



TITLE IX – University Advisor Updates

Marshall University
Office of Equity Programs/Title IX

Purpose of this Update Session

- These updates are intended to provide updates to current University Advisors on 2020 updates to University Policies and Procedures including:
 - Title IX Regulation Updates
 - Title IX Jurisdiction Updates
 - Title IX Policy Language Updates
 - Title IX Process Updates
 - Minor Changes to Advisor Duties
 - Title IX Review Panel Updates
 - Title IX Appeal Updates
- Not intended to be a full training for a new University Advisor

Timeline of 2020 Final Regulations

- Final Regulations released by Department of Education informally on May 6, 2020
- Final Regulations published in the Federal Register on May 19, 2020 (34 CFR Part 106)
- Effective Implementation Date: August 14, 2020 - President Gilbert approved interim policies by August 14th, then BOG voted on the policies & had public comment periods
- Regulations do not apply retroactively = use policies and procedures in place at the time the incident is alleged to have occurred



TITLE IX JURISDICTION

Marshall University BOG Policy
GA-1, Section 3.3.1

Use Student Disciplinary Procedures
Appendix B, Section 1 or Employee
Title IX Grievance Procedures



The University has a duty to address prohibited Sexual Harassment which occurs:

- a. Within University programs or activities AND
- b. Within the United States
 - a. Literal interpretation – Title IX does not apply to matters which occur outside of the United States - i.e. does not apply to study abroad programs or to sanctioned University travel outside of the United States

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What are University Programs or Activities?

- Locations, Events, or Circumstances
 - May be on campus or off campus—see below
- Over which the University exercises substantial control over both
 - (1) Respondent and
 - (2) The context in which the alleged sexual harassment occurs

Applies to on campus or off campus locations or buildings if:

- 1) owned or controlled by
- 2) an officially recognized student organization

TITLE IX JURISDICTION

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GA-1, Section 3.3.1.1

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Jurisdiction for Title IX Complaints does not apply if:

- (1) the conduct alleged would not constitute sexual harassment as defined in this policy, even if proved;
 - (2) the conduct alleged did not occur in the University's education program or activity; or
 - (3) the conduct alleged did not occur against a person in the United States.
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- If any of the above do not apply, the University must dismiss the formal complaint with regard to that conduct for the purposes of sexual harassment under Title IX.
 - Dismissal does not preclude action under other provision of the University's policies or procedures.

NON-TITLE IX JURISDICTION

Marshall University BOG Policy
GA-1, Section 3.3.1.2

Use Student Disciplinary
Procedures Appendix B, Section 2
or other HR Discipline Policies



Prohibited Sexual Harassment Outside of Title IX Jurisdiction.

- Title IX does not apply to off-campus conduct at:
 - Private residences,
 - Private businesses,
 - Private events, or
 - Other locations outside of the University's substantial control
- **HOWEVER** separate student conduct disciplinary action may apply if:
 - Off-campus conduct unreasonably interferes with the educational or orderly operation of the University community, its mission, or its objectives
OR
 - Off-campus conduct that, in light of all of the facts and circumstances, endangers the health and safety of the University community.

Definition Changes

Marshall University BOG Policy
GA-1

New Regulations led to changes of many Policy Definitions

Particularly:

Sexual Harassment – now defined language

- Sexual Assault – Clery Language
- Dating Violence – VAWA Language
- Stalking – VAWA Language

Quid Pro Quo Sexual Harassment

Hostile Environment Sexual Harassment

Also updates to Sexual Misconduct Definitions



Consent/ Effective Consent

Marshall University BOG Policy
GA-1, Section 3.4.6

- No major changes to Marshall Definitions of “Consent” or “Effective Consent”:
 - Informed,
 - Freely, and
 - Actively given
 - Mutually understandable
 - words or
 - actions
 - Which indicate a willingness to participate in mutually agreed upon sexual activity



NOTICE OF ALLEGED PROHIBITED CONDUCT



Title IX Department or Campus Security Authority



Actual Knowledge Via a Report



Formal Complaint



When do you investigate?

Campus Security Authority

- Includes:
 - Any person who has the authority to take action to redress the harassment; OR
 - Has the duty to report the harassment or other types of misconduct to appropriate officials; OR
 - Someone a student could reasonably believe has the authority or responsibility
- Deans, Supervisors, Directors, Coaches, Director of Athletics, RAs, Athletic Trainers, Student discipline, student housing, faculty advisors or student groups are included
- Faculty & other staff encouraged to still report – at least to supervisors – but are not considered mandatory

Actual Notice

- Individual files a Title IX Complaint
- Individual notifies the Title IX Coordinator or other responsible employee
- Individual reports to campus security/campus police
- Anonymous Complaints will be reviewed; however, because Respondent is entitled to Due Process Rights (Right to Know Information and Accuser) we must have enough information regarding complainant's identity to proceed – complainant can say proceed or do not proceed

Title IX Essential Actions

- Once put on notice, the University should
 - Take immediate action and steps to investigate what occurred
 - Take prompt and effective action to:
 - Stop the harassment
 - Remedy the effects
 - Prevent reoccurrence

The Process

- Incident
 - Notice to Title IX Officer
- Preliminary Inquiry by Title IX Officer
 - Complaint filed and signed by Complainant or University proceeds with Complainant's known identity being shared
- Formal Investigation and Report
 - Assignment of University Advisor
 - Review of evidence and interview of witnesses
 - Issuance of Investigation File – all evidence and response period
 - Issuance of Investigation Report
- Review Panel Hearing
- Sanction (if finding of responsibility)
- Appeal

Confidentiality of the Process

- Privacy for all parties involved – including witnesses and the allegations – should be maintained to the greatest extent possible
- Complete confidentiality not possible
- No “Gag Orders” issued by the University
 - Parties can speak about what has happened to them and what’s going on with others
 - Parties and witnesses are encouraged to keep the matter private
- No Contact Orders
 - Only applicable to the parties – direct or indirect contact – social media contact, classroom contact

Investigation

- What has Respondent been put on notice of?
 - Due Process
 - Notice of Investigation should be specific and should be amended if new allegations come forward
- What has Complainant complained of?
- Issue Spotting and Determine Policies in Play
 - Ongoing
- Witness Interviews
 - Complainant
 - Respondent
 - Solicit witness list from each party
 - Determine the relevancy of proposed witnesses
 - Solicit evidence from each party

Advisors for Parties

- University will assign trained advisor* OR
 - Party may select an advisor of choice

 - Advisor may accompany the party to interviews and hearings
 - Advisor will be required to cross-examine witnesses at any hearing
- * University advisors are not expected to be attorneys
- Do not be afraid to ask procedural questions of Title IX Coordinator or Investigator

Preponderance of Evidence Standard of Proof

- Decision Makers are convinced that more likely than not the allegation is true
 - 50.1 %
 - 50% plus a feather
 - “Tipped the Scale”
-
- Respondent is presumed not responsible until preponderance of the evidence shows otherwise

Who renders a finding?

- **Title IX at Marshall**

- Previously, Investigator rendered an initial finding
- NOW - Investigator will only render Recommendations for a finding of responsibility or no responsibility & recommendations cannot be solely based upon credibility assessments
- The Review Panel will be the first decision maker - reviews the Investigator's report and then makes its independent FINDINGS regarding Responsibility for Title IX Matters at Marshall University

- **Non-Title IX Matters**

- Investigator renders initial findings regarding responsibility, which can be appealed to a Review Panel

Investigator's Report

- Report is admitted as evidence to hearings
 - Investigation Report can be introduced, but is not binding upon the hearing panel
- Investigator will be a witness at any hearing panel or sanctioning hearing
- Can be questioned by the parties and hearing panel at the hearings
 - Can attest to credibility
 - Call attention to discrepancies or corroborating evidence
 - Summarize the investigation, evidence, and policies in play
 - Can be questioned about determinations regarding relevance decisions made in excluding or including something from the Investigation Report

Title IX Coordinator's Duties After Investigation

- Receives Investigation Report from Investigator
- Distributes Investigation Report to the Parties for 10 business day response period
- Reviews Investigation Report and the responses from the Parties and either
 - 1) Dismisses the matter as not meeting Title IX requirements
 - Dismissals are subject to appeal
 - 2) Sends Notice of Referral for Live Hearing to the Review Panel Hearing Officer

Live Review Panel Hearings

- Trained panelists will put parties on notice of hearing guidelines and will conduct a Live Hearing* and will issue a Final Outcome Letter determining:
 - 1) whether there is substantial doubt about the thoroughness, fairness, and/or impartiality of the investigation; and, if not,
 - 2) whether there is sufficient evidence to support the Investigator's recommended findings(s) by a Preponderance of the Evidence
 - 3) sanctions – if any
- Final Outcome Letter will be issued within 10 business days of the Hearing

*The Panel may allow the parties to appear virtually; however, Live Hearings require that all participants are able to be seen and heard by all.

Live Hearing Updates

- Must have Live Hearings to reach determination regarding responsibility for sexual harassment
- Only one (1) Advisor of the party's choice may accompany the party to the Live Hearing
- Live Hearing – can be in person or remote/virtual
 - If remote/virtual, all parties must be able to see and hear each other
 - Parties may request to be in separate rooms

Format of Live Hearing

- Brief opening remarks from Complainant
- Brief opening remarks from Respondent
- Presentation of Witnesses – including Investigator, parties, and other relevant witnesses
 - Questions may be asked by Review Panel during this time
 - Review Panel will determine which witnesses it intends to rely on for any determination and can determine to include or exclude witnesses
 - Cross-examination of parties or witnesses
- Concluding remarks by the parties
 - Impact statements
 - Mitigation statements

What Should Advisors do Prior to the Live Hearing?

- Review all facts of the case
- Submit written responses to the Investigation Report
 - Objections, clarifications, evidence left out
- Request in-person or remote/virtual Live Hearing – make requests for separate rooms, if you party desires that
- Prepare your party for the hearing
 - Opening statement, cross-examination, direct examination, and closing statement/statement regarding sanctions
- Identify and submit to Review Panel any new evidence which was not submitted to Investigator
- Identify and submit to Review Panel any new witnesses and describe the relevance of such witnesses
- Work on relevant questions for all identified parties and witnesses

Cross Examination

- Previous Procedures
 - Allowed cross-examination – but it was not direct or oral
 - Previously, each party had to write out questions which had to be approved by the Review Panel and asked, orally, by the Review Panel – This was a timely process
- NOW - Cross-examination is allowed
 - Directly
 - Orally
 - In Real Time
- CROSS must be done by ADVISOR – parties are never allowed to personally question each other
 - If party does not have an advisor of choice at the live hearing, the University will provide an Advisor for purposes of CROSS
- Witnesses are called & approved by the Review Panel – not by the parties – so, even if a witness is one that your party recommended or one that supports your party's case, still can almost be treated as cross-examination

Cross-Examination - continued

- Classic CROSS is a series of declaratory statements or close-ended questions that the witness can agree or disagree with
 - yes/no answer; single-fact answer
 - i.e. on what date did you call Ms. Smith? Isn't it true that you went to X's room at 8:05 PM?
- Effective CROSS should control the answer / witness – questions should be tailored so that the witness does not have any real choice

Cross-Examination – continued

- Goals of CROSS
 - Obtain facts favorable to your party's position
 - Present and/or support your party's theory of the case
 - Damage the factual basis of the other party's theory of the case
 - Support / Damage credibility
 - Impeach a Witness
 - Attack the accuracy of a witnesses' testimony
 - Point out contradictions
 - Show that a witness has bias
 - Point out prior inconsistent statements
 - Attack credibility due to lack of personal knowledge or ability to observe, recall, or relate
 - Attack a witness' character for truthfulness

Cross-Examination – continued

- NOT the Goals of CROSS
 - Not a fishing expedition
 - Trying to get a witness to agree with you (when they clearly don't)
 - Trying to get a “lying” witness to “tell the truth”
 - Being a bulldog to impress panel or your party
 - Trying to experience a “I GOTCHA” moment
 - Not many of witnesses are going to have startling facts that have not previously come up
- Our Procedures prohibit harassing or abusive questioning
 - Advisor yelling/screaming at other party/witness
 - Advisor standing or leaning into party/witness personal space
 - Asking questions in a manner designed to promote rape myths or sex-based stereotypes

Cross-Examination - continued

- Questions not allowed during CROSS
 - Questions or evidence regarding a party's sexual predisposition and evidence of a party's prior sexual behavior are not allowed and are IRRELEVANT except in 2 areas:
 - 2 Rape Shield Exceptions
 - 1. offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant;
 - 2. if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent

Cross-Examination - continued

- Process of CROSS
 - Question asked by Advisor
 - Before a Complainant, Respondent, or witness answers a cross-examination or other question, the Review Panel must first determine whether the question is relevant and explain any decision to exclude the question as not relevant
 - Objections can be made for not allowing question and appeals can be made based upon those objections
 - Relevance:
 - Has a tendency to make a fact more or less probable than it would be without the evidence
 - Apply logic and common sense - looking for plausibility and consistency from Review Panel

Cannot Rely on Out of Hearing Statements

- If a party or witness does not submit to CROSS at the Live Hearing, the Review Panel MUST NOT rely on any statement of that party or witness in reaching a determination regarding responsibility
- Hearing Panel must hear from the witness or party to consider the statement made with intent to make factual assertion
 - Cannot rely on written complaint
 - Cannot rely on Investigator's summary of witness or party's statement
 - Cannot rely on police reports, SANE reports, medical reports, or other documents/records IF they contain statement of a party who has not submitted to CROSS
- Does not include evidence that does not constitute a person's intent to make a statement – videos, text messages, or social media messages – or evidence that does not contain a person's statement

Sanctions – For Students

- If recommended findings of responsibility are made, the Review Panel will determine the appropriate sanction(s)
- Majority Vote required to issue sanctions and for determinations of responsibility or no responsibility
- Potential Student Sanctions found in Appendix A of Student Disciplinary Procedures
- Sanctions & Final Determinations will be contained within the Final Outcome Letter

Sanctions – For Employees

- If recommended findings of responsibility are made, the Review Panel will refer the matter to a Trained Human Resource Office Designee – excluding the Director to issue sanctions
- Prior to issuing sanctions, Human Resource Officer may consult with (1) Respondent Supervisor, (2) Office of Provost (Faculty), (3) Vice President of Operations/Chief of Staff (Staff), and (4) the Office of Equity Programs
- Sanctions & Final Determinations will be contained within the Final Outcome Letter

Appeals - Final Outcome Letter or Dismissal Letter

- Appeals are not new hearings
- Appeals must be timely filed within 5 business days
- Appeals must be in made writing
- Either party may appeal
 - 1) a decision of the Review Panel and
 - 2) any mandatory or discretionary dismissal, in part or in full, of a Title IX Formal Complaint
- Basis for Appeal and Content of Appeal Statements.
 - The Appellant must base the appeal exclusively on one or more of the following grounds:
 - 1) Procedural irregularity that affected the outcome of the matter;
 - 2) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or
 - 3) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

Authority of the Appeal Officer

- Appeal Officer will issue a written decision describing the result of the appeal and the rationale for the result which may:
 - i. Dismiss the appeal for failure to meet the grounds of appeal, upholding the initial outcome and sanction(s), if applicable.
 - ii. Affirm the action, at which time the matter will be considered final and binding upon all involved.
 - iii. Reverse the action taken by the Review Board and dismiss the case.
 - iv. Remand the case to the Review Panel or Investigator based upon new evidence or procedural irregularities, with specific instructions on the remanded issue(s).
 - v. Recommend an increase or decrease any sanctions imposed based on information presented during the appeal process, with a rationale supporting the modification.

Unless extended - Appeal Officer's decision will be communicated to all parties in writing within 10 business days of receipt of appeal.

Decision of the Appeal Officer is FINAL

Questions?



- THANK YOU to all who serve voluntarily as Advisors for our students, staff and faculty
- YOU ARE ESSENTIAL TO THE FAIRNESS AND INTEGRITY OF THE TITLE IX PROCESS!!!