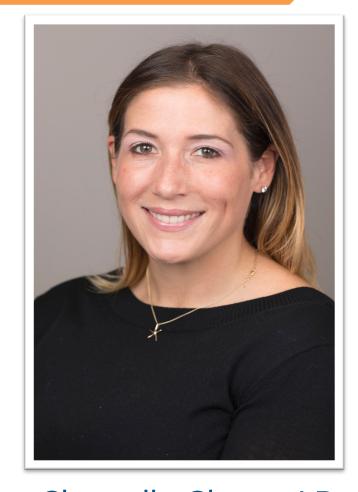


Sexual Misconduct Response Iona College

Chantelle Cleary

Director of Strategic Partnerships & Client Services May 2021

Meet Your Facilitator



Chantelle Cleary, J.D.
Director of Strategic
Partnerships & Client Services

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.





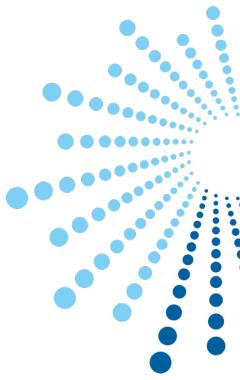
Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity



Today's Agenda



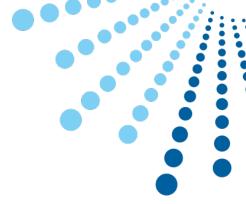




Iona College's Response to Sexual Misconduct

Narrowed jurisdiction and expansive procedural requirements

01



Sexual Misconduct

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.



College Title IX Coordinator

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.

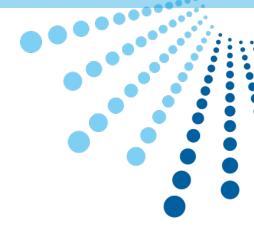




Title IX's Scope and Jurisdiction

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
- (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).

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

Type of Conduct

- Hostile Environment Sexual Harassment
- Quid Pro Quo
- Sexual Assault
- Dating/Domestic
 Violence
- Stalking

Ed Program or Activity

- On campus
- Campus
 Program,
 Activity,
 Building, and
- In the United States

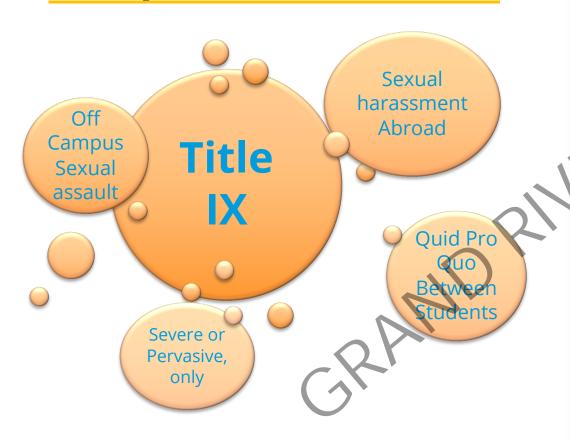
Required identity

 Complainant is participating or attempting to participate in the Ed Program or activity Apply 106.45 Procedures

Required Response:

Section 106.45 Procedures

Conduct Falling Outside the Scope of Title IX



Apply the Sexual Misconduct Grievance Procedure



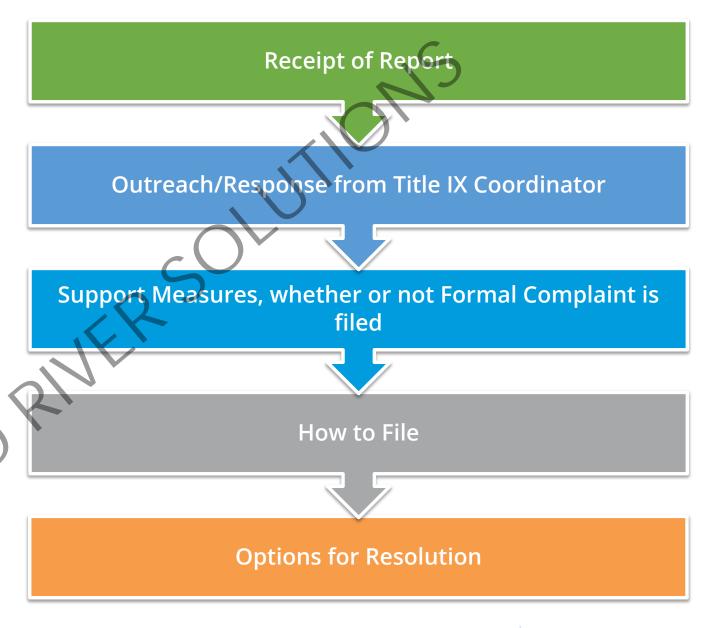
Receiving Reports and Determining the Applicable Procedures

03

Procedures



Initial Response Requirements



Request to Initiate Grievance Process

By complainant

By the Title IX Coordinator



Title IX Requires a Signed Formal Complaint

A Formal Complaint must include:

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

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;

Identity of Respondent, if known;

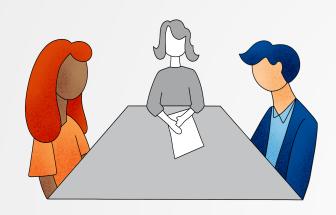
A request for <u>a</u> resolution.

Formal Complaints may be made to the Title IX Coordinator by US Mail, email, or in person.

Notice of Allegation Requirements

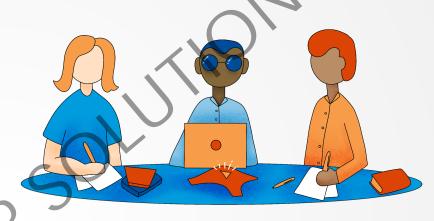
- Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:
 - the identities of the parties involved in the incident, if known,
 - the conduct allegedly constituting sexual harassment 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

RIVER



04

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



05

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.

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



Evidence Collection S



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)





Evidence collection

Investigator drafts a rep

Investigation Procedures

12

Draft report and evidence is shared with both parties

Parties have 3 days to make corrections and submit a written response that does not exceed 5 pages



The Investigation

Title IX Procedures

05(b)



Procedural Requirements for Investigations



Notice TO BOTH PARTIES



Equal opportunity to present evidence



An advisor o 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

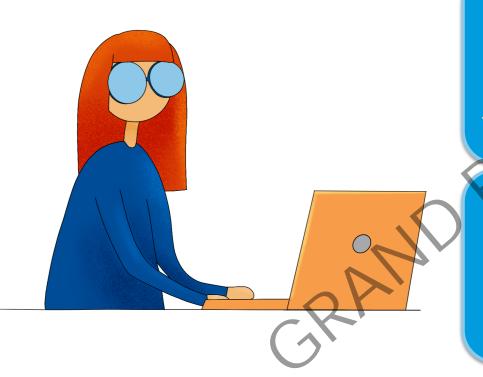


Report summarizing relevant evidence and 10 day review of report prior to hearing





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

"Relevant" Evidence 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 SOLUTIONIS

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GRAND RIVER SOLUTIONS



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
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 S

Sexual Misconduct Grievance Procedures

06(a)



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

Complainant

the person bringing the complaint

Respondent

the person against whom the complaint has been filed

Advisor

May not participate in the process

Witnesses

present in the room only when answering questions

Hearing Chair

coordinates all aspects of the hearing, ensures a fair and equitable hearing process;

Decision-Maker

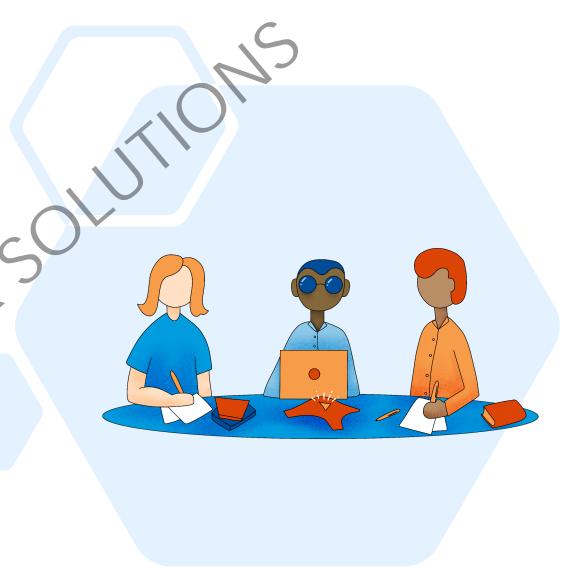
makes decision as to whether policy was violated

Hearing Facilitator

assists with the logistical coordination of the people, the space, technology, etc.

The Decision Makers

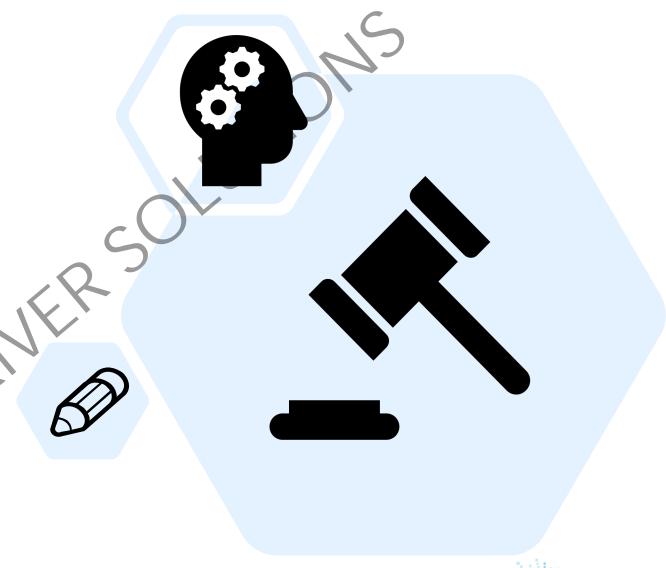
- Fact finders
- Will question the parties and the witness at the hearing
- 1-3 people
- They make the determination of responsibility





The Hearing Chair

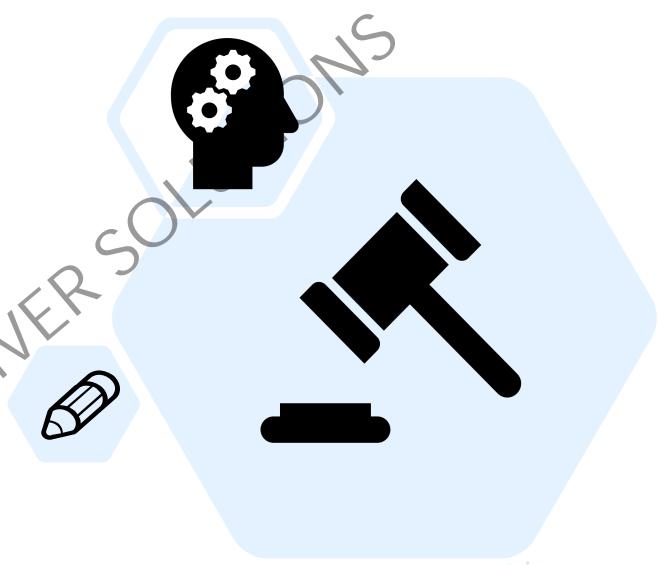
- Oversees the Process
- Maintains order/decorum
- Supports the panel
- Where there is a panel, the Chair will often take the lead in writing the decision





The Hearing Facilitator

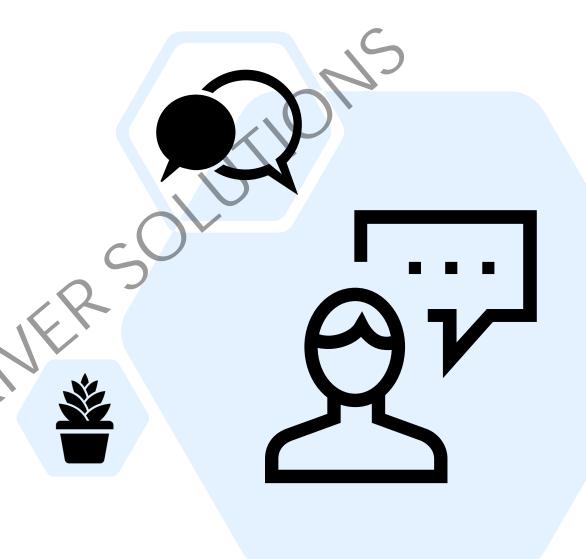
- Provides administrative support to the DM
- Coordinates the technology
- Coordinates the schedule
- Can be anyone, including the Title IX Coordinator



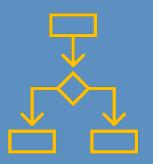


Hearing Advisors

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







The Hearing 50

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

Complainant

Respondent

Advisor

Witnesses

Hearing Chair

Decision-Maker

Hearing Facilitator

the person bringing the complaint

the person against whom the complaint has been filed

will conduct cross examination

present in the room only when answering questions

coordinates all aspects of the hearing, ensures a fair and equitable hearing process;

makes decision as to whether policy was violated

assists with the logistical coordination of the people, the space, technology, etc.

The Decision Makers

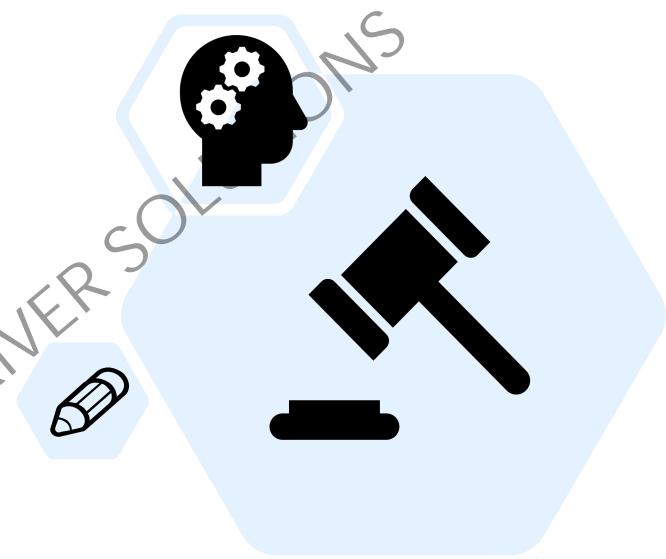
- Fact finders
- Will question the parties and the witness at the hearing
- Can be a single person, or a panel
- Can not be Title IX Coordinator, investigator, or appeal person





The Hearing Chair

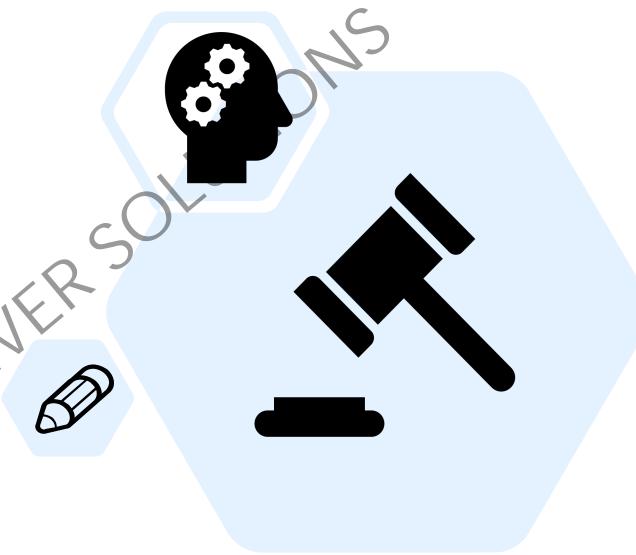
- Oversees the Process
- Maintains order/decorum
- Supports the panel
- Makes ruling
- Must Be a Decision Maker
- Where there is a panel, the Chair will often take the lead in writing the decision





The Hearing Facilitator

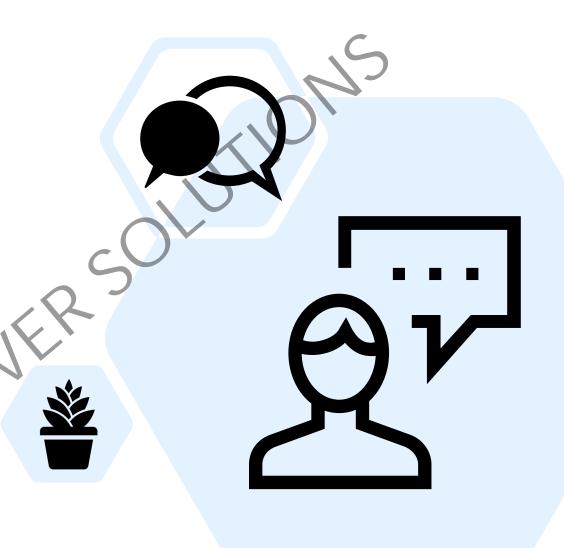
- Provides administrative support to the DM
- Coordinators the technology
- Coordinates the schedule
- Can be anyone, including the Title IX Coordinator





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?

What is Relevant at the Hearing and in the Final Determination



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

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!

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







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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



AppealsThe 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:

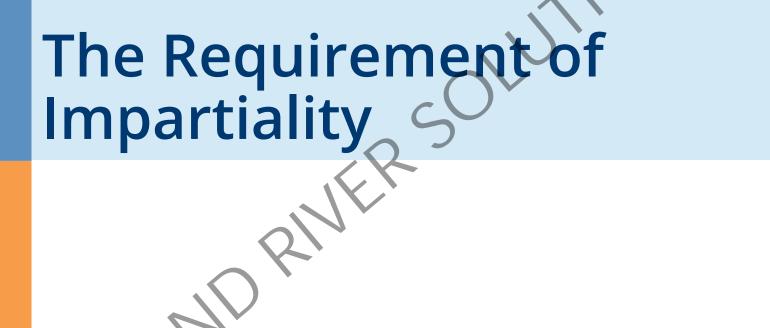
- dismiss the finding;
- modify the finding; or
- refer the matter to the appropriate hearing body for further review.

Once it has been determined that the appeal has been denied or modified, the matter is concluded.





08





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

 For or against complainants or respondents generally, or

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:

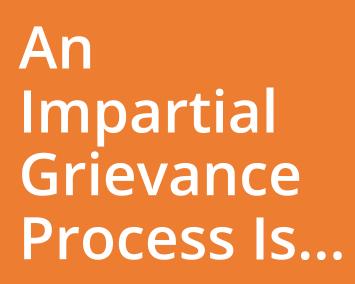
- Decision making that is grounded in stereotypes
- Different treatment based on a person sex or other protected characteristic





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.





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

Follow Us







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