

2020  
Regs  
Rapid  
Response

**R**<sup>3</sup>

# Hearing Panels and Decision- Makers

Briefing on the New Regulations with  
Q&A

2020  
Regs  
Rapid  
Response

R<sup>3</sup>

# Your Faculty



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# 2020 Title IX Regulations

- Issued May 6<sup>th</sup>, 2020
- Effective and Enforceable August 14, 2020
  - Amend the Code of Federal Regs. and have force and effect of law
  - Some provisions already mandated by due process case law in some jurisdictions
  - Intervening variables may impact enforcement, e.g. lawsuits/election
- The Regulations:
  - Significant, legalistic, prescriptive and very due process heavy
  - Enforceable by OCR
  - Preempt state law

# Commitment Beyond Compliance

- Industry standards = the floor. Best practices = the ceiling.
- States, case law, and federal regulations set the floor.
- Some states have laws that exceed federal requirements and do not conflict with the 2020 Regs. Where they conflict, Regs control.
- Aiming for the floor = doing the bare minimum.
  - Will continue the cycle of inequity and unfairness.
- Civil rights issues demand more than the bare minimum.

# Who's Who

- Complainant
- Respondent
- Title IX Coordinator (TIXC)
- Deputy Coordinators
- Investigators
- Decision-makers
  - Hearing Panel
  - Chair
- Appellate Decision-makers
- Advisors
- Hearing Facilitator(s)

# Regulatory Changes for Hearings

- Grievance Procedures
- Neutrality/Conflict of Interest
- Advisor of Choice

# Grievance Procedures

## Must include:

- Presumption that respondent is not responsible until determination is reached
- “Reasonably prompt” timeframes
- Range of possible sanctions and remedies
- Description of standard of evidence
- Bases and procedures for appeal
  - Appeal option required, equitably, on three grounds
- Range of “supportive measures” available to all parties
  - Non-disciplinary, non-punitive, individualized services
- Procedure for emergency removal
  - Non-student employee administrative leave

# Neutrality, Conflict of Interest and Objectivity

- Grievance process must treat parties “equitably”
- Enhanced due process protections before disciplinary sanctions are imposed
- All individuals administering the grievance process must not:
  - Have a conflict of interest or bias for or against complainants or respondents generally, or
  - For or against an individual complainant or respondent
- All relevant evidence must be objectively evaluated
- Bias and conflict of interest by decision-makers that impacted the outcome are grounds for appeal



# Advisor of Choice

- Advisor of choice may be anyone, including attorney
- May restrict participation of advisors equally, except:
  - If a party does not have an advisor present at the hearing, the recipient must provide an advisor of the recipient's choice to conduct cross-exam
  - The advisor must conduct thorough cross-exam (obligatory)
  - If an advisor is provided, this must be done without fee or charge to the party
  - Parents, friends, teammates, coaches?
  - Can a party have more than one advisor? Why would they need one?
- Will advisor also conduct direct exam? If not, who will?

# Investigation and Hearing

- Rights of the Parties
- Evidence
- Investigation and Report
- Live Hearing/Questioning
- Relevance
- Hearing Logistics
- Role of the Investigator

# Rights of the Parties

- Investigation
  - Right to present witnesses, including fact and expert witnesses
  - Right to present inculpatory and exculpatory evidence
  - Right to discuss the allegations under investigation without restriction
  - Right to gather and present relevant evidence without restriction
  - Right to inspect and review evidence and draft report before finalized and submit responses for inclusion in report
- Hearing
  - Advisor to ask relevant cross-examination questions and follow-up questions of parties and witnesses, including challenging credibility
  - Availability of directly-related evidence
  - Use of technology allowing party to simultaneously see and hear the witness answering questions on cross-exam

# Evidence

- **All** relevant evidence must be objectively evaluated and considered – inculpatory and exculpatory
- Credibility determinations may not be based on a person’s status as a complainant, respondent, or witness
- Access to privileged information requires waiver/consent
- No restriction on parties discussing case or gathering evidence
- Equal opportunity to:
  - Present witnesses
  - Present evidence
  - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence which may be offered

# Investigation and Report

- Required investigation results in an investigation report
  - Fairly summarizes all relevant evidence
  - Unclear from Regs if analysis, credibility assessment included
- Prior to the hearing, parties must be provided with the draft investigation report and all evidence directly related to allegations
  - Parties must have two separate ten-day periods to review and submit written responses
- Must also make all relevant evidence (excluded from report) available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-exam
- Investigation report submission to decision-makers not addressed in Regs

# Live Hearing/Questioning

- Mandated live hearing for higher education
  - Optional for K-12 (unless already required by existing law/policy)
- Hearing must allow cross-examination of parties and witnesses conducted exclusively by each party's advisor
  - If a party does not have an advisor present at the hearing, the recipient must provide an advisor to conduct cross-exam
  - All relevant and follow up questions, including challenging credibility
  - K-12 live cross-examination not required
  - For K-12, parties given opportunity to submit written, relevant questions to decision-maker, exchange of answers, and additional limited follow-up questions. Explanation of non-relevance required.

- During hearing, before a party or witness answers a posed question, the decision-maker must determine if the question is relevant and explain any exclusion of a question
- Evidence is generally considered relevant if it has value in proving or disproving a fact at issue
- Evidence of the complainant's sexual behavior or predisposition is irrelevant unless:
  - Offered to prove that someone other than the respondent committed the conduct alleged, or
  - Concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

# Hearing Logistics

- Hearing Structure
- Hearing Preparation
- Technology and cross-examination
  - Upon request, separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions
- Scheduling and administrative tasks
- Recording or creation of transcript
- Note-taking



# Role of the Investigator

- The investigator is often the key witness at any hearing
- The investigation report is admitted as evidence
- The investigator may be questioned and subjected to cross-examination
- The investigator's opinions regarding a determination should not influence the decision-maker; questions about the investigator's opinions should be avoided

# Making a Determination

- Standard of Evidence
- Models of Proof/Analysis
- Credibility Determinations
- Sanctions and Remedies
- Written Determination
- Appeals

# Standard of Evidence

- OCR allows recipients to apply either preponderance of the evidence or clear and convincing standard
  - Preponderance of the evidence is best practice and an equitable standard
  - Must be consistent for all formal complaints of sexual harassment
  - Must apply the same standard for complaints against students as is applied to complaints against employees

# Understanding Evidence Thresholds

## EVIDENTIARY STANDARDS



# Models of Proof and Analysis

- Parse the policy definition into its constituent elements
- Establish, by the applicable standard of proof, whether each element of the definition is met, to determine whether a violation occurred
- Weigh evidence to determine its value
- Avoid “gut feelings;” rely on evidence, facts, policy definitions, and the standard of evidence

# Credibility Determinations

- Credibility generally refers to the trustworthiness, dependability, accuracy, and believability of testimony or evidence
- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness
- Corroboration, plausibility
- Other research-based methods
- May not draw inference about determination of responsibility based solely on a party's presence or absence at hearing or refusal to answer questions

# Sanctions and Remedies Upon Determination of Responsibility

- Disciplinary sanctions for respondent
- “Remedies” to complainant
- Any sanction must be reasonable and proportionate to the severity of the behavior
  - May consider prior misconduct
  - The role of precedent
  - May consider attitude, aggravation, mitigation, contrition, etc.
  - May be educational, but safety is primary consideration
  - Remedy for loss or injury to school or persons
  - Compliant with laws and regulations
- Same panel/officer who decides finding should also decide sanctions

# Sanctioning in Sexual Misconduct Cases

- Must be a nexus between the sanctions and the discriminatory conduct which led to the sanction(s)
- What is appropriate?
  - Separation/expulsion
  - Suspension
  - Lesser sanctions
- Engage in strategic education and training as remedies
- Conduct a risk assessment audit and mitigation process



# Written Determination

- Decision-maker must issue written determination that will be shared with the parties:
  - Allegations potentially constituting sexual harassment
  - All procedural steps taken
  - Findings of fact supporting the determination
  - A determination on each allegation regarding responsibility
  - Any disciplinary sanctions, remedies provided to complainant
  - The recipient's procedures and permissible bases for the complainant and respondent to appeal
  - Delivered simultaneously to all parties

# Appeals

- Appeal option must be offered to all parties:
  - From a determination regarding responsibility
  - From a recipient's dismissal of a formal complaint or any allegation therein
- Three grounds for appeal, with additional grounds optional
- Decision-maker for appeal must differ from previous decision-maker
- All parties receive notification of any appeal filed
- Opportunity for parties to support or oppose outcome via written statement
- Written appeal decision with rationale delivered simultaneously to all parties

# Other Issues

- Finality of Determination

# Finality of Determination

- If an appeal is filed, the determination regarding responsibility becomes final on the date that the recipient provides the parties with the written determination of the results of the appeal
- If an appeal is not filed, the determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely

# Questions?



# Contact Information

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