

GRAND RIVER | SOLUTIONS

# Title IX in a Post Regulatory World

April 2021

## Your Facilitator



# Martha Compton

Director of Strategic Partnerships & Client  
Relations  
Grand River Solutions

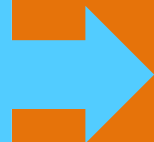
Martha Compton is a nationally recognized expert in student conduct and has over 20 years of experience in higher education, specifically investigating and resolving student conduct, sexual misconduct, and interpersonal violence matters. Martha is the current past-president of the Association for Student Conduct Administration. She speaks and presents frequently across the country on developing policy and conducting thorough and impartial investigations and hearings. Martha is currently a Ph.D. student at Ohio University and received her master's degree from Appalachian State University and her bachelor's degree from Keene State College.





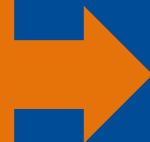
## Vision

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

Regulatory Overview

05

Pre-Hearing Tasks

02

The Investigator,  
Coordinator, Hearing Officer,  
Appeals Officer

06

Conducting the Hearing

03

Hearings: An Infrastructure  
for Compliance

07

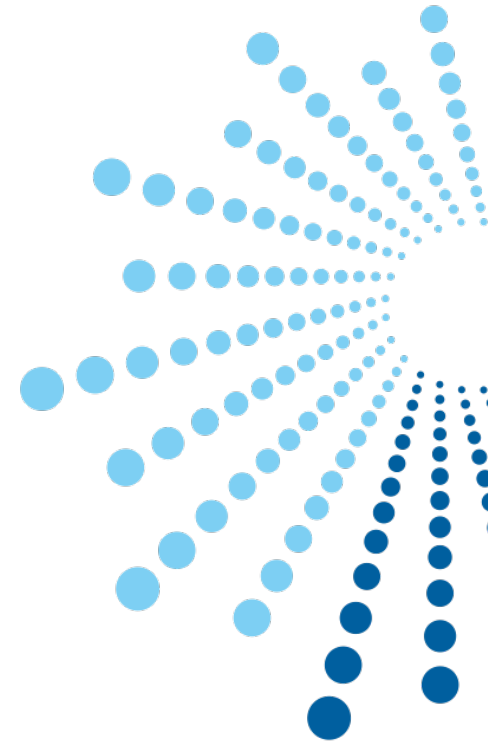
Evidentiary Issues

04

Roles and Responsibilities

08

After the Hearing

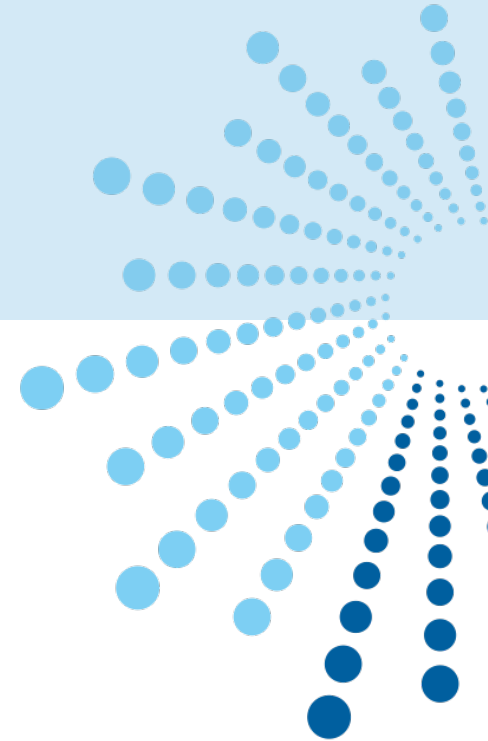


April 16, 2021





# Regulatory Overview



01

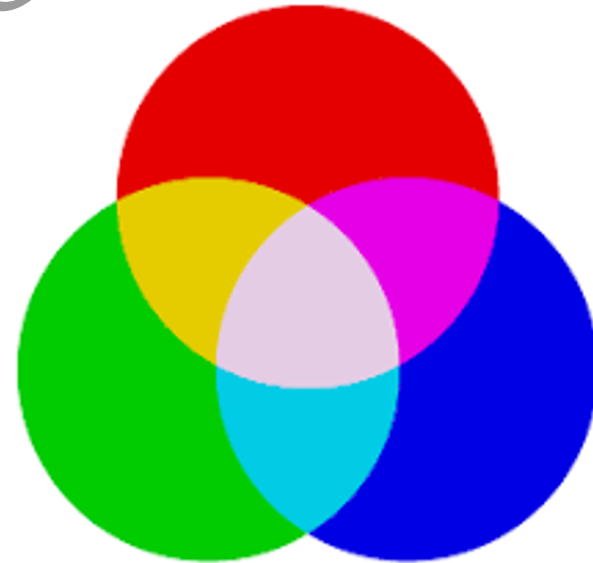


# Title IX of the Education Amendments Act of 1972

"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."

# What (Mis)Conduct is Covered by the 2020 Title IX Regulations?

- Sexual Harassment
  - Hostile Environment
- Quid Pro Quo (by an employee)
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking



# AND... Only Covered, IF:

## Place of Conduct

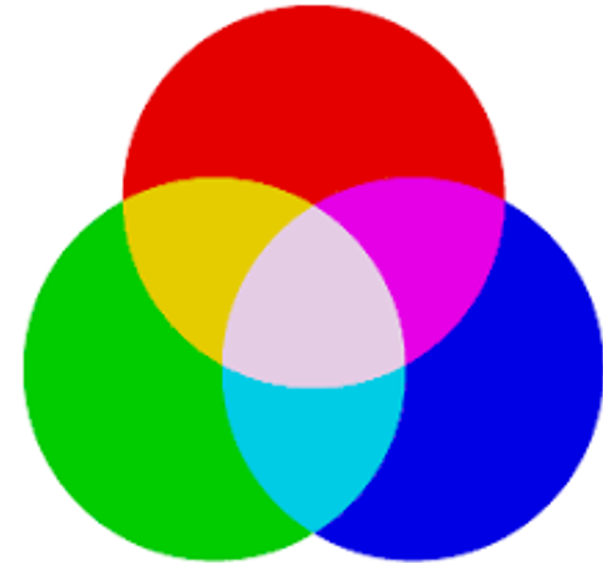
- On campus
- Campus Program, Activity, Building, and
- In the United States

## Required Identity

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

# What (Mis)Conduct is NOT Covered by the 2020 Title IX Regulations?

- Discrimination
- Harassment other than Sex Harassment
- Pay equity
- Retaliation
- Off-Campus
- Not part of program or activity
- Complainant not a member of community
- No substantial control over respondent



**What do we do  
about  
misconduct  
that does not  
fall within this  
narrow scope,  
Martha?**

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# Conduct Falling Outside the Scope of Title IX

- Apply other applicable institutional policies and procedures.





What are  
the §106.30  
definitions?





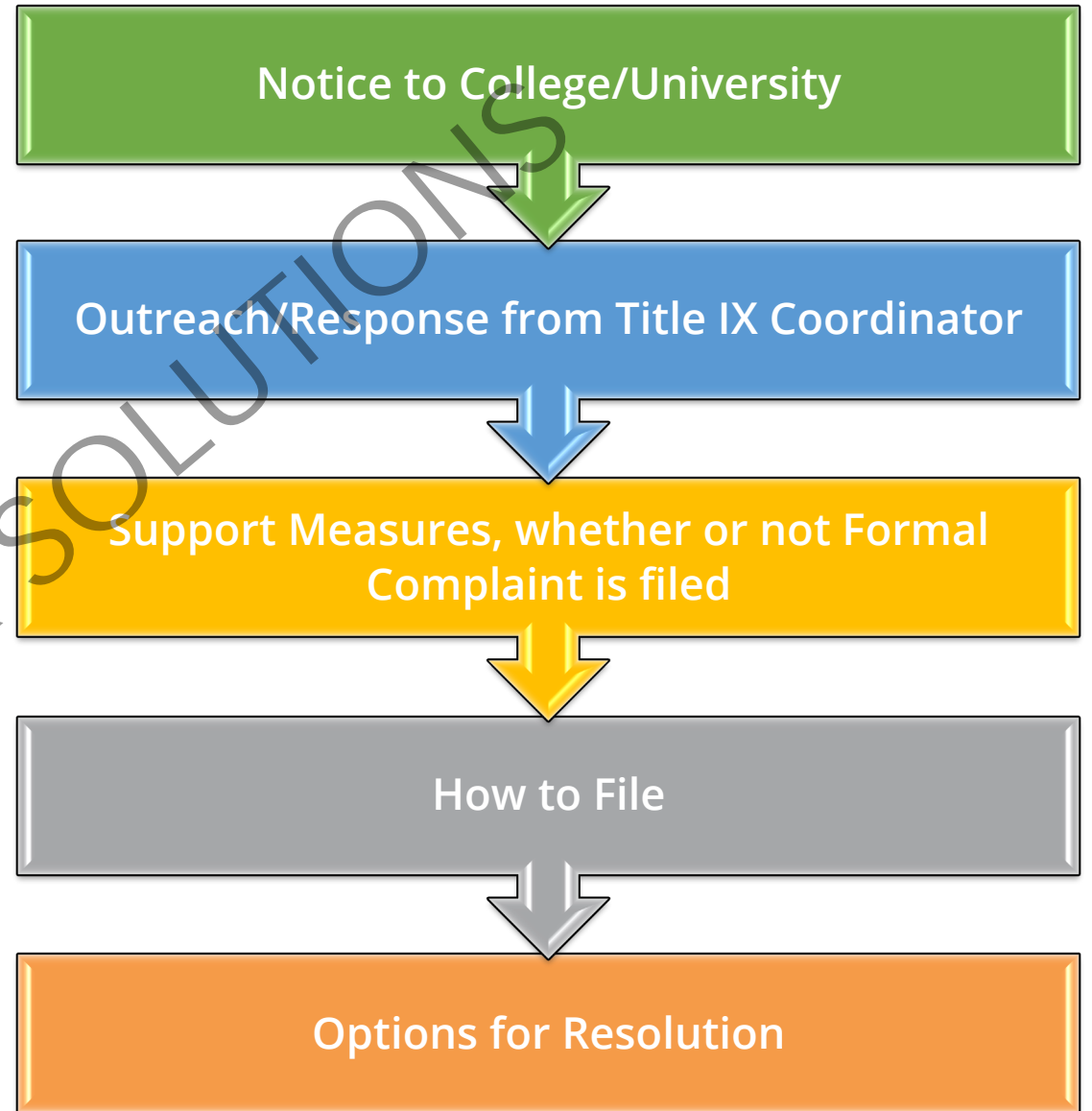
# Section 106.30: Sexual Harassment

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).

*First  
Things  
First...*

## Before The Investigation



# Procedural Requirements for Investigations



NOTICE TO BOTH  
PARTIES



EQUAL  
OPPORTUNITY TO  
PRESENT EVIDENCE



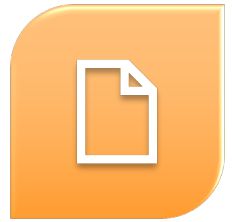
AN ADVISOR OF  
CHOICE



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

Participation cannot be compelled

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 advisor 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, rationale, and sanction, as well as information on right to appeal

What do we  
need to do  
all of this?



Space



Technology



Clear & Comprehensive Procedures



Staff



Expertise and Confidence

# Sexual Harassment Hearing Process

Univ. of Idaho

Investigation

Preliminary Report

Evidence Review & Response

Final Report

Submission of Final Report

Title IX Hearing Board Appointed

Notice of Live Hearing

Parties Submit Information

Hearing

- Opening Statement
- Witnesses Questioned by Board
- Cross Examination
- Closing Statements

Written Decision

Appeal

# Sexual Harassment Hearing Process

LCSC

Investigation

Preliminary Report

Evidence Review & Response

Final Report

Referral for Hearing

Panel Appointed

Notice of Hearing

Pre-Hearing Meetings

Hearing

- Introduction and Explanation of Procedure
- Presentation of Final Report
- Testimony and Questioning

Notice of Outcome

Appeal



# Informal Resolution Process

Univ. Of Idaho  
and LCSC

## Formal Complaint

## Parties Agree to Informal Resolution

- Can enter into any time before a determination is reached
- Can withdraw at any point and return to formal grievance process

## Three Options for Resolution

- Alternative Resolution
- Negotiated Resolution
- Respondent Accepts Responsibility

## Process Conclusions

- Parties reach agreement
- Parties do not reach agreement and return to formal grievance process

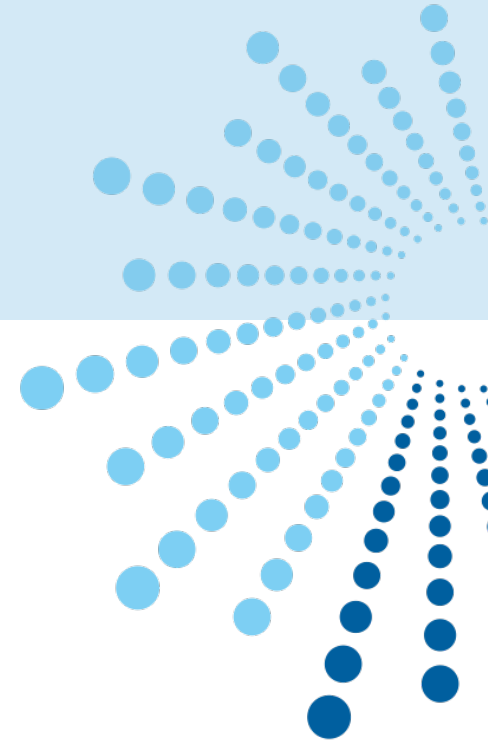




# The Investigator, Coordinator, Hearing Officer, Appeals Officer

02

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# All Who Carry Out a Role



Must be trained in accordance with the requirements in the regulations



Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest

# Avoiding Prejudgment

Practical application of these concepts in investigations...

Do not rely on cultural “rape myths”

Do not rely on cultural stereotypes about how men or women purportedly behave

Do not rely on gender-specific research data or theories

Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence

Avoid any perception of bias in favor of or against complainants or respondents generally

Employ interview and investigation approaches that demonstrate a commitment to impartiality



# Impartiality and Bias



Past personal or  
professional experience



Common sense approach  
to evaluating whether a  
particular person is biased



No generalizations

# Impartiality

Avoiding Prejudgment, Bias, and Conflicts of Interest

Bottom line:

- Follow facts of every individual case
- Investigate in a consistent manner
- Must allow challenges for conflict of interest





# Hearings: An Infrastructure for Compliance

03

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# Purpose of the Hearing

Why does it matter?

Review and  
Assess  
Facts



Make  
Findings of  
Fact



Determine  
Responsibility  
/ Findings of  
Responsibility



Determine  
Sanction  
and  
Remedy

# The Essential Elements of All Hearings

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Clear Procedures

---

Due/Fair Process

---

Fair, Equitable, and Neutral

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Consistency

---

Trauma Informed

---

Well Trained Personnel

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# Clear Procedures

## The Process

- Pre-hearing process, submission of evidence, opening statements, other statements, closing statements, findings, impact statements, etc.

## The Players

- The roles of all participants

## The Evidence

- Relevancy, Exclusions, Timing of submission, how to submit, who decides, etc.

## The Outcome

- Deliberations; Notice; manner and method communicated.

Clear  
Procedures

Due Process

Fairness

Equity

Consistency

Trained  
Personnel

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# 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

Safety considerations

# Other Considerations

Time Limits

Breaks

Formality,  
Order and  
Gate-Keeping

Handling  
disruptions  
and  
interruptions

Poor  
behavior?

Recording

# Pre-Hearing Meeting

## Why do it?

- Helps get everyone on the same page
- Helps anticipate difficulties
- Helps day-of go smoothly

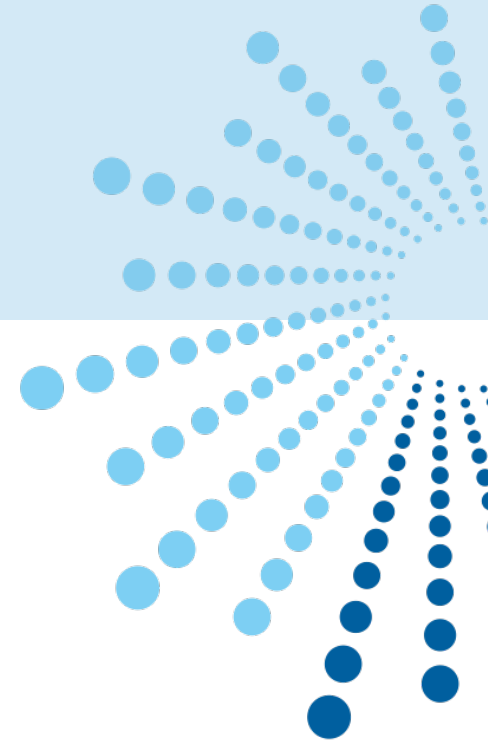
## What to cover?

- Roles of attendees
- Structure and flow of the hearing
- Identifying which witnesses for the hearing
- Process for cross-examination
- Logistics for hearing
- Next steps after the hearing
- Check in on informal resolution
- Questions about process



# Roles and Responsibilities

People, Functions, and Impartiality



04

# Hearing Participants

Complainant	the person bringing the complaint
Respondent	the person against whom the complaint has been filed
Advisor	will conduct cross examination; role varies depending on school
Investigator	summarizes the investigation, answers questions
Witnesses	present in the room only when answering questions
Hearing Administrator/ Coordinator	coordinates all aspects of the hearing, ensures a fair and equitable hearing process, acts as a resource for all participants
Decision-Maker(s)	makes decision as to whether policy was violated
Administrative Staff	assists with the logistical coordination of the people, the space, technology, etc.



Who is  
typically  
not in the  
Hearing?

General Counsel

Parents

Student newspaper

Interested faculty

Title IX Coordinator

# The Players

## Advisors

- Will conduct examination/cross
- Training/Qualifications
- Communicating their role
- Enforcing their role
- When to appoint

“Advisor means a person chosen by a party or appointed by the University to accompany the party to meetings, hearings, or interviews related to the grievance process and to conduct cross-examination for the party at the hearing, if any.” *Univ. of Idaho, 6100, Title IX Sexual Harassment.*

“Advisor means a person chosen by a party or appointed by the institution to accompany the party to meetings 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.” *LCSC, Policy and Procedures Manual, Discrimination, Sexual Harassment, and Retaliation Prohibited, 2020.*

After you are  
assigned a  
matter as an  
advisor...



Review the policy



Review the materials provided, if  
any

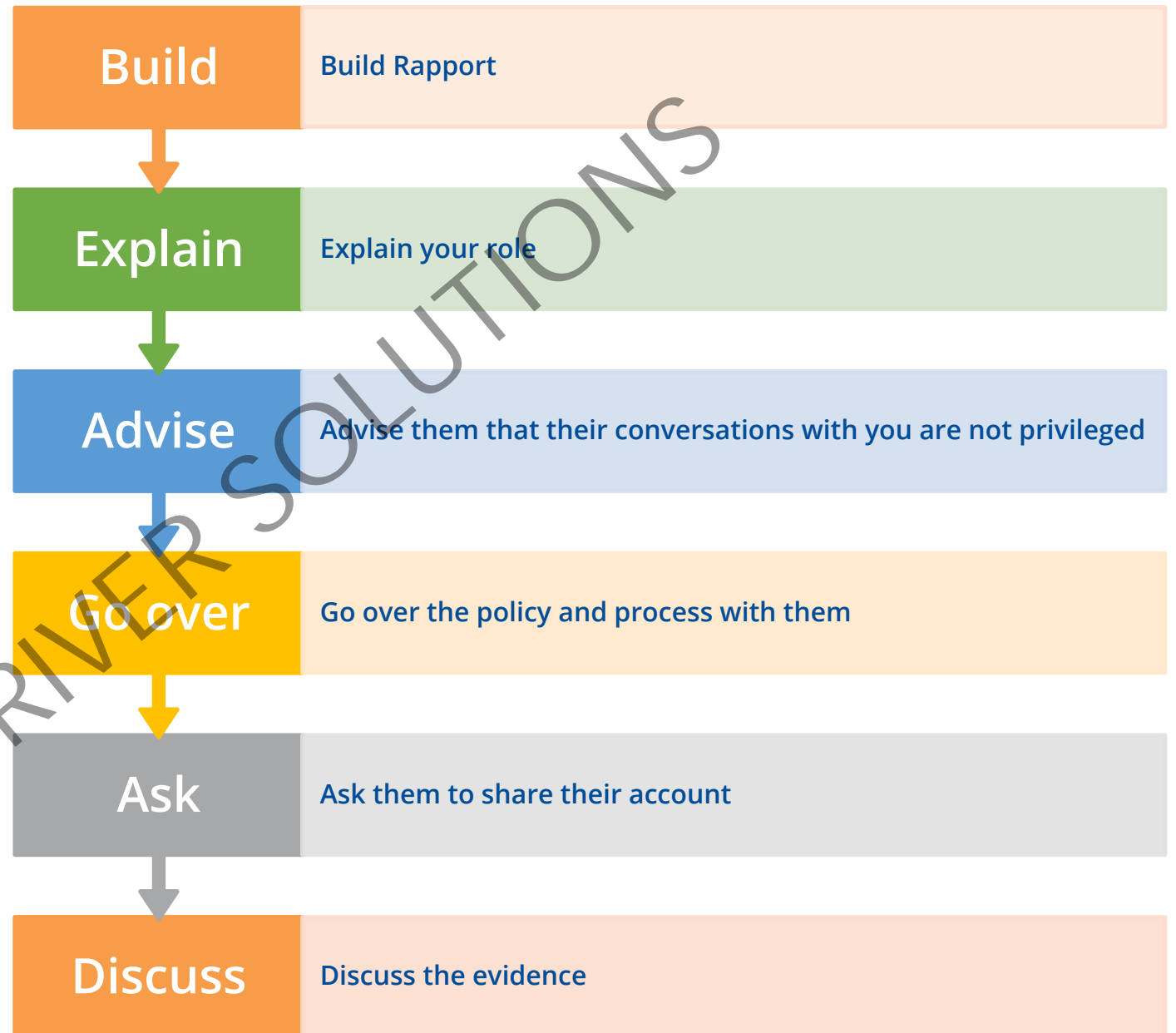


Reach out to your advisee



Schedule a meeting

# Meeting with your advisee



# 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

# The Players

## Support Person

- Optional
- Silent
- Roles
- Communicating their role
- Enforcing their role



# The Players

## The Coordinator/Administrator

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

### “D-11. Hearing administrator.

The hearing administrator shall be responsible for ensuring that the administrative duties relating to the live hearing process are carried out in accordance with this policy. The hearing administrator shall be the senior executive of Human Resources in cases in which the respondent is an employee, and the Dean of Students in all other cases.” *Univ. of Idaho FSH 6100, Title IX Sexual Harassment, August 2020*



# The Players

## The Decision Maker

- May be Hearing Chair or on panel
- Determines whether policy was violated
- Determines appropriate sanction if violation is found
- Cannot be investigator, Title IX Coordinator, or Appeals Officer





# The Players

## The Panel

- Recruitment and retention
- Number of panelists?
- Can you have a panel of one?
- Must finding be unanimous?
- What about sanctions?
- Internal, external, or some combination?



# Impartiality

WHAT DOES THIS *REALLY* MEAN?



# Impartiality: Avoiding Prejudgment and Bias

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“The Department’s interest in ensuring impartial Title IX proceedings that avoid prejudgment of the facts at issue necessitates a broad prohibition on sex stereotypes so that decisions are made on the basis of individualized facts and not on stereotypical notions of what “men” or “women” do or do not do.”

# Impartiality: Avoiding Prejudgment and Bias

Practical  
application of  
these  
concepts in  
investigations

Do not rely on cultural “rape myths” that essentially blame complainants

Do not rely on cultural stereotypes about how men or women purportedly behave

Do not rely on gender-specific research data or theories to decide or make inferences of relevance or credibility in particular cases

Recognize that anyone, regardless of sex, gender, gender identity or sexual orientation, can be a victim or perpetrator of sexual assault or other violence

Avoid any perception of bias in favor of or against complainants or respondents generally

Employ interview and investigation approaches that demonstrate a commitment to impartiality

# Impartiality: Avoiding Bias

Department also rejected commenters' arguments that individuals should be disqualified from serving as investigators because of past personal or professional experience

"Department encourages [schools] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased" WHILE

"exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents"

# Impartiality: Avoiding Conflicts of Interest

Commenters argued that investigators and hearing officers employed by schools have an “inherent conflict of interest” because of their affiliation with the school, so Department should require investigations and hearings to be conducted by external contractors

Department noted that some of those commenters argued that this resulted in bias against complainants, and some argued that this resulted in bias against respondents

Department’s response: Department’s authority is over schools, not individual investigators and other personnel, so Department will focus on holding school’s responsible for impartial end result of process, without labeling certain administrative relationships as per se involving conflicts of interest

# Impartiality: Avoiding Prejudgment, Bias, and Conflicts of Interest

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## Bottom line

- Follow facts of every individual case
- Investigate in manner that will not allow even a perception of prejudgment or bias for or against any party

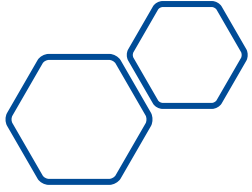


05

# Pre-Hearing Tasks

What should be done in advance of the hearing?





# Logistics

Scheduling participants

Reserving space

Provision of accommodations

Requests for delays;  
adjournments

# 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

# The Decision Maker(s)



Review evidence and report



Review applicable policy and procedures



Preliminary analysis of the evidence



Determine areas for further exploration



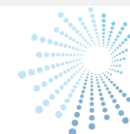
Develop questions of your own

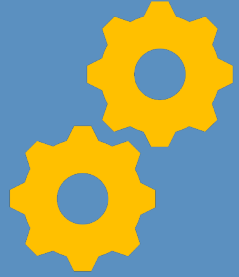


Anticipate the party's questions



Anticipate challenges or issues





06

# Conducting the Hearing

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# Opening Instructions by the Chair

- On the record
- Set the stage
- Reiterate charges
- Reiterate rules and expectations
- Reiterate logistics for the day

*This should be scripted and used consistently.*



# Opening Statements

- Permitted, but not required
- Policy should include purpose and scope
- If permitted, consider
  - Requiring submission prior to hearing
  - Word limit
  - Time limit

“Each party may, but is not required to, make an opening statement. The party’s advisor is not allowed to make the opening statement on behalf of the party.”

*Univ. of Idaho FSH 6100, Title IX Sexual Harassment, August 2020*

# Testimony

Procedures should be clear about:

- Order of/parties and witnesses
  - Could simply leave this up to the decision maker
- Order of examination
  - Questioning by the decision maker
  - Cross examination by the advisor
  - Will the advisor be permitted to question their own party?
  - What if the advisor is also a witness?
  - Will there be a second round of questioning?
- Consistency is essential. Consider putting this all in your procedures.

# 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

## Permissible Questions

Questions must be relevant

Not relevant

- Duplicative questions
- Questions that attempt to elicit information about
  - Complainant's prior sexual history
  - Privileged information
  - Mental health

# Cross Examination

## Relevant Questions

- 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.”

# Cross Examination

## Role of the Decision Maker

Rulings by  
Decision Maker  
required after  
each question is  
asked by the  
advisor

Explanation only required where  
question not permitted

Can allow advisors to make case as to  
why question should be asked, but not  
required

# Cross Examination

## Impact of Not Appearing

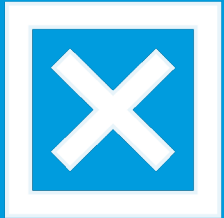
Exclusion of all statements of that party

Exception- DOE Blog

What if a party or witness appears, but does not answer any or all questions?

# Cross Examination

## Impact of Not Submitting to Cross



Exclusion of all statements of that party or witness

# Cross Examination

## Impact of Not Appearing



Statements that consist of or are made in the course of the prohibited conduct



When cross examination is waived or not conducted

# Closing Statements

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- Permitted, but not required
- Policy should include purpose and scope
  - Closing statement vs. Impact statement
- If permitted, consider
  - Time limit
  - Submission in writing after the hearing

“At the conclusion of the presentation of evidence, each party may, but is not required to, make a closing statement to the hearing officer. The party’s advisor is not allowed to make the closing statement on behalf of the party.”

*Univ. of Idaho FSH 6100, Title IX Sexual Harassment, August 2020*

# 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

- Univ. Of Idaho - "Advisors are expected to refrain from interference with the University's investigation and resolution. Advisors who step out of their role will be warned only once. If the advisor continues to disrupt or otherwise fails to respect the limits of the advisor role, the advisor will be asked to leave the meeting or hearing. If the advisor's continued interference occurs at the live hearing, the University will provide the party with an advisor to conduct cross-examination."
- LCSC - "If a party's Advisor of choice refuses to comply with the College's established rules of decorum for the hearing, the College may require the party to use a different Advisor. If a college-provided Advisor refuses to comply with the rules of decorum, the College may provide that party with a different Advisor to conduct cross-examination on behalf of that party. "



# Tips for Increasing Efficiency

01

Be prepared

02

Have an  
experienced chair

03

Have back up  
plans for  
technology issues

04

Require pre-  
hearing written  
submissions

- of opening statements
- of questions in advance

# Being Trauma-Informed

## Training your panel/adjudicators

- Asking questions
- Asking “why”
- Filtering questions of the parties

## Preparing parties

- Reviewing the investigation report
- Sharing their story again
- Answering questions again

## The attraction of prurient interests



# Evidentiary Issues

07

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# 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

# Types of Evidence

## **Direct Evidence**

Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

## **Circumstantial Evidence**

Evidence based on inference and not on personal knowledge or observation.

## **Corroborating Evidence**

Evidence that differs from but strengthens or confirms what other evidence shows

# Non-Testimonial Evidence

Text Messages

Social Media  
posts

Social Media  
Communications

Emails

Surveillance

Videos

Photographs

Police Body  
Camera  
Footage

Swipe Records

Medical  
Records

Phone Records

Audio  
Recordings

# Some Other Evidentiary Issues

- Character evidence
- Polygraph examinations
- SANE reports
- Past conduct of complainant, respondent

**EVIDENCE**

# 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!



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



# Assessing Authenticity

Investigating the products of the investigation



Never assume that an item of evidence is authentic.



Ask questions, request proof.



Investigate the authenticity if necessary.



# Assessing Credibility and Reliability

**No formula exists, but consider the following:**

- opportunity to view
- ability to recall
- motive to fabricate
- plausibility
- consistency
- character, background, experience, and training
- coaching
- your own bias and limited experience

# Assessing Reliability

Inherent plausibility

Logic

Corroboration

Past record

Other indicia of reliability

# Credibility Versus Reliability

## Reliable Evidence

- I can trust the consistency of the person's account of their truth.
- It is probably true and I can rely on it.

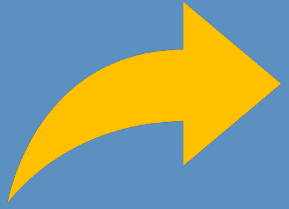
## Credibility

- 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.

# Being Convinced

## It Is True, or Biased Conclusion?

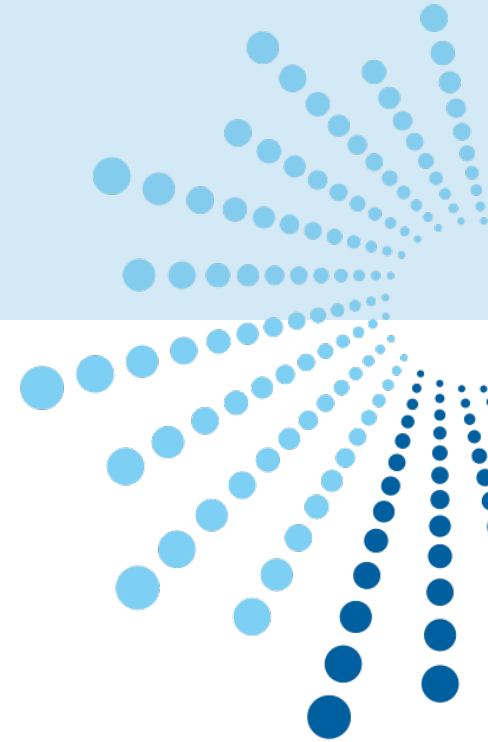
**A credible witness may give  
unreliable testimony**



# After the Hearing

08

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# Deliberations



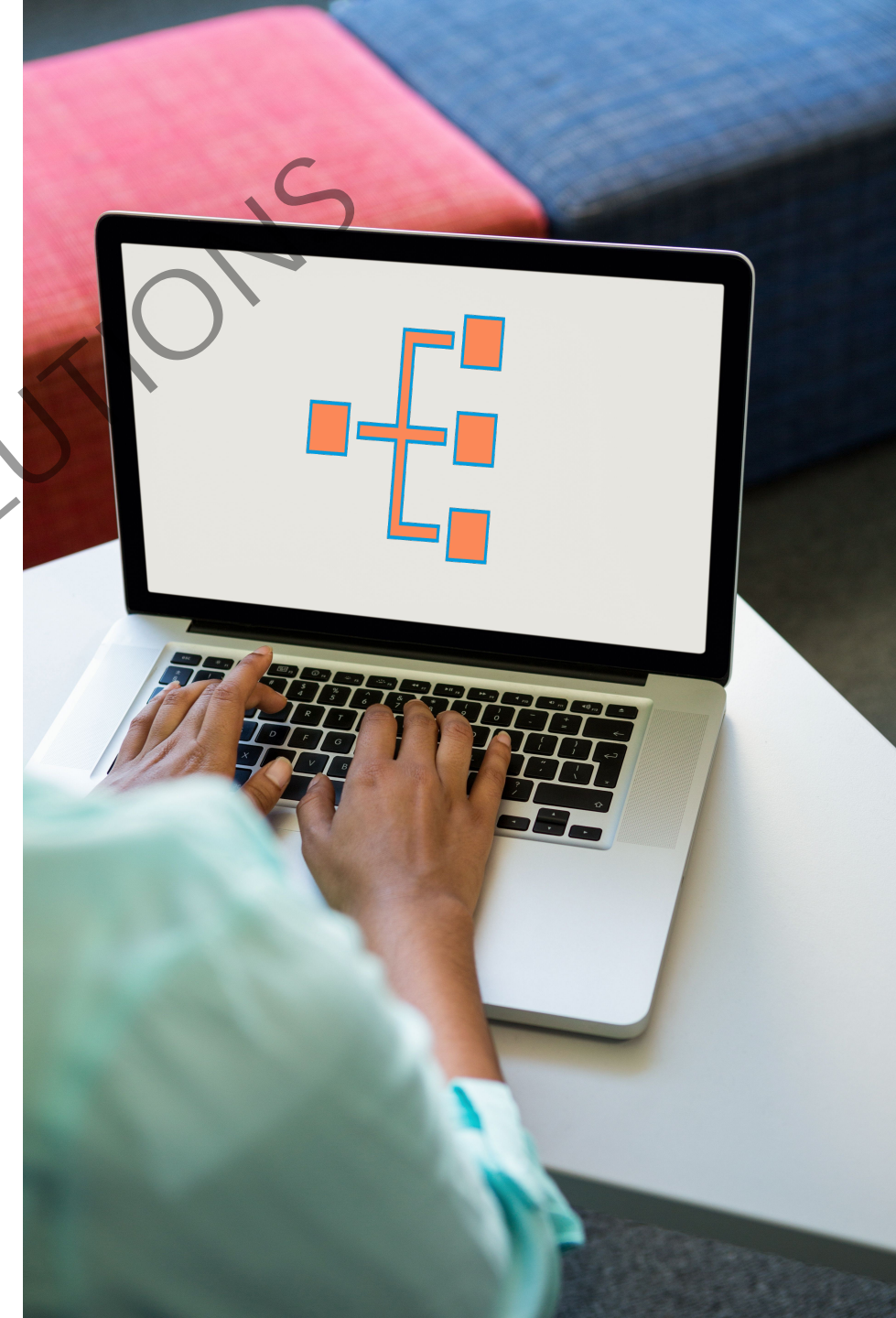
# Weighing the Evidence & Making A Determination

- 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



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# 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





# Written Decision/ 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



# Grounds for Appeal

- i. Procedural irregularity that affected the outcome;
- ii. New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome;
- iii. The Title IX Coordinator, investigator, or decision-maker(s) had a general or specific conflict of interest or bias against the Complainant or Respondent that affected the outcome.

# Questions?



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