

**GRAND RIVER** | SOLUTIONS

# **University of Tennessee System-Wide Training**

**May 2020 Title IX Regulations  
Day Two**

Jody Shipper

## Meet Your Facilitator



**Jody Shipper, J.D.**

Co-Founder and Managing Director

Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Jody received her J.D. from the University of California, Hastings College of Law and her bachelor's degree from Georgetown University's School of Foreign Service.

# About Us

Grand River Solutions provides Title IX, equity, and Clery Act consulting services. Together, our experts have decades of direct, on-campus experience at both small and large, public and private institutions. This practical expertise derived from years of hands-on experience enables our team to offer customized solutions unique to your educational institution's needs. Grand River has a suite of creative, cost-effective and compliant solutions to help schools meet their needs in innovative ways.

# Agenda

01

**Brief Overview of Title IX  
Grievance Procedure**

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02

**Pre-Hearing Tasks**

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**Due Process Considerations**

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**The Hearing Process**

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**Conducting an Impartial  
Process**

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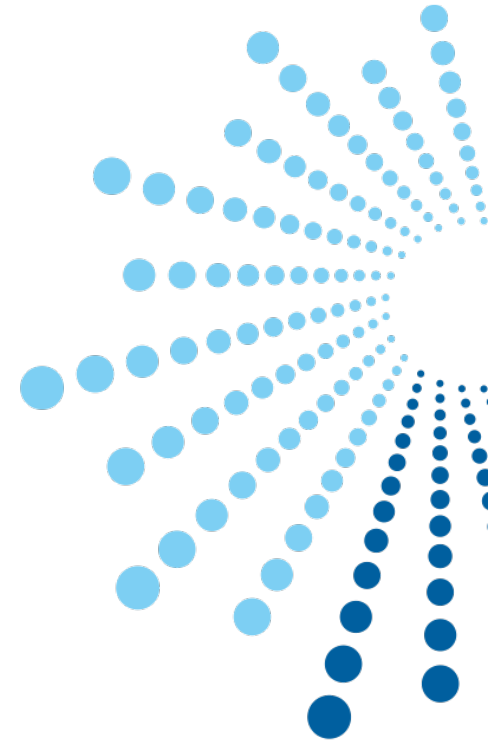
**Deliberations**

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07

**Appeals**

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# Brief Overview of Title IX Grievance Procedure



01

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# The May 2020 Title IX Regulations Cover A Narrow Scope of Title IX

**Discrimination, harassment, retaliation, stalking, DV, sexual assault that does NOT meet the new, detailed definitions**

**Sexual Harassment, Sexual Assault, DV, Stalking that DOES meet new definitions**

**NOT defined in  
regulations**

**Defined in  
regulations**

**Only THESE get the new processes**

# 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
- (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).



## **BUT WAIT, THERE'S MORE!**

### **1. Definition:**

Does this meet the definition?

**If yes, continue. If no, not IX**

### **2. Location:**

On campus, within the United States;

In building owned/controlled by a recognized student org., in the U.S.;

Part of a program or activity, and within the United States.

**If yes to one of the above, continue. If no, not IX**

### **3. The institution has control over the respondent**

**If yes, continue. If no, not IX**

### **4. Complainant is accessing or attempting to access a university program or activity, in the U.S.**

**If yes, use New Title IX Process**

# Title IX Application Post May 2020 Regulations





## Overview of Procedures:

Mandatory Response

Supportive Measures

Formal Complaint

Mandatory Dismissal

Investigation

Hearing \*\*\*\*\*

Appeal

# 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

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

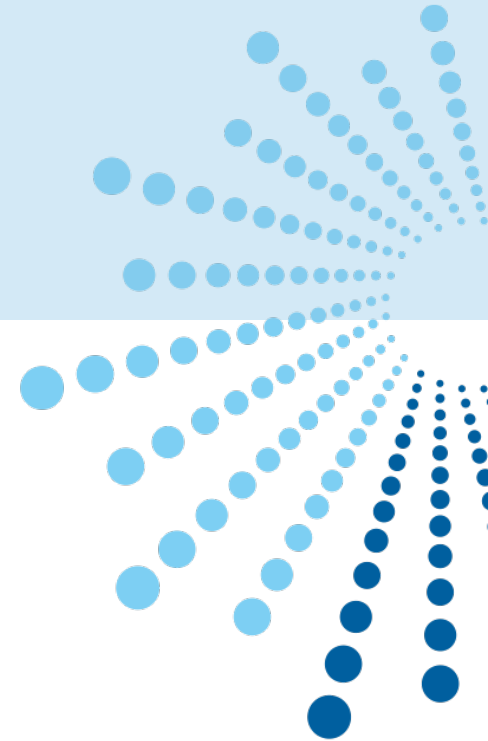
Written decision must be issued that includes finding and sanction

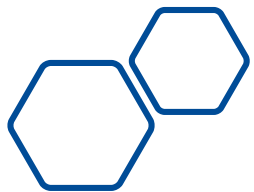


## Pre-Hearing Tasks

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# Logistics

Scheduling participants

Reserving space

Provision of accommodations

Requests for delays;  
adjournments

# The Parties and their Advisors, and the Witnesses

## Pre-hearing instructions

- Via conference or meeting
- In writing

## Set expectations

- Format
- Roles of the parties
- Participation
- Evidence
- Decorum
- Impact of not following rules



# The Decision Maker(s) Pre-Hearing Tasks



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



Develop questions of your own



Anticipate the party's questions



Anticipate challenges or issues

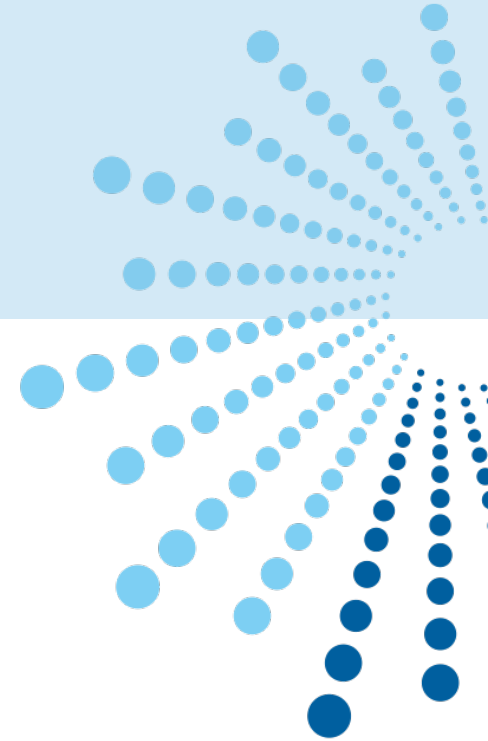




03

# Due Process Considerations

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# 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

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Clear Procedures

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Due/Fair Process

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Fair, Equitable, and Neutral

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Consistency

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Trauma Informed

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Well Trained Personnel

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# Clear Procedures

## The Process

- Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings, impact statements, etc.

## The Players

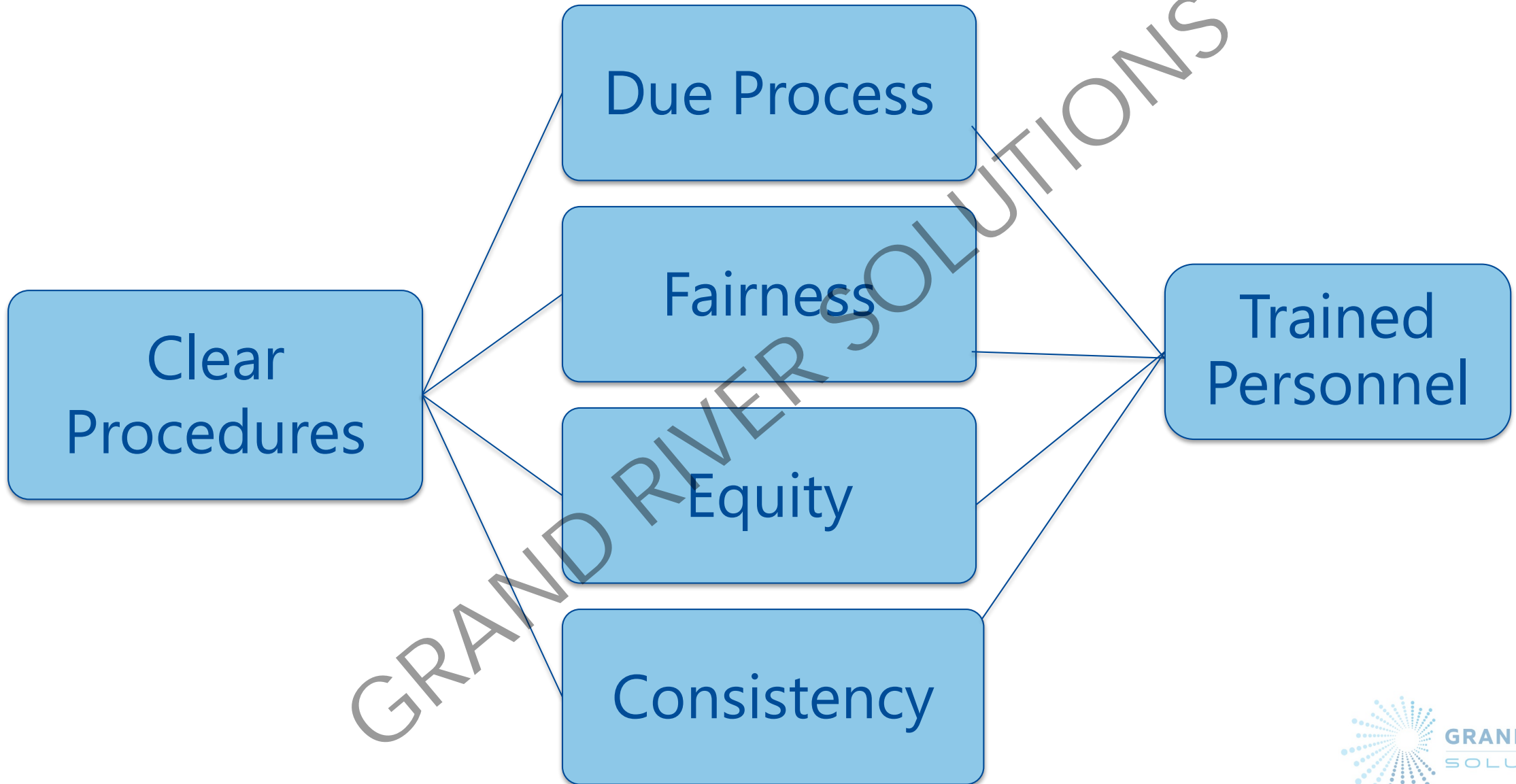
- The roles of all participants

## The Evidence

- Relevancy, Exclusions, Timing of submission, how to submit, who decides, etc.

## The Outcome

- Deliberations; Notice; manner and method communicated.

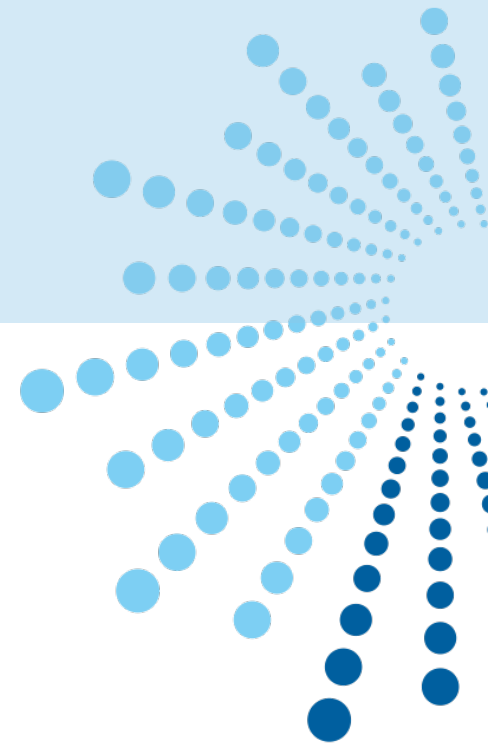




# The Hearing Process

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# Hearing Participants

Complainant

Respondent

Advisor

Adjudicator(s) or Panelist(s)

Investigator

Witnesses

Hearing

Coordinator/Officer

Decision-Maker

Administrative Staff



# Opening Instructions by the Chair

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

*This should be scripted and used consistently.*



# Opening Statements

- Permitted, but not required
- Policy should include purpose and scope
- If permitted, consider
  - Requiring submission prior to hearing
  - Word limit
  - Time limit

# Testimony

Procedures should be clear about:

- Order of/parties and witnesses
  - Could simply leave this up to the decision maker
- Order of examination
  - Questioning by the decision maker
  - Cross examination by the advisor
  - Will the advisor be permitted to question their own party?
  - Will there be a second round of questioning?
- Consistency is essential. Consider putting this all in your procedures.

# Cross Examination

## Who does it?

- Must be conducted by the advisor
- If party does not appear or does not participate, advisor can appear and cross
- If party does not have an advisor, institution must provide one

# Cross Examination Permissible Questions

- Questions must be relevant
- Not relevant
  - Duplicative questions
  - Questions that attempt to elicit information about
    - Complainants prior sexual history
    - Privileged information
    - Mental health

# Cross Examination

## Role of the Decision Maker

- Rulings by Decision Maker required
  - Explanation only required where question not permitted

# Cross-Examination Conundrum: Rules of a Courtroom Do Not Apply

- Is **Cross-examination** limited to questioning only on matters that were raised during **direct examination**. NO?
- Badgering a witness
- Asked and answered
- Unduly Harassing
- Leading questions

# Can the Hearing Officer Exclude Questions?

“A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant”

“The Department purposefully designed these final regulations to allow recipients to retain flexibility to adopt rules of decorum that prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner.”



# Form of the Question

So you're really saying that . . .

Why did you . . . ?

Isn't it true that (followed by long statement)

A statement, not a question: Is there a question in there?

# Asking that a Question be Rephrased

- Party or witness cannot understand the question
- Advisor struggling to form a question
- Compound questions
- Abusive, disrespectful, intimidating questions

# Cross Examination

## Impact of Not Appearing

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

## Closing Statements

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

# Common Challenges

- Non-appearance by a party or witness
- Non-appearance by an advisor
- Party or witness appears but declines to answer some (or all) questions
- Disruptions
- Maintaining Decorum

# Tips for Increasing Efficiency

01

Be prepared

02

Have an  
experienced chair

03

Have back up  
plans for  
technology issues

04

Require pre-  
hearing written  
submissions

- of opening statements
- of questions in

# Other Decisions

- Will you include Opening, Closing, or Impact Statements? NOT required, but you need to decide.
- How will questioning take place? Direct cross examination, indirect?
- How will questions be submitted?
- Will there be any restrictions on questions that can be asked, such as due to relevancy, already asked and answered, unduly harassing?
- If done remotely, how will the technology be set up?
- If in person, room set-up and who is in the room?



# Conducting an Impartial Process

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# Prejudging

- “Believe all victims”?
- Is bringing forward a case a “judgment”?
- Avoiding any presumption of responsibility

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# Bias? Conflict of Interest

- Being anti-rape
- The investigator once took a women's studies course
- The appeals officer wrote on Facebook last week that if a boy is accused, he definitely did at least *something* wrong
- The Title IX Coordinator went to the same college as the Complainant's mother
- The Title IX Coordinator's daughter works for the Complainant's mother

# Credibility Versus Reliability

- Logic
- Plausibility
- Consistent/inconsistent
- Ability to observe
- Ability to recall
- Corroboration

Does the demeanor of the person ever matter?

Where does bias fit in?

# The Dangers of Assessing Credibility

Cultural cues that you do not recognize

A person just “seems believable”

Their story makes sense to me

I know how to spot a liar

## Gesture #4: Denying Eye Contact



Denying eye contact is often a sign of discomfort.

Usually people make eye contact for about half of the conversation, so if you notice their eyes constantly wavering, especially during a touchy subject, you may be dealing with a liar.

all right reserved to Body Language Cards  
[www.bodylanguagecards.com](http://www.bodylanguagecards.com)



# Deliberations

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# Weighing the Evidence & Making A Determination

- 1) Evaluate the evidence collected to determine what factually is more likely to have occurred, and then
- 2) Analyze whether the conduct that happened constitutes a violation of the school's policies

# 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



# Policy Analysis

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





# Report, Method 1

- Determine the material facts
  - Break policy into elements
- Determine which material facts are:
  - Undisputed – consistent, detailed and plausible, and/or agreed upon by the parties [e.g. X and Y attended a fraternity party on April 5, 2019]
  - Disputed – unsupported by documentary or other evidence, or are facts about which an element of doubt remains [e.g. X alleged that Y kissed her without her consent around 1 am at the party, and Y asserted he never kissed X and went home early]

# For Those Facts that are in Dispute

Why are some facts are accepted, and others rejected? SHOW YOUR WORK

“While Y maintained that he never kissed X and went home early, witnesses 2, 3, and 4 corroborated that Y was at the party until 3 a.m. In addition, a photo was submitted by witness 4 showing Y kissing X. Therefore, I find that Y’s version of events cannot be credited as true.”



## Appeals

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## Appeals: Mandatory Grounds

(A) Procedural irregularity that affected the outcome of the matter;

(B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or

(C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

# Permissible Grounds for Appeal

- Non-appearance by a party or witness
- Non-appearance by an advisor
- Party or witness appears but declines to answer some (or all) questions
- Questions that were deemed relevant/not relevant
- Bias

# Let's Practice

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Which  
questions will  
you allow?

Say hi!

Pick a scribe

Discuss

- Which are relevant?
- Groups 1 & 2: Complainant
- Groups 3 & 4: Respondent
- Groups 5 & 6: Witnesses

# Report Out

Groups 1 & 2: Complainant

Groups 3 & 4: Respondent

Groups 5 & 6: Witnesses



# Asking to rephrase or reframe?



Can you rephrase the question?



Disrespectful, abusive, intimidating?

# Questions?



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