

What Advisors Need to Know About Their Role in Penn State University Title IX Hearings

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Topics for Discussion

- Advisor role in PSU AD85/AD91 hearing process framework
- Department of Education's perspective on advisor role
 - Will be discussed throughout presentation
- Working with investigative record and advisees to prepare for hearings
- Special evidentiary issues

Topics for Discussion

- Hearings: Logistics, cross-examination, relevance
- Decorum expectations
- Confidentiality considerations
- Complainant advisor and respondent advisor considerations

Hearing Requirements Under New Title IX Regulations

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May 2020 Regulation Title IX Hearing Procedures

- All recipient institutions (public and private) must hold live hearings in Title IX Sexual Harassment cases
- Following rationale of *Doe v. Baum*:
 - Hearings must include opportunity for cross-examination of parties and witnesses by advisors
 - Must be conducted directly, orally, and in real time by party's advisor of choice
- Regulation requirement (not *Doe v. Baum* requirement):
 - Cross-examination must be done by advisors, but never by a party personally

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Advisor Role in PSU AD85/AD91 Process Framework

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AD 85 Framework

- <https://policy.psu.edu/policies/ad85>
- Update regarding cross-examination from Department of Education perspective:
 - see: [Education Department Ceases Enforcement of "Arbitrary and Capricious" Exclusionary Rule | Insights | Holland & Knight \(hklaw.com\)](#)
- Follow PSU policies regarding effects of change in Department's position

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Definitions of Title IX Prohibited Conduct

Applicable Definitions – AD85

» <https://policy.psu.edu/policies/ad85#TITLE%20IX%20TERMS%20AND%20DEFINITIONS>

Working with Investigative Record and Advisees to Prepare for Hearings

“Directly Related” Evidence

2020 Title IX Regulation:

- » Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
- » Including evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source
- » So that each party can meaningfully respond to the evidence prior to the conclusion of the investigation

“Directly Related” Evidence

- » In Preamble, Department declines to define “directly related” further, indicating that it “should be interpreted using [its] plain and ordinary meaning.”
- » Department notes that term aligns with (similarly undefined) term in Family Educational Rights and Privacy Act (“FERPA”), which defines covered education records in part as documents that are:
 - “directly related to a student; and
 - Maintained by an educational agency or institution”
- » Department ties parties’ right to review directly related information under Title IX regulations with Department’s prior position that students may review FERPA-protected information about other students if necessary to preserve their due process rights

“Directly Related” Evidence

- » Term is broader than:
 - “all relevant evidence” as otherwise used in Title IX regulations, and
 - “any information that will be used during informal and formal disciplinary meetings and hearings” as used in Clery Act
- » Point of information-sharing provision is to promote transparency and allow parties to object to investigator’s conclusion that certain evidence is not relevant, and argue why certain evidence should be given more weight

“Relevant” Evidence

- » Investigative reports must “summarize relevant evidence”
- » The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”
- » See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:
 - “Evidence is relevant if:
 - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - (b) the fact is of consequence in determining the action.”

“Relevant” Evidence

- » Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance
 - Subject to parties’ right to argue upon review of “directly related” evidence that certain information not included in investigative report is relevant and should be given more weight

Investigative Reports

» Regulation:

- “Prior to completion of the investigative report, the [school] must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and
- the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.”

Investigative Reports

» Regulation:

- Investigative reports must “fairly summarize relevant evidence”
- “at least 10 days prior to a hearing . . . send to each party and the party’s advisor, if any, the
- investigative report in an electronic format or a hard copy, for their review and written response.”
- » Investigator does not need to revise investigative report in light of this written response from parties

Working with Advisees to Prepare for Hearing

- » Logistics
- » Scope of advisor role
- » Expectations

Hearings: Logistics, Cross-Examination, Relevance, Advisor Role and Decorum

Hearings

- <https://policy.psu.edu/policies/ad85#FORMAL%20HEARING%20PROCESS>

Advisor Role at Hearings

Advisors

- Each party may have an advisor of their choice present at the hearing
- The advisor does not participate in the hearing except for the limited purpose of conducting cross-examination on behalf of that party
- Advisors may be, but are not required to be, attorneys
- If a party does not have an advisor of their choice present at a hearing, the University will, without fee or charge to the party, provide an advisor of the University's choice
 - for the sole and limited purpose of conducting cross-examination on behalf of that party

Rules of Decorum

- https://pennstateoffice365-my.sharepoint.com/:w:/g/personal/tjl5832_psu_edu/ESmPpaobry9HnXi6pupBaNQBZ3RHTwAMUk2JI6Da1RDbKg?e=vNY8QI

Special Evidentiary Issues

Special Evidentiary Issues

- » Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless
 - such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
 - concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

Special Evidentiary Issues

- » Information protected under a legally recognized privilege
 - (e.g., privileged communications between a party and their physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in a treatment capacity, or privileged communications between a party and their attorney),
- » are not considered unless the information is relevant
 - and the person holding the privilege has waived the privilege.

Special Evidentiary Issues

- » The hearing officer will not draw an inference about the determination regarding responsibility based solely on a party or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

Confidentiality Considerations

Confidentiality Considerations

- » Confidentiality considerations regarding record and investigative report
- » Confidentiality considerations regarding information gathered during course of pre-hearing conference and hearings
- » Other confidentiality considerations

Complainant Advisor and Respondent Advisor Considerations

Complainant/Respondent Advisor Considerations

- » Preamble to regulations:
 - “The Department agrees with commenters that sex bias is a unique risk in the context of sexual harassment allegations, where the case often turns on plausible, competing factual narratives of an incident involving sexual or sex-based interactions, and application of sex stereotypes and biases may too easily become a part of the decision-making process.”

Complainant/Respondent Advisor Considerations

- » Preamble to regulations:
 - “The Department agrees with commenters that ensuring fair adversarial procedures lies within the Department’s authority to effectuate the purpose of Title IX because such procedures will prevent and reduce sex bias in Title IX grievance processes and better ensure that recipients provide remedies to victims of sexual harassment.”

Complainant/Respondent Advisor Considerations

- » Preamble to regulations:
 - “The Department agrees with commenters that cross-examination equally benefits complainants and respondents, and that both parties in a high-stakes proceeding raising contested factual issues deserve equal rights to fully participate in the proceeding.
 - This ensures that the decision-maker observes each party’s view, perspective, opinion, belief, and recollection about the incident raised in the formal complaint of sexual harassment.”

Complainant/Respondent Advisor Considerations

- » Preamble to regulations:
 - “The Department agrees with commenters who note that any person can be a complainant, and any person can be a respondent, regardless of a person’s race, sexual orientation, gender identity, or other personal characteristic, and each party, in every case, deserves the opportunity to promote and advocate for the party’s unique interests.”

Hypothetical Scenarios

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Thank You!



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