BARNES & THORNBURG LLP

# New Title IX Regulations:

## Decision Makers & Advisors

August 12, 2020

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# Discussion Topics:

- Hearing Procedures
- Mock Hearing Scenarios and Evidentiary Issues
  - Review of the Investigation Report
  - Planning the Hearing
  - Evidentiary Issues
- Final Determinations and Appeals
- Key Takeaways


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Presented by Mark Scudder

# HEARING PROCEDURES

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# Hearings Topics

- Big Picture Items
- Roles Within School's Title IX Department
- Hearings
- Advisors & Cross-Examinations

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# Big Picture Items

- Both the investigation and hearing processes have gone through significant changes as a consequence of the regulations
- Cannot be discriminatory on the basis of sex and must apply to complainants and respondents


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# Roles Within School's Title IX Department

- Single investigator model is no longer allowed
  - Investigators and Decision Maker(s) cannot be the same in any given case
- All individuals in the case must be unbiased

*This is one area that could result in requiring additional staff!*

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# Hearings

- Hearings are now *mandatory* for all post-secondary schools
- Must be conducted live with both parties able to simultaneously see and hear each other
  - If requested by either party, the hearing can be conducted in separate rooms with technology to enable this requirement
  - Can also be done virtually


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# Hearings

- Recordings of the hearings must be available for all parties to inspect and review
  - Audio
  - Audiovisual
  - Transcript


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# Hearing Procedure

- Opening statements?
- Order of witnesses?
- Questions from the hearing officer?
- Closing statements?

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# Advisors & Cross-Examinations

- Cross-examinations are now allowed by regulation
- Parties can *not* directly cross-examine each other
  - Questions must be asked by a party's advisor or attorney
- Schools must provide an advisor for the purpose of cross-examinations if parties do not have one
  - Does not have to be a lawyer

*This is another area that may result in requiring additional staff!*


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# Advisors & Cross-Examinations

- Questions must be relevant before the party or witness provides an answer
- Relevance is not defined within the regulations
- Questions regarding prior sexual history are only allowed when:
  - Such information is offered to prove someone other than the respondent committed the sexual harassment, or:
  - Prior sexual behavior between the parties offered as proof that there was consent


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# Limitations on Advisor's Role

- Advisors must be allowed to cross-examine and question witnesses
- Any other restrictions are allowed, but must be applied equally to all parties


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Presented by Chris Bayh

# MOCK HEARING SCENARIOS / EVIDENTIARY ISSUES

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# Scenario

- Scenario to illustrate some key concepts


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# Starting the Hearing

- Proceedings must be equitable and governed by consistent procedures
- Opening statements discretionary
  - Time limit?
  - Party versus advisor?
  - Excluded entirely?


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# Direct Examination of Complainant (Sophia)

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# Key Issues We Tackled

- General process
- Opportunity to be heard
- Relevance
- Leading questions
- Bias


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# Cross Examination of Complainant (Sophia)

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# Key Issues We Tackled

- Relevance
- Sexual history & predisposition
- Mistaken identity
- Intoxication
- Badgering the witness

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# Relevance – how defined?

- "The final regulations do not define relevance, and the **ordinary meaning** of the word should be understood and applied." Cmt. p. 811, fn 1018.
- Something that has a tendency to make a consequential fact more or less probable than it would be without the evidence.
- A school "may **not** adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence." Cmt. p. 812.


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# Relevance – any specifics?

- A few – § 106.45(b)(6)(i):
  - Irrelevant: "the complainant's sexual predisposition or prior sexual behavior"
    - Think: rape shield laws
  - Exceptions—where prior sexual behavior may be relevant:
    - Assailant identity: "to prove that **someone other than the respondent** committed the conduct alleged"
    - Prior complainant-respondent relations: evidence "concern[ing] specific incidents of the complainant's prior sexual behavior **with respect to the respondent** and are offered to prove consent"


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# Relevance – making the call

- Chance to address it from the investigation report.
  - "[I]f a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii)."
- Chance to address it during or even after the hearing.


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# Absent Witnesses

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# Key Issues We Tackled

- Opportunity to be heard
- Relevance
- Cross-examination of “statements”

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# Cross-Examination

- To be admitted, any "statement" must be subject to cross-examination.
- "Statement" is broad.
  - It "has its ordinary meaning."
  - It "would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements."
  - Includes "police reports, SANE reports, medical reports, and other documents and records… to the extent that they contain the statements of a party or witness."
- Who makes the statement is important.
  - Rule is limited to cross-examination.


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# Cross-Examination – trouble spots

- Where concerns tend to show up:
  - Formal reports: police, SANE, medical, other investigations
  - Emails and text messages
  - Hearsay—"I heard…"; "he told me…"; etc.
- Is it really cross-examination? Look out for:
  - Which side is offering the statement into evidence? It's the other side that must have the chance to ask the speaker about it.
  - Think: whether the person who made the statement may wish to avoid that statement by refusing to testify.


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# Deciding what evidence can be part of the record

## Admissible or not?

**From:** Jennifer Travelor <jennifertravelsalot@gmail.com>
**Sent:** Saturday, July 25, 2020 4:38 PM
**To:** Investigator, Sophia
**Subject:** [EXTERNAL]Fwd: Title IX Witness Statement

Good Afternoon:

I am writing this statement to the investigator. I was asked to write about my experience with Aiden. He is a bad guy. Last semester I was at a party and had too much to drink. When I woke up, Aiden was in a bed with me and I quickly realized he had sex with me. I did NOT ask him to have sex. He should be locked up.

I am writing this while I am still at the port. I will be at sea for the next 2 months and will not have service. Please accept this as my written statement.

Thanks,
Jennifer


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# Hearsay – what about that?

- "the proposed rules do not speak to admissibility of hearsay"
- However, § 106.45(b)(6)(i) "states that the decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination" Cmts. p. 811 & fn. 1017.
- Think:
  - Is an affirmative statement of fact being left unchallenged?
  - Or is the original speaker the complainant or respondent?


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# Direct Examination of Aiden


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# Key Issues We Tackled

- Relevance


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# Cross Examination of Aiden


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# Key Issues We Tackled

- Opportunity to be heard
- Relevance
- Cross-examination

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# Deciding what evidence can be part of the record

## Relevant or not?

Complainant wishes to rely on a text message that the Respondent sent to a friend the day after the events in question. The text reads, “I don’t remember much from last night but I think I did something bad.” Respondent refuses to testify.

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# Refusal to Answer Questions

- § 106.45(b)(6)(i)
  - "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on **any statement** of that party or witness in reaching a determination regarding responsibility;"
  - "provided, however, that the decision-maker(s) **cannot draw an inference** about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions."


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Presented by Mark Scudder

# FINAL DETERMINATIONS & APPEALS

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# What happens after the final determination is made?

After the hearing has been concluded and a final determination has been made, the decision-maker prepares the written determination.


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# Evidentiary Standard

The new Rule provides the choices between 2 standards:

- the preponderance of the evidence standard; **or**
- the higher clear and convincing evidence standard.

What's the difference?


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# What are your thoughts?

Would Aiden be found to be responsible under a PREPONDERANCE OF THE EVIDENCE standard?

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# What are your thoughts?

Would Aiden be found to be responsible under a CLEAR AND CONVINCING EVIDENCE standard?

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# What must be included?

- Identification of the allegations
- Description of the procedural steps taken from the receipt of the formal complaint through the determination
  - Must include:
    - Any notifications to the parties
    - Interviews with parties and witnesses
    - Site visits
    - Methods used to gather evidence
    - Hearings held


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# What must be included?

- Findings of fact supporting the determination;
- Conclusions regarding the application of the Code of Conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility;
- Any disciplinary sanctions imposed;
- Any remedies provided to the Complainant;


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# What must be included?

- Procedures and permissible bases for an appeal (available to both parties)

The written determination must be provided to the parties **simultaneously**.


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# When does the written determination become final?

- Either the date on which an appeal would no longer be considered timely; OR
- On the date that the parties are provided the written determination of the result of the appeal.


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# Appeal Process

*Both parties must be offered an appeal from a determination regarding responsibility or from a dismissal of a formal complaint or any allegations therein.*

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# Basis for Appeals

- Procedural irregularity that affected the outcome of the matter;
- 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;
- 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.


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# Appeal Procedure (mandatory)

- Notify the other party in writing when an appeal is filed;
- Implement appeal procedures equally for both parties;
- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.


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# Record Retention

The following must be retained on file for seven years:

- Records of investigation
- Records of appeals and associated materials
- Records of any informal resolution process
- All materials used to train Title IX staff and any person who facilitates an informal resolution
- Records of supportive measures taken in response to a complaint


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Presented by Janilyn Brouwer Daub

# KEY TAKEAWAYS & DISCUSSION

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# Key Takeaways

- There have been significant changes in both the investigation and hearing processes as a result of the new regulations.
- Hearings are now mandatory.
  - Both parties must have an advisor for cross-examination
- Relevance is key!
- Develop a final determination report that both adequately supports the determination of the decision maker and covers your bases for potential future appeals.


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# QUESTIONS?

Submit through the chat window!

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# WRAP-UP

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# THANK YOU FOR ATTENDING!

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