



GRAND RIVER | SOLUTIONS

Being an Effective Title IX Professional: From Investigations to Hearing

Washington College

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September 2023

Meet Your Facilitators



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He/Him/His

Senior Solutions Specialist



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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

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**Title IX Process Requirements
and Participants**

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Practical Application

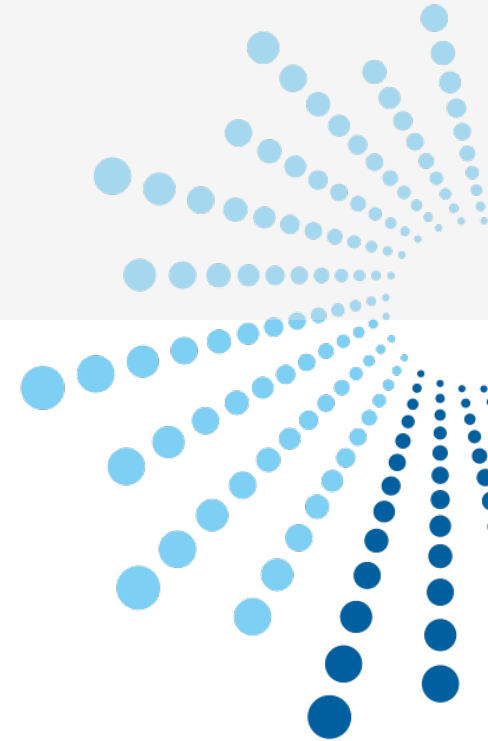
Sensitivity Warning

- We are going to be discussing sensitive topics throughout the training today. If you feel as though you need to take a break from the material for any reason, please feel free to do so.



Title IX Requirements for Investigations & Hearings

01





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
- (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).

AND... Only Covered, IF:

Place of Conduct

- On campus **OR**
- Campus Program, Activity, Building, **AND**
- In the United States

Required Identity

- Complainant participating/attempting to participate in Program or Activity, **AND**
- Control over Respondent

Confidential Resources vs. Mandated Reporting

- **Confidential resources:** certain employees that are required by law to protect confidentiality when acting in the course of their professional duties.
 - Confidential resources generally may not share information with other individuals without the express consent of the reporting party. An exception may exist if there is an imminent risk of danger to the reporting party or another individual.
 - There are two listed Confidential Resources at Washington College: Counseling Services and Health Services.
- **Mandated Reporter:** individuals required to report allegations regarding prohibited conduct to the Title IX Coordinator.
 - All employees of Washington College are mandated reporters except student employees.
 - Resident Assistants are the only mandated reporters among student employees.



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, 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.

”

Informal Resolutions of the Process

- **Informal Resolution: an alternative resolution to a formal complaint taking place outside of the hearing process.**
- **Informal resolution may be pursued at any time after a formal complaint has been filed and before a hearing is commenced.**
 - This type of resolution can take varying forms. Two prominent examples are: (1) Restorative Agreements, and (2) Negotiated Agreements.
 - Restorative Agreements focus on the parties identifying and agreeing on a set of remedies.
 - Negotiated Agreements focus on the Respondent accepting some measure of responsibility for the alleged misconduct. The parties then have the opportunity to negotiate with the Title IX Coordinator regarding the sanction.

The Participants

The Parties

Complainant

The person who experienced the prohibited conduct.

Respondent

The person accused of engaging in the prohibited conduct.

The Participants

The Investigator

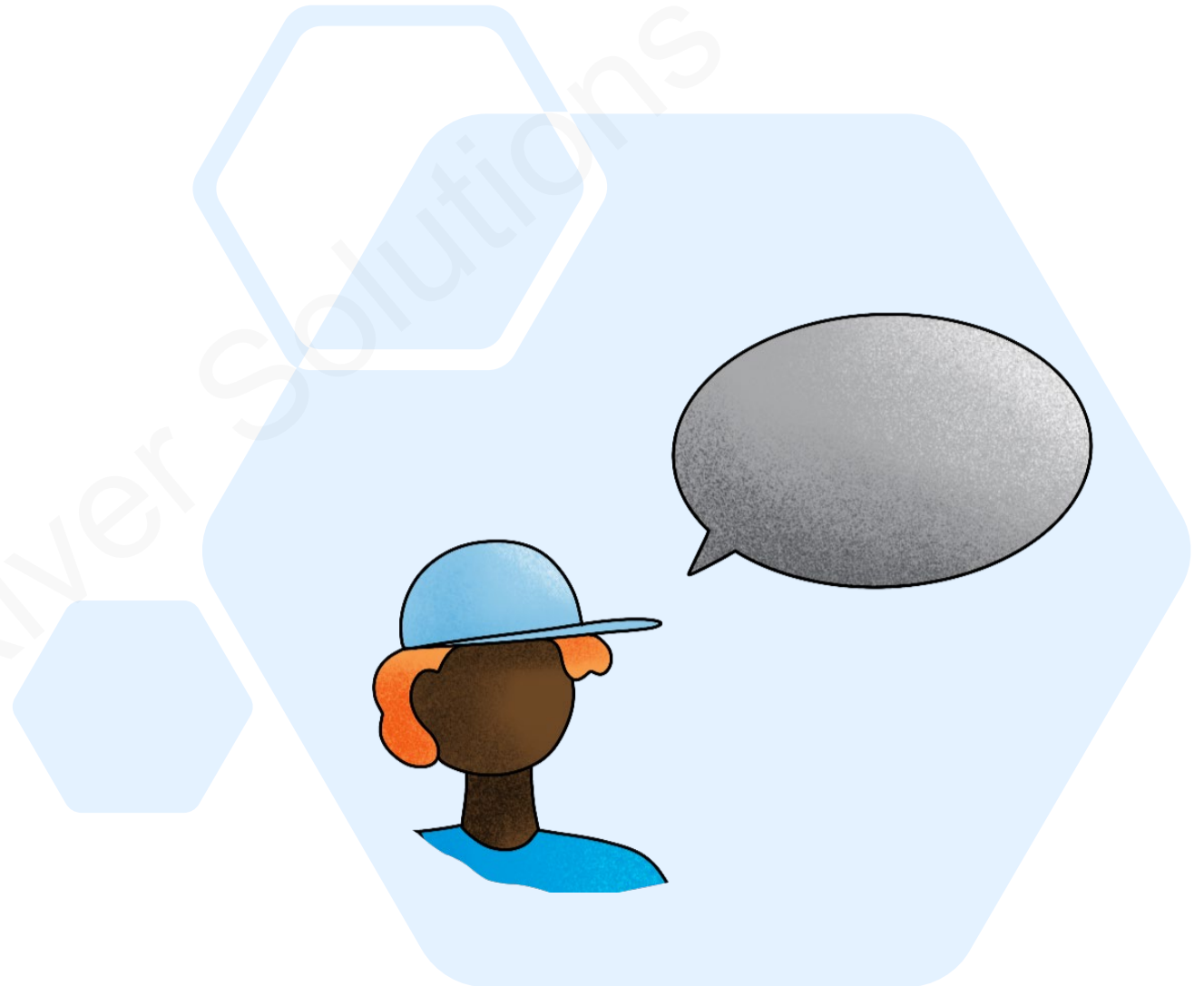
- The individual(s) charged with investigating a complaint of the College's Sexual and Gender Based Misconduct Policy. The Investigator(s) will typically be the Title IX Deputy Coordinator, a member of Campus Safety, and/or external investigators designated by the College.
- Investigators attend, at a minimum, annual Title IX investigator training.
- Appointed by the Title IX Coordinator.
- Gathers, assesses, and synthesizes evidence.
 - Interview the parties and witnesses
 - Collects evidence
- Develops an investigative report that summarizes the evidence that the investigator deems relevant.
- Does not make conclusions, engage in policy analysis, and render recommendations as part of their report.
- Presents evidence at the hearing.



The Participants

Advisors

- Both parties are entitled to be accompanied by an advisor of their choosing to any meetings, hearings, conferences, and interviews pertaining to the investigation or adjudication of the Title IX complaint.
- In most of these instances, the advisor's role is limited to observing, consulting with, and providing support to the party.
- The advisor may not speak or communicate on behalf of their advisee.
- At the hearing, each party's Advisor of Choice is permitted to ask the other party or parties and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Questions must be asked in accordance with the College's rules of decorum.



The Participants

The Hearing Panel

- Review the investigation report and record; will receive evidence at a hearing.
- Make rulings regarding relevancy of evidence, questions posed during cross examination.
- Make a determination of responsibility.
- Issue a written determination of responsibility.
- Maintain decorum.
- Receive annual training.

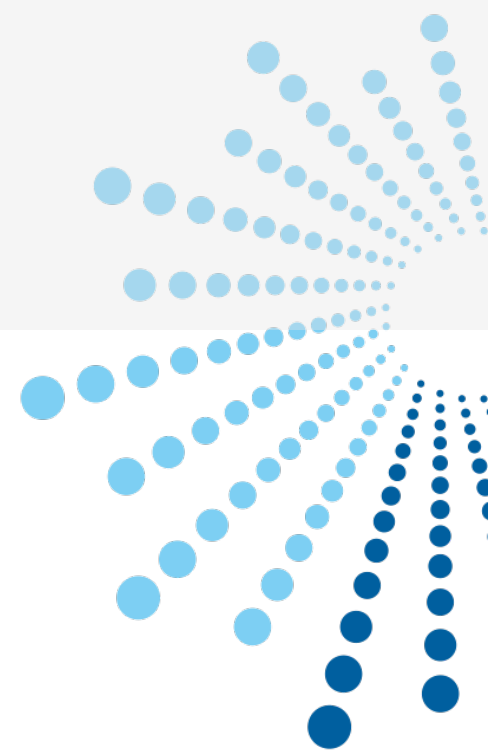




Investigations

02

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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

Investigation Tips and Advice

- Identify the specific allegations and the provisions of the policy that they could violate.
- Formulate questions based on these policies (i.e., if you need to prove incapacitation for a finding of responsibility, focus questioning on alcohol/drug consumption if relevant.)
- Be sure to attempt to meet with all potentially useful witnesses.
- Take detailed notes of interviews if they are not recorded.
- Identify potential areas of exploration: is there information that the party is not elaborating on that you want them to explain?

Investigation Tips and Advice

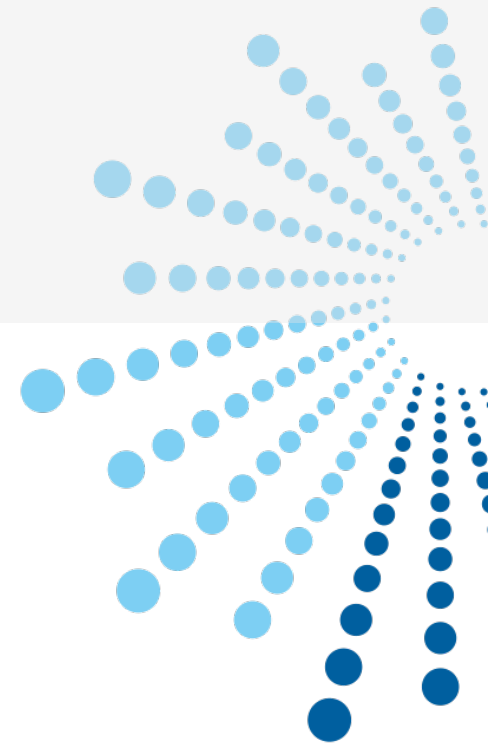
- Think of how you would like to interview your witnesses
 - Does a certain order make sense?
- Establish communication with critical witnesses early in the investigation, if possible, to avoid witness unavailability.
 - Students may graduate, employees may find work elsewhere, etc.
- Be prepared to re-interview a party or witness because of additional information gathered during the investigation.
 - This is a good practice, as parties previously interviewed should be given an opportunity to address new information or evidence.
- Be sure to remain compliant with provisions in the Policy, such as giving interviewed parties and witnesses the opportunity to review their interview summaries and provide feedback.
- Give the parties and witnesses the opportunity to submit evidence and documentation, and be sure to tell them how to submit this information.



Pre-Hearing Tasks: Hearing Panel & Chair

What should be done in advance of the hearing

03



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

Hearing Panel as a Whole



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



Develop questions of your own

Common Areas of Exploration



Credibility?



Clarification on timeline?



Thought process?



Inconsistencies?

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

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

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)

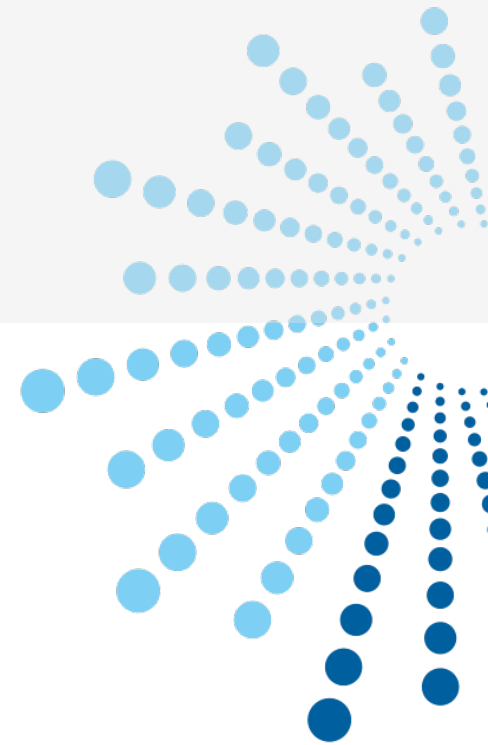
The parties with their advisors



Pre-Hearing Tasks: Hearing Advisor

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After you are assigned a case as a Hearing Advisor...



Review the policy



Review the materials provided, if any



Reach out to your advisee



Schedule a meeting



Do Your Homework



Do Your Homework

- Review applicable policy language/provisions
- Familiarize yourself with investigative report
- Understand the ins and outs of the report
- What is the timeline of events
- Think about what areas you may want to highlight or expand upon
- What type of questions you will ask
- Who are the key witnesses
- Consult with your advisee
- Anticipate questions of others
- Consider impact of your decisions and develop a strategy

Meeting with your advisee

Build

Build Rapport

Explain

Explain your role

Advise

Advise them that their conversations with you are not privileged

Go over

Go over the policy and process with them

Discuss

Discuss the evidence

Identify the Claims, What Needs to be Proven

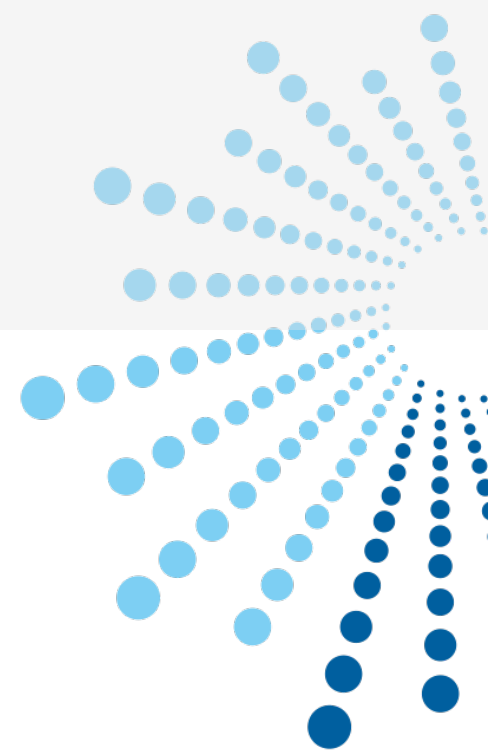
- Why are we here?
- What are the elements for the charge?
- What are the definitions of those elements?
 - Consent?
 - Incapacitation?



The Hearing

04

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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

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 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

Prepare Your Advisee for the Hearing



How to answer questions



Questions they can expect



How to prep for the hearing day itself and self-care

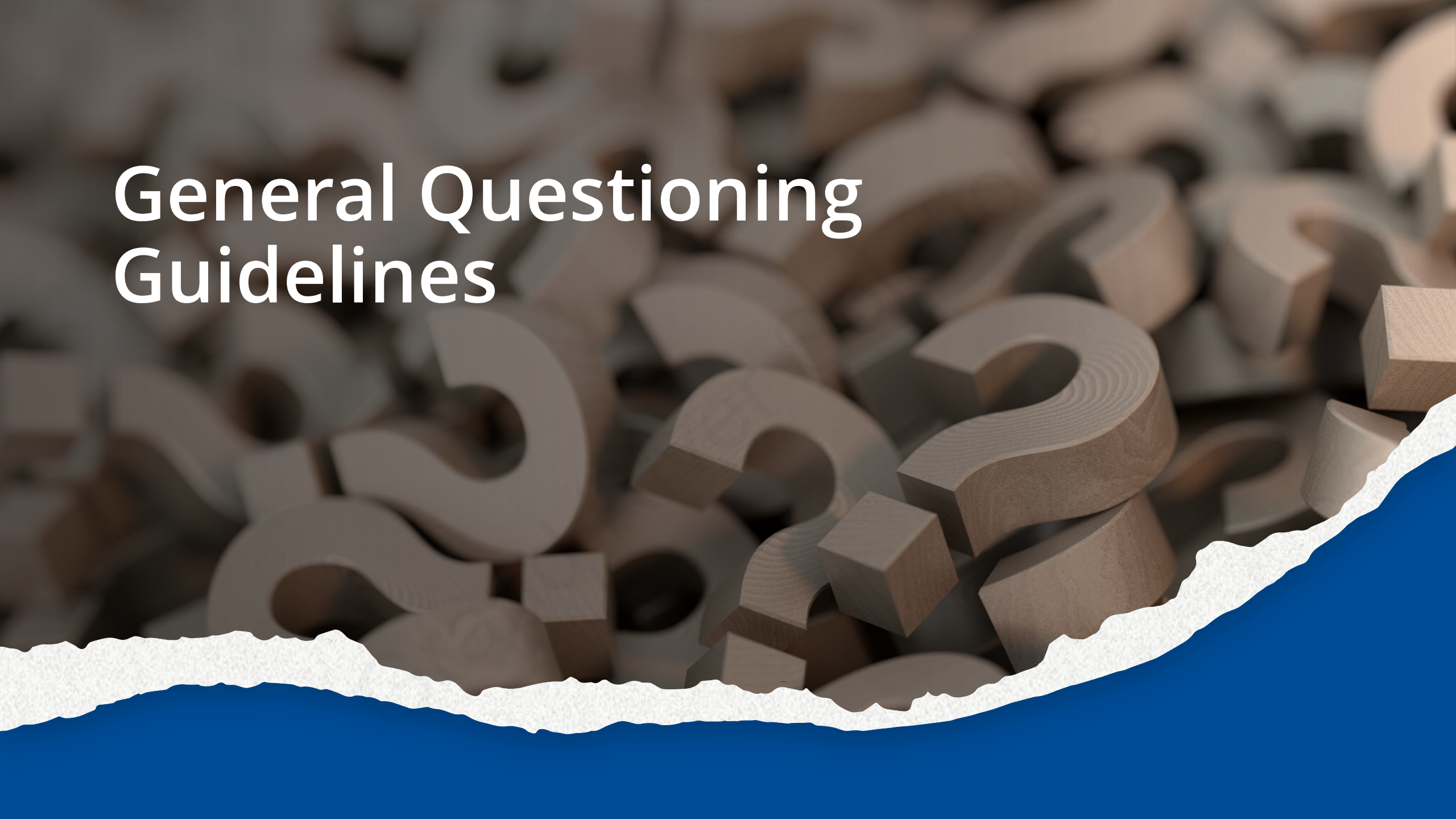


Communicating During the Hearing



Selective Participation and Potential Impacts

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



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.

Irrelevant and Impermissible Questions

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 rely on it?



What weight, if any, should it be given?

Weight is determined by the finder of fact!

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

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.



Never assume
that an item of
evidence is
authentic.

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?**

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

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



Ask questions about how they conducted their investigation (if not in the report)



Explore the investigator's decision making (if not in the report)



Seek clarity about evidence collected

Where it came from
Authenticity of the evidence



Ask factual questions that will assist in evaluation of the evidence



If bias is not in issue at the hearing, the Chair should not permit irrelevant questions of the investigator that probe for bias.

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



Special Considerations for Advisor Questioning

The background of the slide is a close-up, slightly blurred image of numerous wooden blocks and question marks scattered together. The wood has a natural, light brown tone. In the lower portion of the image, there is a jagged, torn-paper effect that separates the wooden scene from a solid, vibrant blue area at the very bottom. The text is overlaid on the upper left portion of the wooden scene.

Cross Examination:

Do be efficient in your questioning – go event by event

Don't rehash everything a witness has said

Do focus on the information that is helpful

Don't call folks liars or attack them

Do raise concerns about credibility and reliability

Don't rant, rave, lose your temper

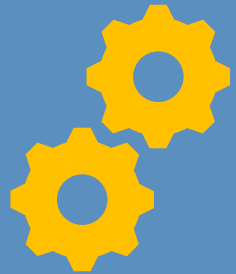
Do make your points through pointed and calm questioning

Don't forget to be prepared to pivot as testimony is given

Observe and Listen

Be open to adjusting plans or strategy based on information presented at the hearing.

Make note of any issues that you think may be appropriate for appeal.



The Decision Maker's Role in Advisor Questioning

05a



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.

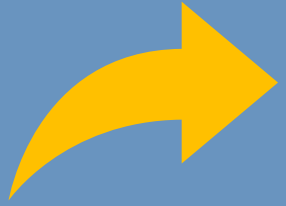
When Assessing Relevance, the Decision Maker Can:

Ask the person who posed the question why their question is relevant

Take a break

Ask their own questions of the party/witness

Review the hearing record



After the Hearing

05





Deliberations

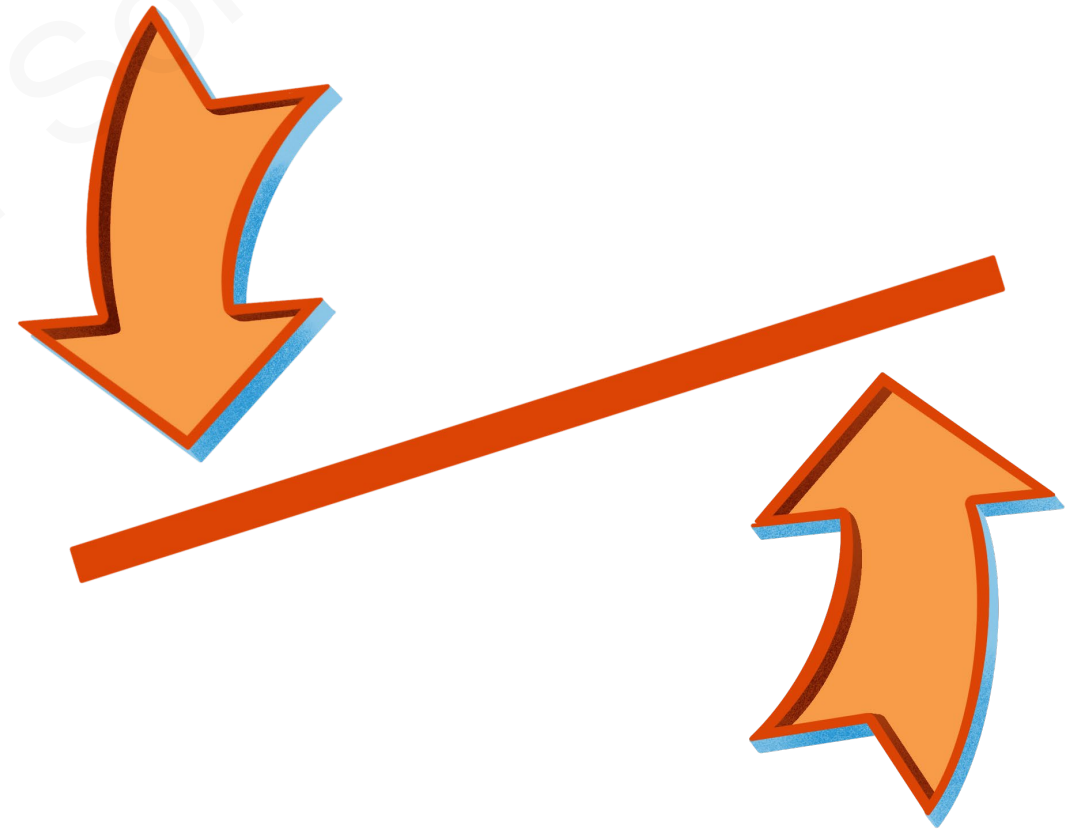


Preponderance of the Evidence

- 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?**

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?



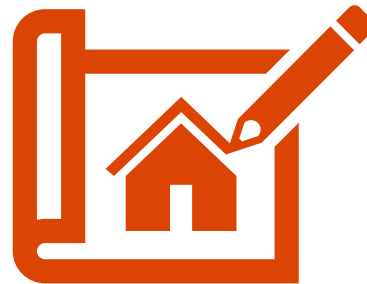
Sanctioning



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



- S** Simple and Easy to Comprehend
- T** Transparent/Clear
- A** Accurate
- N** Neutral/Unbiased
- D** Draw Attention to Significant Evidence and Issues

After the Hearing: Advisor



DEBRIEF?



THE APPEAL



Post-Training Quiz

06



Question 1

- True or false: All employees at Washington College are mandatory reporters.

Sensitivity Warning

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Meet Your Facilitators



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Agenda

1

Overview of Title IX and its Hearing Requirements

2

Live Hearing Format and Logistics

3

Hearing Participants

4

Role of the Advisor

5

Practical Application

During the Investigation: Advisor of Choice

- Assist the advisee in understanding the Policy
- Assist in the identification of witnesses
- Assist in the identification of evidence
- Assist in providing the investigator with information
- Assist in preparation for investigative interviews
- Accompany advisee to investigative interviews
- Advise during the interview
- Assist with document/evidence review and response
- Assist with review of the report and development of the response



Lessons Learned



Advisors arguing relevancy?



Asking an ill-advised question?



Case by case



Observe and Listen



Practical Application

05

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Thank You!

Send Feedback



Email Us

info@grandriversolutions.com

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