been violated, they will provide the participant with one opportunity to correct their behavior. If the decision-maker determines that the participant continues to violate these rules, the decision-maker may either limit their participation moving forward or remove them from the hearing. For repeated violations and/or egregious behavior, an advisor may be prohibited from serving as an advisor in University processes.

# Rules of Decorum: Examples

If an advisor is removed from the hearing, the affected party may either select a new advisor or the University will provide an advisor to the party for the remainder of the hearing. In this case, the hearing, or rest of the hearing may be postponed if necessary to allow for the selection or provision of a new advisor.

Any actions taken by the decision-maker regarding violation of these rules or removal of participants, will be documented as part of the record made available upon appeal.



# Roles and Responsibilities

People, Functions, and Impartiality

02

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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

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.

Who is NOT  
in the  
Hearing?

General Counsel

Spectators

Student newspaper

Interested faculty

Title IX Coordinator



# The Players

## Hearing Advisors

- Will conduct examination/cross
- Roles
- Training/Qualifications
- Communicating their role
- Compliance with the role

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# 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

## A Panel?

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



# Impartiality

WHAT DOES THIS *REALLY* MEAN?

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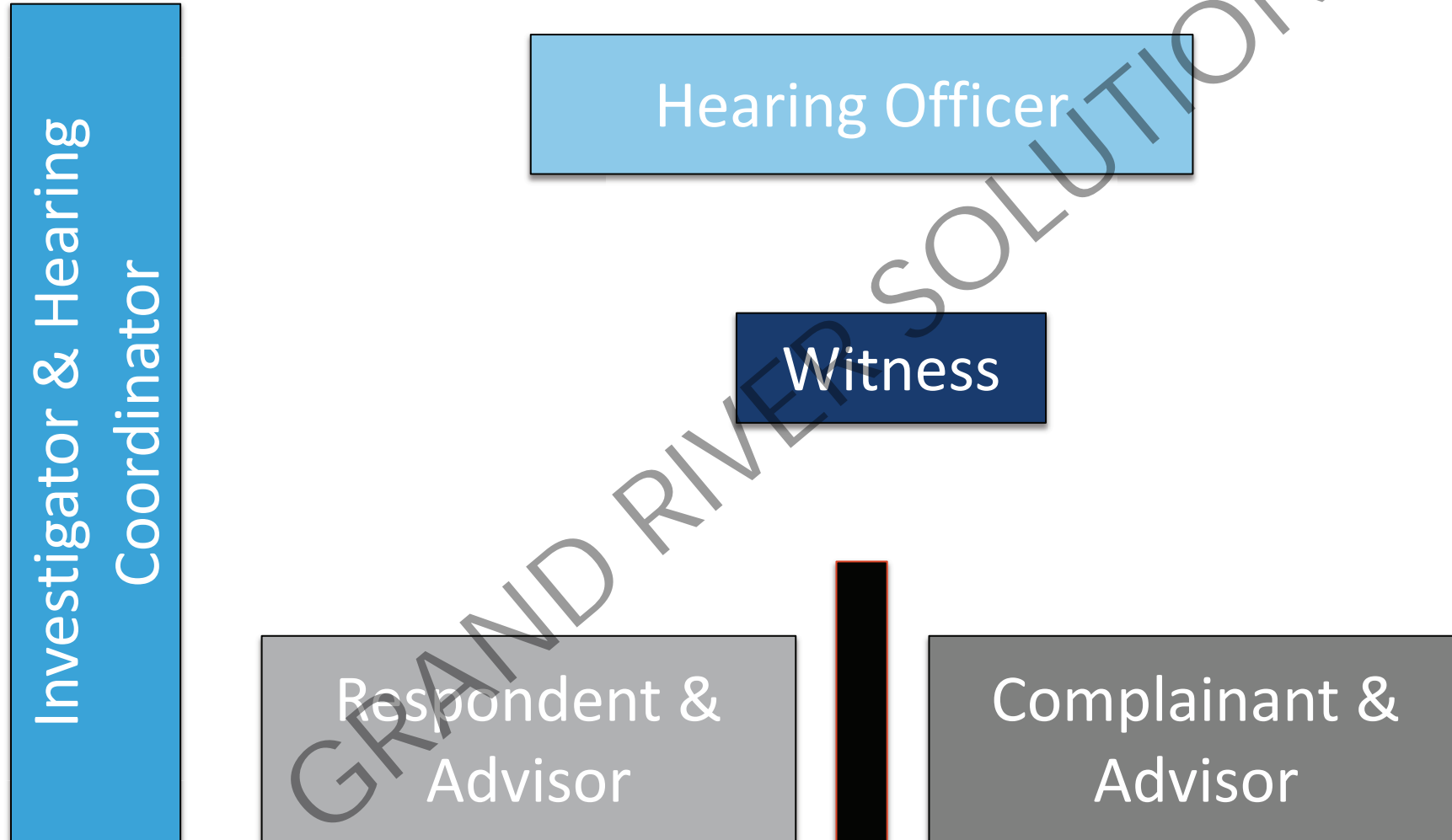


# Logistics of a Hearing

# Considerations for the Physical Space

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

# Hearing Room Configuration





# 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



## The Hearing

03

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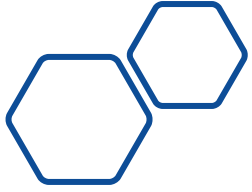
# Pre-Hearing Tasks

What should be done in advance of the hearing

3A

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# Logistics

Scheduling participants

Reserving space

Provision of accommodations

Requests for delays; adjournments

# The Parties and their Advisors, and the Witnesses

## Pre-hearing instructions

- Via conference or meeting
- In writing

## Set expectations

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

# The Decision Maker(s)



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



Develop questions of your own



Anticipate the party's questions



Anticipate challenges or issues



## Conducting the Hearing

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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.*



# 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

### Order of/parties and witnesses

- Could simply leave this up to the decision maker

### Order of examination

- Questioning by the decision maker
- Cross examination by the advisor
- Will the advisor be permitted to question their own party?
- Will there be a second round of questioning?

Consistency is essential. Consider putting this all in your procedures.

# Cross Examination

## Who does it?

Must be conducted by the advisor.

If party does not appear or does not participate, advisor can appear and cross.

If party does not have an advisor, institution must provide one.

# Cross Examination Permissible Questions

Questions must be relevant

Not relevant

- Duplicative questions
- Questions that attempt to elicit information about
  - Complainants prior sexual history
  - Privileged information
  - Mental health

# Cross Examination

## Role of the Decision Maker

Rulings by Decision Maker required

Explanation only required where question  
not permitted

# Cross Examination

## Impact of Not Appearing

Exclusion of all statements of that party

Exception - DOE Blog

What if a party or witness appears, but does not answer all questions?

# Closing Statements

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Permitted, but not required

Policy should include purpose and scope

If permitted, consider

- Time limit
- Submission in writing after the hearing



# Common Challenges

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Non-appearance by a party or witness

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Non-appearance by an advisor

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Party or witness appears but declines to answer some (or all) questions

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Disruptions

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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



# Evidentiary Issues

05

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# Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.

Is it authentic?

Is the item what it purports to be?

Is it credible?

Is it convincing?

Is it reliable?

Can you trust it or really on it?

What weight, if any, should it be given?

Weight is determined by the finder of fact!

# Evaluating this evidence

- Character evidence
- Polygraph examinations
- SANE reports
- Articles from journals
- Past conduct of complainant, respondent
- Unlawfully obtained evidence

**EVIDENCE**

# 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.

# Assessing Credibility and Reliability

**No formula exists, but consider the following:**

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

# Assessing Reliability

Inherent plausibility

Logic

Corroboration

Past record

Other indicia of reliability



# Credibility Versus Reliability

## Reliable Evidence

- I can trust the consistency of the person's account of their truth.
- It is probably true and I can rely on it.

## Credibility

- I trust their account based on their tone and reliability.
- They are honest and believable.
- It might not be true, but it is worthy of belief.
- It is convincingly true.
- The witness is sincere and speaking their real truth.

# Being Convinced

## It Is True, or Biased Conclusion?

A credible witness may give  
unreliable testimony

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## 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

# Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate
- Apply Standard of Proof



# 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

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# 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?



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