



DECISION MAKER TRAINING: HEARINGS IN A POST REGULATORY WORLD

Day One

Jackie Hennard

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MEET YOUR FACILITATOR

Jackie Hennard



Senior Solutions Specialist
He/Him/His

Jackie Hennard is a member of Grand River Solutions' Investigation, Hearing, & Appeal Services team. She also trains and mentors new investigators and hearing officers. Jackie brings extensive experience leading and conducting Title IX, discrimination, harassment, and employee relations investigations across higher education, municipal government, and police accountability settings. Jackie holds a bachelor's degree in political science from Michigan State University, a J.D. from Cleveland Marshall College of Law, is admitted to the Illinois bar, and is a certified mediator.

ABOUT US

Vision

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

Mission

To 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

● Title IX Requirements for Hearings

● Hearing Overview

● Pre-Hearing Tasks

● Developing Questions

● The Hearing

● Practical Application

TITLE IX REQUIREMENTS FOR HEARINGS

01

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TITLE IX

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."

20 U.S.C. § 1681 (1972).



SEXUAL HARASSMENT: SECTION 106.30

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).

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

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
directly related 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

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

Written decision must be issued that includes finding and sanction

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.

The campus must create a recording or transcript to have available for the parties' inspection/review

Participants must be able to communicate with decision makers and advisors during the hearing

THE REQUIREMENT OF IMPARTIALITY



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SECTION 106.45(b)(1)(iii)

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

- For or against complainants or respondents generally, or
- An individual complainant or respondent



ACTIVITY: IS THERE A CONFLICT OF INTEREST?

Complainant: Alex, a senior student and President of the Student Government Association (SGA) at a small liberal arts college.

Respondent: Jack, a junior student, and member of the college's basketball team.

Hearing Officer: Dean Thompson, who is the Dean of Students but also Alex's direct supervisor as the SGA advisor.

Additional Context: Dean Thompson has a close professional and mentoring relationship with Alex, having worked with Alex extensively on SGA projects and initiatives. Additionally, Dean Thompson has a vested interest in maintaining a positive relationship with Alex, as the SGA President plays a crucial role in representing student interests and collaborating with college administrators.

HEARING OVERVIEW

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WHAT IS THE PURPOSE OF A HEARING?



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

PROCESS PARTICIPANTS

- The Parties:
 - Complainant
 - Respondent
- Advisors
- Hearing Facilitator
- Decision Maker (s) / Hearing Chair
- Investigator
- Witnesses



THE PARTICIPANTS

The Parties

Complainant

An individual who is alleged to be have experienced the conduct that could constitute sexual harassment.

Respondent

An individual who has been reported to have engaged in the conduct that could constitute sexual harassment.

THE PARTICIPANTS

Advisors

There are two types of Advisors



Process Advisor: throughout
the whole process



Hearing Advisor: hearing,
for purposes of asking
questions

THE PARTICIPANTS

1: Process Advisor

- Can be anyone, including a lawyer, a parent, a friend, and a witness
- No particular training or experience required (institutionally appointed advisors should be trained)
- Can accompany advisees to all meetings, interviews (and the hearing if they continue role throughout).
- Should help the Parties prepare for each meeting; expected to advise ethically, with integrity, and in good faith
- May not speak on behalf of their advisee or otherwise participate.



THE PARTICIPANTS

2: Hearing Advisor

- Can be anyone, including a lawyer, a parent, a friend, and a witness
- No particular training or experience required (institutionally appointed advisors should be trained)
- Accompanies their advisee to the hearing and conducts cross-examination at the hearing.
- May meet with their advisee in advance to prepare for the hearing and develop questions.
- Expected to advise advisees without disrupting proceedings



THE PARTICIPANTS

Advisors: How a campus may address prohibited behavior

Check your policy and rules of decorum on how to address an advisor who oversteps the role defined in the policy. A common example would be to issue a verbal warning for the first instance and to then potentially limit someone's participation (in consultation with the Coordinator) if the behavior(s) persist.



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
- Not required



THE PARTICIPANTS

Decision Maker or Makers

Decision Maker

One-person makes findings of fact and determines if policy was violated

Decision Maker Panel

A panel (often 3 people)
A hearing chair leads the process
Policy may vary on whether the panel determination must be unanimous or based on the majority vote

THE PARTICIPANTS

The Decision-Makers

- **A panel**
- Helps prepare questions for the parties and witnesses at the hearing
- Potentially questions hearing participants (depending on Chair role)
- Determines responsibility
- Determines sanction, where appropriate



THE PARTICIPANTS

The Hearing Chair

- Is a decision-maker
- Leads questioning for Panel (may ask all questions on Panel's behalf)
- Answers procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written determination
- Determines sanctions with Panel, when appropriate



THE PARTICIPANTS

The Sole Decision Maker

- One person
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written determination



THE PARTICIPANTS

The Investigator

- Can present a summary of the final investigation report, including items that are contested and those that are not;
- 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.



PRE-HEARING TASKS: HEARING PANEL & CHAIR

What should be done in advance of the hearing?

03

FOR THE FACILITATOR

Arranging for space

Arranging
technology

Scheduling pre-
hearing meetings
with parties &
advisors

Scheduling
prehearing
meetings of
the panel

Providing
report and
record to
panel and
parties

Scheduling
the hearing

Conflict
checks

Call for
written
submissions

Accommodations

Other considerations?

PRE-HEARING MEETINGS

- Review the Logistics for the Hearing
- Set expectations
 - Format
 - Roles of the parties
 - Participation
- Decorum
- Impact of not following rules
- Cross Examination/Questioning Format & Expectations



DECISION MAKER OR HEARING PANEL AS A WHOLE



Review
evidence
and report

Review applicable policy
and procedures

Preliminary
outline of
the
evidence

Determine
areas for
further
exploration

Develop
questions

RAPID FIRE RECAP



Development
of
introductory
comments

Initial discussion of
the evidence

Areas for
further
exploration

List of
questions for
the parties
and the
witnesses

Anticipation
of potential
issues

Logistics

Review of
any written
submissions
by the
parties

Other
considerations?

PRE-HEARING TASKS: DEVELOPING QUESTIONS

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COMMON AREAS OF EXPLORATION

Credibility
/Reliability

Clarification
on timeline

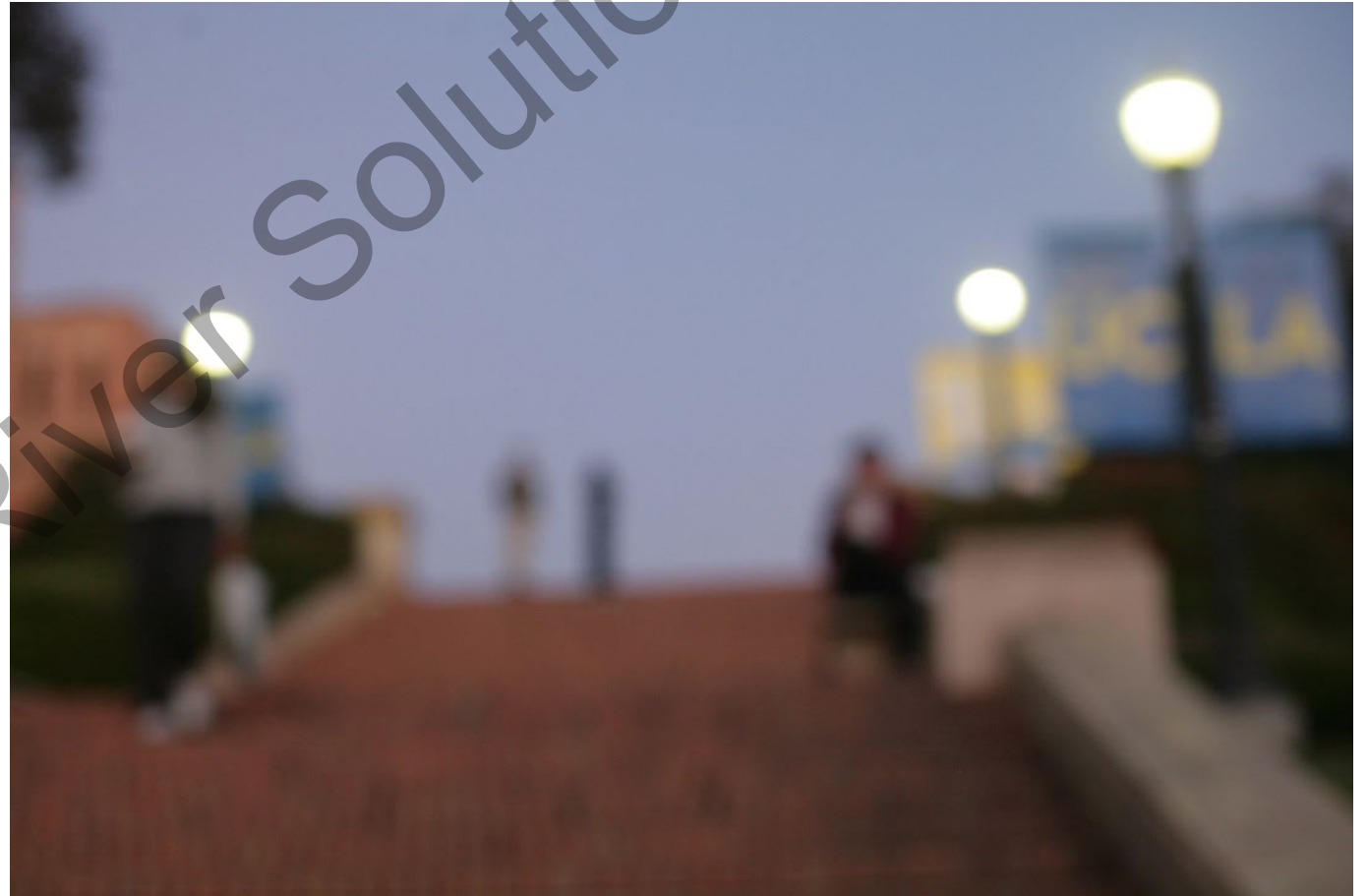
Thought
process

Inconsistencies



COMMON AREAS OF WHERE CLARITY OR ADDITIONAL INFORMATION IS NEEDED

- Timing of the report
- Details about the alleged misconduct
- Relevancy of certain items of evidence
- Factual basis for opinions



PLEASE REFERENCE THE SAMMIE/ALEX PACKET



Instructions for Break Out #1

In this next exercise, we would like you to imagine that you are meeting with your fellow decision makers to discuss topics or areas that you would like to explore further during the hearing, and questions that you would like to ask the parties and witnesses.

Group 1: Questions for Complainant and Witnesses 1 and 3

Group 2: Questions for Respondent and Witnesses 1 and 2

In a few moments, we are going to divide you into groups and put each group into a breakout room. Once inside the room we would like you to briefly introduce yourselves to each other. Then, we would like you to pick a scribe. The scribe will be responsible for documenting your groups' responses.

WHAT ARE YOUR QUESTIONS?



POLICY ANALYSIS

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



RECAP – WHAT PREP WORK DO YOU NEED TO DO AS DECISION-MAKER?



Rapid Fire

Using the chat box:
share your “To Do” List
for hearing preparation.



THE HEARING

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SAMPLE ORDER OF PROCEEDINGS

1. Introductions and instructions by the Chair

2. Opening Statements

3. Presentation of information and questioning of the parties and witnesses

4. Closing Statements

5. Deliberation & Determination

OPENING INTRODUCTIONS AND INSTRUCTIONS BY THE CHAIR

- Campuses should have a script for this portion of the proceedings for consistency.
- Introduction of the participants.
- Overview of the procedures.
- Overall goal: manage expectations.
- Be prepared to answer questions.

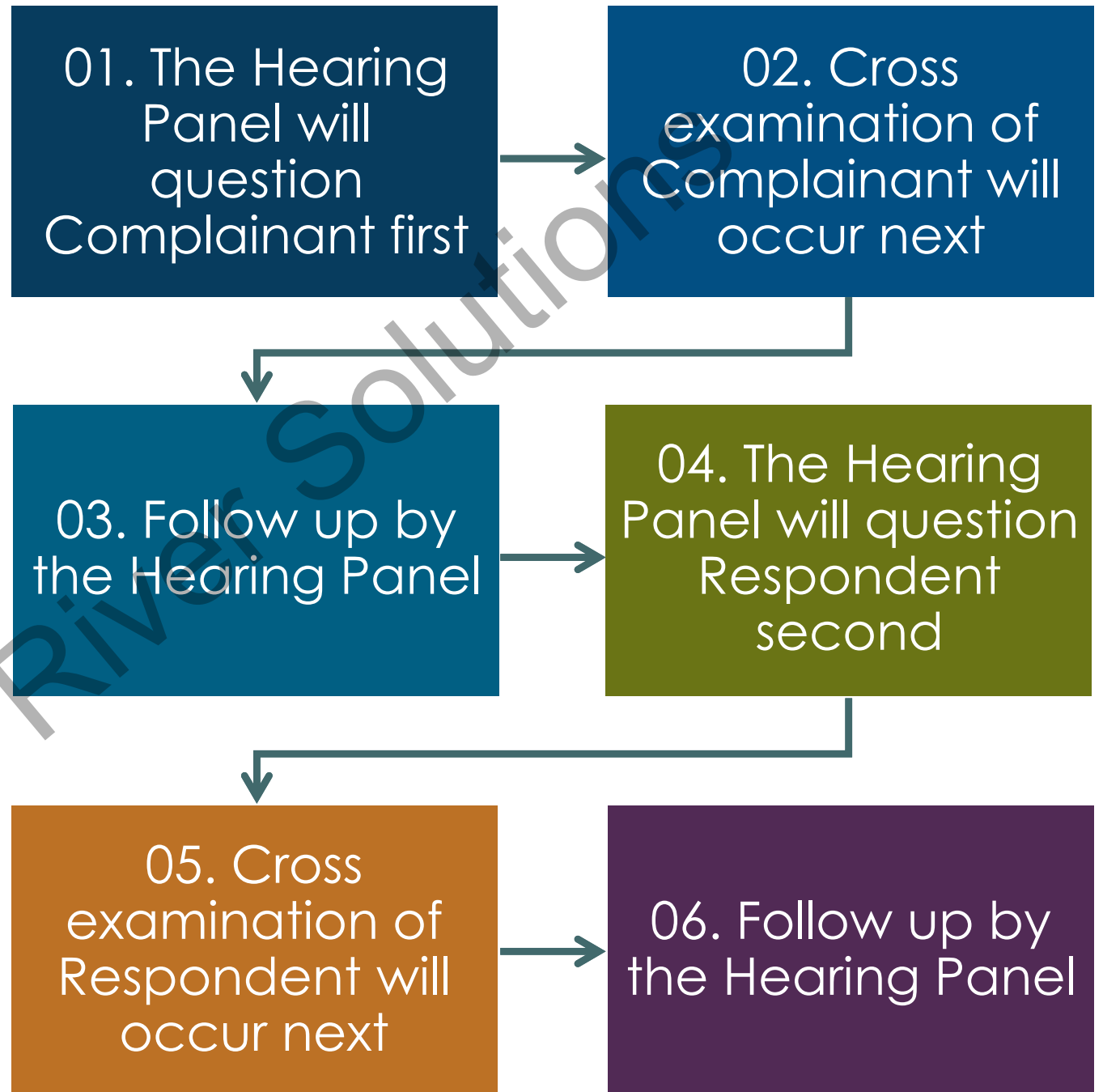


OPENING STATEMENTS

Optional: Not required by the regulations; institution may choose to allow.

- Prior to questioning beginning during the hearing, each party may be given the opportunity to make an opening statement.
- Intended to be a brief summary of the points the party would like to highlight.
- Directed to the Decision Maker and only the Decision Maker.
- Both parties should give opening statement before either is questioned.
- Typically, Complainant goes first.

PRESENTATION OF INFORMATION & QUESTIONING OF THE PARTIES



QUESTIONING OF THE WITNESSES

1

The Chair will determine the order of questioning of witnesses

2

The Hearing Panel will question first

3

Advisor cross-examination will occur next (suggested: Complainant's advisor followed by Respondent's advisor)

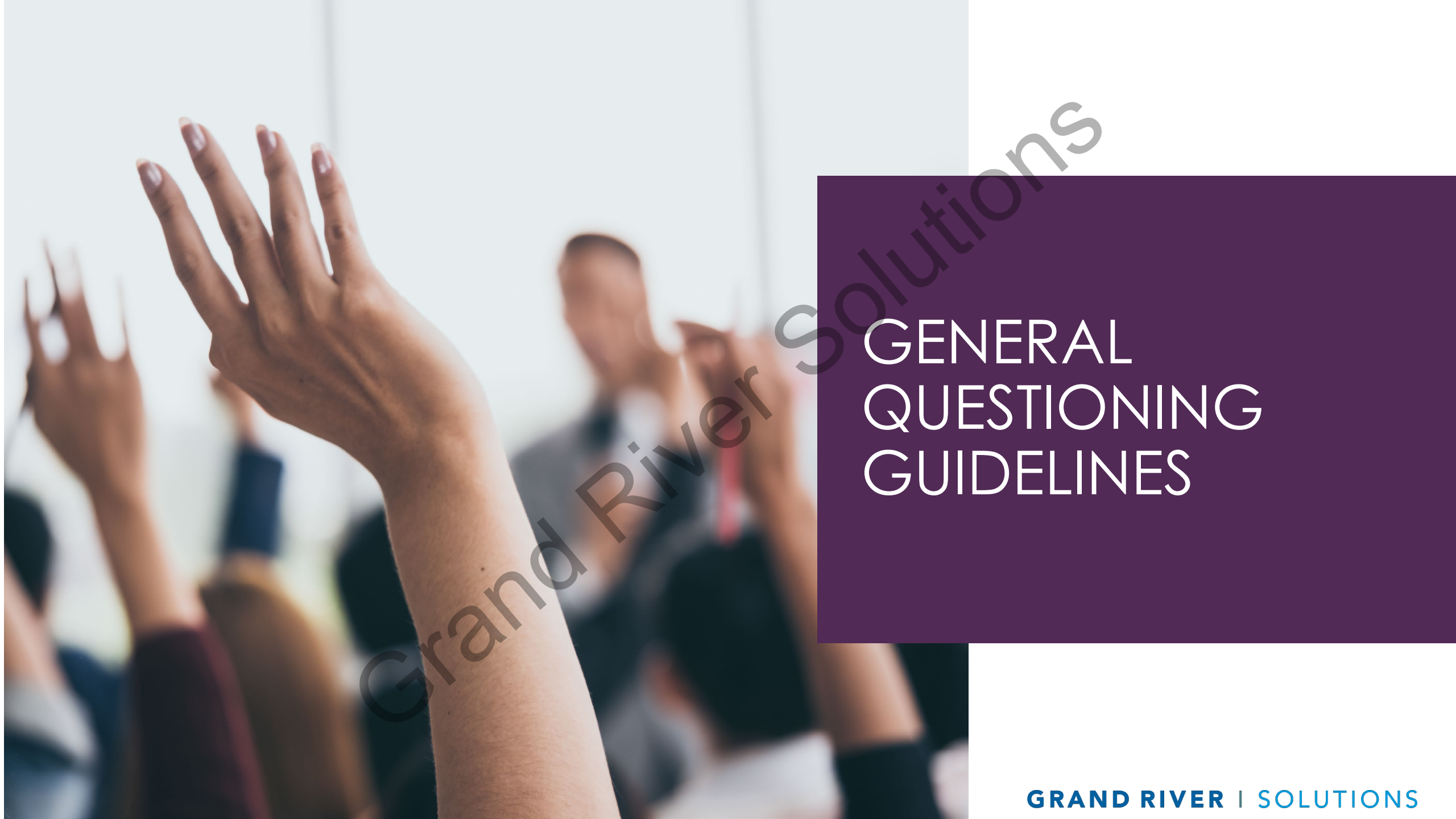
4

Follow up by the Hearing Panel

CLOSING STATEMENTS

Prior to the conclusion of the hearing, each party will have the opportunity to make a closing statement.

- Intended to be a brief summary of the points the party would like to highlight.
- Directed to the Decision Maker and only the Decision Maker
- Not time to introduce new information or evidence.



GENERAL QUESTIONING GUIDELINES

WHEN QUESTIONING....

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



FOUNDATIONAL QUESTIONS TO CONSIDER ASKING

Were you provided with your interview summary during the investigation.

Did it accurately capture what you told the Investigator.

As you sit here today, has anything changed?

What is your current relationship with the parties?

Have you spoken to the parties about the hearing?

Do you feel that you have been influenced in the testimony you are providing?

ADDITIONAL FACTOR WHEN CONSIDERING EVIDENCE

- What weight should it be given?
 - *What type of evidence is it (first-hand versus second-hand information)?*
 - *Are there any reliability issues with the testimony of a witness?*



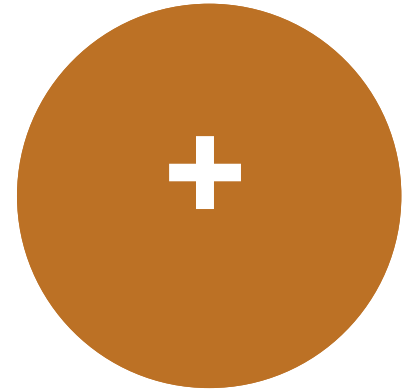
IS IT AUTHENTIC?



Question the person
who offered the
evidence.



Have others review
and comment on
authenticity.



Are there other
records that would
corroborate?

WHEN ARE QUESTIONS RELEVANT?

- Logical connection between question and the material disputed facts or elements of the alleged violation
- Tends to make a fact that is of consequence more or less probable than it would be without that evidence
- Questions about Complainant's sexual predisposition or prior sexual history



ASSESSING CREDIBILITY/ RELIABILITY

No formula exists, but
consider the following:

Sufficiency of detail and specificity

Internal consistency

Corroboration

Inherent plausibility

Material omission

Motive to falsify

Ability to recall events

CREDIBILITY/RELIABILITY ANALYSIS

Step by Step

1

Determine the material facts based on the notice of allegations

2

Determine which material facts are disputed and undisputed

3

If any facts are disputed, consider whether a credibility/reliability analysis will help reconcile the dispute

“Marcy alleged that Jack kissed Marcy at the party sometime shortly before 3 a.m. Jack denied kissing Marcy and stated that he left the party before 12 a.m. Meanwhile, several witnesses corroborated Marcy’s statement that Jack was at the party until 3 a.m. In addition, a witness submitted a photograph showing Jack kissing Marcy at the party. Given that Marcy’s statements were corroborated by witness statements, and given the photographic evidence, Marcy’s account was deemed more reliable regarding this material fact.”

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?



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

SPECIAL CONSIDERATIONS FOR QUESTIONING THE INVESTIGATOR

- If the Investigator's role was fact-gathering only, it is appropriate for the Investigator to limit questioning of the Investigator to the collection of evidence and disallow questions seeking the Investigator's opinions on reliability/credibility or analysis of the evidence.



TITLE IX HEARINGS IN A POST REGULATORY WORLD

Day 2

Davis Crow & Jessica Brown

OUTSTANDING QUESTIONS FROM DAY ONE?



OVERVIEW OF DAY TWO

- | Advisor Questioning
- | Deliberations
- | Practical Application
- | Questions



THE DECISION MAKER'S ROLE IN ADVISOR QUESTIONING

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CROSS EXAMINATION

WHO DOES IT?

1

Must be conducted by the advisor

2

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

3

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.
- The Chair will determine whether the question will be permitted or disallowed and may ask that a question be rephrased. Depending on the policy, the Chair may explore arguments regarding relevance with the Advisors.
- The Chair may disallow questions that are deemed not relevant. The Chair will explain any decision to exclude a question as not relevant.
- The Chair has final say on all questions and determinations of relevance. Depending on the policy, parties and their advisors are usually 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.
- Expectations may be set in the script (e.g., for disallowing duplicative questions or enforcing rules of decorum).

THE PARTICIPANTS

Advisors: Prohibited Behavior

An Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting may be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability determine how to address the Advisor's non-compliance and future role.



WHEN ASSESSING RELEVANCE, THE DECISION MAKER CAN:

- Ask the person who posed the question why their question is relevant
- Take a break
- Suggest reframing
- Ask their own questions of the party/witness



RELEVANT VS. IRRELEVANT



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

BREAK OUT! #2

All groups: Review questions and determine whether they are relevant and allowed to be asked or irrelevant/impermissible



Say hi again!



Pick a scribe



Discuss

Group 1: Questions for Complainant and Witnesses 1 and 2

Group 2: Questions for Respondent and Witness 3

REPORT OUT #2



GROUP 1

QUESTIONS SUBMITTED BY **RESPONDENT'S** ADVISOR: Questions for Complainant

1. Isn't it true you found Respondent attractive after you first met?
2. You made this complaint only because you wanted your boyfriend's attention, isn't that true?
3. You told the investigator you imagined seeing Respondent when you walked to your car at night. How many times did that happen?
4. And how often do you hallucinate?
5. Why did you ask your boyfriend to walk you to your car when you knew you were supposed to meet Respondent there?
6. You said you were frightened by seeing Respondent in the parking garage. Did he have a weapon?
7. Did he try to hit you?
8. Why did you file this complaint?

GROUP 1

QUESTIONS SUBMITTED BY **COMPLAINANT'S** ADVISOR: Question for Witness 1

1. Weren't you supposed to forward Complainant's Title IX Complaint to the Coordinator, and don't you think that if you had done so, she would have been spared his stalking?

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GROUP 1

QUESTIONS SUBMITTED BY COMPLAINANT'S ADVISOR: Question for Witness 2

1. Do you know for sure that there were confirmed plans for Respondent and Complainant to get together one night and talk?

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GROUP 2

QUESTIONS SUBMITTED BY COMPLAINANT'S ADVISOR:

Questions for Respondent

1. Have you ever stalked someone other than Complainant?
2. Why did you think Complainant would welcome you showing up by her car with flowers?
3. When you first talked to Complainant about your girlfriend breaking up with you, did you make that up just so you could talk to Complainant?
4. What did you throw at Complainant during the incident by her car?

GROUP 2

QUESTIONS SUBMITTED BY **COMPLAINANT'S** ADVISOR: Questions for Witness 3

1. Can you think of any reason for Respondent to be hanging out in the garage with flowers, other than to frighten Complainant?
2. Did you see him throw an object at Complainant?

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GROUP 2

QUESTIONS SUBMITTED BY RESPONDENT'S ADVISOR: Questions for Witness 3

1. When you saw Respondent in the parking garage, were you frightened?
2. What, specifically, did Respondent do that was frightening?
3. Does Complainant always overreact?
4. What, specifically, did Respondent throw at her?

AFTER THE HEARING

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Deliberations

FINAL WRITTEN DETERMINATION

- 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



- S** Simple and Easy to Comprehend
- T** Transparent/Clear
- A** Accurate
- N** Neutral/Unbiased
- D** Draw Attention to Significant Evidence and Issues

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 make findings of fact.
3. Apply the facts to each element of the policy definition.
4. 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...**
 - The parties are in a dating relationship. Complainant reports that Respondent shoved Complainant against a wall in the residence hall. Respondent denies that this occurred.
 - Witness 1 produces a text exchange. In the exchange, Witness 1 asked, "Hey [Respondent], is it true what I'm hearing? Did you push [Complainant]?" Respondent responds, "Yeah, I did, but [Complainant's] making it into a bigger thing than it was."
- **Next steps?**

TIME FOR...POLICY ANALYSIS

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



SAMPLE ALLEGATION: SEXUAL CONTACT *(REPLACED FONDLING)*

Sexual Contact —

- ☐ The intentional touching of the clothed or unclothed body parts
- ☐ without consent of the victim
- ☐ for the purpose of sexual degradation, sexual gratification, or sexual humiliation.

DID YOU ALSO CHECK...?

On campus?

Program or Activity?

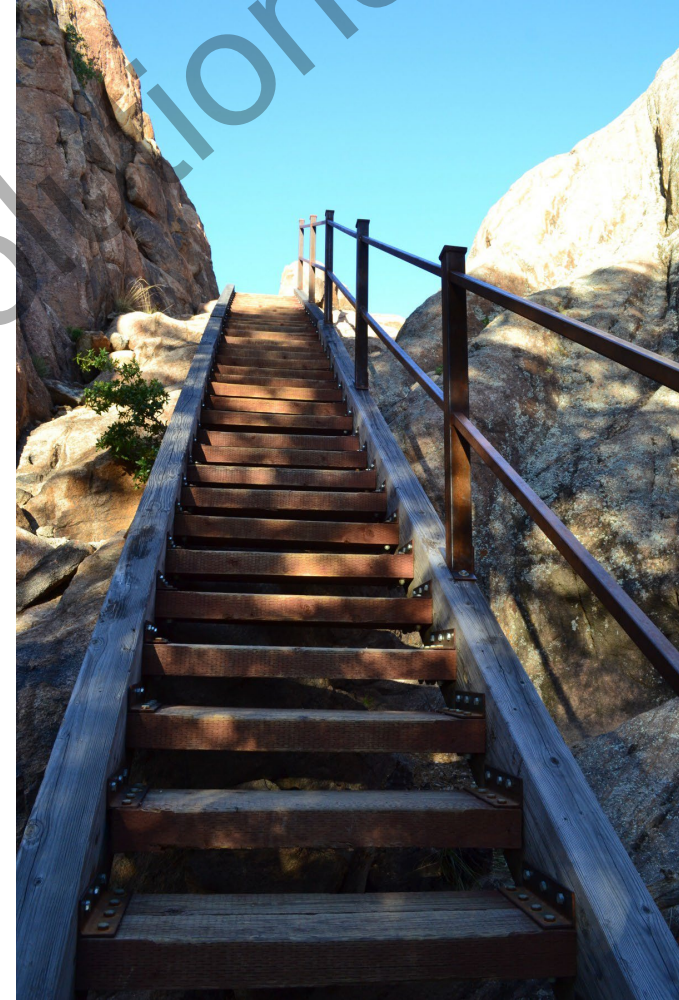
In a building owned/controlled by a recognized student organization?

Substantial control over respondent and context?

Complainant was attempting to access program/activity?

GOALS OF SANCTIONS/DISCIPLINE

1. End the harassment
 2. Prevent its recurrence
 3. Remedy the harm
- What steps would be reasonably calculated to end harassment and prevent recurrence?



DETERMINING THE PROPER SANCTION

- Consistency – How have similar cases been sanctioned?
- Any aggravating/mitigating factors?
- Past conduct?
- Remorse?
- Complainant impact statement?



POTENTIAL AGGRAVATING CIRCUMSTANCES

- Premeditation
- Physical violence
- Repeated violation
- Multiple policy violations
- Harm to others, impact on complainant and/or community
- Did the behavior continue after intervention?
- Effort to conceal or hide the conduct?
- Past failures to comply with directives



THE SANCTION DOES NOT UNDO THE FINDING

- No greater or lesser sanction if you disagree with findings
- Sanctioning officer must assume findings are correct

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ADVISOR'S ROLE POST-HEARING

- May meet with their advisee to review decision and respond to procedural questions.
- Institutionally-appointed advisors typically do not advise nor assist the party in developing an appeal.
- Advisor of choice may assist in advising party whether or not to appeal and in the drafting of an appeal.



PRACTICAL APPLICATION



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SCENARIO 1



- Respondent appears at the hearing with Witness 7. Respondent would like Witness 7 to provide text messages that may indicate that Complainant falsified the allegations.
- **Can the Decision Maker hear from Witness 7 at the hearing?**

SCENARIO 2



While answering questions, Complainant starts using the word “you” in apparent reference to Respondent. For instance, Complainant says, “You knew what you were doing when this happened” or “Everyone knows what happened and what you did to me.”

How should the Decision Maker handle this?

SCENARIO 3



During the hearing, Complainant's advisor has called in from the same physical location as Complainant and can be heard making quiet statements to Complainant as Complainant answers questions.

If you are the Hearing Chair, how do you respond?

WRAP-UP

08

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- Hearings & Appeals
- Alternative Resolutions
- Program Review
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Title IX, Equity & Clery



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QUESTIONS

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