Hearings in a Post Regulatory World

Day One

Martha Compton | January 2023
Meet Your Facilitator

Martha consults and trains nationally on Title IX and student conduct and has previously served as a technical trainer for Department of Justice VAWA campus grantees. Martha is a former President of the Association for Student Conduct Administration, has been a faculty member for ASCA’s Gehring Academy, and was part of the core team that developed ASCA’s Sexual Misconduct Institute. A student conduct professional for over 20 years, Martha is also a former dean of students and has extensive experience in residence life, behavior intervention, emergency services, orientation, leadership, and working with student organizations.

Martha Compton
She/her
Director of Strategic Partnerships and Client Relations
About Us

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
Agenda

1. Title IX Requirements for Hearings
2. Process Participants
3. Pre-Hearing Tasks
4. The Hearing
5. After The Hearing
6. Practical Application
Title IX Requirements For Hearings
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.”
Section 106.30: Sexual Harassment

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

AND... Only Covered, IF:

<table>
<thead>
<tr>
<th>Place of Conduct</th>
<th>Required Identity</th>
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<tr>
<td>• On campus <strong>OR</strong></td>
<td>• Complainant participating/attempting to participate in Program or Activity, AND</td>
</tr>
<tr>
<td>• Campus Program, Activity, Building, <strong>AND</strong></td>
<td>• Control over Respondent</td>
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<td>• In the United States</td>
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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
**Procedural Requirements for Hearings**

- Must be live, but can be conducted remotely
- Cannot compel participation of parties or witnesses
- 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
The Requirement of Impartiality
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
Section 106.45(b)(1)(iii)

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

• For or against complaints or respondents generally, or
• An individual complainant or respondent
Section 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.
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.

All hearings must be recorded.

Participants must be able to communicate during the hearing

The parties with the decision maker(s)
The parties with their advisors
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
## Evaluating the Evidence

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
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<td><strong>Is it relevant?</strong></td>
<td>Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.</td>
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<td><strong>Is it authentic?</strong></td>
<td>Is the item what it purports to be?</td>
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<tr>
<td><strong>Is it credible?</strong></td>
<td>Is it convincing?</td>
</tr>
<tr>
<td><strong>Is it reliable?</strong></td>
<td>Can you trust it or rely on it?</td>
</tr>
<tr>
<td><strong>What weight, if any, should it be given?</strong></td>
<td>Weight is determined by the finder of fact!</td>
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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
Process Participants
## The Participants

### The Parties

<table>
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<tr>
<th>Complainant</th>
<th>Respondent</th>
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<tr>
<td>An individual who is alleged to be the victim of conduct that could constitute sexual harassment.</td>
<td>An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</td>
</tr>
</tbody>
</table>
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.
- Questions about their opinions on credibility, recommended findings, or determinations, are prohibited. If such information is introduced, the Chair will direct that it be disregarded.
There are two types of advisors:

- Advisor (throughout the whole process)
- Hearing Advisor (hearing, for purposes of asking questions)
The Participants

Advisors

- 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 their advisees at all meetings, interviews, and the hearing
- Advisors should help the Parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith
- May not speak on behalf of their advisee or otherwise participate, except that the advisor will conduct cross examination at the hearing.
- Advisors are expected to advise their advisees without disrupting proceedings
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.
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
- Optional, not required
The Participants

The 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 deliberation statement
- Assists in preparing the Notice of Outcome
The Participants
The Decision-Makers

- A panel
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate
The Participants
The Hearing Chair

- Is a decision-maker
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written deliberation statement
- Assists in preparing the Notice of Outcome
Pre-Hearing Tasks: Hearing Panel & Chair

What should be done in advance of the hearing
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

- 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
- May convene a pre-hearing meeting
- Anticipate challenges or issues
- Prepare the script
<table>
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<th>Step</th>
<th>Description</th>
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<tr>
<td>1</td>
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<td>2</td>
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<td>Determine areas for further exploration</td>
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<td>5</td>
<td>Develop questions of your own</td>
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Hearing Panel Chair

- Compile questions on behalf of the Panel
- May convene a pre-hearing meeting
- Review questions submitted by the parties
- Anticipate challenges or issues
- Become familiar with the script
Common Areas of Exploration

- Credibility?
- Clarification on timeline?
- Thought process?
- Inconsistencies?
The Hearing
Order of the Proceedings

01 Introductions and instructions by the Chair; Opening Statements

02 Presentation by Investigator

03 Presentation of information and questioning of the parties and witnesses

04 Closing Statements

05 Deliberation & Determination
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, the complainant goes first.
Opening Introductions and Instructions by the Chair

The University has a script for this portion of the proceedings, and it should be used. Introduction of the participants. Overview of the procedures. Overall goal: manage expectations. Be prepared to answer questions.
Presentation of Information
Presentation of Information & Questioning of the Parties

01 The Hearing Panel will question Complainant first
02 Cross examination of Complainant will occur next
03 Follow up by the Hearing Panel
04 The Hearing Panel will question Respondent second
05 Cross examination of Respondent will occur next
06 Follow up by the Hearing Panel
Questioning of the Witnesses

01 The Chair will determine the order of questioning of witnesses

02 The Hearing Panel will question first

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

04 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.

• 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
Format of Questioning

- The Hearing Panel or the advisor will remain seated during questioning.
- Questions will be posed orally.
- Questions must be relevant.
What constitutes a relevant question?

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.”
When is evidence relevant?

- 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
Irrelevant and Impermissible Questions

- Information protected by an un-waived legal privilege
- Medical treatment and care
- Unduly repetitious or duplicative questions
- Information that otherwise irrelevant
- Complainant’s prior sexual history, with limited exceptions.
When Questioning....

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

- Were you interviewed?
- Did you see the interview notes?
- Did the notes reflect your recollection at the time?
- As you sit here today, has anything changed?
- Did you review your notes before coming to this hearing?
- Did you speak with any one about your testimony today prior to this hearing?
Common Areas of Where Clarity or Additional Information is Needed

- Credibility
- Reliability
- Timelines
- Inconsistencies

- Details about the alleged misconduct
- Facts related to the elements of the alleged policy violation
- Relevancy of Certain Items of Evidence
- Factual Basis for Opinions
Questioning to Assess Reliability

- Inherent plausibility
- Logic
- Corroboration
- Other indicia of reliability
Questioning to Assess Credibility

No formula exists, but consider asking questions about the following:

- opportunity to view
- ability to recall
- motive to fabricate
- plausibility
- consistency
- character, background, experience, and training
- coaching
Credibility Versus Reliability

**Reliability**
- 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.
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?
Asking Questions to Assess Authenticity
Investigating the Products of the Investigation

Never assume that an item of evidence is authentic. Ask questions, request proof. Request further investigation of the authenticity if necessary.
Is it authentic?

- Never assume that an item of evidence is authentic.

- Question the person who offered the evidence.
- Request original evidence.
- Obtain original evidence from the source.
- Have others review and comment on authenticity.
- Are there other records that would corroborate?
What are the “Hard” Questions

- Details about the sexual contact
- Inconsistent evidence/information
- Alcohol or drug consumption
- Seemingly inconsistent behaviors
- What they were wearing
- Probing into reports of lack of memory
How to Ask the Hard Questions

Lay a foundation for the questions

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

Be deliberate and mindful in your questions:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...
Special Considerations for Questioning the Investigator

• The Investigator’s participation in the hearing is as a fact witness;
• Questions directed towards the Investigator shall be limited to facts collected by the Investigator pertinent to the Investigation;
• Neither the Advisors nor the Decision-maker(s) should ask the Investigator(s) their opinions on credibility, recommended findings, or determinations;
• The Investigators, Advisors, and parties will refrain from discussion of or questions about these assessments. If such information is introduced, the Chair will direct that it be disregarded.
### Special Considerations for Questioning the Investigator

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<td><strong>Ask questions about how they conducted their investigation (if not in the report)</strong></td>
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<td><strong>Explore the investigator’s decision making (if not in the report)</strong></td>
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<tr>
<td><strong>Seek clarity about evidence collected</strong></td>
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<tr>
<td><em>Where it came from</em> <em>Authenticity of the evidence</em></td>
</tr>
<tr>
<td><strong>Ask factual questions that will assist in evaluation of the evidence</strong></td>
</tr>
<tr>
<td><strong>If bias is not in issue at the hearing, the Chair should not permit irrelevant questions of the investigator that probe for bias.</strong></td>
</tr>
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Special Considerations for Panels

- If a panel, decide in advance who will take the lead on questioning
- Go topic by topic
- Ask other panelists if they have questions before moving on
- Do not speak over each other
- Pay attention to the questions of other panelists
- Ok to take breaks to consult with each other, to reflect, to consult with the TIXC or counsel
The Decision Maker’s Role in Advisor Questioning
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
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.

Chair will determine whether the question will be permitted, disallowed, or rephrased. The Chair may explore arguments regarding relevance with the Advisors.

The Chair will limit or disallow questions on the basis that they are irrelevant, unduly repetitious (and thus irrelevant), or abusive.

The Chair will state their decision on the question for the record and advise the Party/Witness to whom the question was directed, accordingly. The Chair will explain any decision to exclude a question as not relevant, or to reframe it for relevance.

The Chair has final say on all questions and determinations of relevance. The parties and their advisors are 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.
When Assessing Relevance, the Decision Maker Can:

- Ask the Advisor (Process A) or Party (Process B) why their question is relevant
- Take a break
- Ask their own questions of the party/witness
- Review the hearing record
After the Hearing
Deliberations
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 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.
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...
  • Complainant reports that they and Respondent ate ice cream prior to the incident
  • Respondent says that they did not eat ice cream
  • Witness 1 produces a timestamped photo of Respondent eating ice cream

• Next steps?
Policy Analysis

• Break down the policy into elements
• Organize the facts by the element to which they relate
Allegation: Fondling

Fondling is the:
- touching of the private body parts of another person
- for the purpose of sexual gratification,
- Forcibly and/or without the consent of the Complainant,
- including instances where the Complainant is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.
## Analysis Grid

<table>
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<th>For the purpose of sexual gratification</th>
<th>Without consent due to lack of capacity</th>
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<td>Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.</td>
<td>Respondent acknowledges and admits this element in their statement with investigators. “We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants…”</td>
<td>Complainant: drank more than 12 drinks, vomited, no recall Respondent: C was aware and participating Witness 1: observed C vomit Witness 2: C was playing beer pong and could barely stand Witness 3: C was drunk but seemed fine Witness 4: carried C to the basement couch and left her there to sleep it off.</td>
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Apply Preponderance Standard to Each Element

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Did You Also Analyze...?  
(if required by policy)

- 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

End the harassment, prevent its recurrence, remedy the harm

What steps would be reasonably calculated to end harassment and prevent recurrence?
Sanctioning

- State law
- System policy
- Learning environment
- Measures available
The Sanction Does Not Undo the Finding

No lesser sanction if you disagree with findings

Sanctioning officer must assume findings are correct
Determining the Proper Sanction

- Consistency
- Foreseeability of repeated conduct
- Past conduct
- Does bias creep in?
- Remorse?
- Victim impact?
Aggravating Circumstances

- Premeditation
- Predation
- Physical violence
- Repeated violation
- Multiple policy violations in one incident
- Harm to others, impact on complainant and/or community
- Did the behavior continue after intervention?
- Effort to conceal or hide the incident?
- Refusal to attend past trainings
- Past failures to comply with directives
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
The Final Determination Should STAND On Its Own

- Simple and Easy to Comprehend
- Transparent/Clear
- Accurate
- Neutral/Unbiased
- Draw Attention to Significant Evidence and Issues

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Questions?

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