Chantelle Cleary is a nationally-recognized subject-matter expert in Title IX and related fields. She has more than 10 years of experience in the investigation and adjudication of sexual and interpersonal violence. She lectures extensively at universities and conferences throughout the U.S. on Title IX, VAWA, harassment, and implementation of best and emerging practices. Prior to joining Grand River Solutions, Chantelle served as the Director for Institutional Equity and Title IX at Cornell University, and before that as the Assistant Vice President for Equity and Compliance and Title IX Coordinator at the University at Albany. In these roles, she provided direct, hands-on experience in the fields of Title IX, civil rights, employment law, and workplace and academic investigations. Her responsibilities included focusing on diversity efforts, sexual assault prevention and training, affirmative action, and protecting minors on campus.
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 Brief Review of Requirements
02 Process Participants
03 Advisor's First Steps
04 Pre-Hearing Tasks
05 The Hearing
06 Practical Application
07 Next Steps
Brief Review of Requirements

What should be done in advance of the hearing
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
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

Why does it matter?

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>
</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>
</thead>
<tbody>
<tr>
<td>“An individual who is alleged to be the victim of conduct that could sexual harassment based on a protected class; or retaliation for engaging in a protected activity; or other violation of this policy.”</td>
<td>“An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment or retaliation for engaging in a protected activity.”</td>
</tr>
</tbody>
</table>
The Participants

The Investigator

- “the person or persons charged by the College with gathering facts about an alleged violation of the Policy assessing relevance and credibility, synthesizing the evidence, and compiling this information into an investigation report and file of directly related evidence.”
- Appointed by the Title IX Director
- gathers, assesses, and synthesizes evidence
  - Interview the parties and witnesses
  - Collect 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.
- Present evidence at the hearing
The Participants

Advisors

- “A person chosen by a party or appointed by the College to accompany the party to meetings, investigation interviews, or hearings related to the resolution process, to advise the party on that process, and to conduct cross-examination for the party at the hearing, if any.”
- 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
- 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.
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 Decision Maker(s)

- One person or a panel of three
- 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
Advisor’s First Steps
After you are assigned a case...

- Review the policy
- Review the materials provided, if any
- Reach out to your advisee
- Schedule a meeting
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

- **Ask**
  - Ask them to share their account

- **Discuss**
  - Discuss the evidence
Make the Party Aware that...

You are under no obligation to keep the information confidential

- There is no attorney client relationship nor any other recognized privilege between you and the party
- You are not under an obligation to keep what the party tells you confidential

Were this matter to go to a court of law, and you were asked to testify, you would have to do so, truthfully.

Do this at the outset
Advisor Participation During the Investigation
During the Investigation

- 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
Understand the Scope of the Investigation

Review the formal complaint

Ask questions if unsure
Evidence

- Testimony
- Text Messages
- Social Media Posts and messages
- Emails
- Surveillance
- Videos
- Photographs
- Police Body Camera Footage
- Swipe Records
- Medical Records
- Phone Records
- Audio Recordings
A Process for Identifying Evidence

1. Receive Notice
2. Develop a timeline
3. Identify Witnesses
4. Identify Potential Evidence
5. Develop Strategy to Collect Evidence
Timeline

Prior History
- Between the Parties
- Of the Parties

Incident
- Consent
- Type of Contact
- Injuries

Pre-Incident
- Communications
- Interactions
- Conduct

Post Incident
- Behaviors
- Communications
Considerations for Evidence Collection in a Post-Regulatory World

- Testimony
- Text Messages
- Social Media Posts
- Medical Records
- Public Safety/Police Records
Pre-Hearing Tasks

What should be done in advance of the hearing
Pre-Hearing Tasks for the Advisor
Pre-Hearing Preparation

Do Your Homework
Exactly, What Type of 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
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?
What Does the Advisor Want to Show?

- Credibility?
- Clarification on timeline?
- The thought process?
- Inconsistencies?
Preparing for Cross

- Review and evaluate the evidence
- Identify your narrative, or the version of events that you want to illustrate
- Identify the facts at issue and the findings of fact that you want the decision maker to make
- Plan to highlight the evidence that support the narrative and the findings of fact that you want the decision maker to make
- Prepare an outline of topics to explore
Pre-Hearing Tasks for the Decision Makers and Chair
The Decision Maker(s)

- 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
- Prepare the Script
The Hearing
Order of the Proceedings

01 Opening introductions and instructions by the Chair

02 Investigator presents a summary of the final investigative report and submits to questioning by the decision maker(s) and the advisors

03 Testimony and Questioning

04 Deliberations
Opening Instructions by the Chair

- The College 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.
- Parties are provided on last opportunity to challenge the composition of the Panel for bias or conflict of interest.
  - Chair or TIXC will make ruling.
Testimony
Testimony of the Parties & Witnesses

01 Investigator will testify first
02 Complainant will testify second
03 The Chair will determine the order of testimony following Complainant
04 The Decision Maker will question first
05 Advisor questioning will occur next
06 Follow up by the Decision Maker
General Questioning Guidelines
Format of Questioning

The decision maker or the advisor, will remain seated during questioning:

Questions will be posed orally,

Advisors can request permission to ask questions electronically, or in writing

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 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:

- opportunity to view
- ability to recall
- motive to fabricate
- plausibility
- consistency
- character, background, experience, and training
- coaching
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?
Opinion Evidence: Try it!

You are investigating an allegation that Casey had sex with Taylor when Taylor was incapacitated. You interview several witnesses, one of whom made the following statement:

“I got to the party pretty late, and Taylor was already lit.”

“Taylor was wasted. Like totally messed up. There is no way they could have given permission for sex”
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.
<table>
<thead>
<tr>
<th>What are the “Hard” Questions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Details about the sexual contact</td>
</tr>
<tr>
<td>Seemingly inconsistent behaviors</td>
</tr>
<tr>
<td>Inconsistent evidence/information</td>
</tr>
<tr>
<td>What they were wearing</td>
</tr>
<tr>
<td>Alcohol or drug consumption</td>
</tr>
<tr>
<td>Probing into reports of lack of memory</td>
</tr>
</tbody>
</table>
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) present a summary of the final investigation report, including items that are contested and those that are not,
• 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

- Ask questions about how they conducted their investigation
- Explore the investigators decision making
- Seek clarity about evidence collected
- 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 Decision Maker Questioning
Special Considerations for Panels

Anticipate advisor's questions and consider asking them

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
First Decide: To Cross or Not to Cross

Special Considerations

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

WILL CONDUCTING CROSS EXAMINATION SERVE THE PARTY’S INTERESTS?
Cross Examination
Common Approaches

1. Highlight the evidence that supports your advisee’s narrative/version of events and the findings of fact that you want the decision maker to make.

2. Obtain/Highlight helpful information.

3. If a witness does not have information that is helpful, ask questions that illustrate that they are unimportant.

4. Highlight bias/lack of bias.

5. Highlight credibility and reliability/lack of credibility or reliability.

6. Discounting/Impeachment of the party or witness.
Questioning
How to Discount

1. Confirm
2. Compare
3. Conclude
Discounting Example

Statement A:

During her interview with the investigator, Witness Y stated that she overheard Respondent and Complainant fighting inside of Complainant’s bedroom. She stated that Complainant came out of the room crying and that their face was red and swollen. She stated that Respondent followed Complainant out of the room “looking angry” and grabbed Complainant by the arm “aggressively” and pulled them back into the room. The fighting then continued.

Statement B:

At the hearing, Witness Y tells the decision maker that while she heard loud voices, it might not have been fighting. She also stated that the parties came out of the room together, that Complainant looked upset, that Respondent looked concerned, and that they “calmly” went back in the room together.
Confirm

- Witness Y, earlier today you were asked about what you heard and saw on the night in question...
- And you indicated that you heard loud voices, but that you are not sure if it was fighting, is that correct?
- You also said that the parties came out together and then went back into the room, is that what you saw?
- And you are sure of this?
Compare

• Witness Y, this isn’t the first time you shared your observations of Complainant and Respondent that night, is it?
• Did you talk to the investigator about this?
• And that statement was provided just two days after the incident, correct?
• Do you recall what you said to the investigator?
• Did you tell the investigator the truth when you were interviewed?
Conclude

• Witness Y, when you spoke to the investigator, you indicated that you heard fighting, correct?
• And that Complainant came out of the room crying, isn’t that right?
• And that Respondent came out looking angry, correct?
• You also stated that you saw Respondent grab Complainant and drag them back into the room, isn’t that true?
• Since speaking with the investigator, you and Complainant have had a falling out, haven’t you?
The Do’s of Conducting Cross

- Be efficient
- Do make your points through pointed and calm questioning
- Take your time. Be thoughtful. Ask for breaks if you need it.
- Highlight the portions of their testimony that support your narrative.
- Listen.
- Be prepared to go down a road that you hadn't considered or anticipated exploring.
- Do raise concerns about credibility and reliability
The Do Nots of Cross Examination:

- Don’t rehash everything a witness has said.
- Don’t call folks liars or attack them.
- Don’t rant, rave, lose your temper.
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

05(d)
# 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.
Impact of Not Submitting to Cross Examination

Exclusion of all statements of that party or witness
Cross Examination
Exceptions to the Exclusionary Rule

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.
Deliberations
Next Steps
Day 2 Outline

Opening Instructions by the Chair

Testimony from Complainant

Testimony from Respondent

Testimony from Witness TC
Homework

All Participants
- Review Sample Investigation Report and Record
- Review Hearing Script
- Review Advisor Rules and Decorum
- Review Hearing Checklist

DM’s
- Prepare the Script for the hearing
- Prepare questions for Complainant, Respondent, and TC

Advisors
- Prepare the questions for the DM
- Prepare questions for Complainant, Respondent, and TC
Questions?

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Leave Us Feedback:

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