AGENDA:

• Week 1: Introduction –
  – Introductions
  – Bias, Prejudice and Recusal
  – Due Process
  – Rationale for decision makers
  – Process
  – Pre-hearing Prep

• Week 2: Policy
  – Policy definitions
  – Subtleties of policy application

• Week 3: Evidence
  – Different types of evidence
  – Weighting evidence
  – Hearsay
  – Credibility and G.A.S.

• Week 4: Questioning Skills
  – Why do we ask questions
  – Types of questions
  – Proper wording of questions
  – Style of questions

• Week 5: Deliberation
  – How to Deliberate
  – Policy: Parsing and Analysis
  – Evidentiary Standard
  – Reaching Conclusions
  – Outcome letters

• Week 6 Sanctioning
  – Purpose of sanctioning
  – Title IX Requirements
WHAT IS YOUR MISSION AS A DECISION-MAKER?
WHAT DOES IT MEAN TO BE A “DECISION-MAKER?”

• New Title IX regulations require a “decision-maker” to determine whether a Respondent has violated policy.
  – May be a single person (a/k/a “Hearing Officer”).
  – May be a panel of decision-makers.
  – May be internal or external individuals.

• Required separation of roles.
  – Title IX Coordinator may not serve as “decision-maker.”
  – Investigator(s) may not serve as “decision-maker.”

• Appellate decision-maker is a separate role.
  – May also be a single person or panel; previously uninvolved.
WHEN AND HOW THE “DECISION-MAKER” WORKS

- New Title IX regulations require that colleges and universities hold a live hearing.
  - May take place in person; however, must provide an option for a video conference.
  - Key new element is that the parties may cross-examine each other and witnesses, through an advisor.

- K-12 schools and other federal funding recipients (such as many hospitals with residency programs), need not conduct a live hearing, but must provide an opportunity for the parties to submit written questions for the other party/witnesses.
  - If a hearing is offered, it does not have to comply with §106.45.
Rank your Top 3 responsibilities as a decision-maker. Identify what you consider least important

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<th>Your Rank</th>
<th>Group Rank</th>
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- Finding the truth
- Providing a just result
- Providing an educational process
- Making a safe community
- Upholding the institution’s policy
- Ensuring a fair process
- Protecting the institution from liability
- Punishing wrongdoing
HEARING OFFICER/DECISION-MAKER COMPETENCIES

- The Legal Landscape
- The Conduct/Disciplinary Process
- Understanding Investigations
- Title IX & VAWA Requirements
- Pre-Hearing Evidence Review
- Pre-Hearing Investigation Report Review
- Critical Thinking Skills
- How to Prepare for a Hearing
- Hearing Decorum
- Questioning Skills, including Relevance
- Weighing Evidence, including Relevance
- Analyzing Policy
- Applying Standards of Evidence
- Sexual Misconduct/Discrimination
- Technology Used at Hearing
- Controlling Evidence
- Managing Advisors
- SANE and Police Reports
- Presumption of Innocence
- Due Process and Fairness
- Domestic/Dating Violence
- Bias/Impartiality/Conflicts of Interest
- Stalking/Sexual Assault/Harassment
- Deliberation
- Sanctioning/Remedies
- Understanding the Appeal Process
- Cultural Competency
- Intersection with Mental Health Issues
- Concurrent Criminal Prosecutions
- Impact of Failing to Testify/Answer
- Drawing Inferences?
- Manage Accommodations During Process
- Fixing Procedural Deviations
- Managing Impact Statements
- Writing Decisions/Rationales
- Role in Appeal Process?
BIAS, CONFLICTS OF INTEREST, AND RECUSAL
BIAS

• Among the most significant problems for hearing decision-makers

• Bias can represent any variable that improperly influences a finding and/or sanction

• There are many forms of bias and prejudice that can impact decisions and sanctions:
  – Pre-determined outcome
  – Partisan approach by investigators in questioning, findings, or report
  – Partisan approach by hearing board members in questioning, findings, or sanction
  – Intervention by senior-level institutional officials
  – Not staying in your lane
  – Improper application of institutional procedures
  – Improper application of institutional policies
  – Confirmation bias
  – Implicit bias
  – Animus of any kind
BIAS AND CONFLICT OF INTEREST

• Conflicts of interest and bias are expressly prohibited in the 2020 Title IX regulations.

• Types of conflicts/bias:
  – Wearing too many hats in the process
  – Legal counsel as investigator or decision-maker
  – Decision-makers who are not impartial
  – Biased training materials; reliance on sex stereotypes

• Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised.

• Also, having disciplined a student or employee previously is often not enough to create a conflict of interest.
• Decision-makers may determine that they need to recuse themselves from hearing a particular case or a party might seek a decision-maker’s recusal.

• This is why having an alternate decision-maker on hand is always wise.

• Your policy should define the process and circumstances by which a party may seek to recuse a decision-maker.

• Typically the Title IX Coordinator determines whether or not to honor the request.

• If you yourself discern that you are not able to hear a case impartially, please let your Title IX Coordinator know immediately.
Community standards identify what constitutes sexual harassment within your community.

- The definitions and procedures used may be impacted by Title IX requirements.

It is not a question of right and wrong, but whether there has been a policy violation, proven by the standard of evidence.

Your role is to impartially uphold the integrity of the process.

You may not agree with your policy, but you must be willing to uphold it.
DUE PROCESS: LEGAL FOUNDATIONS

• *Dixon v. Alabama* (1961)
• *Esteban v. Central Missouri State College* (1969)
• *Goss v. Lopez* (1975)
In February of 1960, six black students sat in at a public (all white) lunch counter and were arrested.

Alabama State summarily expelled all of them without any notice of the charges or of a hearing, and no opportunity to provide evidence or defend themselves.

Federal appellate court established minimum due process requirements (reiterated by U.S. Supreme Court in *Goss v. Lopez* (1975)):

- Students facing expulsion at public institutions must be provided with at least **notice of the charges** and an **opportunity to be heard**.
- Ushered in most campus disciplinary and hearing-based processes.

*DIXON V. ALABAMA STATE BD. OF ED.*

294 F. 2D 150 (5TH CIR., 1961).
• Specifically, the court set forth a number of due process-based guidelines, including:
  – Notice, with an outline of specific charges.
  – A fair and impartial hearing.
  – Providing names of witnesses to accused.
  – Providing the content of witnesses’ statements.
  – Providing the accused an opportunity to speak in own defense.
  – The results and findings of the hearing presented in a report open to the student’s inspection.
• **Esteban v. Central Missouri State College**, 415 F.2d 1077 (8th Cir. 1969) added more specific requirements, Examples included:
  – Notices in writing with time to prepare
  – Hearing before the person or panel with authority to suspend or expel
  – Right to present evidence and witnesses

  – U.S. Supreme Court validated the informal hearing requirements and extended to K-12 students informal hearings for students facing suspension.
  – Potential suspensions beyond 10 days or expulsions, however, require a more formal procedure to protect against unfair deprivations of liberty and property interests
DUE PROCESS

• What is Due Process?
• Due Process in Procedure
• Due Process in Decision
• Procedural Rights under 2020 Title IX Regulations
• Standard of Evidence
WHAT IS DUE PROCESS?

• Due Process (public institutions):
  – Federal and state constitutional and legal protections ensuring no public entity deprives someone of education or employment without substantive and procedural fairness. (5th and 14th Amendment)

• “Fundamental Fairness” (private institutions):
  – Contractual guarantee that to impose discipline, the institution will abide substantially by its policies and procedures.
  – Outcome neither arbitrary nor capricious; rationally related to facts and evidence.
WHAT IS DUE PROCESS?

• Ultimately, both are rights-based protections that accompany disciplinary action by an institution with respect to students, employees, or others.
  – Informed by law, history, public policy, culture etc.

• DP in criminal and civil courts vs. DP within an institution.

• DP analysis and protections have historically focused on the rights of the Respondent.

• A sexual assault can be a legal deprivation of a Complainant’s substantive due process rights.

• Perceptions of “due process” can be connected to perceptions of legitimacy of a process’s outcome.
Substantive Due Process

• **Due Process in Decision** - A decision must:
  - Be appropriately impartial and fair (both finding and sanction).
  - Be neither arbitrary nor capricious.
  - Be based on a fundamentally fair rule or policy.
  - Be made in good faith (i.e. without malice, ill-will, conflict, or bias).
  - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence.
DUE PROCESS CONCEPTS
IN TITLE IX PROCESSES

Procedural Due Process:

- Consistent, thorough, and procedurally sound review of all allegations.
- Substantial compliance with written policies and procedures.
- Policies and procedures afford sufficient rights and protections to satisfy mandates of all applicable laws.
  - Clear, written notice of the allegations
  - Opportunity to present witnesses and evidence and be heard by the decision-maker
DUE PROCESS PROCEDURAL RIGHTS IN 2020
TITLE IX REGULATIONS

• Right to:
  – Present witnesses, including fact and expert witnesses.
  – Present and know inculpatory and exculpatory evidence.
  – Discuss the allegations under investigation without restriction.
  – Gather and present relevant evidence without restriction.
  – Have others present during any grievance proceeding/meeting.
  – Be accompanied to any related meeting or proceeding by an advisor of their choice, who may be, but is not required to be, an attorney.
  – Written notice of allegations, as well as notice of the date, time, location, participants, and purpose of investigative interviews or other meetings, with sufficient time to prepare.
  – Inspect and review evidence and draft investigation report before finalized.
  – Right to argue for inclusion of “directly related” evidence at the hearing.
  – Ask relevant questions of the other party and witnesses through an advisor, in the presence of the decision-maker.
THE “TITLE IX PROCESS:” WHAT HAPPENED BEFORE IT GOT TO A HEARING?

• Title IX
• The IX Commandments
• The General Phases of a Title IX Process
• Ten Steps of an Investigation
• Key Elements from new Title IX regulations
# THE IX COMMANDMENTS

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<th>Thorough</th>
<th>Reliable</th>
<th>Impartial</th>
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<td>Prompt</td>
<td>Effective</td>
<td>Equitable</td>
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- Not act unreasonably to end the discrimination
- Not act unreasonably to prevent recurrence
- Act equitably to remedy effects

- **Investigation** (prompt & fair – VAWA Sec. 304)
- **Process**
- **Remedies**

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THE PROCESS

Incident
Notice to Title IX officer
Strategy development

Initial Assessment
Jurisdiction?
Policy violation implicated?
Informal, administrative, or formal resolution?

Formal Investigation & Report
Notice
Identification of witnesses
Interview scheduling
Evidence collection
Evidence and Inv. Report
Shared
Inv. report finalized

Hearing
Determination
Sanction

Appeal
Standing?
Vacate? Remand? Substitute?
10 STEPS OF AN INVESTIGATION

1. Receive Notice/Complaint.

2. Initial Assessment and Jurisdiction Determination

3. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)


5. Establish investigation strategy

6. Formal comprehensive investigation.
   • Witness interviews
   • Evidence gathering.

7. Draft report
8. Meet with Title IX Coordinator (or legal counsel) to review draft report & evidence.

9. Provide all evidence directly related to the allegations to parties and their advisors for inspection and review with 10 days for response.

10. Complete final report.
    • Synthesize and analyze relevant evidence (may include making recommended findings or conclusions)
    • Send final report to parties for review and written response at least 10 days prior to hearing.
ADVISORS

• Advisor can be anyone; no restrictions in the regulations.
  – Already required under VAWA.

• If a party chooses an advisor who is also a witness, you will need to assess how that impacts their credibility as a witness.

• If a party does not have an advisor to conduct cross-examination at the live hearing, the institution must provide an advisor of the institution's choice without fee or charge to the party.
  – Not required to be an attorney.
  – No prior training required; no mandate for institution to train.

• Institutions may still limit the role of advisors during the hearing with the exception of cross-examination and the ability to confer with the party.
• Advisors chosen by the party must conduct thorough cross-examination.

• If they refuse, the institution will appoint an advisor who will do so.

• An advisor appointed for the party is required to conduct thorough cross-examination of the other party(ies);
  – Even if the party being advised doesn’t want the advisor to do so, and is non-cooperative.
  – The regulations envision that the advisor may not do more than repeat or rephrase questions framed by the party, but in many hearings, expect that the advisor will be far more active and engaged than that.
• Title IX regulations require that published grievance procedures include a statement of a presumption of non-responsibility for the Respondent until a final determination is made.

• Hopefully not a change from current procedures, because the determination has always been based on evidence, not presumptions.

• What would it mean to presume neither “guilt” nor “innocence?”
  – How does presumption work in light of an affirmative consent policy?
  – How is presumption of non-responsibility different than no presumption?
  – What does it take to overcome presumption?
  – Should there be an equitable presumption for the Complainant?
    ▪ If so, what would it be?
PRE-HEARING CONSIDERATIONS FOR HEARING BOARDS
PRE-HEARING PREPARATION

• Could include:
  – “Motions” hearing
  – Meeting of Panel
  – Review of Investigation Report
  – Review of file of “directly related” evidence that was not relied upon by investigators
  – Preparation of questions

• Must include:
  – Vetting of decision-maker/panel
  – Conflicts check
  – Recusal protocol

• What About...
  – Can you meet with investigators?
  – Should you meet with parties/advisors
  – How will you ensure rules of the hearing are followed?
SAMPLE PREPARATION PLAN

• Review and understand all charges

• Review all the material carefully and thoroughly – get a general overview of the complaint

• Review it a second time and note all areas of consistency of information
  – You don’t need additional verification or questioning on these issues, of assuming the accuracy of consistent information – but beware of suspiciously consistent stories

• Read it a third time to identify inconsistencies in the information
  – This is the area you will need to concentrate your questions
PREPARING FOR THE HEARING

• Review the policy or section of the policy alleged to have been violated

• Identify all Key Elements of each policy alleged to have been violated
  – Parse all the policy elements (what does it take to establish a policy violation?)
  – Break down the constituent elements of each relevant policy

• Identify what evidence you have that relates to each element.
**PREPARING QUESTIONS**

- Have the Code section at the top of your note page
- Write down the following as a reminder to you:
  - What do I need to know?
  - Why do I need to know it?
    - If the answer to this is not that it will help you determine whether or not a policy violation occurred and you can explain a rationale for that; then it is not something you need to know!
  - What is the best way to ask the question?
  - Who is the best person to get this information from? Usually the investigator.
- When dealing with conflicting testimony apply a credibility analysis (covered later), if it is not already in the report.
PREPARING FOR THE HEARING – THE DAY OF THE HEARING

• Clear your calendar— it could take 30 minutes or it could take the entire morning and/or afternoon
• Dress professionally – Jeans, t-shirts, shorts, or sandals are not appropriate
• Arrive prepared and early
• Bring snacks and water/drinks
• Turn off your phone! And put it away!
• Note-writing tips
  – Less is more
LIVE HEARING

• Final regulations mandate live hearing for higher ed.
  – Virtual hearings are permitted; do not violate due process

• Must create audio/audiovisual recording, or transcript, of hearing and make it available to the parties for inspection and review.

• Parties must attend hearing, otherwise all statements made by absent (or non-testifying) party must be excluded.
  – What are considered “statements” and what effect will this rule have?

• Decision-maker may not be Title IX Coordinator or the investigator.
  – Will there be a facilitator role? Who? What do they do?

• Must allow live cross-examination to be conducted exclusively by each party’s advisor (separate rooms still allowed).
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