The Final Rule: Title IX Hearing in a New Era
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.
Today’s Agenda

01 Regulatory Overview
02 The Infrastructure for Compliance
03 Roles and Responsibilities
04 Pre-Hearing Tasks
05 The Hearing
06 Evidentiary Issues
07 Post-Hearing
The Infrastructure for Compliance

An overview of what is required and what is needed to comply
Narrowed jurisdiction and expansive procedural requirements
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**
<table>
<thead>
<tr>
<th><strong>Procedural Requirements for Hearings</strong></th>
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<tr>
<td>Must be live, but can be conducted remotely</td>
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<td>No Compelling participation</td>
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<td>Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters</td>
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<td>Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution</td>
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<td>Decision maker determines relevancy of questions and evidence offered</td>
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<td>Exclusion of Evidence if no cross examination</td>
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<td>Written decision must be issued that includes finding and sanction</td>
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What do we need to do all of this?

- Space
- Technology
- Clear & Comprehensive Procedures
- Staff
- Expertise and Confidence
The Infrastructure for Compliance
The Essential Elements of All Hearings

- Due/Fair Process
- Fair, Equitable, and Neutral
- Consistency
- Trauma Informed
Clear Procedures

Due Process

Fairness

Equity

Consistency

Trained Personnel
Roles and Responsibilities

People, Functions, and Impartiality
Other Considerations
Panel

- Number of panelists?
- Can you have a panel of one?
- Must finding be unanimous?
- Internal, external, or some combination?
The Players
Hearing Advisors

• Will conduct examination/cross
• Roles
• Training/Qualifications
• Communicating their role
• Enforcing their role
The Players
The Coordinator/Chair

- Oversees the Process
- Maintains order/decorum
- Supports the panel
- Makes ruling
- Voting or non-voting
- Writes the decision
- Trained
The Players
The Decision Maker

- May be Hearing Chair or on panel
- Determines whether policy was violated
- Cannot be investigator, Title IX Coordinator, or Appeals Officer
The Players
The Panel

- Fact finders
- Number of panelists?
- Composition?
- Makes the finding
- Unanimous?
- Pool?
- Recruitment and retention
Impartiality

WHAT DOES THIS *REALLY* MEAN?
Logistics of a Hearing
Considerations for the Physical Space

- Room location and set-up
  - Entrances, exits, and proximity
- Privacy screens & partitions
- Technology
- Hallway control
- Space for extra visitors
Remote Participation

- In whole or in part?
- Communication considerations
  - Chat function or emails
- Private consultation between parties and advisors
  - Use of breakout rooms
  - Communication considerations
- Practice runs
- Connectivity Considerations
Other Considerations

- Time Limits
- Breaks
- Formality, Order and Gate-Keeping
- Handling disruptions and interruptions
- Poor behavior?
- Recording
The Hearing

PART 2
Pre-Hearing Tasks

What should be done in advance of the hearing
Logistics

- Scheduling participants
- Reserving space
- Provision of accommodations
- Requests for delays; adjournments
Preparing 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
Preparing 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
The Hearing
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.
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
Role of the Decision Maker

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

“Something (including testimony, documents, tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or non-existence of a fact.”

Black’s Law Dictionary
Some Other Evidentiary Issues

- Character evidence
- Polygraph examinations
- SANE reports
- Articles from journals
- Past conduct of complainant, respondent
- Unlawfully obtained evidence
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
Relevance is Not...

- Strength of the evidence
- Believability of the evidence
- Based on type of evidence: circumstantial, direct
- Based on complicated rules of court
After the Hearing
Deliberations
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
Policy Analysis

• Break down the policy into elements
• Organize the facts by the element to which they relate
Preponderance of the Evidence

- More likely than not
- Does not mean 100% true or accurate
- A finding = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated
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
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