Hearings in a Post Regulatory World

Bucknell University

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Martha Compton is a nationally recognized expert in student conduct and has over 20 years of experience in higher education, specifically investigating and resolving student conduct, sexual misconduct, and interpersonal violence matters. Martha is the current past-president of the Association for Student Conduct Administration. She speaks and presents frequently across the country on developing policy and conducting thorough and impartial investigations and hearings. Martha is currently a Ph.D. student at Ohio University and received her master’s degree from Appalachian State University and her bachelor’s degree from Keene State College.
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

01 Title IX Requirements for Hearings
02 Process Participants
03 Pre-Hearing Tasks
04 The Hearing
05 After the Hearing
06 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:

- **Place of Conduct**
  - On campus
  - Campus Program, Activity, Building, and
  - In the United States

- **Required Identity**
  - Complainant participating/attempting to participate in Program or Activity, AND
  - Control over Respondent
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
- Individuals cannot be compelled to participate
- 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 an advisor 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
The Requirement of Impartiality
Section 106.45(b)(1)(iii)

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

For or against complainants or respondents generally, or

An individual complainant or respondent
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.
Impact of Not Submitting to Cross Examination:
Appendix A proceedings

Exclusion of all statements of that party or witness
Cross Examination

Exceptions to the Exclusionary Rule (Appendix A proceedings)

- Statements that consist of or are made in the course of the prohibited conduct

- When cross examination is waived or not conducted
When Has a Party Submitted to Cross Examination?

- The party or witness has answered all questions deemed relevant on cross.
- A party or witness appears for cross, but the advisor does not ask any relevant questions.
- A party or witness refuses to answer one relevant question posed by advisor.
- A party or witness only answers the decision maker’s questions and refuses to answer questions on cross.
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

- Review and Assess Evidence
- Make Findings of Fact
- Determine Responsibility / Findings of Responsibility
- Determine Sanction and Remedy
## Evaluating the Evidence

<table>
<thead>
<tr>
<th>Question</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>Is it relevant?</td>
<td>Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.</td>
</tr>
<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 rely 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>
Trauma-informed practices provide tools/techniques for interviewing and engaging with the Complainant, Respondent, and Witnesses.
Process Participants
## The Participants

### The Parties

<table>
<thead>
<tr>
<th>Complainant</th>
<th>Respondent</th>
</tr>
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<tbody>
<tr>
<td>“Any individual who has allegedly experienced a violation of this Policy.”</td>
<td>“Any student or student organization alleged to have violated this Policy.”</td>
</tr>
</tbody>
</table>
The Participants

The Investigator

- Attends at the request of the Hearing Panel Chair
- Submits to questioning by the Decisionmaker(s) and the parties (through their Advisers).
- 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.
The Participants

Advisers

- Can be anyone, including a lawyer, a parent, a friend, and a witness
- No particular training or experience required (College appointed advisors will be trained)
- Can accompany their advisees at all meetings, interviews, and the hearing
- Advisers 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.
- Advisers are expected to advise their advisees without disrupting proceedings
Any Adviser who oversteps their role as defined by this policy will be warned. If the Adviser continues to disrupt or otherwise fails to respect the limits of the Adviser role, the meeting will be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator will determine how to address the Adviser's non-compliance and future role.
The Participants
The Hearing Facilitator*

- Manages the recording, witness logistics, party logistics, curation of documents, separation of the parties, and other administrative elements of the hearing process
- Non-Voting
The Participants
The Hearing Panel (non-Appendix A)

- Panel of three, one serving as Chair
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate
The Participants
The Hearing Chair/Officer

- 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 or Hearing Officer's Report
- Assists in preparing the Notice of Outcome
Pre-Hearing Tasks: Hearing Panel & Chair

What should be done in advance of the hearing
Hearing Panel

- Review evidence and report
- Review applicable policy and procedures
- Preliminary analysis of the evidence
- Determine areas for further exploration
- Develop questions of your own
- Review questions submitted by the parties
- Anticipate challenges or issues
- Prepare the script
Common Areas of Exploration

- Credibility?
- Clarification on timeline?
- The thought process?
- Inconsistencies?
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 Expectations
Order of the Proceedings

01 Opening introductions and instructions by the Chair
02 Reading of Allegations
03 Presentation of information and questioning of the parties and witnesses
04 Closing Statements
05 Deliberation & Determination
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.
- Be prepared to answer questions.
Presentation of Information
Presentation of Information & Questioning of the Parties

01 The Hearing Panel will question Complainant first

02 Adviser questioning of Complainant will occur next

03 Follow up by the Hearing Panel

04 The Hearing Panel will question Respondent second

05 Adviser questioning 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 Adviser cross-examination will occur next

04 Follow up by the Hearing Panel
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

Questions that seek to illicit irrelevant information
- Complainant’s prior sexual history
- Information protected by an unwaived legal privilege
- Medical treatment and care

Duplicative questions

Information that is otherwise irrelevant
When Questioning….

- Be efficient.
- Be prepared to go down a road that you hadn’t considered or anticipated exploring.
- Explore areas where additional information or clarity is needed.
- Listen to the answers.
- 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

- 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
- Credibility
- Reliability
- Timelines
- Inconsistencies
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:

<table>
<thead>
<tr>
<th>Question</th>
</tr>
</thead>
<tbody>
<tr>
<td>opportunity to view</td>
</tr>
<tr>
<td>ability to recall</td>
</tr>
<tr>
<td>motive to fabricate</td>
</tr>
<tr>
<td>plausibility</td>
</tr>
<tr>
<td>consistency</td>
</tr>
<tr>
<td>character, background, experience, and training</td>
</tr>
<tr>
<td>coaching</td>
</tr>
</tbody>
</table>
# Credibility Versus Reliability

## Reliable Evidence
- 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?
Assessing Authenticity
Investigating the products of the Investigation

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

- Question the person who offered the evidence
- Request originals
- Obtain originals 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
- Seemingly inconsistent behaviors
- Inconsistent evidence/information
- What they were wearing
- Alcohol or drug consumption
- 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 Advisers nor the Decision-maker(s) should ask the Investigator(s) their opinions on credibility, recommended findings, or determinations;
- The Investigators, Advisers, 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.
<table>
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<th>Special Considerations for Questioning the Investigator</th>
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<tr>
<td>1. Ask questions about how they conducted their investigation</td>
</tr>
<tr>
<td>2. Explore the investigators decision making</td>
</tr>
<tr>
<td>3. Seek clarity about evidence collected</td>
</tr>
<tr>
<td>4. Authenticity of the evidence</td>
</tr>
<tr>
<td>5. Ask factual questions that will assist in evaluation of the evidence</td>
</tr>
<tr>
<td>6. If bias is not in issue at the hearing, the Chair should not permit irrelevant questions of the investigator that probe for bias.</td>
</tr>
</tbody>
</table>
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.
To Cross or Not to Cross
Special Considerations for Advisers

WILL SUBMITTING TO CROSS EXAMINATION SERVE THE PARTY’S INTERESTS?

WILL CONDUCTING CROSS EXAMINATION SERVE THE PARTY’S INTERESTS?
The Decision Maker’s Role in Adviser Questioning
# Cross Examination

## Who does it?

<table>
<thead>
<tr>
<th>Must be conducted by the advisor</th>
<th>If party does not appear or does not participate, advisor can appear and cross</th>
<th>If party does not have an advisor, institution must provide one</th>
</tr>
</thead>
</table>

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After the Adviser 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 Advisers.

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 adviser why their question is relevant
- Take a break
- Ask their own questions of the party/witness
- Review the hearing record
Impact of Not Submitting to Cross Examination (Appendix A proceedings)

Exclusion of all statements of that party or witness
When a Party or Witness Declines to Answer a Relevant Questions Posed by an Adviser

The Chair should:

- Remind the party of the impact of not submitting to cross examination;
- Pause the proceedings to allow the party or witness to reconsider.
After the Hearing
Deliberations
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
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>
<thead>
<tr>
<th>Touching of the private body parts of another person</th>
<th>For the purpose of sexual gratification</th>
<th>Without consent due to lack of capacity</th>
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<tbody>
<tr>
<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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| **Undisputed:** Complainant and Respondent agree that there was contact between Respondent’s hand and Complainant’s vagina. | **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…” | **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. |
Did You Also Analyze...?
(Appendix A proceedings)

- 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?
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
Practical Application
Scenario 1

During the hearing, Witness 1 appears. Witness 1 answers all relevant questions by the Hearing Panel, the Complainant’s Adviser, and the Respondent’s Adviser. After cross by both Advisers, the Hearing Panel asks a second round of questions. Witness 1, who is now tired and frustrated, refuses to answer any of the Hearing Panel’s follow up questions.

- Can the Hearing Panel rely upon/consider the statements of Witness 1?
Scenario 2A

Respondent provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations.

- The Investigator determines the report is irrelevant. Must the Investigator share the report with the decision maker?
Scenario 2B

Respondent provides a polygraph report to Investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations. The polygrapher appears and declines to answer all questions posed on cross by Complainant’s advisor.

• Can the Hearing Panel consider the answers to other questions during the hearing? The report?
Scenario 2C

Respondent provides a polygraph report to Investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations. The polygrapher appears and answers all relevant questions on cross.

• Must the Hearing Panel find Respondent not responsible because of the findings in the report?
Scenario 3

Complainant provides records of a sexual assault forensic exam. In the record, the nurse notes that Complainant had bruising on her inner thighs and abrasions on her cervix. The nurse does not appear at the hearing. Complaint testifies and fully submits to cross. In her testimony she states that she saw bruises on her inner thighs and that the nurse told her about the injuries to her cervix.

- Can the HP consider evidence of the inner thigh injuries?
- Can the HP consider evidence of the injuries to C’s cervix?
Scenario 4

Respondent appears at the hearing with Witness 7. Respondent would like Witness 7 to provide information testimony about text messages between them and Complainant that indicate that Complainant has made the allegations up.

- Can the HP hear from Witness 7 at the hearing?
Questions?

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