Title IX Training for the University of Nebraska: The Hearing Process

September 25, 2020
October 2, 2020

Presented by:
Debbie Osgood, Esq.
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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.
- Whenever a gender-specific term or example is used in this presentation, it should be understood as referring to both genders, unless explicitly stated.

Your Trainers

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• Independent Title IX Investigator and Hearing Officer
• Former National Enforcement Director at U.S. Dept. of Education’s Office for Civil Rights (OCR)
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• Independent Title IX Investigator and Hearing Officer
• Former in-house Title IX Investigator at the University of Michigan
• Former Interim Deputy Title IX Coordinator at Michigan State University
• Former sex crimes and domestic violence prosecutor in Bloomington, Indiana
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Agenda Hearings

1. What the new Title IX regulations require, generally
2. What the new Title IX regulations require for hearings
3. Evaluating evidence and making a finding
4. Writing the written determination

University of Nebraska

1. Sexual misconduct policy
2. Student sexual misconduct procedures
3. Employee sexual misconduct procedures

Effective on August 14, 2020

Available on the Institutional Equity and Compliance Office website at: https://www.unl.edu/equity/university-sexual-misconduct-policy

What the New Title IX Regulations Require, Generally
“Sex” Discrimination

Title VII: Bostock v. Clayton County (U.S. Supreme Court June 2020)
- “Sex” discrimination includes discrimination on the basis of sexual orientation and transgender status
- Facilities issues not addressed

Title IX: OCR adopts Bostock definition of “sex” discrimination in the Title IX context.
- Will investigate allegations of discrimination on the basis of sexual orientation and transgender status
- Separate facilities still not required

University of Nebraska: Non-discrimination policy prohibits discrimination on the basis of sexual orientation and transgender status

U.S. Department of Education (DOE)

Revised Title IX Regulations - effective 8/14/20
- New liability standard (deliberate indifference)
- New specific rules about sexual harassment
- New training requirements
- New recording and recordkeeping requirements (7 years)
- Regulations are not retroactive
- See ongoing federal litigation

The Scope of Title IX Sexual Harassment
1. Actual notice
2. Sexual harassment
3. In an educational program or activity
4. Against a person in the United States

Sexual Harassment
1. Quid pro quo (for employees only)
2. Violence Against Women Act (VAWA) categories:
   - Sexual assault
   - Domestic violence
   - Dating violence
   - Stalking
3. Hostile environment

Sexual Harassment – Hostile Environment
- Unwelcome conduct
- Of a sexual nature
- As determined by a reasonable person
- That is so severe and pervasive and objectively offensive
- That it effectively denies a person equal access to an educational program or activity

Compare Title VII Definition of Hostile Environment
- Unwelcome conduct
- Of a sexual nature
- That is so severe or pervasive
- That it creates an intimidating, hostile, or offensive working environment

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What the Title IX Regulations Require for Hearings

Hearing Requirement

- Previously, universities had a choice as to how to conduct investigation and resolution process – single investigator model, hearing model, or hybrid of two
- Under the new Title IX regulations, universities must provide a live hearing with opportunity for cross-examination

What is a Title IX Hearing?

- After the final investigation report, a live hearing must be held for PSE institutions
- Advisor for each party allowed to conduct cross-examination of other party and witnesses
- Hearing Officer/Hearing Panel issues written determination of responsibility and, if applicable, sanctions

Hearing – Individuals Involved

- Hearing officer or member of a hearing panel
- The Complainant
- The Respondent
- Witnesses
- Title IX Coordinator (in an administrative, not substantive role)
- The Investigator (as a possible witness)

Hearing – Location and Logistics

- May be held in the same geographic location or virtually
- Either party may request separate rooms
- Virtual hearing may be held at university’s discretion
- Technology must allow the parties, their advisors and the Hearing Officer/Panel to see and hear one another and any witnesses

Qualifications of the Hearing Officer

- Must receive Title IX training
- May not be the same person as the Title IX Coordinator, the Investigator(s), or the Appeal Decision-maker
- Must be impartial and unbiased
- Must be free from conflicts of interest
Hearing Officer – Responsibilities

- Makes an impartial determination as to whether a university policy or procedure was violated
- Presides over the hearing
- Determines relevancy of questions
- Ensures University’s policies and procedures are followed
- Issues written determination of responsibility and sanctions

Hearing Officer – Ethical Considerations

- Neutrality -- not an advocate for the Complainant or the Respondent
- Must be unbiased
- Must not have conflicts of interest -- A conflict of interest is any direct or indirect financial or personal interest in the outcome or any existing or past relationships with any of the parties, representatives, or witnesses.
- Must maintain confidentiality – before, during and after hearing

Pre-Hearing Preparation

Hearing Officer should:
- Be trained and knowledgeable about the applicable laws
- Review Final Investigation Report
- Consider pre-hearing submissions by the parties
- Know the university’s policy and procedures, including any specific hearing procedures
- Identify areas needing clarification or where you have additional questions
- Prepare opening and closing comments
- Prepare ground rules for hearing
- Have contact information for the General Counsel and Title IX Coordinator

Access to the Evidence

Parties must be allowed with access to the evidence during the hearing

Issues of Relevancy at the Hearing

- Only relevant cross-examination and other questions may be asked of a party or witness.
- The Hearing Officer or Hearing Panel must decide if a question is relevant before it is answered at the hearing and explain any decision to exclude a question.

Cross-Examination

- Live hearing must provide opportunity for cross-examination of parties and witnesses
- To be conducted by advisors
- Cross-examination must be conducted directly, orally, and in real time
Hearing – Provision of an Advisor

If a party does not have an advisor present at the live hearing, the university must provide without fee or charge to that party, an advisor of the university’s choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

Hearing – Exclusion of Statements

- If a party or witness does not submit to cross-examination at the live hearing, the hearing officer must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
- The hearing officer 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.

To keep in mind (cont.) …

Written determinations may be appealed on following bases:
- Procedural irregularity that affects the outcome
- New evidence that was not reasonably available at the time of the determination that affects the outcome
- Bias or conflict of interest that affects the outcome
- See additional University of Nebraska policy bases

Evaluation Evidence and Making a Finding

Concepts we use to evaluate evidence

- Relevance
  - Tends to make a fact more or less probable than it would be without that evidence
  - Assists in coming to the conclusion – it is “of consequence”
- Credibility
  - Has to do with a witness’s veracity; their believability
- Reliability
  - Accurate
  - Trustworthy
- Weight
  - The value you give to piece of evidence

What is “relevant evidence?”

- Use logic and common sense
- Toss out old rules/practices regarding categories of information permitted (except for three situations)
<table>
<thead>
<tr>
<th>Relevance</th>
<th>Relevance IS NOT</th>
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<tbody>
<tr>
<td>Tends to make a fact more or less probable than it would be without that evidence</td>
<td>Strength of the evidence</td>
</tr>
<tr>
<td>Logical connection between the evidence and facts at issue</td>
<td>Believability of the evidence</td>
</tr>
<tr>
<td>Assists in coming to the conclusion – it is “of consequence”</td>
<td>Based on type of evidence: circumstantial v. direct</td>
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<td>Based on complicated rules of court</td>
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Relevance IS NOT

- Strength of the evidence
- Believability of the evidence
- Based on type of evidence: circumstantial v. direct
- Based on complicated rules of court

Special categories of evidence that are off-limits

- **IRRELEVANT**: Complainant’s prior sexual predisposition or prior sexual history (with two exceptions)
- **IRRELEVANT**: Information protected under a legally-recognized privilege
- **CANT USE**: Medical, psychological and similar records without written consent of party

Evaluating relevance part 1

**Skill-building exercise**

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 a 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? Appeared 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.

Caution re: demeanor evidence
Evaluating inconsistencies & unanswered questions

Thank you!

• Part two of training: October 2, 2020

• We will be sending you a hypothetical and brief homework assignment for next session. Please read the hypothetical and complete the homework prior to October 2, 2020.

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Skill-building exercise

Evaluating relevance part 2: Ruling on advisor’s questions

The process as a whole: Weighing the evidence and making a determination

1. Making the factual determination of what happened

2. Analyzing whether the conduct that happened constitutes a violation of your institution’s policies

Policy Analysis

• Break down the policy into elements

• Organize the facts by the element to which they relate
Sexual Harassment: Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.

Once factual findings are made, analyze under Title IX policy definition.

Skill-building exercise

What questions do you have?

Evaluating the Evidence

Evidence supporting the Complainant
Evidence supporting the Respondent

Which has the greater weight?
“More likely than not”?

Evaluating the Evidence – Bulls Eye

Physical Evidence of Sexual Assault

The most reliable evidence is in the center – the evidence gets less reliable the further it is from the center.

Text from friend of Complainant to another friend about the incident

Testimony of the Parties

Statements regarding Either Party’s Good Character

Texts between the Parties

X

Preponderance of the Evidence

Preponderance of the evidence

IS
• Starting from the presumption of non-responsibility, is the complainant’s account supported by the majority of the evidence?

IS NOT
• I think the information shows the respondent most likely to have engaged in the conduct, but I am not convinced beyond a reasonable doubt

• Starting from the presumption of non-responsibility, does the evidence establish that the complainant’s account is most likely to have occurred?

• I think the information shows the respondent most likely to have engaged in the conduct, but I am not firmly convinced

• Since the prosecutor declined to file charges, I don’t think we should hold the respondent responsible either

Levels of Proof

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Your reasoning should NOT sound like this:

- I don’t think the evidence is sufficient to support a finding of responsibility, but I don’t want to cause a problem for UNL because this is a high-profile matter.
- I think the respondent did it, but I don’t like the complainant and think the complainant filed this claim just to hurt the respondent.
- Yes this is a technical violation of the policy but I disagree with the policy’s definition of consent.
- I don’t really think the respondent did it, but I feel really bad for the complainant who is clearly traumatized.
- I think the respondent did it, but I don’t want to ruin the respondent’s life.

Written Determination

The written determination must include:

- Allegations
- Procedural steps
- Findings of fact
- Conclusions regarding the application of the policy to the facts using the applicable standard of evidence
- A statement of, and rationale for, the result as to: each allegation, including whether remedies will be provided by the university to the Complainant
- Appeal procedures

More important points for the final letter

- Use standard format and language
- State that you considered the totality of the circumstances
- Identify inculpatory and exculpatory evidence -- address significant pieces of evidence that are contrary to your finding(s) and why you do not find them persuasive

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
- Explanation: Sanctions must be objectively explained in the written determination

Considerations for the Impostion 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 relevant prior discipline history, both at the university or elsewhere, including criminal convictions
- Maintenance of a safe and respectful environment conducive to learning

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QUESTIONS NOW AND LATER:
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