

MODULE II

DECISION-MAKER TRAINING: HEARING PANEL

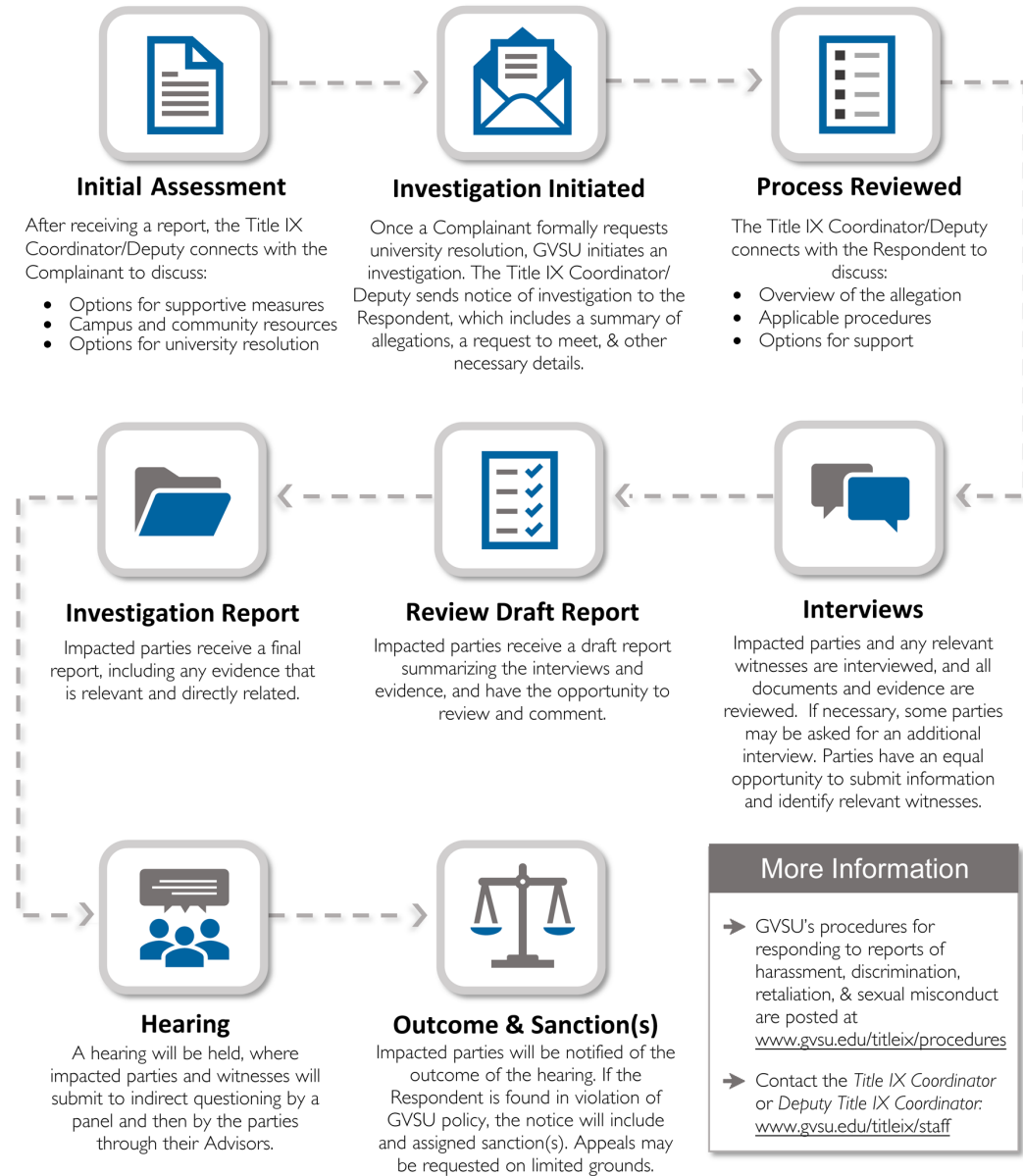
OFFICE FOR TITLE
IX AND
INSTITUTIONAL
EQUITY (TIXIE)
GRAND VALLEY
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WELCOME TO MODULE II!

- As a result of the Title IX Final Rules, GVSU adopted a Title IX complaint procedure and revised existing policies and procedures
- Under Title IX (Policy A) the “formal grievance process,” illustrated on the next slide, requires a hearing in which Hearing Panel decision-makers have the authority to hear and make determinations on all allegations of harassment, retaliation, and/or sexual misconduct, and to issue sanctions
- *Key new element* is that during the hearing the parties may cross-examine each other and witnesses, through an advisor
- As a co-investigator, you may be asked to serve as a Hearing Panelist decision-maker.

GVSU's Overview of Process A: Formal Grievance Process

Under 2020 Title IX Regulations



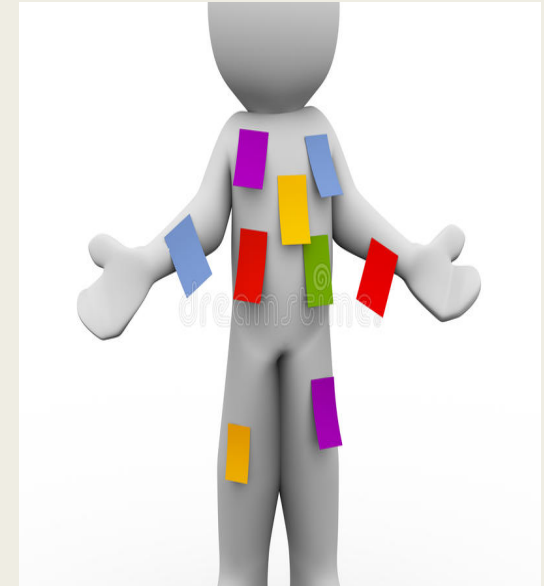
WELCOME TO MODULE II!

- Module II discusses:
 - *structure of the Hearing Panel*
 - *how to prepare for the Hearing Panel*
 - *roles of the Hearing Panel Chair and decision-makers*
 - *requisite skills*
 - questioning
 - assessing evidence
 - assessing credibility
 - *deliberation and decision-making re: policy violation*

WELCOME TO MODULE II!

Overall objective of **Module II** :

- To fine-tune the requisite skills of a Hearing Panel decision-maker, *i.e.* to focus on the *how* and the *why*, rather than the *what*.
- *For a reminder of the “what”* you are encouraged to review the Title IX (Process A) policy at:
www.gvsu.edu/titleix/policydirect
- And the the formal grievance procedure (Process A) at:
- www.gvsu.edu/titleix/proceduresdirect



FIRST. . . LET'S TALK ABOUT CONFLICT OF INTERESTS, BIAS AND RECUSAL

- In order to assure an impartial and fair hearing, a Hearing Panel decision-maker must be free from any conflict of interest or bias.
 - *Conflict of interest: conflict between your personal interests –family, friendship, business, financial, social—and your official responsibilities as a Hearing Panel decision-maker. Because a conflict of interest can affect your judgment, decisions, or actions, please discuss any concerns with the Title IX Coordinator before you agree to serve.*
 - *NOTE: Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised*

CONFLICT OF INTEREST, BIAS AND RECUSAL (con't)

- **Bias:** The Title IX Final Rule does not define bias, but assumes we'll know it when we see it (kind of like pornography 🤔).
- So consider it is any variable that improperly influences a finding and/or sanction. For example:
 - **prejudgment** *reaching a decision or drawing a conclusion before the evidence is made available and has been analyzed.*
 - **NOTE:** The Title IX formal grievance process is predicated on the assumption that the Respondent is **not responsible** for violating policy unless and until the Hearing Panel decision-makers find there is a preponderance of evidence that policy has been violated.
 - **prejudice** *(emotional bias)*
 - **discrimination** *(behavioral bias)*
 - **stereotyping** *(cognitive bias)*
 - **NOTE:** issues of sexual harassment and sexual misconduct are fraught with stereotypes that are repeated and reinforced in culture and that intersect with stereotypes about identity. As an educator, bring your social awareness, self-awareness, and critical thinking into the decision-making process.
 - **animosity** *towards any of the parties*

CONFLICT OF INTEREST, BIAS AND RECUSAL (con't)

- If you are concerned that you are *not* able to hear a case impartially, please let your Title IX Coordinator and/or Deputy Coordinator know immediately.
- **NOTE:** trainings the TIXIE Team has attended are either silent on the issue of whether research, course work, and/or activism in the areas of sexual harassment and/or sexual misconduct can be taken as evidence of bias, or are contradictory on that issue.
 - *If you are in doubt, please contact the Title IX Coordinator and/or Deputy Coordinator.*

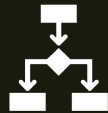
STRUCTURE OF THE HEARING PANEL

- The Title IX Coordinator will designate a three-member panel from the Pool, with one of the three members appointed as Chair.
 - **NOTE:** *the designated Chair will be an attorney not affiliated with GVSU; the remaining two appointees will be co-investigators.*
- The Hearing Panel decision-makers will not have had any previous involvement with the investigation.
- The Title IX Coordinator or Deputy Coordinator may not serve as a Hearing Panel decision-maker or Chair in the matter but may serve as an administrative facilitator of the hearing if his/her previous roles in the matter do not create a conflict of interest. Otherwise, a designee may fulfill this role.

...NOW TO YOUR
ROLE AND
RESPONSIBILITIES
AS A HEARING
PANEL DECISION-
MAKER. BUT
FIRST, TIME FOR A
DEEP BREATH AND
A REMINDER



The skills you bring to a Hearing Panel are the same skills that you bring to an investigation: thoughtfulness, critical thinking, empathy, objectivity and impartiality.



Just remember: you have no “side” in decision-making other than the integrity of the process.



And *you* represent the process.

PREPARATION FOR THE HEARING: REVIEW



■ REVIEW:

- *Policy: the Title IX Coordinator or Deputy Coordinator will inform you of the relevant policy; you will also find it on the investigation report;*
- *Respondent's written notice;*
- *Investigation report;*
- *Packet of evidence;*
- *Script to be read by the Hearing Panel Chair*

■ PREPARE. . .ASK YOURSELF:

- *What do I need to know?*
- *Why do I need to know this? If the answer is anything other than that you need to know in order to determine if a policy violation occurred, you do not need to know it.*
- *How do I ask the question?*
- *To whom do I address the question?*

HEARING: ROLE OF THE HEARING PANELIST CHAIR

- The Chair will be an attorney who is not affiliated with GVSU and is a voting member of the Hearing Panel
- Responsibilities:
 - *Conduct a pre-hearing meeting with the parties and their advisors.*
 - *Determine the relevance and appropriateness of questions asked by advisors and Hearing Panel decision-makers.*
 - *When necessary, provide directives to disregard a question or information deemed irrelevant, abusive, or unduly repetitive.*
 - *Manage advisors as necessary, including cross-examination.*
 - *Maintain the professionalism of all Hearing Panel Decision-Makers.*
 - *Deliberate with the Hearing Panel decision-makers and vote on the finding to a finding.*
 - *Deliberate with Hearing Panel decision-makers on sanction(s).*
 - *Prepare a written deliberation and sanction statement.*

YOUR ROLE AS HEARING PANEL DECISION-MAKER

- Hearing Panel decision-makers are present for the entirety of the hearing in order to:
 - *Observe cross-examination of impacted parties and witnesses*
 - **NOTE:** this will be by the advisors, speaking for their respective parties, and will be regulated by the Hearing Panel Chair
 - *Ask questions of impacted parties and witnesses*
 - **NOTE:** your questions also will be “approved” by the Hearing Panel Chair before they are answered
 - *Ask questions about any of the evidence submitted by the parties*
 - **NOTE:** your questions also will be “approved” by the Hearing Panel Chair before they are answered

HEARING: QUESTIONING THE PARTIES

- As a co-investigator—you got this!
- The type of questioning recommended on the next slide is exactly the same as you ask in an investigation!



HEARING: QUESTIONING THE PARTIES

- Generally use open-ended questions (tell us...,who..., what..., how...)
- Try to avoid close-ended questions (Did you..., were you...)
- Don't ask Compound Questions –“I have two questions; First,..., Second,...”
- Don't ask Multiple Choice Questions–“Were you thinking (a) or (b)?”
- Consider using phrases such as these:–“So it sounds like...”–“Tell me more...”–“Walk me through”–“Help me understand”
- Avoid “gotcha” questions.
- Avoid suggesting an answer in your question.
- Handle emotions sensitively and tactfully.

HEARING: EVIDENCE

- Evidence is any kind of information presented with the intent to prove what took place
- Types of evidence that may be presented and discussed in a Hearing Panel:
 - *Documentary, e.g. supportive writings or documents*
 - *Electronic e.g. photos, text messages, and videos*
 - *Material i.e. physical objects*
 - *Direct or testimonial evidence, e.g. personal observation or experience*
 - *Circumstantial i.e. not eyewitness, but compelling in that it suggests a fact*

HEARING: EVIDENCE (con't)

- Most Title IX investigations accumulate a great deal of evidence, but not all of it is **relevant**, in that it does not have value in proving or disproving a fact at issue regarding:
 - *An alleged policy violation*
 - *The credibility of the either party and/or any/all of the witnesses.*
- The investigators will have made initial relevance decisions by including evidence in the final investigation report:
 - *But relevance is ultimately up to the Hearing Panel decision-makers, who are **not** bound by the investigators' judgment.*
- *All* relevant evidence must be objectively evaluated and considered in decision-making, regardless of whether it is inculpatory (favorable to the Complainant) or exculpatory (favorable to the Respondent).

HEARING: EVIDENCE RESTRICTIONS

IMPORTANT NOTE:

Evidence of the Complainant's prior sexual behavior or predisposition is explicitly and categorically *not* relevant, even if introduced by the Complainant. This is known as the **rape shield**.

Two limited **exceptions**:

- *Evidence offered to prove that someone other than the Respondent committed the conduct alleged, or*
 - *Evidence that concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and evidence is offered to prove consent*
- This does **not** apply to Respondent's prior sexual behavior or predisposition

HEARING: EVIDENCE RESTRICTIONS (con't)

- Additional permissions required for:
 - *Records made or maintained by a*
 - Physician
 - Psychiatrist
 - Psychologist
- Questions or evidence that seek disclosure of information protected under a legally recognized privilege must not be asked without permission.

HEARING: EVIDENCE (con't)



- So, evaluate the evidence in the hearing with the same skill that you evaluate evidence in a final investigation.
- Evidence is **relevant** when it has any tendency to make a fact more or less probable than it would be without the evidence and when you can rely upon it for decision-making.
- The Title IX Final Rule also does not define “relevance,” but suggests that Hearing Panel decision-makers use “**common sense.**”

HEARING: CREDIBILITY

The Final Title IX Rule allows investigators defer to Hearing Panel decision-makers to assess credibility, *or* assess credibility in the final investigation report *with or without* drawing a conclusion.

So many choices. . . .The TIXIE Team has determined that the investigators will assess credibility, but will **not** draw a conclusion. That conclusion will be up to you as a Hearing Panel decision-maker.

HEARING: CREDIBILITY (con't).



- Once again, as a Hearing Panel decision-maker, you will use the the same skills you use to evaluate credibility as you use as a co-investigator.

HEARING: CREDIBILITY (con't)

Credibility assessment focuses on the following:

1. **Inherent plausibility**, i.e. does what you are hearing make sense? Is it likely?
 - *You know to be careful here, because bias can sneak in if you do not take into account the totality of the circumstances. E.g. If you're thinking, "it doesn't make sense that she didn't report the rape immediately; it doesn't make sense that he stayed in an abusive relationship; it doesn't make sense that they didn't block the stalker who was calling all the time" then you have reason to ask more questions, not to come to a plausibility conclusion.*
 - *And, if you're thinking, "I wouldn't have done that. . said that. . .acted that way," then **STOP**. The main lesson we can learn from what social psychologists call the "hot/cold empathy gap" is that we often don't understand human behavior (our own or someone else's) until we are in that situation and experiencing it first-hand. This is especially true for intense, emotionally-charged events that can cloud our rational judgment.*
2. **Motive to falsify**. Does the party have a reason to lie?

HEARING: CREDIBILITY (con't)

Credibility Assessment (con't)

3. **Corroboration**. What testimony and/or evidence aligns with and supports what you are hearing.

- This is the **strongest indicator** of credibility

4. **Past record**. Is there a history of similar behavior?

5. **Demeanor**:

- *And you know to be careful here, too. People act and react differently.*
- *No decision should be made on demeanor alone. . . **NONE.***
- *It should only constitute the smallest part of your decision-making, if at all.*

HEARING: DELIBERATION

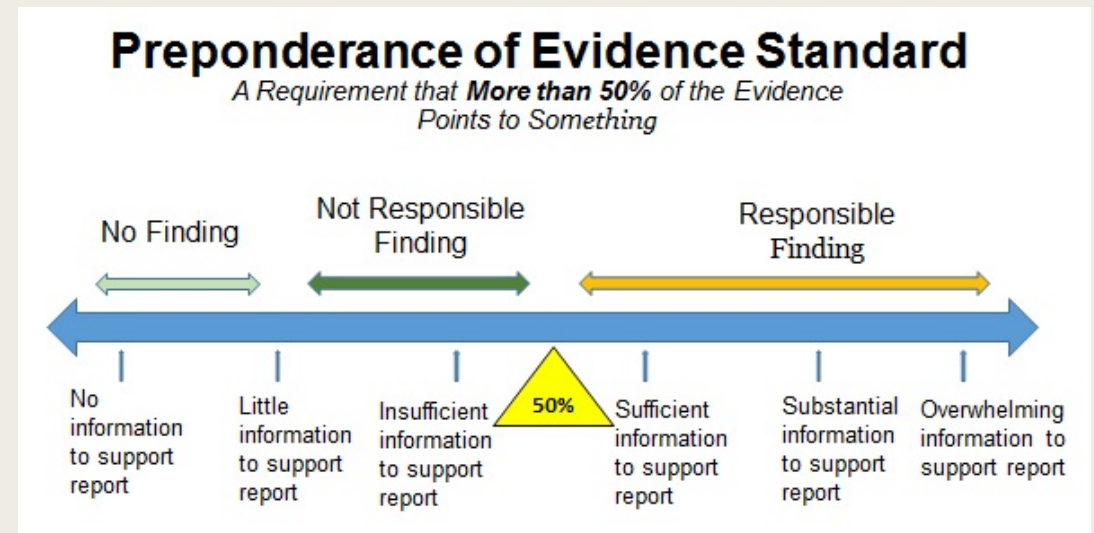


- When the hearing is finished, you will determine if policy was violated.
- The Hearing Panel Chair will lead the discussion, but her/his/their opinion is no more important or significant than yours.
- The Hearing Panel Chair also has a vote, but it carries no more weight than yours.

HEARING: DELIBERATION (con't)

Fundamentals of decision-making:

- Decisions must be based only upon the facts, opinions, and circumstances provided in the investigation report and/or presented at the hearing.
- Do not turn to any outside “evidence.”
- Assess each element in the policy definition of the prohibited conduct in question (refer to **Module I**), separate each out and determine if you have evidence that supports that a violation of that element is proven.
- Remember that you are using the preponderance of evidence standard of proof.



HEARING PANEL: REPORT

- Hearing Panel decision-makers will outline their decision and rationale in a brief report addressing the following:
 - *Whether anything was raised during the hearing that challenged or substantiated, in part or in whole, the credibility of the complainant, respondent, witness(es), evidence, and/or the investigative report. If so, identify and describe.*
 - *Whether the challenge or substantiation is relevant to the circumstances of the alleged misconduct.*
 - *Whether the challenge or substantiation calls into question the credibility of the Complainant, Respondent, witness(es), evidence, and/or the investigative report. If so, identify how and why.*
 - *Whether the Hearing Panel decision-makers determined, by a majority vote, that there is, by a preponderance of the evidence, a violation of policy.*



HEARING: DELIBERATION (con't)

- When you have reached an impartial decision that is free of substantive bias and have written your report, you have accomplished a major task in your role as a Hearing Panel decision-maker.

- *NOT YET*



All that remains is to determine sanction(s).

Module III can provide some guidance with that.



TIX TEAM MISSION. . AND THANKS!

- **Reminder:** With our TIXIE value statement in mind, we will be holding in-person discussions that will provide the opportunity to engage in critical thinking, knowledge sharing, empathic engagement, imagination, discernment and examination of the materials **in Modules I, II and III.**
- And, oh, yeah, the in-person sessions will be a great opportunity to see each other again!
- **We thank you for your commitment to Title IX!**

