



TITLE IX REVIEW PANEL TRAINING

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Agenda

1. Title IX Basics
2. Review Panel Member Role
3. Due Process
4. Policy Definitions & Terminology
5. The Title IX Process
6. Bias, Conflicts of Interest, and Recusal



Agenda

7. Preparing for the Hearing
8. Hearing Logistics
9. Making a Decision
10. Appeals



Title IX

"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 educational program or activity receiving federal financial assistance."

ONLY 37 WORDS!



TITLE IX COMMANDMENTS

INVESTIGATION
(plus prompt & fair)

PROCESS

REMEDIES

Thorough

Prompt

Act reasonably
to stop
discrimination

Reliable

Effective

Act reasonably
to prevent
recurrence

Impartial

Equitable

Act equitably
to remedy
effects



What Does It Mean To Be a Review Panel Member?

- 2020 Title IX regulations require separation of roles
 - Title IX Coordinator may not serve on Review Panel
 - Investigator(s) may not serve on Review Panel
- Appeal Officer is a separate role
 - Previously uninvolved



When and How the Review Panel Works

- Required live hearings for colleges and universities
 - May take place in person; however, must provide an option for a video conference
 - Key element added in 2020 is that parties may cross-examine each other and witnesses, through an Advisor



The Challenge for Review Panel

- Community standards identify what constitutes sexual harassment within the institutional community
 - The definitions and procedures used may be impacted by Title IX requirements
- It is not a question of right and wrong, but whether there has been a policy violation, proven by the standard of evidence
- Review Panel's role is to impartially uphold the integrity of the process
- Review Panel member may not agree with institutional policy, but they must be willing to uphold it



**REMEMBER, YOU HAVE NO
"SIDE" OTHER THAN THE
INTEGRITY OF THE PROCESS,
AND YOU REPRESENT THE
PROCESS.**

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What Is Due Process?

- Substantive and Procedural Due Process (DP)
 - Rights-based protections that accompany disciplinary action by an institution with respect to students, employees, or others
 - Informed by law, history, public policy, culture, etc.
- DP in criminal and civil courts vs. DP within an institution
- DP analysis and protections have historically focused on the rights of the Respondent
- A sexual assault can be a legal deprivation of a Complainant's substantive due process rights
- Perceptions of "due process" can be connected to perceptions of legitimacy of a process's outcome



"Procedural Due Process"

Are You Following Your Process?

Procedural Due Process:

- Consistent, thorough, and procedurally sound review of all allegations
- Substantial compliance with written policies and procedures
- Policies and procedures afford sufficient rights and protections to satisfy mandates of all applicable laws
 - Clear, written notice of the allegations
 - Opportunity to present witnesses and evidence and be heard by the Review Panel



"Substantive Due Process"

Due Process in the Decision Itself

Due Process in Decision

- A decision must:
 - Be appropriately impartial and fair (both finding and sanction)
 - Be neither arbitrary nor capricious
 - Be based on fundamentally fair rule or policy
 - Be made in good faith (i.e., without malice, ill-will, conflict, or bias)
- Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence



Due Process Procedural Rights in 2020 Title IX Regulations

Right to:

- Present witnesses, including fact and expert witnesses
- Present and know inculpatory and exculpatory evidence
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction
- Be accompanied to any related meeting or proceeding by an Advisor of their choice, who may be, but is not required to be, an attorney



Due Process Procedural Rights in 2020 Title IX Regulations Continued

Right to:

- Written notice of allegations, as well as notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Inspect and review evidence and draft investigation report before finalized
- Right to argue to inclusion of "directly related" evidence at the hearing
- Ask relevant questions of the other party and witnesses through an Advisor, in the presence of the Review Panel



Evidentiary Standard

- **Preponderance of the evidence:** it is "more likely than not" policy was violated
 - The only equitable standard
 - 50.1% (50% plus a feather)
 - The "tipped scale"



The Process

Incident

Initial
Assessment

Formal
Investigation
& Report

Hearing

Appeal

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Steps of an Investigation

1. Receive notice/Complaint
2. Initial Assessment and Jurisdiction Determination
3. Establish basis for an investigation (Incident, Pattern, and/or Culture/Climate)
4. Notice of Investigation to Parties/Notice of Formal Allegation ("Charge")
5. Establish investigation strategy
6. Formal comprehensive investigation
 - Witness interviews
 - Evidence gathering



Steps of an Investigation Continued

7. Draft report

8. Provide report and all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response

9. Complete final report

- Synthesize and analyze relevant evidence
- Send final report to parties for review and written response



Advisors

- Advisor can be anyone; no restrictions in the regulations
- If a party chooses an Advisor who is also a witness, you will need to assess how that impacts their credibility as a witness
- How will they be cross-examined?
- If a party does not have an Advisor to conduct cross-examination at the live hearing, the institution must provide an Advisor of the institution's choice without fee or charge to the party
 - Not required to be an attorney



Advisors Continued

- Advisor should conduct cross-examination
 - Even if party does not appear at hearing
 - If an Advisor refuses to ask questions their advisee wishes them to ask, the institution will appoint an Advisor who will
- Regulations envision that the Advisor will not do more than repeat or rephrase questions framed by the party, but in many hearings, expect that the Advisor will be far more active and engaged than that



Presumption of Non-Responsibility

- Title IX regulations require that published procedures include a statement of a presumption of non-responsibility for the Respondent until a final determination is made
- What would it mean to presume neither "guilty" nor "innocence?"
 - How does a presumption work considering an affirmative consent policy?
 - How is presumption of non-responsibility different than no presumption?
 - What does it take to overcome a presumption?



Sexual Harassment

Title IX regulations require Marshall to define **sexual harassment** as conduct on the basis of sex that satisfies one or more of the following:

- **Quid Pro Quo:** An employee of Marshall conditioning the provision of an aid, benefit, or service of Marshall on an individual's participation in unwelcome sexual conduct.
- **Hostile Environment:** Unwelcome conduct determined by a reasonable person to be so severe and pervasive, and objectively offensive (SPOO) that it effectively denies a person equal access to Marshall's education program or activity



Hostile Environment: "Unwelcome"

Unwelcomeness is subjective and determined by the Complainant



Hostile Environment: "Reasonable Person"

Severity, pervasiveness, and objective offensiveness (SPOO) are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances ("in the shoes of the Complainant"), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced



Hostile Environment: "Severe"

- Physical conduct is more likely to be severe without need for repetition
 - Sexual assault and many dating/domestic violence incidents are almost always sufficiently severe
 - Other physical conduct that does not meet the definitions for sexual assault or dating/domestic violence may also rise to the level of "severe"
- Consider the circumstances (e.g., ability for Complainant to escape the harassment)
- Assess whether accompanied by threats or violence
- Assess whether there was a degree of embarrassment or humiliation



Hostile Environment: "Pervasive"

- Widespread
- Openly practiced; occurring in public spaces
- Well-known among students or employees – reputation of a department, person, etc.
- Frequency, intensity, and duration of the conduct
- Unreasonable interference with school or job
- A gauntlet of sexual abuse (*Meritor v. Vinson*, 477 U.S. 57 (1986))
- Incidents occurring in concert or with regularity are more likely to be considered pervasive
- Consider the specific circumstances and facts

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Hostile Environment: Totality of the Circumstances

There has been an increasing issue of conflating discomfort or being offended with the higher standard of sexual harassment. There is a high bar for meeting this definition.

The circumstances to consider include:

- The nature, pervasiveness, and severity of the conduct
- Whether the conduct was reasonable physically threatening
- Whether the conduct was objectively and subjectively humiliating
- The objective and subjective reasonable effect on Complainant's mental or emotional state



Hostile Environment: Totality of the Circumstances Continued

- Whether conduct was directed at more than one person
- Whether a reasonable person would see/experience/determine the conduct to be SPOO?
- Whether the statement only amounts to utterance of an epithet that is offensive or offends by discourtesy or rudeness, and thus is not SPOO
- Whether the speech or conduct deserves the protection of academic freedom or of the First Amendment, which means it is not sexual harassment

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Putting It All Together: Hostile Environment Sexual Harassment

- The role of the Review Panel is to determine whether all the elements of a hostile environment are present
- Requires a "totality of the circumstances" analysis, which is the key role for the Review Panel
- When conduct does not meet the elements, applying the standard of evidence, then the Respondent is "not responsible"
- Hostile environment complaints may often, therefore, lend themselves to informal resolution processes and may not ultimately come before the Review Panel, unless they are connected to other forms of sexual harassment, such as sexual assault, dating violence, domestic violence, and/or stalking.



Putting It All Together: Hostile Environment Sexual Harassment Continued

- Remember that the sex, gender identity, gender expression, and/or sexual orientation of the individuals do not matter in how we apply the relevant evidence to the policy elements



Sexual Assault

Any sexual act directed against another person, without the consent of the Complainant, including instances where the Complainant is incapable of giving consent.

- **Rape** – Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without their consent including instances where they are incapable of giving consent because of age or temporary or permanent mental or physical incapacity
- **Sodomy** – Oral or anal sexual intercourse with another person, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.



Sexual Assault Continued

- **Sexual Assault with an Object** – The use of an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity
- **Fondling** – The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against the person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity



Sexual Assault Continued

- **Incest** – Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by West Virginia law.
- **Statutory rape** – Nonforcible sexual intercourse with a person who is under the statutory age of consent of sixteen.



Consent

- Informed, knowing, and voluntary (freely given)
- Active (not passive)
- Creates mutually understandable permission regarding the condition of sexual activity
- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
- Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally



Overview of the Three Questions

1. Was force used by the Respondent to obtain sexual or intimate access?
2. Was the Complainant incapacitated?
 - a. If so, did the Respondent know, or
 - b. Should the Respondent have known that Complainant was incapacitated

NOTE: The intoxication of Respondent cannot be used as a reason they did not know of Complainant's incapacity.

3. What clear words or actions by Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?



Force

1. Was force used by the Respondent to obtain sexual or intimate access?

- Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force
- Consider the impact of power dynamics



Force Continued

Types of force to consider:

- **Physical violence:** hitting, restraint, pushing, kicking, etc.
 - This may also involve alleged violations of other policies (e.g., harm to persons, violation of law)
- **Threats:** anything that gets someone to do something they wouldn't ordinarily have done absent the threat
 - This requires an analysis as to the viability of the threat and whether a reasonable person would believe the Respondent could or would carry out the threat



Force Continued

Types of force to consider:

- **Intimidation:** an implied threat that menaces and/or causes reasonable fear.
 - This requires the same threat analysis as above
- **Coercion:** the application of an unreasonable amount of pressure for sexual access
 - Consider isolation, frequency, intensity, and duration



Incapacity

2. Was the Complainant incapacitated?

- What was the status of the Complainant in terms of:
 - Situational awareness
 - Consequential awareness
- What was the reason for incapacity?
 - Alcohol or other drugs (prescription or non-prescription)
 - Mental/cognitive impairment
 - Injury
 - Asleep or unconscious



Incapacity Continued

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent
- Incapacitation is a determination that will be made after the incident in light of all the facts available
- Blackouts are frequent issues
 - Blackouts - incapacitation (automatically)
 - Blackout = no working (a form of short-term) memory for a consistent period, thus unable to understand who, what, when, where, why, or how
 - Partial blackout must be assessed as well



Behavioral Cues

Evidence of incapacity context cues:

- Slurred speech
- The smell of alcohol on the breath in combination with other factors
- Shaky equilibrium; stumbling
- Passing out
- Throwing up
- Appearing disoriented
- Unconsciousness
- Known blackout
- Outrageous or unusual behavior (requires prior knowledge)



Prior Knowledge Construct

- Did the Respondent know the Complainant previously?
- If so, was Complainant acting very differently from previous similar situations?
- Evaluate what the Respondent observed the Complainant consuming (via the timeline)
- Determine if Respondent provided any of the alcohol for the Complainant
- Other relevant behavioral cues



Incapacity Analysis

- If the Complainant **was not** incapacitated, move on to the Consent Analysis
- If the Complainant **was** incapacitated, but:
 - Respondent did not know it, **AND**
 - Respondent would not have reasonably known it = policy not violated, move to Consent Analysis
- If the Complainant **was** incapacitated, and:
 - Respondent **knew it or caused it** = policy violation; sanction accordingly
 - Respondent **should have known it** = policy violation; sanction accordingly
 - Respondent's own intoxication cannot be used as a defense



Consent Analysis

3. What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

- Is there any sexual or intimate pattern or history between the parties?
- What verbal and/or non-verbal cues were present during any acts that the parties agree were consensual?
- This is where getting detail and specifics of intimate behaviors is critical



Dating Violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition -
 - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
 - Dating violence does not include acts covered under the definition of domestic violence.



Domestic Violence

- A felony or misdemeanor crime of violence committed -
 - By a current or former spouse or intimate partner of the Complainant;
 - By a person with whom the Complainant shares a child in common;
 - By a person who is cohabitating with, or has cohabited with, the Complainant as a spouse or intimate partner;
 - By a person similarly situated to a spouse of the Complainant under the Complainant under the domestic or family violence laws of West Virginia
- By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of West Virginia



Domestic Violence Continued

- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates
- The people cohabiting must be current or former spouses or have an intimate relationship.



Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to -
 - Fear for the person's safety or the safety of others; or
 - Suffer substantial emotion distress.
- For the purposes of this definition:
 - **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by an action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property

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Stalking Continued

- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the Complainant
- **Substantial emotional distress** means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

Please, please, please, don't interpret this to violate anyone's First Amendment rights.



Sexual Exploitation

Sexual Exploitation: an individual taking non-consensual or abusive sexual advantage of another for their own benefit or for the benefit of anyone other than the person being exploited, and that behavior does not otherwise constitute sexual harassment.

Examples include, but are not limited to:

- Sexual voyeurism
- Invasion of sexual privacy (e.g., doxing)
- Exposing one's genitals or anus or causing another to expose one's genitals or anus
- Knowingly transmitting a sexually transmitted infection to another person



Sexual Exploitation Continued

- Causing or attempting to cause the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give consent to sexual activity, or for the purpose of making that person vulnerable to non-consensual sexual activity
- Misappropriation of another person's identity on apps, websites, or other venues designed for dating or sexual connections (e.g., spoofing)
- Taking pictures, video, or audio recording of another in a sexual act, or in any other sexually related activity when there is a reasonable expectation of privacy during the activity, without the consent of all involved in the activity; or exceeding the boundaries of consent (such as allowing another person to hide in a closet and observe sexual activity; or disseminating sexual pictures without the photographed person's consent), including the making or posting of non-consensual pornography



Sexual Exploitation Continued

- Taking pictures, video, or audio recording of another in a sexual act, or in any other sexually related activity when there is a reasonable expectation of privacy during the activity, without the consent of all involved in the activity; or exceeding the boundaries of consent (such as allowing another person to hide in a closet and observe sexual activity; or disseminating sexual pictures without the photographed person's consent), including the making or posting of non-consensual pornography
- Knowingly soliciting a minor for sexual activity
- Engaging in sex trafficking
- Knowingly creating, possessing, or disseminating child pornography



Retaliation

- No institution or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a conduct code violation for making a materially false statement in bad faith in the course of Title IX matter does not constitute retaliation
- Determining retaliation regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith



Basic Legal Principles of Retaliation

Protected activity under Title IX:

- Reporting sex discrimination, including sexual harassment and assault
- Filing a discrimination complaint
- Assisting someone in reporting discrimination or filing a complaint
- Participating in any manner in an investigation of discrimination, for example as a witness
- Protesting any form of sex discrimination (e.g., lack of equity in athletics)



Determining Retaliation Claims: Keys to Understanding

- Establishing retaliation, unlike establishing sexual harassment, requires proving motive – the intent to retaliate.
- Someone's intention is rarely displayed openly. Therefore, the policy framework is about whether a retaliatory motive can be inferred from the evidence.
- Gathering details of what occurred is critical.



Elements and Analysis of a Retaliation Claim

The following elements establish an inference of retaliation:

1. Did the individual engage in protected activity?
 - Usually straightforward,
 - Unless there is a question of reasonableness of belief or manner.
2. Was the individual subsequently subjected to adverse action?
3. Do the circumstances suggest a connection between the protected activity and adverse action?
 - Did individual accused of retaliation know about activity?
 - How soon after the protected activity did the adverse action occur?

**If these three elements are not shown,
there is not a finding of retaliation.**



Retaliation and Adverse Action

- Common definition of **adverse action**:
 - Significantly disadvantages or restricts the individual as to their status as students or employees, or their ability to gain the benefits or opportunities of the program
 - Precluded from their discrimination claims
 - Reasonably acted or could act as a deterrent to further protected activity
- The U.S. Supreme Court and the federal courts have defined adverse action **very broadly**.



Serving Impartially

- Do not rely on sex stereotypes when approaching allegations, witnesses, Complainants, Respondents, or Formal Complaints.
- Investigations and adjudications under the Grievance Procedures must be impartial.
 - Act objectively throughout your role in the process
 - Avoid generalizing individuals based on prior prejudices involving sex, sex stereotypes, or status in the process

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Bias – What is Bias?

The Department of Education has defined bias as occurring in the following situations:

- Treating a party differently on the basis of the party's sex or stereotypes about how men or women behave with respect to sexual violence.
- Ignoring, blaming, or punishing a student due to stereotype about the student.



Bias – What is Bias?

Impermissible bias is fundamentally about making a decision based on the characteristics of the parties, instead of the available facts.



Bias – What is Bias?

The Department of Education has indicated three areas that are NOT defined as bias:

1. Outcomes of the Grievance Process
2. Title IX Coordinator Signs Formal Complaint
3. Professional Experience or Affiliation



Conflict of Interest

Individuals serving as Title IX Coordinator, Title IX Investigator and Review Panel Members must not have a conflict of interest or bias:

- For or against Complainants or Respondents generally; or
- For or against individual Complainant or Respondent.



NOT a Conflict of Interest

The University may fill Title IX personnel positions, including Review Panel, with its own employees.

The University may have different individuals from the same office serve separate Title IX roles.



Recusal

- A conflict of interest might necessitate recusal, or party may request it
- If you feel you cannot hear a case impartially, notify the Title IX Coordinator immediately



Avoid Prejudgment of the Facts of Issue

Title IX Coordinator, Title IX Investigator and any Review Panel Members cannot:

- Pass judgment on the allegations presented by either party or witnesses; or
- Jump to any conclusions without a full investigation / review of the relevant facts from all parties involved.



Avoid Prejudgment of the Facts of Issue

It would not be avoiding prejudgment of the facts at issue if:

A Complainant reports allegations of sexual harassment to a Title IX Coordinator (TIXC). After TIXC hears the Complainant's allegations, the TIXC presumptively decides the allegations are false and the Complainant is uncredible. From solely the Complainant's reports, the TIXC also forms a preconceived notion that the Respondent will be credible.



Avoid Prejudgment of the Facts of Issue

It would not be avoiding prejudgment of the facts at issue if:

The Title IX Investigator (TIXI) meets with both parties, and after the initial interviews, the TIXI concludes that the Respondent is believable, and the Complainant is not. The TIXI relies on a "gut-feeling" about the situation, and it reminds them of a prior case where a Respondent was found not responsible. Based on this alone, they decide there is no need to conduct further fact-finding or interview any additional witnesses identified by the parties.

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Avoid Prejudgment of the Facts of Issue

Necessitates a broad prohibition of sex stereotypes.

Decisions must be based on individualized facts, and not on stereotypical notions of what "men" and "women," "Complainants" and "Respondents" do or not do.



Best Practices to Avoid Prejudgment of the Facts of Issue

Any and all stereotypes about men and women must be left behind (whether from past Title IX proceedings or personal experiences).

Approach each allegations with neutrality at the outset.

Treat both parties equally and provide an equal opportunity to present evidence, witnesses, and their versions of events.



Avoiding Bias – Determination of Credibility

Any determination of credibility made by the Review Panel cannot be based solely on an individual's status as a:

- Complainant;
- Respondent; or
- Witness.



Must Do: Prep for the Hearing

All Review Panel Members Must Review:

- Written Notice of Investigation and copy of Complaint
- Policy (policies) alleged to have been violated
 - What does it take to establish a policy violation?
 - Identify the elements of each alleged offense
 - Break down the constituent elements of each relevant policy
- All the materials carefully and thoroughly
- Review and re-review the investigation report



Must Do: Prep for the Hearing Continued

Review Panel Members Must Thoroughly Review All Materials:

- Recommend you review materials multiple times
 - Note all areas of consistency/undisputed information
 - Often does not require questions in hearing
 - Note all areas of inconsistency/disputed information
 - These should be the main focus of questioning
- Prepare questions in advance
 - Will have more questions arise, but be prepared going in, no matter how experienced you are



Pre-Hearing Conferences

- Review Panel may conduct pre-hearing conferences, either in writing, or in person
 - Answer questions about the hearing and its procedures
 - Clarify expectations regarding logistics, decorum, the role of Advisors, and technology
 - Discuss witness and party participation and cross-examination
 - Discern any conflicts of interests / vet recusal requests
 - Consider any questions regarding relevance of evidence or proposed questions and may make pre-hearing rulings



Pre-Hearing Conferences

- Review Panel may request parties to provide questions before the hearing in order to make relevancy determinations prior to hearing with the understanding that additional questions may come up during the hearing
- Otherwise, a relevancy determination will be made after the question is asked and before an answer is given
- This helps to make the hearing smoother



Attendance of Witnesses

- Review Panel will request presence of Investigator or any other witness it deems necessary to its determination
- Parties may also request the presence of witnesses
- Proposed Witness List shall be provided to Hearing Officer at least four business days prior to Hearing, and it will include a brief statement of the need or relevancy of the proposed witness's presence
- Review Panel has absolute discretion to determine which witnesses are relevant and may decline to hear from witnesses where it concludes that the information is not necessary for its review



Attendance of Witnesses Continued

- Responsibility of each party to arrange for attendance of any proposed witness who is not affiliated with Marshall
- Marshall does not have subpoena power to compel the attendance of witnesses who are not affiliated with Marshall
- Witnesses will not be present for or hear the testimony of the parties or other witnesses
- Neither party is required to participate in hearing for the Hearing to proceed
- If a party does not appear, their Advisor may still appear to ask cross examination questions



Day of the Hearing

- Arrive prepared and early
- Bring snacks and water/drinks
- Silence or turn off your phone and put it away
- Bring a pen and paper or note-taking device
 - Less is better; note what you need to make a determination
 - Notes may be requested in litigation
- Clear calendar after the hearing – deliberation could take as few as 30 minutes or it could take much longer



Hearing Decorum

- Be professional, but avoid lawyer-like approach
 - This is not court – this is an administrative process at a school
 - You are not cross-examining or interrogating, you are striving to determine whether the Respondent(s) violated Marshall policy
- Be respectful
 - Tone, manner, questioning
 - Sarcasm or being snide is never appropriate
 - Maintain your composure; never allow emotion or frustration to show
 - De-escalate or take breaks if emotions/tensions are running high



Hearing Decorum Continued

- Work to establish a baseline of relaxed conversation for everyone in the room
- Use active listening skills
- Listen carefully to everything that is said
 - Try not to write too much when people are talking
 - Track questions/answers to avoid permitting too much repetition, and in case you need to repeat a question back
 - If questioning, focus on answer, rather than thinking about your next question
- Nod affirmatively
- Don't fidget, roll your eyes, or give a "knowing" look



The Hearing

Tips for the Review Panel and Hearing Officer:

- Recognize the need for flexibility with the order of statements and questioning, depending on the circumstances.
- Be familiar with your institution's hearing procedures; review again before each hearing.
- If a procedural question arises that must be addressed immediately, take a short break to seek clarification.
- Will you have legal counsel available by phone/text/in person?
- Apply all appropriate Marshall policies and procedures.



The Hearing

Hearing Testimony: The Role of the Chair/Review Panel:

- Determine the relevance and appropriateness of questions. Pause after each question to "rule" on relevance. Must state rationale for the record.
- When necessary, the Chair provides 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 Review Panel Members.
- Recognize positional authority.



Evidence

- No restriction on parties discussing case or gathering evidence
- Equal opportunity to:
 - Present witnesses, including experts
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination
- Cannot limit types/amount of evidence that may be offered except that it must be relevant
- Parties may have access to all gathered evidence that "directly relates" to the allegations available for reference and use at the hearing, but they must make the case for its relevance



Is it relevant?



Is it reliable? (Is it credible?)



Will we rely upon it as evidence supporting a rationale/the written determination?



Understanding Evidence

- Rules of Evidence do not apply in Title IX hearings
- If the information helps to prove or disprove a fact at issue, it should be admitted because it is relevant
- If credible, it should be considered
 - Evidence is any kind of information presented with the intent to prove what took place
 - Certain types of evidence may be relevant to the credibility of the witness, but not to the alleged policy violation directly
- **Relevance goes to the admissibility of the evidence**
- **Credibility goes to how much weight admissible evidence is given**



Relevant Evidence

- Evidence is relevant when it tends to prove or disprove an issue in the complaint
- Parties may make case to the Review Panel that this evidence is not relevant or directly related
- Once finalized, this evidence should be provided to the parties/Advisors/Review Panel Members



Relevance

- Evidence is generally considered relevant if it has value in proving or disproving a fact at issue, and relevance means the evidence may be relied upon by the Review Panel
 - Regarding alleged policy violation and/or
 - Regarding a party or witness's credibility
- Investigator will have made initial relevance "decisions" by including evidence in the investigation report.
- Relevance is ultimately up to the Review Panel, who is not bound by the Investigator's judgment
- All relevant evidence must be objectively evaluated and considered – both inculpatory and exculpatory



Evidence that Directly Related, But Not Relevant Evidence

- Evidence is directly related when it is connected to the complaint but is neither inculpatory nor exculpatory and will not be relied upon the investigation report
- Parties may make case to the Review Panel that this evidence is relevant or not directly related
- Once finalized, this evidence should be provided to the parties/Advisors/Review Panel Members



Other Evidence May Be Directly Related

Directly Related Evidence:

- Connected to the complaint but is neither inculpatory nor exculpatory
- While Investigator initially made evidence determinations, the Review Panel makes the final determination as to what evidence will be relied upon and what will not.



Evidence that Is Neither Relevant Nor Directly Related

- Evidence maintained in the file, but disregarded for purposes of the process



Weighing Evidence

- Review Panel may consider and assign weight to different types of evidence, when relevant and credible
- Review Panel should typically only consider impact statements during sanctioning



Documentary Evidence

- e.g., supportive writings or document

Electronic Evidence

- e.g., photos, text messages, and videos

Real Evidence

- i.e., physical objects

Direct or Testimonial Evidence

- e.g., personal observation or experience

Circumstantial Evidence

- i.e., not eyewitness, but compelling

Hearsay Evidence

- e.g., statement made outside the hearing but presented as important information

Character Evidence

- Subject to relevance determination; often not probative of the underlying allegation



Specific Evidence Issues Under Title IX

- Evidence of the Complainant's sexual **predisposition** is never relevant
- Evidence about the Complainant's **prior sexual behavior** is explicitly and categorically **not relevant** except for two limited exceptions:
 - Offered to prove that someone other than the Respondent committed the conduct alleged; or
 - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition



Additional Evidence Restrictions Under Title IX

Additional permissions (from the party) 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
 - This is complex in practice because you won't know to ask for permission unless you ask about the records first



Additional Evidence Considerations in Hearings

- In Title IX hearings, relevant and directly related evidence is often "admitted" in the sense that it is not excluded and/or Review Panel is not shielded from hearing/knowing it
- Some evidence can be excluded, or witnesses can be directed not to answer certain questions if not relevant, directly related, or not permissible subject matter (e.g., Complainant's sexual history)
- However, the Review Panel will need to determine whether the evidence can and will be relied upon if it is introduced
 - There will be a decent amount of trying to "unhear"/disregard what is introduced, because even though you know it, you can't consider it

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Questioning

- The goal of questioning in the hearing is to ensure that as the Review Panel, you understand information and evidence contained in the report:
 - Relevant evidence about what happened during the incident
 - Any related events
 - Any corroborating information
- Use your questions to elicit details, eliminate vagueness, fill in the gaps where information seems to be missing
- Your goal is not:
 - Satisfying your curiosity
 - Chasing the rabbit into Wonderland
- Do not expect the "Gotcha" moment. That is not your role. You are not prosecutorial.



If You Still Have To Ask A Question, Ask Yourself

- **Is the answer already in the report or documentation I have been provided?**
 - If not, why not? (Ask the Investigator this.)
 - You still will need to ask it again but keep the report in mind
- **What do I need to know?**
 - Who is the best person to ask this of?
 - Usually it will be the Investigator, and then the original source, if available
 - It may be good to ask the Investigator if they asked it already and what answer they previously received



If You Still Have To Ask A Question, Ask Yourself Continued

- **Why do I need to know it?**
 - If it is not going to help you decide whether a policy was violated or not and you can explain now, then it is not a good question (thought you may not know this until you hear the answer).
- **What do I need to know?**
- **Are you the best person to ask this question?**

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Asking Good Questions

- 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 a or b?
- Avoid suggesting an answer in your question



Questioning Skills

- Listen carefully and adapt follow-up questions.
- Work from your prepared outline but stay flexible.
- Seek to clarify terms (when the report is silent) that can have multiple meanings or a spectrum of meanings such as "hooked up," "drunk," "sex," "acted weird," "sketchy," or "had a few drinks."
- Be cognizant of the difference between what was "heard" (hearsay), what can be assumed (circumstantial), and what was "witnessed" (facts).
- Be aware of your own body language. Stay neutral, even if you heard something you distrust or dislike.



Questioning Tips

- Restate/summarize what was said. Helps validate that you are listening and helps ensure you understand what is being said.
- Consider using these phrases:
 - "So it sounds like . . ."
 - "Tell me more . . ."
 - "Walk me through . . ."
 - "Help me understand . . ."
- Frame questions neutrally.
- Be on the lookout for "cued" responses or rehearsed or memorized answers.
- Handle emotions sensitively and tactfully.
- Observe body language, but don't read too much into it.



What is Credibility

- Primary factors: corroboration and consistency
- Accuracy and reliability of information
- Review Panel must determine the credibility of testimony and evidence, and hence its reliability
- "Credible" is not synonymous with "truthful"
- Memory errors, evasion, misleading may impact credibility
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility
- Credibility assessment may not be based on a person's status as a Complainant, Respondent, or Witness



Credibility

- **Inherent Plausibility**
 - "Does this make sense?"
 - Be careful of bias influencing sense of "logical"
- **Motive to Falsify**
 - Do they have a reason to lie?
- **Corroboration**
 - Aligned testimony and/or physical evidence
- **Past Record**
 - Is there a history of similar behavior?
- **Demeanor (use caution!)**
 - Do they seem to be telling the truth?



Factors to Consider for Credibility

Inherent Plausibility

- Does what the party described make sense?
 - Consideration of environmental factors, trauma, relationships
- Is it believable on its face?
- "Plausibility" is a function of "likeliness"
 - Would a reasonable person in the same scenario do the same things? Why or why not?
 - Are there more likely alternatives based on the evidence?



Factors to Consider for Credibility Continued

Inherent Plausibility Continued

- Is the party's statement consistent with the evidence?
- Is their physical location or proximity reasonable?
 - Could they have heard what they said they heard?
 - Were there other impediments? (e.g., darkness, obstructions)
- How good is their memory?
 - Temporal proximity based on age of allegations
 - "I think," "I'm pretty sure," "It would make sense"



Factors to Consider for Credibility Continued

Motive to Falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
 - Think academic or career implications
 - Personal or relationship consequences
- What if the allegations are false?
 - Other pressures on the Complainant – failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony



Factors to Consider for Credibility Continued

Corroborating Evidence

- Strongest indicator of credibility
- Independent, objective authentication
 - Party says they went to dinner, provides receipt
 - Party describes text conversation, provides screenshots
- Corroboration of central vs. Environmental facts
- Not simply alignment with friendly witnesses



Factors to Consider for Credibility Continued

Corroborating Evidence Continued

- Can include contemporaneous witness accounts
 - More "separate" the witness, greater the credibility boost
- Outcry witnesses
 - Does what party said then line up with what they say now?
- Pay attention to allegiances
 - Friends, roommates, teammates, group membership
 - This can work both directions (e.g., honest roommate)



Factors to Consider for Credibility Continued

Past Record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations?
 - Even if found "not responsible," may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship
- Use caution; past violations do not mean current violations



Factors to Consider for Credibility Continued

Demeanor

- BE VERY CAREFUL
 - Humans are excellent at picking up non-verbal cues
 - Humans are terrible at spotting liars
- Is the party uncomfortable, uncooperative, resistant?
- Certain lines of questioning – agitated, argumentative
- Look for indications of discomfort or resistance
- Make a note to dive deeper, discover source



Credibility Assessments in Investigation Reports

Regulations permit Investigators to make credibility recommendations

- Can serve as a roadmap for Review Panel but is not binding



Credibility In The Hearing

- Distinguish performance/presentation skills from believability
- Evidence requiring a credibility assessment should be examined in a hearing
 - Fundamental to due process
 - Failure of a witness/party to participate undermines ability to fully assess credibility
 - Other evidence can be considered
 - What will the effect of that be on the process/decision?



Overview of the Deliberation Process

- Only Review Panel Members attend and participate in deliberations
 - Parties, witnesses, Advisors, and other excused
 - TIXC and legal counsel should not participate
- Do not record; and recommend against taking notes
- Parse the policy (elements that compose each allegation)
- Assess credibility of evidence and assess statements as factual, opinion-based, or circumstantial
- Apply evidentiary standard to determine if policy has been violated

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Deliberations

General Information

- Must provide detailed, written rationale for and evidence supporting its conclusions
- Chair must be a voting member
- Typically, there is no specific order in which allegations must be addressed. When in doubt, start with the most serious
- Chair should ensure that all viewpoints are heard
- Neutralize any power imbalances among panel members, particularly based upon their position at the institution
- Ensure an impartial decision that is free of substantive bias

Withhold judgment until all the evidence has been considered



Deliberations

Foundations for Decisions

- Decisions must be based only upon information/evidence in the investigation report or presented at the hearing
- Do not turn to any outside "evidence"
- Parse the policy (break it down by its constituent elements)
- Assess evidentiary weight. Measure with the following questions:
 - Is the question answered with the fact(s)?
 - Is the question answered with opinion(s)?
 - Is the question answered with circumstantial evidence?

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Deliberations

Findings, Impact Information, and Sanctions

- Separate the "Finding" from the "Sanction"
 - Do not use impact-based rationales for findings (e.g., intent, impact on Complainant, impact on Respondent)
 - Use impact-based rationales/evidence for sanctions only
- Impact/mitigation statement(s) should only be considered if and after the Respondent is found in violation
- Whether Respondent violated policy should be distinct from factors that aggravate or mitigate the severity of the violation
- Be careful – do not heighten the evidentiary standard because the sanctions may be more severe



Sanctioning in Sexual Misconduct Cases

Title IX and case law requires:

- Review Panel should also decide sanction if credibility will influence the sanction
- Marshall must act reasonably to bring an end to the discriminatory conduct (**Stop**)
- Marshall must act reasonably to prevent the future reoccurrence of the discriminatory conduct (**Prevent**)
- Marshall must restore Complainant as best they can to their pre-deprivation status (**Remedy**)
- This may create a clash if sanctions only focus on educational and developmental aspects
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose



Common Student Sanctions

- Warning
- Probation
- Loss of privileges
- Counseling
- No contact
- Residence hall relocation, Suspension, or expulsion
- Limited access to campus
- Online education
- Alcohol and drug assessment, and counseling
- Discretionary sanctions
- College suspension
- College expulsion
- Service hours

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Written Determinations

Review Panel issues a detailed, written determination regarding responsibility that includes the following:

- Policies alleged to have been violated
- A description of the procedural steps taken from the receipt of the complaint through the determination including:
 - Any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Statement of and rationale for the result as to each specific allegation
 - Should include findings of fact and conclusions



Written Determinations

- Sanctions imposed on Respondent (if any) and rationale for sanctions chosen (or sanction not chosen)
- Whether remedies designed to restore or preserve equal access to the education program or activity will be provided by Marshall to the Complainant
- Procedures and bases for any appeal
- Review Panel may follow a template provided by TIXC



Logistics of Written Determinations

- The written determination should be provided to the parties simultaneously
- The determination becomes final either on the date that Marshall provides the parties with the written determination of the result of the appeal, or if an appeal is not filed, the date on which an appeal would no longer be considered timely
- FERPA cannot be construed to conflict with or prevent compliance with Title IX
- Letter will be reviewed by the TIXC



Appeals

- Appeal Officer cannot be TIXC
- Also cannot be the Investigator or Review Panel member
- Marshall may have pool of Review Panel members who sometimes serve on Review Panel or as Appeal Officer
- Marshall may have dedicated Appeal Officers



Appeal Response

- When an appeal is filed, Marshall must notify the other party and implement appeal procedures equally for all parties
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- Review Panel Chair may be called upon by Hearing Officer to inform the appeal process
 - Likely a paper exchange; not in-person



Bases for Appeal

- Procedural irregularity that affected the outcome
- New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome
- TIXC, Investigator, or Review Panel had a general or specific conflict of interest or bias against the Complainant or Respondent that affected the outcome.



Process for an Appeal

Starts with Request for Appeal

- If Denied, such as filed outside time frame, Decision Stands
- If Accepted, three options
 1. Decision Stands,
 2. Remand, or
 3. Sanction Adjusted
- If remanded, three options
 1. New Investigation
 2. New Hearing
 3. Sanctions Only Hearing



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- If Accepted, three options
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Any Questions?

Additional concerns or requests?

Please contact

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Title IX Office

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