2020 Hearing Panel Training Part 2

As required by VAWA, the Clery Act and 34 CFR § 106

What this training will include:

- Issues of relevance related to questions and evidence submitted during the hearing.
- How to serve impartially
- How to avoid pre-judgment of the facts at issue
- Conflicts of interest
- Bias
- Sanctions

Important Hearing Reminders

- Respondent is presumed “Not-Responsible”
- Only relevant evidence can be admitted during the hearing
  - Does the evidence help prove/disprove the alleged conduct occurred?
  - If the evidence proves the conduct occurred, does it meet the definition of prohibited conduct within the University’s policy?
  - If it does violate a University policy, what is the appropriate sanction that can remedy the effects of the discrimination and prevent reoccurrence, while considering the impact of separating the student from the University?
- Certain Evidence is inadmissible
  - Rape Shield Law
  - Evidence protected by a legal privilege
  - Evidence involving medical treatment records

Important Hearing Reminders

- Cross-examination can only be conducted by advisors
  - Hearing panel must decide whether questions asked are relevant
  - Any relevant questions that are not asked by the parties' advisors must be asked by the hearing panel
- The hearing panel must be impartial
  - No assumptions can be made by the absence of party
  - Must avoid any conflicts of interests or bias
  - Determine any applicable sanctions or remedies at the conclusion of the hearing.

Assessing Credibility and Relevant Evidence

Credibility

- In assessing whether a witness' statement is true and accurate use your common sense and experience.
- Review each witness by the same standards.
- Do not automatically reject a witness' statement *just* because of inconsistencies or conflicts – consider whether the differences are important or not.
- Witnesses can forget things or remember things differently at different times.
- Two people may witness the same event yet see or hear it differently.

Credibility

- In evaluating a witness' credibility you may consider anything that *reasonably tends to prove or disprove* the truth or accuracy of the statement.
- Some factors may include:
  - How well they could have seen or heard the things the witness testified about
  - Was the witness influenced by a factor such as bias or prejudice (i.e. personal relationship with someone involved in the matter)
  - What was the witness' attitude about the matter?
  - How reasonable is this witness' statement when you consider all of the other evidence in the case?

What makes evidence relevant?

- “Relevant Evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.
- Does the evidence or question help the panel decide whether:
  - The alleged misconduct did/did not occur
  - IF the alleged misconduct occurred, was it a policy violation?

Not Relevant – Questions/Evidence that CANNOT be admitted

(1) Questions or evidence about a complainant's sexual predisposition

(2) Questions about the complainant's prior sexual behavior (UNLESS it meets one of the two exceptions)

(3) Questions about evidence that is protected by a legal privilege

(4) Treatment records unless the student indicates in writing that they can be admitted

Exceptions

Questions and evidence about the complainant's prior sexual behavior *may* be permitted if:

(1) They are offered to prove that someone other than the respondent committed the conduct alleged by the complainant; or

(2) If the questions and evidence concern specific incidents of the complainant's prior sexual behavior, with respect to the respondent, and are being offered to prove consent.

Relevant Evidence

- Example of an Irrelevant question:
  - How many sexual partners did the complainant have prior to this case?
- Example of a relevant question:
  - How many drinks did the complainant have that night? (may be relevant to show capacity for consent)
- Only relevant cross-examination questions may be asked at the hearing.
- Once the advisor asks the question, the hearing panel rules on whether the question is relevant
  - If the panel finds a question is not relevant – must explain why
- Decision-maker must ask all relevant questions that advisors fail to ask

Relevant Evidence Under the Regulations: Party does not participate or attend

- When a party does not show up at the hearing, the hearing panel cannot rely on any statement made by that party
  - A witness coming in to relay what they had heard the missing party say is not sufficient to allow the missing party's statement to come in
  - Applies to complainants, respondents & witnesses
  - Exception: When the statement by the missing party IS the allegation
  - Cannot rely on a prior statement if a party *does* attend, but will not answer questions on cross-examination regarding that particular topic or line of questioning.

Relevant Evidence Under the Regulations: Party does not participate or attend

- No inferences can be drawn from the fact that the party did not attend or refused to answer a question.
  - Cannot assume that a party or a witness' absence or refusal to answer cross-examination or other questions indicates an admission of responsibility or lack thereof.
- The regulations recognize that are many reasons a witness, complainant or respondent may not attend the hearing or not answer specific questions.

Relevancy – Character witnesses

- The hearing panel may exclude any witnesses, such as character witnesses, who are deemed irrelevant to deciding the outcome of the matter.

Relevance vs. weight

- Title IX regulations require an objective evaluation of any relevant evidence but do not define what weight the hearing panel can give them.
- Evidence may be relevant – but may not carry much weight
  - Witness statement as to what they heard the complainant or respondent say at the time of the incident is relevant but does not carry as much weight as the complainant's or respondent's own testimony.
  - A party summarizing a text conversation vs. a screenshot of the conversation

Cross - Examination

Advisors

- Complainant and Respondent each have the opportunity to be advised by a support person/personal advisor at any stage of the process and to be accompanied by that advisor to any meeting or hearing.
- A party can choose their own advisor at their expense
- If the party does not have an advisor prior to the hearing, the University will provide an advisor to conduct cross-examination on behalf of that party.

Cross-Examination

- What is the goal of cross-examination?
  - Provides the opportunity for both parties to test the consistency, accuracy, memory and credibility of a potential witness
  - Opportunity for both parties to bring any implausibility, inconsistency, unreliability, ulterior motives or lack of credibility to the attention of the hearing panel.
  - Promotes transparency and equal access at the hearing.

Advisors

- How to prepare:
  - Review the entire file and investigation so you know the information that has been provided to the parties in the case.
  - Review all included relevant evidence
  - Meet with the student via zoom or phone to introduce yourself and let them know you will be asking questions on their behalf.

  - Determine who your party's witnesses might be and whether they will show up – the University cannot force a student to participate.
  - Discuss a list of questions based on the allegations and avoiding any non-admissible questions/topics.

Advisors

- At the hearing
  - At the hearing advisors should be sure to allow the hearing panel to rule on the relevancy of each question.
  - Should not be aggressive or adversarial but should stick to the questions and facts of the case.

- Cannot consider the statements of a party who does not appear at the hearing for cross-examination
  - If one party does not appear and their advisor does not attend, the University will still need to appoint an advisor to cross-examine the party who is in attendance at the hearing, on behalf of the party who is not there. (FR 30346)

Advisors

- After the hearing, advisors provided by the University have no role after the hearing panel has issued a decision nor in the appeals process.

Decision-Makers & Advisors

- Once an advisor asks a cross-examination question, the hearing panel has the opportunity to stop the question from being answered or can inquire as to why the advisor thinks the question is relevant
- The decision-maker has the duty to ask the questions the advisor does not ask.
  - If one party brings an advisor (i.e. friend, relative) that is ineffectively conducting cross-examination then the decision-maker has the responsibility to ask questions that advisor may be missing or failing to ask.

Bias, Impartiality, Conflicts of Interest

Title IX Requirements

- Grievance process is a fair and impartial process and requires an objective evaluation of all relevant evidence including both inculpatory and exculpatory evidence.
- Any decision-makers involved in the process will not have a conflict of interest for or against complainants or respondents, in general or on an individual basis.
- Respondent is presumed not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

Conflicts of Interest

- If you know the complainant or respondent in any capacity and believe it would affect your ability to be impartial during the hearing, please let the TIX Coordinator know so another person can be assigned to the panel for that particular hearing.
- If a student objects to your participating on the hearing, the panel will be notified in writing and together can make a decision as to what the best path forward would be.

Impartiality/Elimination of bias

- Bias definition (dictionary.com): “A particular tendency, trend, inclination, feeling or opinion, especially one that is pre-conceived or unreasoned.”
- Be aware of implicit bias

- Respondents must be presumed “not responsible”
- Cannot make any assumptions based on gender or the designation of either party as complainant/respondent
- Cannot make any presumptions about a party’s absence from a hearing.

Avoiding pre-judgment of the facts

- With each case hearing panel members should review the investigation and any additional evidence with an open mind.
- The complaint document does not contain all of the information
  - Be sure to read the full investigation including each party's statements
  - Usually more information comes out in the course of the investigation that will either elaborate on the allegations in the complaint or call into question certain aspects of, if not the entire, complaint.

Sanctions & Remedies

Sanctions & Remedies

- Sanctions are implemented if the respondent is found responsible for the alleged misconduct and the misconduct violated a University policy.
- The goal of sanctions is to eliminate a hostile environment, prevent the reoccurrence of the misconduct and to address any effects of the misconduct while considering the impact of separating a student from his/her education.
- Remedies are designed to restore or preserve equal access to the University's education program or activity

Possible Sanctions/Remedies

- No contact order between the parties
- Conduct probation
- Alternate housing or class arrangements
- Limitations for the respondent to attend on-campus classes or enter certain buildings
- Suspension for one or more semesters
- Expulsion
- Termination of employment for employees.

Sanctions & Remedies

- The sanctions and remedies will be provided to both parties simultaneously in writing (via email)
- If an appeal is filed the sanctions and remedies will not be final until they are notified of the outcome of the appeal.
- If no appeal is filed, any remedies are final on the day an appeal would no longer be considered timely.

Sanction Considerations: Aggravating/Mitigating Factors

- Instances of prior misconduct (compounding factor)
  - Evidence of a pattern of behavior
- Severity and Egregiousness of the offense
- Reporting Party's request for lesser sanctions
- Responding Party's Attitude
  - Right to defend themselves vs. brazen refusal to take responsibility for a clear violation of policy