

GRAND RIVER | SOLUTIONS

Hearings in a Post Regulatory World

MICA, Day 2

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Your Facilitator



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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.



Let's Practice!



Break a
policy down
to its
elements



Everyone take
policy (see next
page), sketch out
the elements of
sexual
harassment



Report back

Sexual Harassment: *Section 106.30*

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).

Ex: Hostile Environment Sexual Harassment

What was the conduct?

- ☐ Unwelcome conduct
- ☐ Determined by a reasonable person
- ☐ Severe
- ☐ Pervasive
- ☐ Objectively offensive
- ☐ Denial of equal access

Pre-Hearing

The investigation is complete!

It is time to schedule the hearing...

Rapid Fire #1

Using the chat box, share your “To Do” List for coordinating the hearing.



Rapid Fire Recap

Arranging for space

Arranging technology

Advisors assigned?

Scheduling pre-hearing meetings with parties & advisors

Scheduling prehearing meetings of the panel

Providing report and record to panel and parties

Scheduling the hearing

Accommodations

Call for written submissions

Conflict checks

Other considerations?

You and your team did a great job scheduling the hearing and arranging all the logistics!

Rapid Fire #2

Dear Decision-Maker,

It is now one week prior to the hearing. You have already received and reviewed the report and record and you will be meeting with the rest of the panel (or spending some quiet time by yourself) to prepare for the hearing.

Use the chat box to share what you plan to discuss/think about during the prehearing meeting.



Rapid Fire Recap

Development of introductory comments

Initial discussion of the evidence

Areas for further exploration

List of questions for the parties and the witnesses

Anticipation of potential issues

Logistics

Review of any written submissions by the parties

Other considerations?

Is it 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



Can You Have a General Rule About Evidence In Title IX Investigations?

NO

Evidence That Will Not Be Considered



Rape Shield
Protections



Privileged
Information

Not a Court of Law

Not making complex legal arguments

Are not treating parties with hostility

Rules of evidence outside of Title IX regulations do not apply

Not looking for the “gotcha” moment

Decorum at the Hearing

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

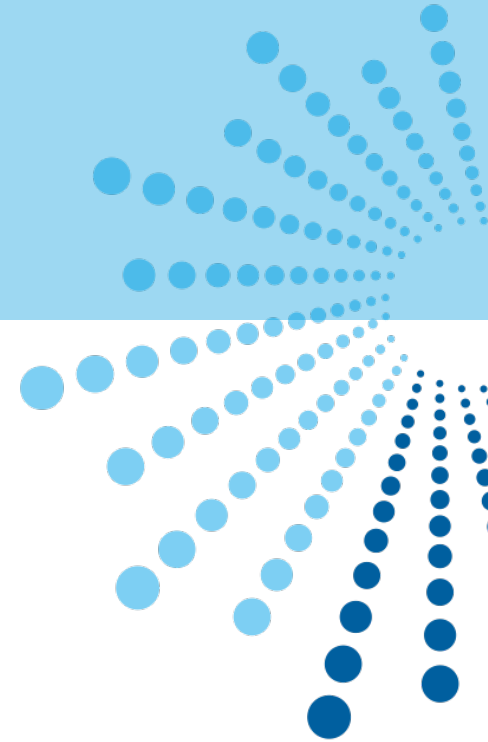
A postsecondary institution recipient may adopt reasonable rules of order and decorum to govern the conduct of live hearings

Schools “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.”



How do I Know which Questions to Ask?

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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 Also Cover . . . ?

- On campus?
- Program or Activity?
- In a building owned or controlled by a recognized student organization
- Substantial control over respondent and context
- Complainant was attempting to access program/activity



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Break Out!

#1

Say hi!

Pick a scribe

Discuss

- Develop Questions for Hearing Panel to ask...
 - Groups 1: Complainant & Henry
 - Groups 2: Respondent & Elaine

Come back prepared to discuss

- I will call on each group one by one

Report Out



Develop Questions
for Hearing Panel
to ask...

Group 1

- Complainant & Henry

Group 2

- Respondent & Elaine

Break Out!

#2

Say hi again

Pick a scribe

Discuss

- Make determinations on questions and cite rationale
- Group 1: Questions submitted by Respondent for Complainant (p1) & Questions for Henry (p3)
- Group 2: Questions submitted by Complainant for Respondent (p2) & Questions for Elaine (p4)

Prepare to report back



Report Out

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Questions submitted by Respondent for Complainant

1. Do you think you're a good musician?
2. How long has it been your dream to work as a professional musician?
3. Isn't it true that most of the students who have been in the David Prof quintet have gone on to be hired as professional musicians after graduation?
4. You'd do anything to get into the David Prof quintet, wouldn't you?
5. Did you post on Instagram 4 years ago that you think of yourself as "ruthless" and "single-minded"?
6. Isn't it true that you filed this claim only so that you could negotiate your way into the Quintet?
7. Isn't it true that you asked the Title IX Coordinator to place you into the Quartet even though you did not qualify?
8. Do you have a sofa in your living room?
9. Could you have slept on it?
10. Why did you take your clothing off?
11. Did David Prof ask you to take off your clothing?
12. Isn't it true you told David Prof that his being in bed with you was "fine."
13. If so, why did you even file this complaint?
14. Isn't it true that there was no reason for you to get into bed next to David Prof except to entrap him?
15. Did you know David Prof is in a serious relationship?
16. Do you feel bad for tempting him into cheating?
17. Do you have a boyfriend?
18. So you cheated on your boyfriend in order to advance your career, isn't that right?
19. Do you follow the groped_at_Conservatory Instagram page?
20. Were you using social media postings to shame the Conservatory into giving you a spot in the Quintet?
21. Did you file a report with the police?
22. Why not?
23. Did you get a medical exam?
24. Why not?
25. Knowing that no one in the music community will forgive you, why would you entrap a famous musician and make up a complaint like this? Do you not worry about what people will think of you?

These questions are submitted by Complainant's Advisor for Respondent

1. How many drinks did you have at the bar that night?
2. Do you frequently order doubles?
3. Do you have a drinking problem?
4. Have you ever had treatment for alcohol abuse?
5. How often do you go out drinking with students?
6. Have you ever been out drinking with male students?
7. Is it your habit to work with female students and prepare them for auditions with your Quintet?
8. Do you offer private lessons to students?
9. How many female students did you coach for auditions into your Quintet, and how many who do not identify as female?
10. Is that how students pay for entrée into the Quintet, by hiring you for lessons to help them prepare for their auditions?
11. How many students pay you for entrée into your quintet?
12. You told the investigator that you were uncomfortable with Sara's trying to "push" her way into the Quintet, yet then went drinking with her and plied her with alcohol. Is this your way of handling a student who makes you uncomfortable?
13. Isn't it true that you did not deny putting your hands on Sara's crotch when the two of you were sitting at the bar?
14. Isn't it true that you could have offered Sara a spot on the Quintet if you had wanted to do so?
15. You are the sole judge at the auditions; isn't it a problem for one person to have so much power?
16. Did you take any medications the day of the sexual assault?
17. Do you have a medical condition that might cause you to forget events?
18. Did you talk to Sara after your night together and before the audition?
19. Why didn't you call her after your night together to check on her?
20. How often do you cheat on your girlfriend?

Questions for Henry:

From Complainant:

1. Did you get into the Quintet?
2. Do you think it was due to your talent?
3. You are aware that David Prof knows what you are saying as part of this investigation and hearing, right?
4. Did he suggest to you that you should paint Sara in a poor light in order to ensure your spot on the Quintet?
5. Did he promise you a job in exchange for your favorable testimony in this matter?
6. You hope to be a professional musician, isn't that true?
7. You recognize that a good word from David Prof could ensure your future, right?
8. You would say anything to protect your future as a musician, isn't that right?

From Respondent:

- Sara was unnaturally focused on getting into the Quintet, wasn't she?
- When she told you that she would do 'anything' to get into the Quintet, what did you think she meant?
- How well do you know Sara?
- Do you know if she has ever lied?
- Why do you think Sara did not make up a lie about being sexually assaulted by David Prof?
- Do you have any proof she was assaulted?
- You cannot be certain whether or not Sara lied when she said he sexually assaulted her, can you?

Questions for Elaine:

From Complainant:

- Were you ever afraid of David Prof?
- When he was groping you when you went out for drinks with him, were you afraid of telling him to stop?
- How many times did he make sexual advances toward you?
- Isn't it true that, if you hadn't damaged your hand, you knew that your only path forward toward becoming a top professional musician was to get on David's good side?

From Respondent:

- Are you currently a musician?
- Isn't it true that your hand is not damaged, and instead that you no longer play due to your lack of talent?
- You said David Prof got handsy with you, yet you continued going out for drinks with him. Did you enjoy all of the attention you received from him?
- Would you have had sex with David Prof if you hadn't lived with 3 roommates at the time he allegedly asked you about getting together at his house?
- I imagine you have a lot of anger about not becoming a professional musician; do you have a lot of anger about that?
- Did he ever ask you to have sex with him?
- What, specifically, did he ask you to do?



Evidentiary Issues

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Evidence.
Is it . . .

Relevant

Reliable?

Does it matter (is it due
any weight)?

Relevance Is Not . . .

Strength of the
evidence

Believability of
the evidence

Based on type
of evidence:
circumstantial,
direct

Based on
complicated
rules of court

What about

Polygraph examination

Private investigator's
interview notes

Declarations submitted
under penalty of perjury



What about

An expert report discussing low incidence of false reports

An expert report discussing bias against male complainants

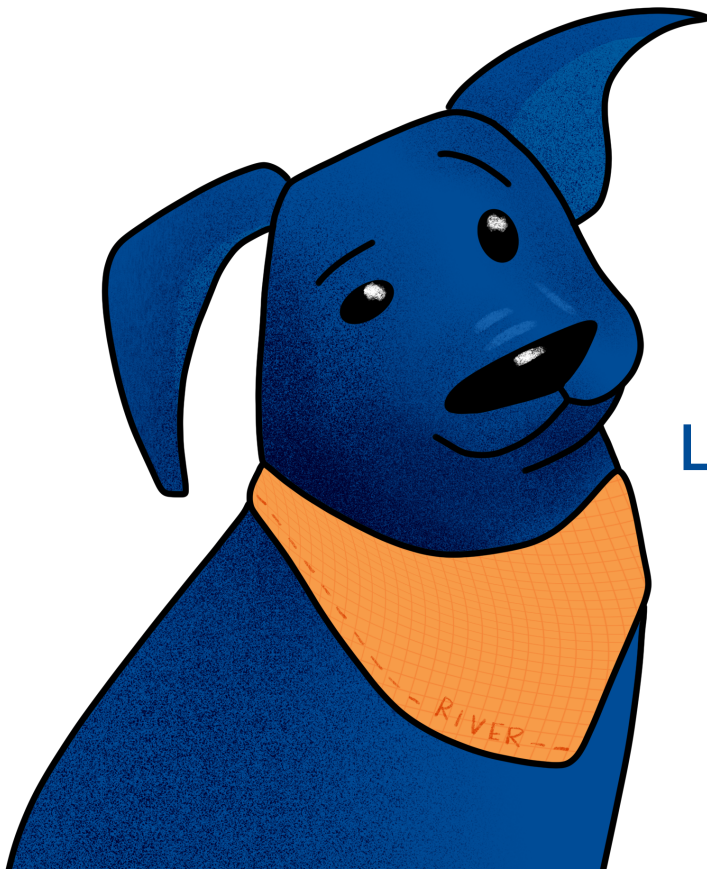
An expert report on reasons why blackouts are not evidence of incapacitation

What about

News article that colleges are failing complainants

News article that colleges fail to provide due process, are biased

News article about a related criminal case



Questions?

Leave Feedback:



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