

**TITLE IX
HEARING PANEL TRAINING**

Presented by Katsura Kurita and David Tiscione



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**OVERVIEW OF TRAININGS**

- Hearing Panel Member, Advisor, and Title IX Intake Officer Training (Friday, September 18- 11 AM – 12:30 PM)
- Title IX Intake Officer Training (Friday, September 25- 10 AM –12 PM)
- Advisor Training (Thursday, October 1- 2 - 4 PM)
- **Hearing Panel Member Training (Friday, October 16- 2 – 4 PM)**
- Combined case study (Friday, October 30- 2– 4 PM)
  
- SUNY SCI online trainings due **October 30**.

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**OVERVIEW OF TODAY**

- Investigation overview
- Definitions
- Technology
- Hearing Agenda
- Relevance
- Questioning
- Cross examination
- Rationale
- Sanctions

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**INTRODUCTIONS**

- Share Name, Title & Office
- Name ONE responsibility or expectation of hearing panel member

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**SHARING ROLE OF HEARING PANEL MEMBER**

- Determining whether a student is responsible or not responsible for an alleged violation
- Cross examining the people that are involved in the case
- Listening intently throughout the process and looking for available information in an effective and compassionate way
- Questioning process through lens for both complainant and respondent and due process
- Make sure everyone feels heard
- Navigating decorum in the hearing process; staying calm and polite

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**SHARING ROLE OF HEARING PANEL MEMBER**

- Trying to approach case from trauma informed perspective while being impartial in decision making
- Approaching the process as an open, compassionate listener
- Be supportive of all parties as possible; do no harm
- Being well trained and up to date on recent developments and nuances
- Be familiar with and apply the policy
- Be engaged and challenge each other to ensure appropriate decision
- Trained in and approach hearing with cultural sensitivity
- Weighing the evidence very carefully in an unbiased manner
- De-escalating tensions in the room

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### OVERVIEW OF INVESTIGATION PROCESS

Title IX Deputy Coordinator is responsible for scheduling all meetings with Investigator and will provide:

- Notice of date, time & location of interview with investigator(s)
- Request names and contact info for all witnesses
- Request that the party provide all evidence (ie, photos, screen shots, text messages, voicemails, social media posts, etc.) to investigator(s)

During meeting with investigator(s), Advisors may not speak for party.

- Party is permitted to submit questions for the Investigator(s) to ask others.



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Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 2 or 3

Once finalized, this evidence should be provided to the Parties/Advisors/Decision-makers within the investigation report via secure technology

Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 1 or 3

Once finalized, this evidence should be provided to the Parties/Advisors/Chair in a separate file via secure technology

Evidence should be maintained by the Investigator(s), but disregarded for purposes of the process. Parties/Advisors/Decision-makers don't get to see or know about it

**ATIXA**  
Investigation  
buckets



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### OVERVIEW OF INVESTIGATION PROCESS

- Preliminary Investigation Summary Report will be provided to both Parties and Advisors for review and comment for 10 days.
  - Note errors
  - Note any questions for the investigator(s)
  - Suggest additional witnesses or evidence that should be obtained
  - Argue for or against any findings made
  - Raise any issues of bias or conflict of interest that must be addressed
  - Raise concerns about the evidence that is contained in the report or that there is evidence that was not considered directly relevant by the Investigator(s) and should be in the report.
- After all comments are reviewed and addressed by Investigator(s), then the Investigation Summary Report is issued and sent to the Parties, Advisors and Office of Student Conduct for a hearing before a hearing panel or to external decision-makers for Employee cases.



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**CONSOLIDATION OF COMPLAINTS**

- Complaints can be consolidated when the complaint arises out of the same factual circumstances in two instances:
  - Where there is more than one complainant or respondent;
  - Where a cross-complaint has been filed by a respondent against a complainant


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**DEFINITIONS**

Consent is defined as an **affirmative indication by words and/or actions of a voluntary agreement to engage in the particular sexual act or conduct** in question. **Consent for one sexual act or conduct does not constitute consent to all sexual acts or conduct.** **Consent can be withdrawn at any time**, and once withdrawal of consent has been expressed, **sexual activity must cease**. **Consent cannot be obtained through the use of force, threat, intimidation, or coercion.** **Silence or absence of resistance on the part of an individual does not constitute their consent.** **Consent cannot be given by someone who is incapacitated.** Due to consuming drugs or alcohol or for any other reason (including but not limited to being unconscious, asleep, or otherwise unaware that sexual activity is occurring). Incapacitation is a state where someone cannot make rational, reasonable decisions because they lack the capacity to give knowing consent (e.g., to understand the "who, what, when, where, why or how" of their sexual interaction). While incapacitation may result from the use of alcohol and/or drugs, incapacitation is a state beyond drunkenness or intoxication. Incapacitation may also exist because of a physical, mental, or developmental disability. The question of incapacitation will be examined objectively from the perspective of the respondent i.e. whether a reasonable, sober person in place of the respondent should have known the condition of the complainant based on the apparent indications of incapacitation, which may include, but are not limited to, acting confused or incoherent, difficulty walking or speaking, and vomiting.


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**DEFINITIONS**

**Sexual Harassment** defined as **conduct on the basis of sex** which may include such behavior as unwelcome sexual advances, requests, and other verbal, written, or electronic communications or physical conduct of a sexual nature when (1) an **employee** of the University **conditions the provision of an aid, benefit, or service of the University on an individual's participation in the unwelcome sexual conduct**, or (2) **conduct that is** determined by a **reasonable person** to be so **severe, pervasive, and objectively offensive** that it effectively **denies a person equal access to the University's education program or activity.**


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**DEFINITIONS**

*Sexual assault* is defined as **any sexual act directed against another person, without consent** of the complainant, including instances where the complainant is incapable of giving consent. Sexual assault includes **penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person,** without the consent of the complainant. This definition includes any gender of the complainant or respondent.

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**DEFINITIONS**

*Fondling* is another form of sexual assault which is defined as the **touching of the private body parts,** including but not limited to breasts, buttocks, or groin of another person, for the purpose of sexual gratification, **without the consent** of the complainant, including instances where the complainant is incapable of giving consent because of their age or because of their temporary or permanent mental incapacity.

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**DEFINITIONS**

*Incest* is also a form of sexual assault when non-forcible **sexual intercourse** occurs **between persons who are related to each other within the degrees wherein marriage is prohibited by law.**

- Vaginal intercourse with an individual's grandparent, parent, child, sibling, grandchild, grandparent's spouse, spouse's grandparent, parent's sibling, stepparent, spouse's parent, spouse's child, child's spouse, grandchild's spouse, spouse's grandchild, or sibling's child

*Statutory Rape* is non-forcible **sexual intercourse** with a **person who is under the statutory age of consent which is 16 years of age in the state of Maryland** (which means the victim must be under 16); however, 14- and 15-year-olds may consent if the offender is less than four years older than the victim.

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**BIAS**

- "Could not be objective toward them based on previous interactions" (Community Standards, p. 47)
  - Notify us if you have had any interactions with the parties or witnesses
  - Perceived and actual bias
    - Bad grade
    - A previous disagreement with the party
    - A positive relationship with the party
      - Advise a party's student group
        - Supervises the party
    - Social media posts that parties should or should not be believed
    - Others?

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**BIAS**

- Do not pre-judge information
  - Hearing the case before deciding it
- "Respondent is presumed not responsible for the alleged conduct" until conclusion of a grievance process

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**TECHNOLOGY OVERVIEW**

- Regulations require parties to be seen and heard when answering questions in Title IX cases
  - Regulations do not require parties to watch or listen
  - We will utilize Zoom or similar platforms to conduct the hearings
  - Parties not answering questions may be asked to turn off their cameras and mute themselves
  - Parties and their advisors will be able to connect via phone or breakout room
  - A practice session may be conducted in the pre-hearing conference
- Regulations do not apply to non-Title IX cases
  - We are only required for parties to be heard
  - This may be done through phone and/or a combination of zoom and breakout rooms

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**ZOOM OVERVIEW**

<https://www.linkedin.com/learning/learning-zoom/options-during-a-meeting?u=57888833>



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**OVERVIEW OF HEARING**



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**PRE-HEARING CONFERENCE**

- Pre-hearing Conference will be scheduled after investigation report has been finalized and before the scheduled hearing (likely within 10 days of the report being finalized)
- Prior to or during conference, student will be asked to complete a panel member strike list
- Student should submit questions or topics about which they wish ask at the hearing 2 business days prior to conference
  - Chair will rule on relevance and document ruling
  - Does not preclude questions from being asked, especially based on testimony provided
- Chair may consider arguments for relevance and document ruling
- Chair will conduct a technology overview
- Chair will review the hearing agenda
- Chair will review advisor roles and responsibilities



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### PRE-HEARING PREPARATION

- Review and understand all charges
- Review all material carefully and check with chair for questions or concerns
  - Ensure you have all information referenced
- Review it a second time and note all inconsistencies between parties
- Review it a third time and note all inconsistencies between parties
- Prepare your questions based on the inconsistencies
  - Be mindful of not unnecessarily repeating questions or asking questions to which we already know the answers
- Prepare questions for:
  - Investigator
  - Respondent
  - Complainant
  - Witnesses



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### HEARING TIMELINES

- Hearing length will vary
- Hearings will likely span multiple days
- Given the additional length of time, we will focus on shorter hearing periods within a day
- Chair or Office of Student Conduct will work with yours and student schedules to schedule the hearings
- Deliberation will occur typically on separate day from hearing
- Outcome including rationale will be drafted and reviewed with panel within the 10 days after the hearing



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### HEARING AGENDA

- Introduction
  - Panel, parties, and advisors introduce themselves
  - Rights and responsibilities are reviewed
  - Charges are read and respondent pleads responsible or not responsible
- Investigator will present a summary of the investigation and be questions by panel
  - Cross examinations by parties' advisor (Title IX hearing)
  - Suggested questions by parties (non-Title IX hearing)
- Respondent opening statement and questions by panel
  - Cross examination by complainant advisor
  - Suggested questions by parties (non-Title IX hearing)
- Complainant opening statement and questions by panel
  - Cross examination by respondent advisor
  - Suggested questions by parties (non-Title IX hearing)
- Witness testimony and question by panel
  - Cross examination by parties' advisors
  - Suggested questions by parties (non-Title IX hearing)
  - All witnesses will be called in title IX hearings
  - Only witnesses the panel or parties call will be called for non-Title IX hearings
  - Closing statement by complainant
  - Closing statement by respondent
  - Closed deliberation



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**RELEVANCE**

- Chair determines relevance
- Relevance can be defined as directly related to the issue and helps prove (inculpatory) or disprove (exculpatory) the allegation
- The following is irrelevant:
  - Sexual predisposition or prior sexual behavior (rape shield law)
    - 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
      - Consent when the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent
  - Privileged information
  - Medical Records
  - Duplicative or abusive questions
  - New information (can be remanded to investigation)
- Panels should not ask questions about irrelevant information


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**RELEVANCE**

- Relevance of crosses examination questions should not be based on:
  - Who asked the question
  - Their possible (or clearly stated) motives
  - Who the question is directed to
  - The tone or style used to ask about the fact
  - The sex or gender of the party for whom it is asked or to whom it is asked
  - Their status as complainant or respondent
  - Past status as complainant or respondent
  - Any organizations of which they are a member
  - Any other protected class covered by federal or state law (e.g. race, sexual orientation, disability).


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**RELEVANCE DETERMINATIONS BY CHAIR:**

*Question regarding Privileged Information*

- The question is relevant because it asks whether a fact material to the allegations is more or less likely to be true.
- The question is irrelevant because it asks about a detail that does not touch on whether a material fact concerning the allegations is more or less likely to be true.

*Question regarding Prior Sexual Behavior*

- The question is relevant because although it calls for prior sexual behavior information about the complainant, it meets one of the two exceptions to the rape shield protections defined in 34 C.F.R. § 106.45(b)(6)(i), and it tends to prove that a material fact at issue is more or less likely to be true [denote which exception].
- The question is irrelevant because it calls for prior sexual behavior information about the complainant without meeting one of the two exceptions to the rape shield protections defined in 34 C.F.R. § 106.45(b)(6)(i).


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## RELEVANCE

### Question regarding Privileged Information

- The question is irrelevant because it calls for information shielded by a legally-recognized privilege [identify the privilege].
- The question is relevant because, although it calls for information shielded by a legally-recognized privilege [identify the privilege], that privilege has been waived in writing, and the question tends to prove that a material fact at issue is more or less likely to be true.

### Questions about Undisclosed Medical Records

- The question is irrelevant because it calls for information regarding a party's medical, psychological, or similar record without that party's voluntary, written consent. 85 Fed. Reg. 30026, 30294.
- This question is relevant because although it calls for a party's medical, psychological, or similar records, that party has given their voluntary, written consent to including this material, and it tends to prove that a material fact at issue is more or less likely to be true. 85 Fed. Reg. 30026, 30294 (May 19, 2020).



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## RELEVANCE

### Duplicative Questions

- The question is irrelevant because it is duplicative of a question that was asked and answered.



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## QUESTIONING THE INVESTIGATOR



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**CROSS EXAMINATION**

- Advisors will have the opportunity to cross examine the investigator, other party, and all witnesses during Title IX hearings
- If someone does not submit to cross examination, no statement of theirs can be relied upon for sexual misconduct charges
  - "Statements" has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements
  - Anything with words may not be relied upon except video evidence
  - Their statements cannot be part of decision making or rationale
- Cannot make determination solely on someone's absence
- We cannot compel anyone to participate
- If there is no advisor or an advisor has been removed, an advisor will be provided
- Advisor will ask question verbally and live
- Chair will determine and state if the question is relevant or ask the advisor to rephrase
- If the question is relevant, the person will be asked to answer
- If the question is not relevant, the person will be asked not to answer


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**CROSS EXAMINATION- TYPES OF QUESTIONS**

- We may hear more:
  - Leading questions to suggest a point
  - Closed-ended questions help to pin down a point - Didn't you say "you don't remember exactly what was said"?
- Advisors don't have to ask questions

Adapted from ATIXA Guide to Effective Advising in Formal Title IX Proceedings


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**QUESTIONS FROM PARTIES DURING NON-TITLE IX HEARINGS**

- After each party provides testimony, the chair will allow the other party to suggest questions
- The chair can ask the questions as suggested, refuse to ask them, or rephrase them to get the same information.
- Questions should be submitted in advance
- Repetitive or blaming questions will not be asked
- Leading and abusive questions will be rephrased


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**OUTCOME**

- Normally within 10 business days of hearing
- Be prepared for any outcome and to manage response to any outcome
- Outcome is usually an "in person" meeting
- Outcome letter will include:
  - Whether the respondent was responsible or not for each charge
  - A detailed rationale for the findings
  - Sanctions for the outcome, if any
  - A detailed rationale for the sanctions, if any
  - A list of procedural steps taken from formal complaint to determination
  - Whether complainant received remedies
  - Procedures for appeal
- Chair will review outcome and answer questions


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**RATIONALE**

- Findings of fact
  - Analysis of what findings of fact support the determination of responsibility or non-responsibility
- Detailed description of the major components
- How evidence and information presented was weighed
- How the evidence and information support the result and the sanctions (if applicable)
- How preponderance of the evidence was applied to facts and outcome


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**SANCTIONS**

- Consider:
  - Interests of the University community
  - The impact of the violations on the victim(s)
  - Previous documented student conduct history
  - Any mitigating or aggravating circumstances
- Precedent
- Should be designed to restore access for complainant
- Start with Expulsion and go to less severe if applicable
  - Determine rationale with each step


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**APPEAL PROCESS**

- Parties may appeal dismissal or hearing outcome
- Grounds for appeals
  - The party alleges that there were procedural irregularities that affected the outcome of the matter;
  - The party alleges new evidence that was not reasonably available when the determination of responsibility or dismissal of the complaint was made that could affect the outcome of the matter;
  - The party alleges the Title IX Coordinator or Deputies, investigators, or hearing panel had a conflict of interest or bias for or against the complainant(s) or respondent(s) generally, or the individual complainant or respondent that affected the outcome of the matter;
  - The party alleges that the sanctions imposed are grossly disproportionate to the findings of responsibility.

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**DISMISSAL APPEAL PROCESS**

- Appealed to Dean of Students (student cases) or Title IX coordinator (employee cases)
- Recipient will appoint an independent decision maker to decide the appeal
- Outcome is given to parties

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**HEARING OUTCOME APPEAL PROCESS**

- Paper appeal process
- Appeals from both parties will be reviewed by same panel
- Appeal must be submitted within 5 business days of the outcome to the Dean of Students
- No appeal submitted means the party waived their right to appeal
- Burden is on the party to provide support to appeal
- Dean of Students will determine if the burden has been met
- Other party will be given opportunity to submit a written response to the appeal
- Appeals will be decided by panel selected from UBOD (modified when warranted)

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### POSSIBLE OUTCOMES OF APPEAL

- Affirm the original decision
- Affirm the original decision of responsibility for some or all charges and change the sanction
  - Sanction may be reduced or increased
- Reverse the original decision of responsibility for some or all charges and change the sanction
  - Sanction may be reduced or increased
- Remand to original hearing panel
  - Cases of new evidence
- Outcome will be communicated in writing within 5 days of the panel meeting



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### WRAP UP

- ❖ Please raise any concerns or issues during the process, don't assume that is the "new way." We're all learning the "new way."
- ❖ Hearings will take longer so deliberations may also take longer.
- ❖ Thank you for your time, hard work and commitment.

Questions or Concerns



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