2021 Sexual Misconduct & Title IX Hearing Panelist Training
Who’s Here in the Room?

• What’s your day job?

• What do you believe it means to be a Hearing Panelist?

• Does anyone have prior experience serving on panels or as an investigator?
## 3 Types of Hearings

<table>
<thead>
<tr>
<th>Title IX</th>
<th>Formal</th>
<th>Appeal</th>
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<tbody>
<tr>
<td>Most like a courtroom trial</td>
<td>Advisors are very limited</td>
<td>Narrow focus – must satisfy 1 of 3 questions</td>
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Primary Function of the Hearing Panel

• Be a neutral decision maker
  – Hear the facts and circumstances of an alleged policy violation
  – Review the information provided

• Determine whether a policy violation has occurred

• Decide what, if any, sanctions are appropriate
Title IX Overview
The law states that:

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance..."

—United States Code
### ADMINISTRATIVE ACTION ON TITLE IX

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
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<tbody>
<tr>
<td>2011 &amp; 2014</td>
<td>Obama Guidance</td>
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<tr>
<td>2017</td>
<td>Trump Guidance</td>
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<tr>
<td>2018</td>
<td>Rule making notice &amp; comment</td>
</tr>
<tr>
<td>May 2020</td>
<td>Final Rule Issued</td>
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<tr>
<td>August 2020</td>
<td>Final Rule in Effect</td>
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Title IX Sexual Harassment §106.30

• Conduct on the basis of sex that satisfies one or more of the following:
  – (i) An employee conditioning education benefits on participation in unwelcome sexual conduct (i.e. quid pro quo); or
  – (ii) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the school’s education program or activity; or
  – (iii) Sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in VAWA
Title IX Jurisdiction

- Institution’s program or activity in the United States
  - Institution property
  - Institution sponsored or affiliated events [substantial control is key]
  - Buildings owned or controlled by officially recognized student organizations
Sexual Misconduct Policies
Sexual Misconduct Policy

Title IX

Sexually Based Misconduct
# Key Categories of Prohibited Conduct

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<th>Sexual Misconduct</th>
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<td>Dating Violence</td>
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<tr>
<td>Domestic Violence</td>
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<td>Sexual Exploitation</td>
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<td>Sexual Harassment</td>
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<td>Stalking</td>
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<tr>
<td>Nonconsensual Sexual Contact</td>
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<tr>
<td>Nonconsensual Sexual Intercourse</td>
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</tbody>
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Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the alleged victim.

• Includes sexual or physical abuse

• Includes threats of such abuse

• The existence of a covered relationship is based on the totality of the circumstances
Domestic Violence

Violence committed by:
• a current **spouse**, former spouse or **intimate partner**
• a person whom **shares a child**
• a person who is **cohabiting** with or cohabitated with the alleged victim
Stalking

Engaging in a **course of conduct** directed at a specific person that **would cause a reasonable person to fear for his or her safety** or the safety of others OR suffer **substantial emotional distress**.

- Can be direct actions or through third parties
- Could include the use of devices or other methods
- Includes following, monitoring, observing, surveilling, threatening, communicating to or about a person, or interfering with a person’s property
Sexual Exploitation

Taking non-consensual or abusive sexual advantage of another for one’s own advantage or benefit, or for the benefit or advantage of anyone other than the one being exploited.

Examples include:

• Non-consensual photos, videos, or audio of sexual activity

• Non-consensual distribution of photo, video, or audio of sexual activity, even if the sexual activity was consensual

• Intentionally and inappropriately exposing one’s breast, buttocks, groin, or genitals in non-consensual circumstances
Nonconsensual Sexual Contact

Any **physical contact** with another person of a **sexual nature without the person’s consent**.

Includes:

- Touching of another’s intimate parts (genitalia, groin, breasts, buttocks)
- Touching a person with one’s own intimate parts; or
- Forcing a person to touch his or her own or another person’s intimate parts
Nonconsensual Sexual Intercourse

Any **penetration** of another’s body parts without the person’s consent.

Includes:

- Penetration of the vagina, anus, or mouth by a penis, object, tongue, finger, or other body part
- Contact between the mouth of one person and the genitals or anus of another person
Sexual Harassment (Other)

Unwelcome verbal, nonverbal, or physical conduct, based on sex (including gender stereotypes) that may be any of the following:
• Implicitly or explicitly a term or condition of employment status in a course program or activity

• A basis for employment or education decisions; OR

• Sufficiently severe, persistent, or pervasive to interfere with one’s work or educational performance creating an intimidating, hostile, or offensive work environment

• Note: Behavior may rise to the level of a Title IX violation
Sexual Harassment (Student on Student)

Unwelcome verbal, nonverbal, or physical conduct based on sex (including gender stereotypes), determined by a Reasonable Person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to participate in or to benefit from an institutional education program or activity.
Pre-Hearing Complaint Process

• A report of misconduct has been made

• The Complainant or the Title IX Coordinator has initiated the formal investigation process

• Notice of the investigation has been sent to the parties

• The assigned investigator has made preliminary determinations

• The parties and the institution have been unable to reach an informal resolution
Live Hearing § 106.45(b)(6)

- The Final Rule mandates a bifurcated process

- Final determinations of responsibility and sanctions are made by decision-makers
  - CANNOT be the Title IX Coordinator or assigned investigator

- New due process considerations
  - Cross examination
  - Relevancy determinations
  - Impact of party or witness refusal to submit to cross-examination

- Institutions can establish rules of decorum
The UCO Adjudication Processes

**Students**
- All matters not informally resolved will be heard by a Hearing Panel
- Hearing Panels comprised of trained faculty and staff

**Employees**
- Title IX matters not informally resolved will be heard by a designated decision-maker
  - Single decision-maker OR panel
- Sexual Misconduct matters not informally resolved will be resolved according to previously established procedures
  - Institutions may choose to offer a hearing
Title IX Hearings

- Advisors required to conduct cross examination

- If an individual does not submit to cross examination panelists may not rely on their statements

Sexual Misconduct Hearings

- Advisors not allowed to conduct cross examine

- Panelists permitted to rely on statements provided during the hearing and in the investigation report
Typical Order of a Hearing

• Opening by Decision Maker

• Opening statements by both parties

• Questioning of the Complainant
  – By the hearing panel or chair
  – By other party (through their advisor or hearing panel/chair)

• Questioning of the Respondent
  – By the hearing panel or chair
  – By other party (through their advisor or hearing panel/chair)

• Questioning of any Witnesses
  – By the hearing panel or chair
  – By other party (through their advisor or hearing panel/chair)

• Closing statements by both parties

• Closing by Decision Maker
Hearing Panel Roles & Responsibilities
Role of Hearing Panel

• Fair and unbiased review of matter

• Follow the Policy
  – Standard of proof
  – Avoid burden shifting

• Make a determination regarding the violation(s) and sanction(s)
Hearing Panel Roles

• Chair Person
  – Designated leader of the Hearing
  – Should be the voice of the Hearing Panel
  – May make determinations of relevancy

• Other Panel Members
  – Active listening participants who come to their own logical and reasoned decision
Recognize and Avoid Your Own Bias

- Role of Alcohol
- Own experiences...
- Student-Athletes
- Fraternity/Sorority Life
- International Students
- Sex/Gender
- Gender Identity
- Race

- Ethnicity
- Nature of the Violation
- Religion or religious beliefs
- Academic Field of Study/Major
- Politics
- Attitude
- Others?
Understanding The Force-Incapacity-Consent Construct
Overview of the Construct

1. Was **force** used by the Respondent to engage in the sexual activity?

2. Was the Complainant **Incapacitated**?
   a) Did the Respondent know OR
   b) Should the Respondent have known that the Complainant was incapacitated?

3. What **clear words or actions** by the Complainant gave the Respondent indication that the **sexual activity was mutually agreed upon**?

4. Was the Complainant’s consent **withdrawn** during the sexual activity?
Consent

• **Words or actions** that show a knowing and voluntary willingness to engage in a mutually agreed upon sexual activity

• Past consent ≠ Present consent

• The scope of consent matters

• Can be invalidated by: force, intimidation, incapacitation, or withdrawal
Force

• Was force used by the Respondent to engage in the sexual activity?

• Because consent must be voluntary (an act of free will) consent cannot be obtained through use of force

• Types of Force to consider:
  o Physical violence -- hitting, restraint, pushing, kicking, etc.
  o Threats -- anything that gets the other person to do something they wouldn’t ordinarily have done absent the threat
Force Continued

- **Intimidation** - an implied threat that menaces and/or causes reasonable fear

- **Coercion** – the application of an unreasonable amount of pressure for sexual access
  - Consider:
    - Frequency
    - Intensity
    - Duration
    - Isolation
Force Analysis

• Did the Respondent utilize force or intimidation to engage in the sexual activity with the Complainant?
  – If yes = violation of policy
  – If no = Move on with the analysis
Consent and the Role of Alcohol and Drugs
Incapacitation

- Physical and/or mental inability to make informed, rational judgments
  - Could the Complainant make rational, reasonable decisions?
  - Could the Complainant appreciate the situation and address it consciously?
Determining Incapacitation

- Incapacitation is a determination that will be made after the incident in light of all the facts available.

- Assessing incapacitation is very fact dependent analysis of the incident in question.

- Various forms of incapacity:
  - Alcohol or other drugs
  - Mental/cognitive impairment
  - Injury
  - Sleep
Two-Part Incapacitation Analysis

Part One
• Was the Complainant incapacitated?

Subjective analysis based on the facts surrounding the incident

Part Two
• Did the Respondent know of the Complainant’s incapacity?
  - Or would a Reasonable Person have known?

Objective analysis based on the facts surrounding the incident
Common Factors that Impact the Effect of Alcohol

- Rate of consumption
- Strength of drink
- Food in the stomach
- Body Weight
- Body Type – body fat percentage
- Gender
- Enzymes, hormones, water in body
- Medications
- Illness & dehydration
- Fatigue
- Caffeine
- Genetics
Possible Signs of Incapacitation

• Lack of control over physical movements
  – Ex. Inability to dress or walk without assistance

• Lack of awareness of circumstances or surroundings

• Inability to communicate coherently

• Vomiting

• Total or intermittent unconsciousness
Respondent’s Awareness

• The Respondent [or a Reasonable Person] must have been aware of the Complainant’s incapacity

• The Respondent’s own intoxication does not negate their obligation to comply with policy standards
Consent

What clear words or actions by the Complainant gave the Respondent permission for the specific sexual activity that took place?
Consent Is...

• Informed (knowing)
• Voluntary (freely given)
• Active (not passive)
• Clear words or actions
• Indicates permission to engage in mutually agreed upon (sexual) activity
Rules to Remember

• No means no, but nothing also means no
  Silence and passivity do not equal permission

• To be valid, consent must be given prior to or
  contemporaneously with the sexual activity

• Consent can be withdrawn at any time
Withdrawal

• Remember consent can be withdrawn at any time
• The person withdrawing consent is expected to clearly communicate with words or actions they are withdrawing consent
• Other person is required to cease sexual activity until consent is regained
Evaluation of Evidence and Decision-Making Skills
Effective Questioning

• Questions should be used to determine:
  • Who
  • What
  • When
  • Where
  • How

• Be mindful of how a question could be perceived and develop them with caution
Effective Questioning

What are your goals?

• Learn the facts
• Establish a timeline
• Determine what is more likely than not to have occurred [if possible]

What are NOT your goals?

• Satisfying your curiosity
• Answering every unknown to get the “Truth”
Effective Questioning

• Ask open-ended questions to start the conversation
• LISTEN, ask follow-up questions at the end
• Don’t be afraid of silence
• Don’t be afraid to ask for clarification
• Take breaks if necessary
• Maintain your professionalism at all times
Understanding Evidence

• **Formal rules of evidence do not apply.** If the information is considered relevant to prove or disprove a fact at issue, it **should be admitted.** If credible, it **should be considered**

• Evidence is any kind of information presented with the intent to prove what took place

• Certain types of evidence may be relevant to the credibility of the witness, but not to the charges
Understanding Evidence Thresholds

- No Evidence
- Insufficient Evidence
- Preponderance of the Evidence
- Clear and Convincing
- Beyond a Reasonable Doubt
The burden of proof in all UCO hearings is a Preponderance of Evidence. This means that the hearing panel/decision maker must determine **what more likely than not happened** (aka 50 percent plus a feather).
Types of Evidence

- **Documentary** evidence (supportive writings or documents)
- **Electronic** evidence (photos, text messages, videos)
- **Real** evidence (physical object)
- **Direct** or testimonial evidence (personal observation or experience)
- **Circumstantial** Evidence (not eyewitness, but compelling)
- **Hearsay** Evidence (statement made outside the hearing, but presented as important information)
- **Character** Evidence (generally of little value or relevance)
Weighing Evidence

• Weighing evidence means assessing the impact of the information

• The following factors impact the assessment:
  – Relevance
  – Reliability
  – Persuasiveness
  – Bias
Weighing Evidence: Impact Factors

• **Relevance**
  - Must relate to the incident at issue and be of sufficient value in the overall determination
  - Must be offered by an individual with actual knowledge of the event

• **Irrelevant**
  - Questions and information regarding the Complainant’s sexual history or sexual predisposition unless to prove
    - Someone else other than the Respondent committed the alleged misconduct
    - Consent between the parties
Weighing Evidence: Impact Factors

• **Reliability**
  – Information that can be trusted
  – Comes from individuals who are able to have assumed the role they claimed to have or those with actual training or experience to support their claim of expertise

• **Persuasiveness**
  – Induces others to believe through understanding; tries to convince
  – Must be believable, consistent, and establishes a dependable narrative
  – **Note**: be mindful of the rehearsed narrative
Weighing Evidence: Impact Factors

• **Bias**
  – Understand who the person is and their relationship to the parties and incident at issue
  – Bias can manifest in multiple ways:
    • Towards the parties
    • Towards the incident
    • Towards the process
Credibility

“To assess credibility is to assess overall the extent to which you can rely on a witness’ testimony to be accurate and helpful in your understanding of the case”

– Credible is not synonymous with the absolute truth
– Memory errors do not necessarily destroy a witness’ credibility, nor does some evasion or misleading
– Refrain from focusing on irrelevant inaccuracies and inconsistencies

Potential Assessment Factors
– Demeanor
– Non-cooperation
– Logic/Consistency
– Corroborating evidence
Other Evidentiary Exclusions

• Legally privileged information is protected

• A party’s treatment records cannot be used without their voluntary, written consent

• Duplicative evidence may be deemed irrelevant

• If an individual does not submit to cross examination, at a Title IX hearing, their statements cannot be relied upon
Understanding Evidence Thresholds

- No Evidence
- Insufficient Evidence
- Preponderance of the Evidence
- Clear and Convincing
- Beyond a Reasonable Doubt
Determining Appropriate Sanctions

- “Must be made as a proportionate response to the violation.”
- Should prevent the recurrence of sexual misconduct
- Should remedy the effects of the sexual misconduct
Common Student Sanctions

- Warning
- Probation
- Loss of Privileges
- Counseling
- No Contact Directives
- Residence Hall Relocation, Suspension or Expulsion
- Limited Access to Campus

- Community Service Hours
- Online Education
- Alcohol & Drug Assessment and Counseling
- Discretionary Sanctions
- Suspension
- Expulsion
Deliberations & Decision-Making

• Private deliberations with only the panelists
• Not required to make a unanimous decision
• Required to issue a written decision of findings by forming a rationale
  – Summarize evidence supporting the decision
  – Explain the substantial evidence to support sanction of suspension or expulsion
The Written Decision §106.45(b)(7)

• Provided to both parties simultaneously must include:
  – The allegations
  – The procedural steps from the complaint through determination
  – Findings of fact supporting the determination
  – Determinations regarding responsibility, sanctions (and remedies) along with the supporting evidence and rationale
  – Information on the appeals process
Parties will continue to have the right to seek an appeal hearing by submitting an appeal request within 3 days of the original decision.

Appeals need to satisfy one of three merits:
1. Procedural error
2. New evidence
3. Conflict of interest or bias

*For a formal misconduct hearing, the 3rd merit is "Disproportionate sanctions"
Additional Considerations
Hearing Logistics

• The parties must be permitted to be in separate rooms

• Title IX Hearings will be conducted via videoconferencing
  – As panelists you should be familiar with any technology utilized

• All directly related information will be available

• Institutions will establish rules of decorum which everyone is expected to adhere to

• All hearings must be recorded
Things to Keep in Mind

Before the Hearing
• Review all available materials:
  – Sexual Misconduct Policy
  – Investigative Report
  – Supplemental documentation
• Determine whether you are participating in a Title IX or Sexual Misconduct Hearing
• Prepare questions in advance

During the Hearing
• Be patient
• Listen
• Don’t draw conclusions until all evidence and testimony are presented
• Be mindful of the seriousness of the situation
The Investigative Report

- Summary of Allegations
- Identifies Applicable Policies and Procedures
- Statement and Explanation of the Evidentiary Standard
- Describes/Explains Evidence Obtained & Reviewed
- Investigative Findings
Retaliation § 106.71

• **Who is protected**: Reporters, Complainants, Witnesses, Respondents, even those who choose to not participate

• **What is protected**: Intimidation, threats, coercion, discrimination
  - Ex. Charging individuals for code of conduct violations that arise out of the same facts or circumstances
  - Ex. Not keeping the identity of the Complainant, Respondent, or any witnesses confidential
Record Keeping §106.45(b)(10)

• 7-year records retention mandate:
  – Reports [supportive measures, why not deliberately indifferent and what measures taken to restore or preserve equal access]
  – Investigations [determinations, recording of hearing, sanctions and remedies implemented]
  – Appeals
  – Informal resolutions [results]
  – Training materials
Chairing a Title IX Hearing
At the Core

Regardless of the outcome, every aspect of a Title IX hearing must be marked by integrity and equity.

In the end, every complainant and respondent must receive due process.
Due Process

**Due Process** primarily deals with a guarantee of procedural *fairness* for all parties involved in a case. Both complainants and respondents must be treated equally regarding:

- Notifications
- Resources and interim measures
- Opportunity to be heard
- Advisors
- Witnesses
Key Functions of the Chair Person

• Must maintain order
• Determines who and what will be allowed in the hearing
• Keeps hearing focused and on point
Primary Responsibility of the Chair Person

The chair person must adhere to every dictate of the current Title IX regulations and the policies of the University of Central Oklahoma. The chair does not have the prerogative to deviate from either.
Preparing for a Title IX Hearing

• Know the pertinent articles of the COSC and university policies
• Know the pertinent articles of the current Title IX regulations
• Know the case record
Preparing for a Title IX Hearing

Before the hearing, confirm the correct pronunciation for names of all persons participating in the hearing.
The Hearing Process

• Before the hearing, the chair person will receive a script that will serve as a guide through the live hearing
• The chair person merely needs to read the script at a comfortable pace
• The chair person may omit sentences or sections that are not relevant due to something such as a participant's absence
Before beginning the hearing, the chair person should ask a designee to start the recording.

The chair person will then begin reading from the script.

After the introductions, witnesses will be asked to leave the hearing until they are called on to answer questions.
The Hearing Process

It is important for the hearing panel to remember that their assigned purpose is not to re-investigate the matter but to render a decision based on the evidence that is available to them as a result of the investigation and the live hearing.

The live hearing is an opportunity to clarify and to consider the weight and relevance of the evidence.
The Hearing Process

It is the responsibility of the chair person to keep the panel focused on the task at hand.

The chair person must disallow any line of questioning that is irrelevant.

The chair person must also make sure to extinguish any line of questioning that does not contribute to the panel making a decision in regard to the matter at hand.
The Hearing Process

The chair person has the discretion to cut off **lengthy** and/or **irrelevant** questions or statements.

To a participant delivering a **lengthy monologue**, the chair person might say, "Let me stop you there..."

The chair has the **authority** and **responsibility** to warn any participant in regard to inappropriate statements or questions.
After introductions at a live hearing, the chair person must read the rules governing the live hearing. If, during the live hearing, any person present demonstrates they will not abide by the hearing rules, the chair person will dismiss that individual, and the hearing will continue without them.
The Hearing Process

The chair person has the discretion to adjourn the live hearing as needed.

The need could be simply to take a break, for the chair to consult with legal counsel, or to allow participants to compose themselves.
The Hearing Process

- Profanity will not be allowed in a live hearing unless it is part of a direct quote that has evidentiary value.

- With rare exception, a complainant's sexual history is prohibited from being introduced in a live hearing.
Deliberations & Decisions

During deliberations, the chairperson should facilitate the discussion but not seek to impose their will on the decision making process.
After all questions have been answered, all statements made, and all evidence considered, the hearing panel needs to answer 1 or 2 questions*:

1. Did the respondent(s) violate Title IX regulations, the current UCO Code of student Conduct, or any other UCO policies?
2. If "Yes," what, if any, appropriate sanctions should be assigned to the respondent?

*The questions are different for an appeal hearing
The Hearing Process

Appeal hearings are intended to answer one or more of the followings questions:

1. Was there procedural error that was significant enough to impact the original decision?
2. Are the assigned sanctions attached to the original decision disproportionate?
3. Is there new information, not available at the time of the original decision, that is significant enough to change the original decision?
For an appeal hearing, the panel can render 1 of 4 decisions:

1. Uphold the original decision
2. Modify the original decision
3. Overturn the original decision
4. Remand the matter for further investigation
QUESTIONS