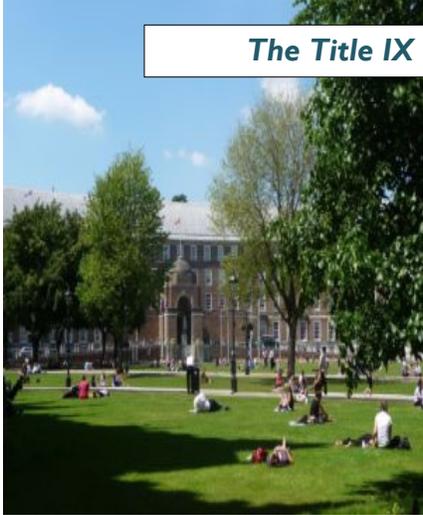


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The Title IX Hearing Process

Chicagoland Title IX Consortium

April 9, 2021

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Agenda

1. What's Next for Title IX?
2. The Title IX Hearing Process:
Practical guidance on conducting both pre-hearing meetings and hearings
3. Selecting Title IX facilitators, decision-makers, and investigators:
An interactive conversation on tips for selecting individuals for various roles and sharing resources

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Disclaimers

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



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What's Next for Title IX?

1. U.S. Department of Education, Office for Civil Rights (OCR) Announcement of Comprehensive Review of Title IX Regulations (April 6, 2021)
2. White House Executive Orders:
 - *Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity* (March 8, 2021)
 - *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (January 21, 2021)

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OCR's To-Do List

1. Hold a public hearing for schools and others to provide oral and written comments
2. Issue a question-and-answer document in the coming months “to provide additional clarity about how OCR interprets schools’ existing obligations under the 2020 amendments”
3. OCR “anticipates” issuing a new Notice of Proposed Rulemaking on the Title IX Regulations

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Sexual Orientation and/or Gender Identity

Expansion of OCR’s jurisdiction to investigate allegations of sexual orientation and gender identity discrimination:

1. Non-discrimination
2. Harassment
3. Transgender-specific issues: sports, facilities, pronoun policy, official records

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Our Role

What should the Chicagoland Title IX Consortium's role be in the upcoming public hearing and rulemaking process?

<https://www.ed.gov/news/press-releases/department-educations-office-civil-rights-launches-comprehensive-review-title-ix-regulations-fulfill-president-bidens-executive-order-guaranteeing-educational-environment-free-sex-discrimination>

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Title IX 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)

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Hearing Officer – Responsibilities

- Makes an impartial determination as to whether a university policy was violated
- Presides over the hearing
- Determines relevancy of questions
- Enforces the rules of order and decorum in the hearings
- Issues written determination of responsibility and sanctions



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Qualifications of the Hearing Officer

- Must receive mandated Title IX training – train your hearing officers on your school's policy and procedures!
- 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



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Orderly Hearings: Setting ground rules

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

RULES

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Orderly Hearings: Logistics to think about beforehand

- Information parties should have before the hearing
- 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 (audio or audio visual) -- to be maintained for 7 years
- Plan for handling/keeping evidence
- Have contact information for Title IX Coordinator/counsel

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Hearing – Location



- 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 Office/Panel to see and hear one another and any witnesses

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Technology for Hearing

- No specific technology required
- Examples: Zoom; Microsoft Teams meetings
- Must be in real time
- Must enable hearing attendees to see and hear one another
- Be sure the technology has the necessary security protections
- Provide accommodations for individuals with disabilities
- Train hearing officer(s) how to use the specific technology for the hearing

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Prehearing Conference

- Opportunity for the hearing officer to meet the parties and their advisors
- Provide an overview of hearing:
 - Order
 - Ground Rules
 - Role of Advisor
- Identify witnesses for the hearing
- Identify additional evidence
- Review technology that will be used (offer practice session)
- Address questions

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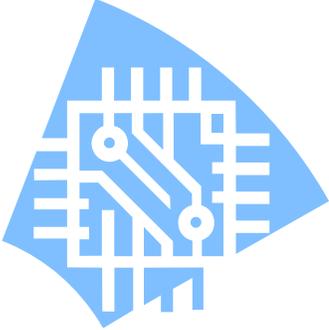
Suggested order for the hearing

- Introductory remarks by hearing officer
- Opening statements by the parties
- Questioning:
 - Investigator?
 - Complainant
 - Respondent
 - Witnesses
- Concluding remarks by the parties
- Concluding remarks by the hearing officer

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Access to the Evidence

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



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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 question is relevant before it is answered at the hearing and explain any decision to exclude a question.

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Sexual Predisposition and Prior Sexual Behavior

Questions and evidence about the Complainant's sexual predisposition and prior sexual behavior are *not relevant*, unless offered to prove that:

- Someone other than the Respondent committed the conduct alleged by the Complainant, or
- If the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent

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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

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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.

ADVISOR

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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.



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Written Determination

- Must provide the written determination to the parties simultaneously
- Keep parties updated on the status of the written determination
- Provide advance notice that written determination will be issued



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Written Determination

Determination must include:

- Allegations potentially constituting sexual harassment
- 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 a determination regarding responsibility, any disciplinary sanctions the university imposes on the Respondent, and whether remedies will be provided by the university to the Complainant
- Appeal procedures available to both parties and the permissible bases for an appeal

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Format of Final Letter

1. Allegation(s)
2. Procedural history
3. Applicable policies and procedures
4. Information considered during investigation (witnesses questioned, documents and other evidence)
5. Findings of fact
6. Analysis and conclusion – whether the alleged conduct violated the policy
7. Evidentiary standard -- preponderance of the evidence
8. Sanctions and/or remedies, if any
9. Rationale for the decision and sanction(s)
10. Appeal procedures

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When is the Decision Final?

The determination regarding responsibility becomes final either on:

- The date that the university provides the parties with the written determination of the result of the appeal, if an appeal is filed, or
- If an appeal is not filed, the date on which an appeal would no longer be considered timely.

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Selecting Title IX facilitators, decision-makers, and investigators

1. Process for making selection
2. Options: internal or external
3. Sharing resources across institutions

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Presenter's Contact Information



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- Partner, *Hogan Marren Babbo & Rose, Ltd.*, Chicago, Illinois;
- Title IX Compliance Services
 - External Investigator
 - Hearing Officer
 - Decision-maker
 - Appeal Officer
 - Policies and procedures review
 - Compliance assessments and recommendations
 - Training
 - General Title IX advice and consultation
- OCR senior manager in Headquarters and OCR Chicago (for 25 years)

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