



# CONFIDENTIALITY & CROSS EXAMINATION

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September 2, 2020

# Confidentiality

For Confidentiality  
we need to examine  
the following:

What is  
“confidentiality”?

Who is entitled to  
“confidentiality”?

When are they  
entitled to  
“confidentiality”?

# What is Confidentiality?

**Confidentiality** is defined as the state of keeping or being kept secret or private.

In Higher Education the most comprehensive law we must follow with respect to student's is the Family Educational Rights and Privacy Act (FERPA).

# FERPA

In general, FERPA is a privacy law that protects the privacy of student education records. Student education records are defined broadly to include almost every record the student has at Marshall.

Need to know.

FERPA essentially prohibits the release of student educational records to any third party, including parents and spouses. It also prohibits the release of student educational records to other employees of the University unless you can establish a “need to know” basis.

# FERPA & TITLE IX

Traditionally, although there are inherent conflicts between FERPA and Title IX requirements it has generally been understood that the Institution, as part of the process, can do the following:

1. If the Complainant does not wish to remain anonymous, advise the Respondent of who the complainant is and the allegations against them.
2. Advise the Complainant of the final outcome and sanctions, if any, given to the Respondent.

## FERPA & TITLE IX

This understanding came from the “Revised Sexual Harassment Guidance: Harassment Of Students By School Employees, Other Students, Or Third Parties.” January 10, 2001.

However, in preparing for this presentation, a review of the pdf on the website is stamped “Rescinded”.

<https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>

## FERPA & TITLE IX

That being said, the new regulations require Institutions to keep confidential the identities of any individuals who have made a report or complaint of sex discrimination, any individuals reported to be the perpetrator of sex discrimination, any complainants, any respondents, and any witnesses, except as permitted by FERPA, **as required by law, or to carry out the new regulations, including any investigation, hearing, or judicial proceeding.**

# Confidentiality: University Procedures

1. Student has the right to request that the School maintain their confidentiality.
  2. University may or may not be able to honor the request.
  3. Some level of disclosure may be necessary to ensure a complete and fair investigation and to ensure that the institution meets its obligations under Title IX. The institution may be limited in its response and investigation if confidentiality is requested.
- VII.C.2 Appendic .B, Student Hearing Procedures.

# Confidentiality: University Procedures

Certain Evidence is not admissible:

Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or 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. XI.A.2.f.iii.e. Appendix B, Student Hearing Procedures.

# FERPA Release

All advisors, unless they are University employees, must have FERPA release signed authorizing their Advisor to receive FERPA protected information and to participate in the hearing.

# Health Insurance Portability and Accountability Act (HIPAA)

Student and employee health and medical information is protected under HIPAA.

This can become an issue when presented with medical evidence of a sexual assault.

# Health Insurance Portability and Accountability Act (HIPAA)

In cases such as this, the Complainant should provide a HIPAA release before the evidence is provided to the Respondent. However, if the evidence cannot be provided then there are questions about its admissibility.

# Employee Confidentiality

Similar to the rights of students, personnel matters are also considered confidential.

Therefore, again we must be careful as to what we can release to the complainant or other regarding an employee's employment and potential discipline.

Who is entitled to confidentiality?

- 1. The Complainant and**
- 2. The Respondent.**

This also means that the University is limited to what it or you can say publicly about a final outcome or ongoing process.

When are they entitled to confidentiality?

Throughout the entire process and after.

# Cross-examination

The examination of a witness who has already testified (direct examination) in order to check or discredit the witness's testimony, knowledge or credibility.

# Cross Examination During LIVE Hearing

## **Cross Examination.**

- a. The parties may not directly question each other.
- b. Each party's Advisor is permitted to ask the other party and any witnesses relevant questions and relevant follow-up questions, including those challenging credibility.

## Cross Examination During LIVE Hearing

c. 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 a question as not relevant.

## Cross Examination During LIVE Hearing

d. Although not required, to aid in the efficiency of the Hearing, it is highly recommended that the parties have questions prepared prior to the Hearing.

## Cross Examination During LIVE Hearing

e. Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or 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 During LIVE Hearing

- f. No harassing or abusive questioning allowed during cross-examination.
- i. Examples of questioning that may be harassing or abusive:
  - Advisor yells or screams at the other party/witness,
  - Advisors stands and physically leans into the party/witness' personal space, or
  - Advisor asks questions in a manner designed to promote rape myths or sex-based stereotypes.

## Other significant procedures

- iv. Advisors may directly question any witness that is not a party to this Complaint or similar complaint involving either party.
- vi. Formal rules of evidence and court procedures are not used and do not apply unless specified herein. Student conduct hearings are not court proceedings; the procedures used in civil or criminal trials, motions, or other proceedings before a court or administrative agency do not apply. For example, discovery procedures, requirements for pleadings, and the hearsay rule do not apply in student disciplinary hearings.

Questions.