



Title IX- Training for Decision Makers and Appellate Authority

Agenda

- Title IX Foundation
- Scope and Jurisdiction
- Response Obligations
- Grievance Process/Formal Complaint
- The Hearing
- Burden of Proof
- Conflict of Interest
- Relevancy
- Rape Shield Laws
- Hearsay
- Appeals



Title IX = Federal Regulation

Title IX has become the primary federal policy that shapes how colleges respond to cases of sexual misconduct and harassment.

When Title IX is discussed, it is usually in connection with a complaint of sexual harassment.



Title IX Scope and Jurisdiction

- Title IX Covered Conduct=Sexual Harassment which comes in 3 forms:
 - Submission to or rejection of sexual demands that affect employment or academic decisions (quid pro quo)
 - Can only be committed by an employee
 - Unwelcome conduct that is severe, pervasive, and objectively offensive that it denies access to the program or activity(hostile environment)
 - Sexual assault, stalking, dating violence, or domestic violence (Clery crimes)



Title IX Scope and Jurisdiction

- Title IX requires that the prohibited conduct occur within an “educational program or activity.”
- This has been defined as applying to all locations, events, or circumstances over which college exercises substantial control over both parties.
- Title IX does NOT apply to private conduct that occurs at a private location.



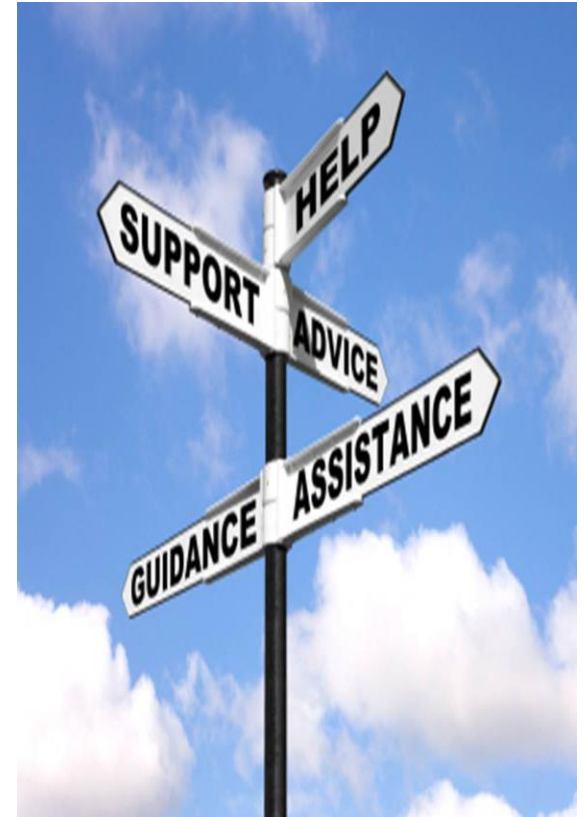
CSM Response Obligations under Title IX

- Sexual harassment response is triggered when the institution has “actual knowledge” of potential harassment.
- Actual knowledge occurs when:
 - An institutional official who has actual authority to take corrective action
 - Observes or receives a report
 - Of sexual harassment that occurred in an educational program or activity
- Title IX limits actual knowledge to “institutional officials” however, CSM has broadened this to include all employees have a responsibility to report.



Title IX Grievance Process

- A formal complaint, given in writing, initiates the grievance process.
- Once a formal complaint is made, the Title IX Coordinator will make an initial assessment to determine if it meets the scope and jurisdiction of the Title IX policy and offer supportive measures.



Evaluating Formal Complaint: Mandatory Dismissal

- If one (or more) of the following conditions is not met, the Title IX Coordinator must dismiss the formal complaint for Title IX purposes:
 - Conduct alleged, if true, does not meet policy's sexual harassment definition;
 - Conduct alleged did not take place within the University's educational program or activity;
 - At time of filing formal complaint, Complainant is not participating in or attempting to participate in the University's programs or activities



Dismissed

Evaluating Formal Complaint: Discretionary Dismissal

If one (or more) of the following conditions is met, the Title IX Coordinator may dismiss the Formal Complaint for Title IX purposes:

- Complainant withdraws formal complaint or allegations in writing;
- Respondent is no longer enrolled or employed by the University; or
- Specific circumstances prevent the University from gathering evidence sufficient to reach a determination regarding responsibility.



Title IX- Investigation

- Title IX Coordinator will appoint Investigator and notify both Complainant and Respondent that an investigation is occurring.
- Investigator will gather all available evidence.
 - Includes both inculpatory and exculpatory
- Investigator will write a report that summarizes the investigation and provide it to the Title IX Coordinator.
- Title IX Coordinator will initiate a Hearing Board.



Wait! Isn't there another option?

- At any time after the formal complaint is made, the parties may agree to an information resolution that would not involve a full investigation and/or live hearing.
- Either party may withdraw from the informal proceedings, and the formal proceedings will resume.
- Informal process is mediated by the Title IX Coordinator and often involves administrative resolutions or restorative justice measures.
 - Opportunity for acknowledgement and apology
 - Reassignment
 - Restitution
 - Written reprimands



Title IX- Hearing Board Members

The Hearing Board

- Consists of three people
 - 2 SLT members
 - 1 outside legal council, who will serve as Hearing Board Chair
 - Title IX Coordinator must conduct a conflict-of-interest analysis with SLT members to determine who is eligible (case by case basis).
- Preside over the hearing
- Serve impartially and avoid prejudgment of the facts at issue
- Avoid any bias or conflict of interests
- Independently reach a determination regarding responsibility
- Cannot give deference to an investigation report



Title IX- Hearing Logistics

The Hearing must:

- Be live (parties can be physically present in same place, or virtually but must be in real time)
- Create an audio or audiovisual recording, or transcript, of the live hearing
- Have cross-examination opportunity for Hearing Board members and the advisors of the opposing party



Role of Advisors in a Hearing

- Parties are allowed to have an advisor of their choice present during interviews.
 - Party may choose to have an attorney as their advisor
 - The advisor must be someone who is not involved (witness) with the investigation.
- CSM must provide an advisor, if requested by party.
- Advisors are responsible for asking all questions to Party and Witnesses.
- Hearing Board may set decorum rules that must be followed during the hearing.
- If advisor does not follow Hearing Board rules, they may be asked to leave, but time must be allowed for another Advisor to be found.

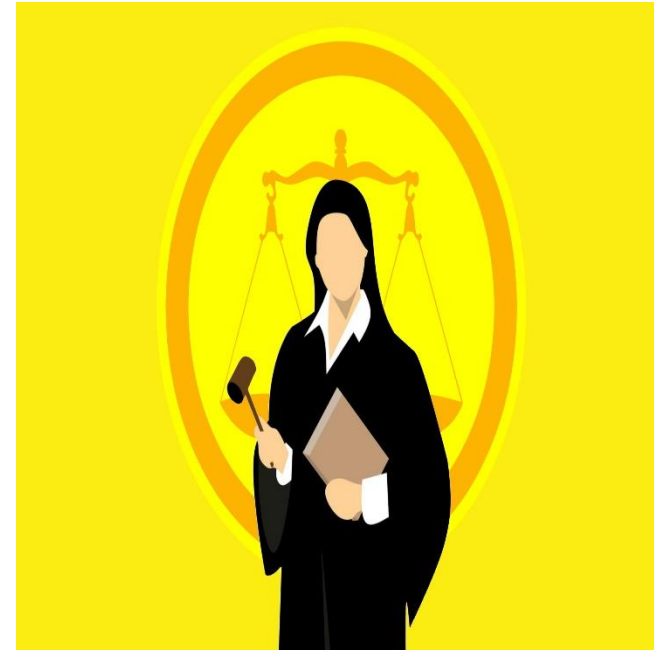


Setting Standards of Behavior for Hearing-Which is Permissible?

- The Hearing Board Chair's rules of decorum require all participants to maintain decorum, remain at their assigned table at all times, and direct all communications to the Hearing Board - with the exception of questions posed to the other party and witnesses by each Party's respective advisor.
- Institution's policy prohibits a party or advisor from "doing anything that would make another party uncomfortable or suffer anxiety, including asking questions that may cause a party to relive an experience in a traumatizing way."

Title IX- Hearing Board Key Concepts

- Respondent is presumed not responsible
- Complainant has burden of proof
- When determining responsibility, a preponderance of the evidence standard applies
- Decision Maker must independently evaluate questions for relevance and resolve relevancy objections
- Advisor to a Party must be given an opportunity to cross examine, or the evidence is excluded.



Title IX- Burden of Proof

BURDENS OF PROOF

Beyond a Reasonable Doubt

Requires elimination of every reasonable doubt.

Clear and Convincing Evidence

Firm belief or conviction.

Preponderance

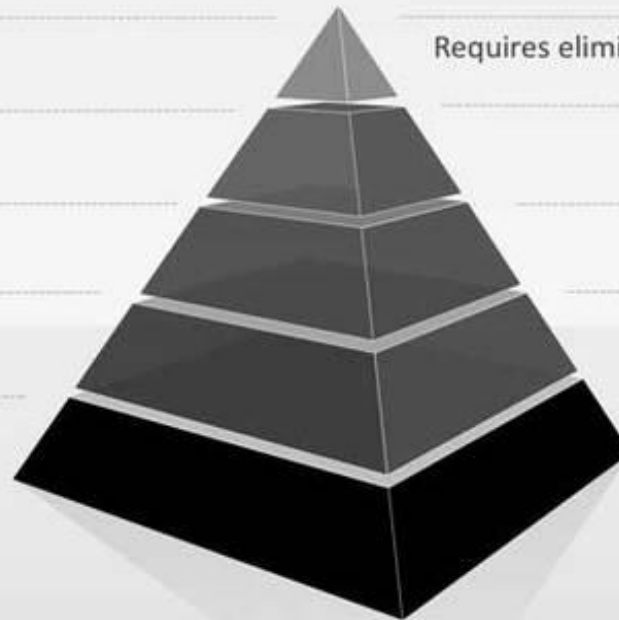
More likely than not.

Probable Cause

Facts and circumstances lead an ordinary person to believe.

Reasonable Suspicion

Specific and articulable facts.



VARGHESE
SUMMERSETT

Why a pyramid? | As the level of proof required rises, the fewer number of cases meet the level of proof.

Relevant Evidence

- As the Deciding/Appellate Authority, you may have to determine whether a fact is relevant or irrelevant and explain any decision to exclude a question as non-relevant.
- The two most basic rules in evidentiary law are:
 - All irrelevant evidence should be excluded
 - All relevant evidence should be admitted/considered.



Is that relevant?

Evidence is relevant if:

A: it has a tendency to make a fact more or less probably *and*

B: the fact is of consequence in determining the action (it has a significant bearing on the matter at hand)



Is it relevant?

- Hearing Officer has broad discretion.
- Certain categories of evidence will rarely, if ever, be relevant:
 - Polygraph and other generally unreliable or unproven scientific evidence
 - Speculation
 - Any party's medical, psychological, and similar treatment records without the party's voluntary, written consent
 - Any information protected by a legally recognized privilege without waiver
 - Party or witness statements that have not been subjected to cross-examination at a live hearing



Is Prior Sexual History Relevant?

- Generally, complainant's prior sexual history is not relevant = Rape Shield Laws.
- Prohibits questions or evidence about a complainant's prior sexual behavior or sexual predisposition.
 - Predisposition includes dress, speech, lifestyle, or previous relationships.
- Does not apply to respondents but respondent's sexual history must still be evaluated based on relevancy.



Rape Shield Laws

There are two exceptions where questions or evidence of past sexual behavior are allowed:

- Exception 1: Evidence of prior sexual behavior is permitted if offered to prove someone other than the respondent committed the alleged offense.
- Exception 2: Evidence of prior sexual behavior is permitted if it is specifically about the complainant and the respondent *and* is offered to prove consent.
 - Does not permit evidence of a complainant's sexual behavior with anyone other than the respondent.



Other Excluded Testimony-Not subject to Cross Examination

- If a party or witness does not submit to cross-examination at the live hearing, then the decision-maker cannot rely on any statement of that party or witness in reaching a determination regarding responsibility.
 - If a party or witness refuses to attend hearing, or refuses to answer questions, then the statement is considered unreliable and can not be used when making a decision.
 - It is not hearsay if the statement itself constitutes the sexual harassment at issue (threat, verbal assault etc).



Title IX- Hearing Board-Process

1. Call to order; state date & time for the record
2. Parties identify themselves
3. Hearing Officer will explain the hearing process and review any rules of decorum (remain seated, no disruptions, no yelling, profanity, or name calling)
4. Parties allowed to ask procedural questions and state any objections to proceeding
5. Investigator summarizes investigative report to include procedural history
 - Questions from Hearing Board
 - Questions from advisors of both parties



Title IX- Hearing Board-Process

7. Complainant presents evidence
 - Complainant provides statement
 - Hearing Board questions Complainant
 - Opposing Party advisor questions Complainant
8. Respondent presents evidence
 - Respondent provides statement
 - Hearing Board questions Respondent
 - Opposing Party advisor questions Respondent
9. Witnesses on behalf of either party
 - Questions first from Hearing Board
 - Questions from Complainant
 - Questions from Respondent
10. Closing statements from both parties



Questioning in Practice

- Step 1: Question: Advisor asks the question.
- Step 2: Ruling: Decision-maker determines whether question is relevant
 - If not relevant, decision-maker must explain reasoning to exclude question. If relevant, then...
- Step 3: Question must be answered by party or witness



Title IX- Hearing Board-Outcome Determination

- At the conclusion of the deliberations, the Hearing Board must issue a written determination of responsibility within 14 days.
 - Must include findings of facts in question, conclusions after applying the policy to the facts, rationale for the result, sanctions if appropriate, and appeals process.
- Both parties receive written determination simultaneously.



Title IX Final Determination

■ Potential Sanctions

SANCTIONS

- Being placed on University probation
- Required counseling or education
- Suspension or Expulsion, if a student
- Termination, if an employee
- Revocation of degree
- Campus ban
- Revocation of honors or awards
- Required community service or other restorative action deemed appropriate
- Imposition of an on-campus "no-contact order"
- Loss of privileges to use campus housing and facilities to include Lied Fitness Center and Dining Hall
- Change in class schedule, work schedule, or job assignment
- Loss of privileges to participate in CSM functions, activities, facilities, or organizations.
- Any other remedy which can be tailored to the involved individuals to achieve the goals of this policy

Title IX-Appeals

- Both parties may appeal.
- Provost acts as the Appeals Officer.
- In any request for an appeal, the burden of proof lies with the party requesting the appeal.
- The appeal is not a de novo (new) review of the underlying matter. The original determination is presumed to have been decided reasonably and appropriately.
- The original decision shall be affirmed unless the Appeals Officer sustains one of the grounds for appeal.



Title IX-Appeals

- Dissatisfaction with the findings is not grounds for appeal. Appeals may be based only on one or more of the following grounds:
 - Procedural error (failure to follow proscribed policy and/or procedures) that may have had a prejudicial effect upon the outcome of the proceedings;
 - New evidence that was discovered after the investigation was completed and *could not have been discovered previously* that may have an effect upon the outcome of the proceedings; or
 - Evidence of conflict of interest, bias, fraud or misconduct on the part of the investigator, Title IX Coordinator, or the Hearing Board members in charge of making the decision and sanctions.



Are all procedural errors appealable?

- No. The procedural irregularity must be one that “affected the outcome of the matter.”
- Errors that affect the outcome may be referred to as “prejudicial” errors.
- Errors that do not affect the outcome may be called “non-prejudicial” or “harmless” errors.



*Taken from Husch Blackwell Title IX & Sexual Harassment Response fall 2020 training.

Title IX- Appeals

- The decision of the Appeals Officer upon an appeal shall be final.
- The Appeals Officer has the following options:
 - Uphold the original decision and sanction
 - Modify the decision and/or sanction
 - Request the case be reheard in its entirety
 - Only utilized in extreme cases with significant procedural lapses that impacted the decision making of the original Hearing Board.
- A written appeals decision that describes the appeal and the rationale for the result must be provided to both parties, simultaneously.



