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Ensuring Equity and Due Process in Title IX Hearings:
Training for Hearing Panels and Hearing Officers

August 1, 2019

Eastern Kentucky
University

Presented by:

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Before we get started . . .

Disclaimers:

- The contents of this presentation and the related discussion are for informational purposes only and do not constitute legal or regulatory advice.
- No party should act or refrain from acting on the basis of any statements made today without seeking individualized, professional counsel as appropriate.

Your Trainers

Debbie Osgood

- Partner at *Hogan Marren Babbo & Rose, Ltd.* since 2016
- Title IX investigations and compliance audits
- Previously, senior manager and attorney for 25 years at OCR
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- Independent Title IX Investigator and Consultant
- Former in-house Title IX Investigator at the University of Michigan
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Top five challenges for hearing officers

1. _____
2. _____
3. _____
4. _____
5. _____



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What you need to know

1. Applicable laws and regulations (Title IX, VAWA, state)
2. Applicable college or university policies and procedures
3. How to run an orderly hearing
4. Rights of the complainant and respondent
5. How to evaluate types of evidence
6. How to assess credibility
7. Analytical approach in determining if a policy was violated
8. Questioning and deliberation techniques

Agenda

Introduction

- I. Overview of the Legal Environment
 - II. Understanding the Potential Claims
 - III. Hearings: Structures, Roles and Process
 - IV. Making the Decision
 - V. Putting Your Training Into Practice
 - VI. Writing the Decision and Imposing Sanctions
- Concluding Remarks

Part I

Overview of the Legal Environment





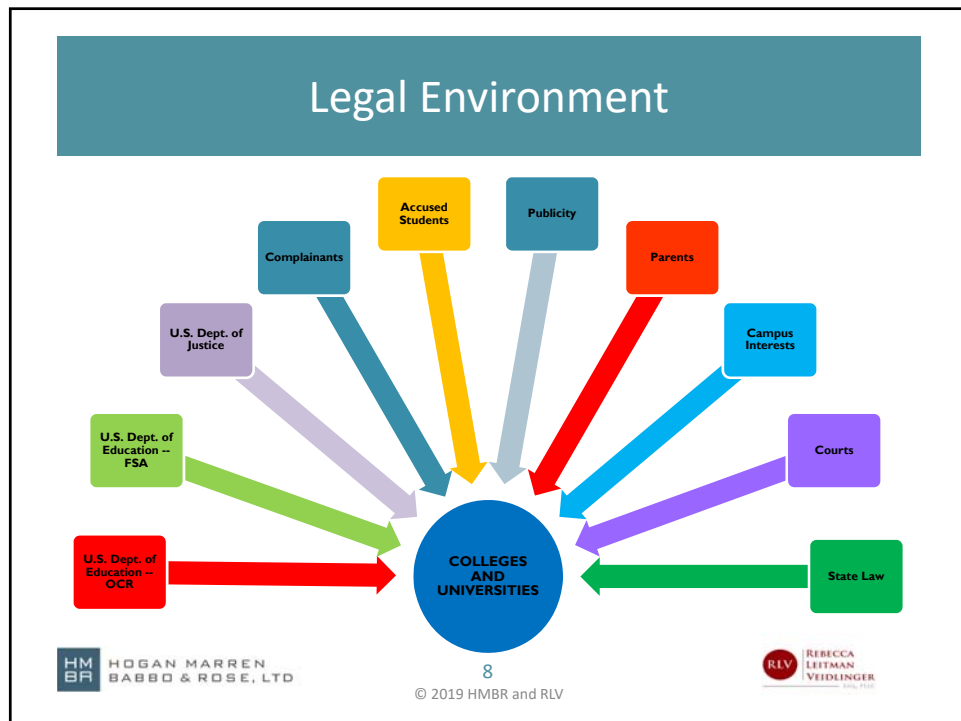
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What are we talking about when we talk about Title IX?



- Statute
 - Regulations
 - Federal court cases
 - Federal guidance documents
 - issued by U.S. Department of Education's Office of Civil Rights ("OCR")
 - Individual resolution agreements between federal government and institutions
- Big changes are coming

Title IX

Title IX of the Education Amendments of 1972 20 U.S.C. § 1681(a)

"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 education program or activity receiving Federal financial assistance."

Title IX

Title IX Regulations

34 C.F.R. Part 106

- Nondiscrimination Notice
- Title IX Coordinator
- “Prompt and Equitable” Grievance Procedures
- Response to Sexual Harassment
- Retaliation



Prompt and Equitable Grievance Procedures

What is “Prompt”?

- No fixed timeframe required by law
- Must be reasonable
- Can be extended for good cause with notice to parties of extension and reason for delay



What is “Equitable”?

- Standard of proof
- Parties have equal rights to:
 - Present witnesses and other evidence
 - Review evidence (including the investigative report)
 - Choose advisor
 - Submit expert testimony
 - Be notified of the outcome



OCR Policy Guidance

Current:

- Dear Colleague Letter on Sexual Misconduct and Q&As (2017)
- Title IX Coordinators documents and resource guide (2015)
- Dear Colleague Letter: Harassment and Bullying (2010)
- Revised Sexual Harassment Guidance (2001)
- Notice of Nondiscrimination Pamphlet (2010)

Proposed:

- Notice of Proposed Rulemaking (Nov. 16, 2018) (still pending)

Withdrawn:

- Dear Colleague Letter: Sexual Violence (2011)
- Questions and Answers on Title IX and Sexual Violence (2014)



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Title IX -- Notice of Proposed Rulemaking (NPRM)

STATUS: Pending with the Department

KEY CHANGES:

- Deliberate indifference
- Narrower obligations
- Specific regulation defining “prompt and equitable”
- Live hearing: Each party can ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility
- Informal resolution



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Clery Act/VAWA

Federal Statute and Regulations:

- Clery Act originally enacted in 1994
- VAWA 2013:
 - Domestic violence, dating violence, and stalking added to existing reporting categories (sexual violence and other crimes)
 - Prevention and awareness programs, publicizing info re: policies and procedures
- Enforcement
 - Department's Office of Federal Student Assistance (FSA)
 - Possible fines



Civil Litigation

Civil Litigation

Increased federal and state court action concerning the process and outcome of Title IX grievance procedures.

- Cases filed by complainants *and* respondents
- Possible injunctions and monetary damage awards
- Court decisions generally issued early in the case
- Most cases concern suspensions or expulsions

Challenges by Complainants



- **Title IX:** Deliberate indifference
- **Tort Law:** Negligence/duty of care
- **Other Claims:** Breach of contract, intentional infliction of emotional distress, and more

Challenges by Respondents

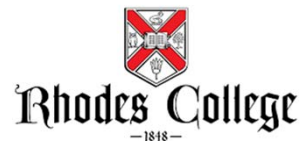
- **Title IX**
- **Due Process**
- **Other Claims:** Breach of contract, intentional infliction of emotional distress, defamation and more



Due Process Challenges by Respondents

Due process:

- Failure to provide notice (of all charges) *and*
- Failure to provide an adequate and meaningful opportunity to be heard



Title IX Challenges by Respondents

Gender Bias:

Do the alleged facts, if true, raise a plausible inference that the university discriminated against the respondent “on the basis of sex”?

- Erroneous outcome: flawed due to sex of a party
- Selective enforcement: similarly situated individuals of different sexes treated differently



Recent Decisions

Doe v. Baum (University of Michigan) -- 6th Cir., Sept. 2018:



Due process requires that public institutions provide a hearing with an opportunity for cross examination where credibility is at issue.

How do these legal developments affect the work of a Hearing Officer?

"What's the point?"

- Expect more hearings
- Expect more lawyers
- Must ensure we:
 - Make reasonable decisions based on the applicable policy and the evidence
 - Avoid any type of bias or conflict in public statements and conduct at hearing
 - Allow cross examination of parties and witnesses
 - Provide equal process for parties to present their cases

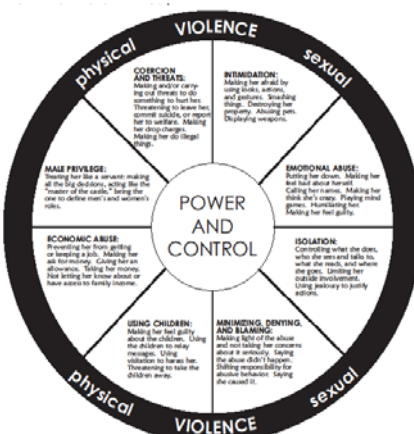
Part II

Understanding the Potential Claims

Common Dynamics of Campus Sexual Assault

- Not strangers
- Intimacy begins when around group of other people
- First sexual activity together
- Consumption of alcohol
- Some consensual sexual activity
- One person stops consenting and the other person disregards that lack of consent for additional sex act

Dynamics of Interpersonal Violence



From National Center on Domestic and Sexual Violence
www.ncdsv.org

Sexual Harassment -- Elements



- Verbal or physical conduct of a sexual nature
- Unwelcome
- Creates a hostile environment

Sexual Harassment



- What does “unwelcome” mean?
 - Uninvited/not initiated by complainant
 - Intention v. (reasonable) Impact
- Does a person always confront their harasser?

Sexual Assault and Consent

EKU definition:

**YES
MEANS
YES**

Words or actions demonstrating a knowing, willful, unambiguous, and voluntary agreement to engage in mutually agreed-upon sexual activity. Consent is determined based on the totality of the circumstances.

Evaluating Claims of Incapacitation



- What evidence is there that the complainant or respondent was incapacitated? (Know your policy's definition of incapacitation.)
- If one party was incapacitated, did the other party know or should they have known about the incapacitation?
- What evidence would you rely upon to evaluate your determinations regarding incapacitation?
- Signs of possible incapacitation

Stretch and Break



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Part III

Hearings: Structures, Roles and Process

Potential Hearing Systems

- Investigator collects evidence only; hearing panel is first decision-maker
- OR
- Investigator collects evidence and makes a finding/recommended finding; hearing panel reviews finding



Potential Roles

- Hearing Officer (Administrative)
- Hearing Officer (Sole decision maker)
- Hearing Panel Member

Before we get to roles, let's look at some key duties

All hearing officers must

- Be unbiased and impartial
- Be free from conflicts of interest/discloses any potential concerns of conflict
- Maintain confidentiality



Administrative Hearing Officer

- Sets tone for the hearing
- Deals with advisors
- Maintains order and decorum of hearing
- Ensures hearing follows institution's written procedures
- Determines how to handle unplanned questions and evidence

Hearing Officer – Sole Decision-Maker

- Everything the administrative officer does, plus:
 - Weighs the evidence
 - Makes credibility determination
 - Writes report of hearing results with rationale

Hearing Panel Member

- Everything the other two do,
Plus:
- Confer with fellow panelists to
 - Weigh the evidence
 - Make credibility determination
 - Write report of hearing results with rationale



For all kinds of hearing processes, the role of the Hearing Officer is:

- Limited
- NOT to collect information in the first instance
- To maintain rules regarding questioning, and the role of advisors
- To ensure due process and equity
- Often, to evaluate and act as a check on the investigative process



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Refresher: Role of Investigator



- Conduct comprehensive and appropriate interview(s) of the complainant and respondent
- Identify witnesses, and then conduct appropriate interviews with relevant witnesses
- Gather any available physical or documentary evidence
- Prepare summary of evidence collected
- Receive, review and potentially conduct additional investigation into feedback received from the parties on a draft investigation report

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Pre-Hearing Review

- Investigation report
- Submissions by the parties in advance of hearing
 - Written questions for other party and witnesses
- Policy
- Hearing procedures

How to Read Investigative Reports

- For hearing panels that receive a finding or recommended finding from the investigator:
 - Start with the finding
 - Then read the report to see if:
 - There is sufficient evidence to support it
 - There were any material defects in the investigative process
 - Listen to the challenging party and assess whether:
 - There were any material defects in the investigative process
 - There is any new evidence that was not known about/could not be accessed
 - Determine the questions you need to ask to resolve any of the above issues

How to Read Investigative Reports

For hearing panels that receive report without any finding or recommended finding from the investigator:

- Have your institution's definition of the prohibited conduct in front of you
- Determine if you need any additional information from the parties, witnesses or investigator in order to determine responsibility or no responsibility

Pre-Hearing Preparation

- Identify areas needing clarification or where you have additional questions
- Tailor your opening and closing comments
- Make/review plan for how to handle new evidence
- Make/review plan for how to handle new questions that might arise

The Hearing Process



Orderly Hearings: Logistics to think about beforehand

- Information parties should have before the hearing
- Inform yourself of any accommodations required by the parties
- Physical space and use of remote technology—before, during and after hearing
- Plan for order of hearing
- Plan for recording hearing
- Plan for handling/keeping evidence
- Have contact information for Title IX Coordinator/counsel

Orderly Hearings: Setting ground rules

- Hearing officer has complete authority
- Limitation on participation of advisors
- No ex parte communications
- Interact respectfully
- No interruptions
- Limitations on evidence (timing, etc.)
- Direct procedural questions to hearing officer

Orderly Hearings: Handling Unplanned Situations

- Inappropriate participation of parties, witnesses or advisors
- Attempted introduction of new evidence
- Scope of questions: relevance, ruling on “objections,” and/or inappropriate subject matter
- Defusing high conflict moments
- Handling cross examination
- Witnesses/parties who don’t attend hearing

Asking Questions

- First and foremost, always remember your role
- Rapport-building stage—what does this look like in a hearing? And why is this important?
- Connect your questions to the elements of the prohibited conduct—stay focused
- If asking a sensitive question, explain why



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Asking Questions (cont'd)

- Use hearing to get clarification of any aspects of investigation report
- Use the hearing to ask about inconsistencies you noted in the evidence
- Ask why just learning new information now
- Ask the challenging party how/what the investigator got wrong



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Polling --- Interview Techniques

Polleverywhere:

**Text Debbieosgood I 12
to 22333 to join**



Interview Techniques

	Questions to use	Questions to avoid
General Principles	• Be empathetic • Ask open ended questions • Ask questions that address the five senses (sight, hearing, taste, touch, smell) • Listen • Give interviewee plenty of time to answer question • Clarify conflicting information	• Ask leading questions • Ask negative questions • Ask questions that imply judgment • Ask multiple choice questions
Sample Question Formats	• Tell me about . . .	
Examples	• Tell me about your thought process when . . . • Tell me what you were feeling when . . . • Would you be willing to say more about . . . • What did you mean when you said . . . • What do you remember about . . .	• Why didn't you . . .



Part IV

Making the Decision

Part IV: Making the Decision

- Understanding the evidence
- Determining credibility
- Evaluating consent in matters involving incapacitation
- Weighing and analyzing the evidence

When you are **evaluating** a finding or recommended finding, you are not asking or saying:



- I see some procedural defects, but I don't want to send this back to the investigator for follow up because it will take so long.
- Would I have come to a different decision?
- I don't think the evidence is sufficient to support a finding of responsibility, but I don't want to cause a problem by disagreeing with the investigator.

When you are **making** a finding, you are not asking or saying:



- I don't think the preponderance establishes responsibility, but I feel sorry for the complainant who is clearly upset
- I think the information shows the respondent is likely to have engaged in the conduct, but I am not convinced beyond a reasonable doubt OR I am not firmly convinced.
- I think the preponderance establishes responsibility, but I don't want this respondent to get kicked out of school.
- Yes, this is a technical violation of the policy but I disagree with the policy's definition of consent.

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"Perhaps you would like to
rephrase your last answer."

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Assessing Credibility

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How to determine if a person is credible?

EEOC
says to
consider:

- ◆ **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- ◆ **Demeanor:** Did the person seem to be telling the truth or lying?
- ◆ **Motive to falsify:** Did the person have a reason to lie?
- ◆ **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- ◆ **Past record:** Did the alleged harasser have a history of similar behavior in the past?

How to determine if person is credible?

Jury
instruction
says to
consider:

- ◆ Relationship to the Plaintiff or to the Defendant
- ◆ Interest, if any, in the outcome of the case -- Anything to gain or lose from the case
- ◆ Manner of testifying – did they appear to be lying? Appear to be telling the truth?
- ◆ Opportunity to observe or acquire knowledge concerning the facts about which the witness testified
- ◆ Candor, fairness and intelligence
- ◆ The extent to which testimony has been supported or contradicted by other credible evidence
- ◆ Any bias or prejudice?
- ◆ Inconsistency within testimony? Reasonable/minor or significant?
- ◆ Use your common sense and your everyday experience in dealing with other people.

How to determine if person is credible?

- ◆ Body language
- ◆ Gut feeling
- ◆ Experience



Cops say:

- ◆ If person has prior criminal history

Biases and Other Things to Keep in Mind Re: Credibility Assessments

- Confirmation bias: the tendency to interpret new evidence as confirmation of one's existing beliefs or theories
- Stereotypes and assumptions related to:
 - Sexual orientation
 - Race
 - International students/cultural issues
- What does it mean to be “trauma-informed?”
- Be mindful of cultural competency and subjectivity regarding:
 - Plausibility and reasonableness of account
 - Own common sense
- Remember our goal: Fair, balanced and impartial decisions

Methods for Evaluating the Evidence

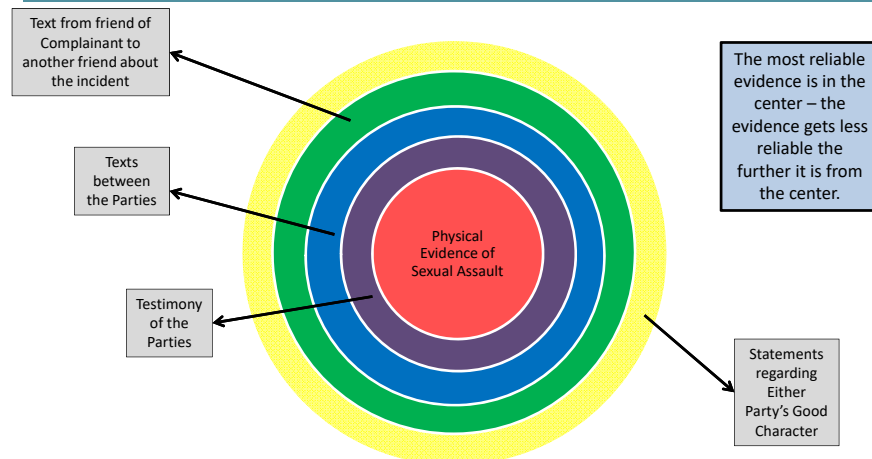


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Methods for Evaluating the Evidence



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Ultimately, equitable investigations require:

- Trained person to analyze and document the evidence
- Decisions supported by the evidence
- Objective evaluation of party and witness credibility
- Synthesis of all available evidence, both inculpatory and exculpatory
- Taking into account the unique and complex circumstances of each case

From 2017 Interim Q & A



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Part V

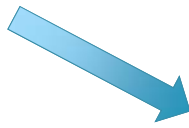
Putting Your Training into Practice



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Read the training hypothetical



And get ready for a fun activity!

Stretch and Break



Part VI

Writing the Decision and Imposing Sanctions

Important points for the final letter

- Format of final letter will depend upon policy
- Use standard format and language that is used in policy and other cases
- State your scope of review (making determination or reviewing investigator's determination?)
- State the standard of evidence
- Identify the materials you reviewed (e.g., witness testimony and documents)
- For each allegation of prohibited conduct, start with your determination
- State material findings of fact (and identify the evidence that guided your decision)
- Address significant pieces of evidence that are contrary to your finding and why you do not find them persuasive
- Summarize your reasoning and process of applying the policy to the facts
Reflect that you have considered the totality of the circumstances

Format of Final Letter

1. Allegation(s)
2. Applicable policies and procedures
3. Facts
 1. Procedural history, including scope of review for hearing board/panel
 2. Description of information considered during investigation (witnesses questioned, documents and other evidence)
 3. Findings of fact
4. Analysis
5. Conclusion
6. Sanction(s), if any
7. Appeal procedures, if any

Sample Language for Conclusion

- “Because the Respondent is presumed not to have violated the policy unless and until the preponderance of the evidence establishes a violation, it cannot be concluded that the Respondent engaged in sexual misconduct.”
- “Based on the totality of the circumstances, it is determined that it is more likely than not that the Complainant was incapacitated at the time of the parties’ sexual interaction.”
- “In consideration of all of the evidence, including ..., it is determined that the preponderance of the evidence does not support the Complainant’s allegation that the Respondent engaged in penetration without his consent.”

Notice of Final Determination: Integrity

- Consistency
- Clarity
- Alignment
- Rigor
- Balance
- Tone
- Timeliness

Considerations for the Imposition of Sanctions

- The nature of the conduct at issue;
- The impact of the conduct on the Complainant;
- The impact of the conduct on the community or the University, including protection of the University community;
- Prior misconduct by the Respondent, including the Respondent's relevant prior discipline history, both at the University or elsewhere, including criminal convictions;
- Maintenance of a safe and respectful environment conducive to learning;
- Whether the Respondent has accepted responsibility for the conduct, which may be considered as a factor that may lessen, not increase, the severity of the sanctions;
- The necessity of any specific action in order to eliminate the prohibited conduct, prevent its recurrence, and remedy its effects on the Complainant or other University community members; and
- Any other mitigating, aggravating, or compelling circumstances, including those set forth in the parties' impact statements, to reach a just and appropriate resolution in each case.

Other things to consider



- Consistency: Sanctions that have been imposed for the same category of prohibited conduct, and how this matter is similar and different to those matters
- Proportionality: Sanctions should ultimately be proportional to the behavior
- Your ability to objectively explain the basis for the sanctions imposed

Concluding Remarks



Recap – Dos and Don'ts



- Be knowledgeable about your school's policies and procedures or know who to ask questions
- Carefully review and consider all the investigative materials (report and documentation)
- Remain impartial, calm and patient throughout process
- Allow parties to tell their stories
- Make findings decisions based on the evidence and policy
- Write clear and thorough final determination letters

Recap – Do's and Don'ts

- Prejudge either party
- Allow evidence of prior sexual activity (except in limited circumstances)
- Make public (or private) statements suggesting gender bias
- Be afraid to ask the questions you need to ask
- Breach a confidence
- Unduly delay the resolution



And



Please complete and turn in the evaluation and CLE forms and pick up your training certificate.

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QUESTIONS NOW AND LATER: OUR CONTACT INFORMATION

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