Title IX in a Post Regulatory World
Day Two
Chantelle Cleary
Today’s Agenda

01. Hearings in a Post Regulatory World
02. Roles and Responsibilities
03. The Hearing
04. Conducting the Hearing
05. Evidentiary Issues
06. Post-Hearing

3A. Pre-Hearing Tasks
Hearings in a Post Regulatory World

Procedural Requirements, Practical Requirements, and so much more
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 Essential Elements of All Hearings

<table>
<thead>
<tr>
<th>Clear Procedures</th>
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<tbody>
<tr>
<td>Due/Fair Process</td>
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<tr>
<td>Fair, Equitable, and Neutral</td>
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<tr>
<td>Consistency</td>
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<tr>
<td>Trauma Informed</td>
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<td>Well Trained Personnel</td>
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## 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.
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
## Hearing Participants

<table>
<thead>
<tr>
<th>Role</th>
<th>Description</th>
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<tbody>
<tr>
<td>Complainant</td>
<td>the person bringing the complaint</td>
</tr>
<tr>
<td>Respondent</td>
<td>the person against whom the complaint has been filed</td>
</tr>
<tr>
<td>Advisor</td>
<td>will conduct cross examination; role varies depending on school</td>
</tr>
<tr>
<td>Investigator</td>
<td>summarizes the investigation, answers questions</td>
</tr>
<tr>
<td>Witnesses</td>
<td>present in the room only when answering questions</td>
</tr>
<tr>
<td>Hearing Coordinator/Officer</td>
<td>coordinates all aspects of the hearing, ensures a fair and equitable hearing process, acts as a resource for all participants</td>
</tr>
<tr>
<td>Decision-Maker</td>
<td>makes decision as to whether policy was violated</td>
</tr>
<tr>
<td>Administrative Staff</td>
<td>assists with the logistical coordination of the people, the space, technology, etc.</td>
</tr>
</tbody>
</table>
Who is NOT in the Hearing?

<table>
<thead>
<tr>
<th>General Counsel</th>
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<tbody>
<tr>
<td>Spectators</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 examination/cross
- Roles
- Training/Qualifications
- Communicating their role
- Compliance with the role
The Players
The Coordinator/Chair

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

The Decision Maker

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

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

WHAT DOES THIS REALLY MEAN?
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

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
The Hearing
Pre-Hearing Tasks

What should be done in advance of the hearing
Logistics

Scheduling participants

Reserving space

Provision of accommodations

Requests for delays; adjournments
The Parties and their Advisors, and the Witnesses

Pre-hearing instructions

- Via conference or meeting
- In writing

Set expectations

- Format
- Roles of the parties
- Participation
- Evidence
- Decorum
- Impact of not following rules
The Decision Maker(s)

- Review evidence and report
- Review applicable policy and procedures
- Preliminary analysis of the evidence
- Determine areas for further exploration
- Develop questions of your own
- Anticipate the party’s questions
- Anticipate challenges or issues
Conducting the Hearing
Opening Instructions by the Chair

- Set the stage
- Reiterate charges
- Reiterate rules and expectations
- Reiterate logistics for the day

*This should be scripted and used consistently.*
Opening Statements

- Permitted, but not required

- Policy should include purpose and scope

- If permitted, consider...
  - Requiring submission prior to hearing
  - Word limit
  - Time limit
Testimony

Procedures should be clear

Order of/parties and witnesses

- Could simply leave this up to the decision maker

Order of examination

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

Consistency is essential. Consider putting this all in your procedures.
Cross Examination
Who does it?

Must be conducted by the advisor.

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

If party does not have an advisor, institution must provide one.
# Cross Examination Permissible Questions

Questions must be relevant

Not relevant

- Duplicative questions
- Questions that attempt to elicit information about
  - Complainants prior sexual history
  - Privileged information
  - Mental health
Cross Examination
Role of the Decision Maker

Rulings by Decision Maker required

Explanation only required where question not permitted
Cross Examination
Impact of Not Appearing

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

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

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

01  Be prepared

02  Have an experienced chair

03  Have back up plans for technology issues

04  Require pre-hearing written submissions
    • of opening statements
    • of questions in advance
Evidentiary Issues
# Evaluating the Evidence

<table>
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<tr>
<th>Question</th>
<th>Answer</th>
</tr>
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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 really on it?</td>
</tr>
<tr>
<td>What weight, if any, should it be given?</td>
<td>Weight is determined by the finder of fact!</td>
</tr>
</tbody>
</table>
Evaluating this evidence

- Character evidence
- Polygraph examinations
- SANE reports
- Articles from journals
- Past conduct of complainant, respondent
- Unlawfully obtained 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
- Corroborated
- 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
After the Hearing
Deliberations
Weighing the Evidence & Making A Determination

1) Evaluate the evidence collected to determine what factually is more likely to have occurred, and then

2) Analyze whether the conduct that happened constitutes a violation of the school’s policies
Policy Analysis

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