Chantelle Cleary is a nationally-recognized subject-matter expert in Title IX and related fields. She has more than 10 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.
Grand River Solutions

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
<table>
<thead>
<tr>
<th></th>
<th>Today’s Agenda</th>
</tr>
</thead>
<tbody>
<tr>
<td>01</td>
<td>Iona College’s Response to Sexual Misconduct</td>
</tr>
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<td>02</td>
<td>Title IX’s Scope and Jurisdiction</td>
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<td>The Requirement of Impartiality</td>
</tr>
</tbody>
</table>
Iona College’s Response to Sexual Misconduct

Narrowed jurisdiction and expansive procedural requirements
Sexual misconduct is a broad term that encompasses a wide range of prohibited behaviors of a sexual nature that is committed without consent or by intimidation, coercion, threat, or force. Sexual misconduct can occur between strangers, acquaintances, or people who know each other well, including those who are involved in an intimate or sexual relationship, and can be committed by anyone regardless of sex, gender, or gender identity.
The Title IX Coordinator’s primary responsibility is to coordinate the College’s compliance with this policy including overseeing the College’s response to complaints of sexual misconduct, coordinating investigations into allegations of sexual misconduct, identifying and addressing any patterns or systemic problems of sexual misconduct that arise during the investigation of a complaint, and assessing the effects of sexual misconduct on the campus climate.
Iona College’s Sexual Misconduct Policy

This Sexual Misconduct Policy is separated into four parts:

1. **Sexual Misconduct Policy** – Umbrella Policy that sets forth common elements for both the Sexual Misconduct Grievance Procedure and the Title IX Grievance Procedure both of which address the types of sex-based offenses constituting a violation of campus policy, and the procedures for investigating and adjudicating those sex-based offenses.

2. **Sexual Misconduct Grievance Procedure** – sets forth procedures for investigation, hearing and appeal of sexual misconduct that do not fall within the definition of Title IX’s Final Rule.

3. **Title IX Grievance Procedure** – sets forth procedures for investigation, hearing and appeal of matters falling within the definitions of Title IX’s Final Rule. (one for students and one for employees)

4. **Definitions** - sets forth definitions of terms used in the Sexual Misconduct Policy, Parts I, II, and III.
Title IX’s Scope and Jurisdiction

Narrowed jurisdiction and expansive procedural requirements
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.”
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

Covered Geography

Includes locations, events, or circumstances over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

- On campus or in a building owned or controlled
- Off-campus incident that occurs as part of the institution's operations
- Institution exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus pursuant to § 106.44(a); or
- The incident of sexual harassment occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution.
Not Covered

- Off campus conduct, even if it has an impact on the educational program or activity;
- Conduct that occurs outside of the United States.
Covered Individuals
Eligibility for Title IX’s Protections

“At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.” 34 C.F.R. § 106.30

Applicant
Accepted/Hired
Enrolled/Employed
# Title IX Application Post May 2020 Regulations

<table>
<thead>
<tr>
<th>Type of Conduct</th>
<th>Ed Program or Activity</th>
<th>Required Identity</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Hostile Environment Sexual Harassment</td>
<td>• On campus • Campus Program, Activity, Building, and • In the United States</td>
<td>• Complainant is participating or attempting to participate in the Ed Program or activity</td>
</tr>
<tr>
<td>• Quid Pro Quo</td>
<td></td>
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<tr>
<td>• Sexual Assault</td>
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<td>• Dating/Domestic Violence</td>
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<tr>
<td>• Stalking</td>
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**Apply 106.45 Procedures**

- Required Response:
  
  Section 106.45 Procedures
Conduct Falling Outside the Scope of Title IX

Apply the Sexual Misconduct Grievance Procedure
Receiving Reports and Determining the Applicable Procedures
Initial Response Requirements

Receipt of Report

Outreach/Response from Title IX Coordinator

Support Measures, whether or not Formal Complaint is filed

How to File

Options for Resolution
Request to Initiate Grievance Process

By complainant

By the Title IX Coordinator
Title IX Requires a Signed Formal Complaint

A Formal Complaint must include:

1. The Complainant's digital or physical signature, or an indication that the Complainant is the person filing the Formal Complaint;

2. An allegation of Prohibited Conduct as defined under this Policy. This may include:
   - Where the incident(s) occurred; what incident(s) occurred; when the incident(s) occurred;

3. Identity of Respondent, if known;

4. A request for a resolution.

Formal Complaints may be made to the Title IX Coordinator by US Mail, email, or in person.
Notice of Allegation 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.
Pathways to Resolution

Alternative/Informal
- Voluntary
- Agreed upon
- Documented in writing

Formal/Investigation/Hearing
Informal Resolution
Informal Resolution Options Under Both Procedures

- Alternate Resolution
- Acceptance of Responsibility
Informal Resolution Notice Requirements

The allegations;

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, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process;

And resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.
Informal Resolution Requirements

- Formal Complaint must be filed;
- Participation in an informal resolution must be voluntary;
- Must occur prior to resolution via a formal process;
- Parties must be permitted to withdraw and seek formal resolution;
- Voluntary, written consent to the informal resolution must be obtained;
- Facilitators of informal resolution must be trained.
The Investigation
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.

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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.
Evidence Collection

- Testimony
- Text Messages
- Social Media Posts, etc
- Emails
- Surveillance
- Videos
- Photographs
- Police Body Camera Footage
- Swipe Records
- Medical Records
- Phone Records
- Audio Recordings
Advisor of Choice in the Investigation Process

- The advisor can be anyone, including an attorney.
- Institutions cannot place restrictions on who can serve.
- No training required.
- May not speak on behalf of their advisee.
The Investigation: Sexual Misconduct Grievance Procedures

05(a)
Investigation Procedures

1. Evidence collection
2. Investigator drafts a report
3. Draft report and evidence is shared with both parties
4. Parties have 3 days to make corrections and submit a written response that does not exceed 5 pages
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
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.
“Directly Related” and “Relevant Evidence”
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
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.”
Evidence That is Not “Relevant”

• “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,
  • unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  • if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

• “Require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

• Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition
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
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.
The Hearing
At the conclusion of the investigation, a hearing is conducted to determine if the Respondent engaged in a violation of the sexual misconduct policy.

The hearing procedures for each process are different.
Purpose of the Hearing

Why does it matter?

Review and Assess Facts

Make Findings of Fact

Determine Responsibility / Findings of Responsibility

Determine Sanction and Remedy
The Essential Elements of All Hearings

- Clear Procedures
- Due/Fair Process
- Fair, Equitable, and Neutral
- Consistency
- Trauma Informed
- Well Trained Personnel
The Hearing

Sexual Misconduct Grievance Procedures
Pre-Hearing Submissions

Three days prior to the hearing the parties:

• List of witnesses they wish the Hearing Committee to call
• copies of documents, and a description of any other information they propose to present

The Title IX Coordinator will provide each party with a copy of the list of witnesses and copies of documents or other information submitted by each party. A party wishing to challenge the admittance of evidence and/or witnesses must notify the Title IX Coordinator, in writing, at least twenty-four (24) hours before the hearing date.

The Hearing Committee will determine whether the challenge has merit, the relevance of any proposed evidence, and whether to include or exclude certain types of evidence.
Hearing Procedures

- The Hearing Committee is comprised of 1-3 individuals.
- The parties have the right to choose to participate.
- The Hearing Committee determines which witness they want to hear from, either live, or through a written statement.
- Questioning is conducted by the Hearing Committee, only.
- The parties can submit questions to be asked of the other party and witnesses; those questions are asked at the discretion of the committee.
- Advisor can be present, but does not participate.
# Hearing Participants

<table>
<thead>
<tr>
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<tbody>
<tr>
<td>Complainant</td>
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<tr>
<td>Respondent</td>
<td>the person against whom the complaint has been filed</td>
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<tr>
<td>Advisor</td>
<td>May not participate in the process</td>
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<td>Witnesses</td>
<td>present in the room only when answering questions</td>
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<td>Hearing Chair</td>
<td>coordinates all aspects of the hearing, ensures a fair and equitable hearing process;</td>
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<tr>
<td>Decision-Maker</td>
<td>makes decision as to whether policy was violated</td>
</tr>
<tr>
<td>Hearing Facilitator</td>
<td>assists with the logistical coordination of the people, the space, technology, etc.</td>
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</table>
The Decision Makers

- Fact finders
- Will question the parties and the witness at the hearing
- 1-3 people
- They make the determination of responsibility
The Hearing Chair

- Oversees the Process
- Maintains order/decorum
- Supports the panel
- Where there is a panel, the Chair will often take the lead in writing the decision
The Hearing Facilitator

- Provides administrative support to the DM
- Coordinates the technology
- Coordinates the schedule
- Can be anyone, including the Title IX Coordinator
Hearing Advisors

- May not participate in the hearing.
- No required Training/Qualifications
- Communicating their role
- Enforcing their role
The Hearing

Title IX Grievance Procedures

06(b)
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
## Hearing Participants

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</table>
The Decision Makers

- Fact finders
- Will question the parties and the witness at the hearing
- Can be a single person, or a panel
- Can not be Title IX Coordinator, investigator, or appeal person
The Hearing Chair

- Oversees the Process
- Maintains order/decorum
- Supports the panel
- Makes ruling
- Must Be a Decision Maker
- Where there is a panel, the Chair will often take the lead in writing the decision
The Hearing Facilitator

- Provides administrative support to the DM
- Coordinators the technology
- Coordinates the schedule
- Can be anyone, including the Title IX Coordinator
Hearing Advisors

- May not participate in the hearing, other than to conduct cross examination.
- No required Training/Qualifications
- The College cannot restrict who serves. It can be anyone, including an attorney or a witness
- Communicating their role
- Enforcing their role
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
  - Complainant's prior sexual history
  - Privileged information
  - Mental health
Cross Examination

Role of the Decision Maker

- Rulings by Decision Maker required after each question is asked by the advisor.
- Explanation only required where question not permitted.
Cross Examination

Impact of Not Participating

Exclusion of all statements of that party

Exception - DOE Blog

What if a party or witness appears, but does not answer all questions?
The Decision Maker/Hearing Committee will make determinations of relevancy during the hearing and in the final determination, including:

- Relevancy of questions posed by the advisors during cross examination
- Relevancy of information offered for consideration
- What evidence is relevant to the ultimate finding of responsibility
Evidence That is Not “Relevant”

• “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant,
  • unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  • if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

• “Require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

• Physical and mental health records and attorney-client privileged communications would fit within scope of this prohibition
Are the following relevant?

- Character evidence
- Polygraph examinations
- SANE reports
- Past conduct of complainant, respondent
Deliberations
Evaluating the Evidence

<table>
<thead>
<tr>
<th>Is it relevant?</th>
<th>Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.</th>
</tr>
</thead>
<tbody>
<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>
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.
Preponderance of the Evidence

More likely than not
Does not mean 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
Sanctioning is Determined by the Student Conduct Administrator

In determining appropriate sanctions, the Student Conduct Administrator will consider:

- any record of past violations of College policies, as well as the nature and severity of such past violation(s);
- whether the Respondent poses a continuing risk to the Complainant and/or the College community.
- The Impact/Mitigation Statements submitted by the parties
Written Determination of Responsibility: Sexual Misconduct Grievance Procedures

- The allegations
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation - Show your work!
- Sanctions and Remedies
- Procedure for appeal
Written Determination of Responsibility: Title IX Grievance Procedures

- The allegations
- Findings of fact
- Procedural History
- Conclusion of application of facts to the policy
- Rationale for each allegation—Show your work!
- Sanctions and Remedies
- Procedure for appeal
Appeals
Grounds for Appeal: Sexual Misconduct Grievance Procedures

(A) the Hearing Committee committed procedural errors that had a significant impact on the outcome of the case;

(B) New evidence that was not reasonably available at the time of the hearing before the Hearing Committee;

(C) the sanctions are not consistent with past practices or the severity of the alleged Sexual Misconduct.
Grounds for Appeal: Title IX Grievance Procedures

(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, and

(D) the sanctions are not consistent with past practices or the severity of the alleged Sexual Misconduct
Appeals
The Procedure

- The Procedure MUST BE FILED WITHIN 7 DAYS OF HEARING COMMITTEES WRITTEN DETERMINATION.
- RESPONSE FROM OTHER PARTY DUE WITHIN 7 DAYS.
- SUBMISSIONS MAY NOT BE LONGER THAN 5 PAGES.
- THREE-PERSON APPELLATE PANEL.
- DETERMINATION ISSUED IN WRITING.
Appellate Finding

The Appeals Committee shall render its decision in writing promptly after review of the materials provided. Should an Appeal Committee determine that one or more of the criteria of a successful appeal has been met, that Committee shall:

• dismiss the finding;
• modify the finding; or
• refer the matter to the appropriate hearing body for further review.

Once it has been determined that the appeal has been denied or modified, the matter is concluded.
The Requirement of Impartiality
Final Rule
§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

1. For or against complainants or respondents generally, or
2. An individual complainant or respondent
Final Rule
§106.45(b)(1)(iii)

Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution must receive training on...how to serve impartially, including avoiding prejudgment of the facts at issue, conflict of interest, and bias. This training material may not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.
Impermissible Bias

Making a decision, determination, or finding that is based on something other than the evidence and specific facts of the case.
What Constitutes Bias?

Fact specific, objective inquiry based in common sense

Includes:

- Decision making that is grounded in stereotypes
- Different treatment based on a person sex or other protected characteristic
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.
An Impartial Grievance Process Is...

- Not influenced by bias or conflicts of interest
- Committed to decisions based on an objective consideration of all the facts and evidence
- Reliable and accurate
- Legitimate
- Truth-seeking
Questions?

Email Us
info@grandriversolutions.com
Chantelle@grandriversolutions.com

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@GrandRiverSols
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