

**BARNES & THORNBURG LLP**

## New Title IX Regulations: Decision Makers & Advisors

July 28<sup>th</sup> & 29<sup>th</sup>

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### Today's Speakers



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### Today's Speakers



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### Discussion Topics:

- Hearing Procedures
- Mock Hearing Scenarios and Evidentiary Issues
  - Review of the Investigation Report
  - Planning the Hearing
  - Evidentiary Issues
- Final Determinations and Appeals
- Key Takeaways

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Presented by Mark Scudder

### HEARING PROCEDURES

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### Hearings Topics

- Big Picture Items
- Roles Within School's Title IX Department
- Hearings
- Advisors & Cross-Examinations

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### Big Picture Items

- Both the investigation and hearing processes have gone through significant changes as a consequence of the regulations
- Cannot be discriminatory on the basis of sex and must apply to complainants and respondents

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### Roles Within School's Title IX Department

- Single investigator model is no longer allowed
  - Investigators and Decision Maker(s) cannot be the same in any given case
- All individuals in the case must be unbiased

*This is one area that could result in requiring additional staff!*

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### Hearings

- Hearings are now mandatory for all post-secondary schools
- Must be conducted live with both parties able to simultaneously see and hear each other
  - If requested by either party, the hearing can be conducted in separate rooms with technology to enable this requirement
  - Can also be done virtually

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### Hearings

- Recordings of the hearings must be available for all parties to inspect and review
  - Audio
  - Audiovisual
  - Transcript

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### Hearing Procedure

- Opening statements?
- Order of witnesses?
- Questions from the hearing officer?
- Closing statements?

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### Advisors & Cross-Examinations

- Cross-examinations are now allowed by regulation
- Parties can not directly cross-examine each other
  - Questions must be asked by a party’s advisor or attorney
- Schools must provide an advisor for the purpose of cross-examinations if parties do not have one
  - Does not have to be a lawyer

*This is another area that may result in requiring additional staff!*

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### Advisors & Cross-Examinations

- Questions must be relevant before the party or witness provides an answer
- Relevance is not defined within the regulations
- Questions regarding prior sexual history are only allowed when:
  - Such information is offered to prove someone other than the respondent committed the sexual harassment, or:
  - Prior sexual behavior between the parties offered as proof that there was consent

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### Limitations on Advisor’s Role

- Advisors must be allowed to cross-examine and question witnesses
- Any other restrictions are allowed, but must be applied equally to all parties

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Presented by Chris Bayh

### MOCK HEARING SCENARIOS / EVIDENTIARY ISSUES

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### Now that you've got the basics...

Take a few minutes to read over the case file we've sent to you.



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### Opening Statements

- Proceedings must be equitable and governed by consistent procedures
- Opening statements discretionary
  - Time limit?
  - Party versus advisor?
  - Excluded entirely?

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### Direct Examination of Complainant (Sophia)

- ADD VIDEO

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### Key Takeaways

- All evidence must be “relevant”
- Were the objections permissible?
  - Leading questions OK?

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### Relevance – how defined?

- “The final regulations do not define relevance, and the **ordinary meaning** of the word should be understood and applied.” Cmt. p. 811, fn 1018.
- Something that has a tendency to make a consequential fact more or less probable than it would be without the evidence.
- A school “may **not** adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.” Cmt. p. 812.

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**Deciding what evidence can be part of the record**

**Relevant or not?**



Complainant wishes to admit evidence that Respondent used campus computers to access and view pornographic videos on two occasions.



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**Cross Examination of Complainant (Sophia)**

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**Key Takeaways**

- All evidence must be “relevant”
- Were the objections permissible?
  - Sophia’s sexual history (partners; bondage)
  - Caiden and mistaken identity
  - Intoxication
  - Badgering the witness

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### Relevance – any specifics?

- A few – § 106.45(b)(6)(i):
  - Irrelevant: “the complainant’s sexual predisposition or prior sexual behavior”
    - Think: rape shield laws
  - Exceptions—where prior sexual behavior may be relevant:
    - Assailant identity: “to prove that **someone other than the respondent** committed the conduct alleged”
    - Prior complainant-respondent relations: evidence “concern[ing] specific incidents of the complainant’s prior sexual behavior **with respect to the respondent** and are offered to prove consent”

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### Deciding what evidence can be part of the record



#### Relevant or not?

Respondent’s advisor asked Complainant: “How many sexual partners have you had?”



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### Witness Testimony (Jennifer)

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### Key Takeaway

- Any admitted “statement” must be subject to cross-examination
- Were the objections permissible?

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### Cross-Examination

- To be admitted, any “statement” must be subject to cross-examination.
- “Statement” is broad.
  - It “has its ordinary meaning”
  - It “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.”
  - Includes “police reports, SANE reports, medical reports, and other documents and records... to the extent that they contain the statements of a party or witness.”
- Who makes the statement is important.
  - Rule is limited to cross-examination.

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### Deciding what evidence can be part of the record Admissible or not?

Complainant’s friend Jennifer plans to testify. She will testify that her old roommate, Elizabeth, once confided in her that the Respondent had sex with her while she was unconscious during freshman orientation two years ago. Elizabeth herself is unavailable to testify because she is currently in a Semester at Sea study program.

From: Jennifer Traylor <jennifertraylor10@gmail.com>  
 Sent: Saturday, July 25, 2020 at 3:18 PM  
 To: Investigator, Sophie  
 Subject: [EXTERNAL]w/rd Title IX Witness Statement



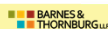
Good Afternoon:

I am writing this statement to the investigator. I was asked to write about my experience with Aiden. He is a bad guy. Last semester I was at a party and had too much to drink. When I woke up, Aiden was in a bed with me and I quickly realized he had sex with me. I did NOT ask him to have sex. He should be locked up.

I am writing this while I am still at the port. I will be at sea for the next 2 months and will not have service. Please accept this as my written statement.

Thanks,  
 Jennifer



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### Hearsay – what about that?

- “the proposed rules do not speak to admissibility of hearsay”
- However, § 106.45(b)(6)(i) “states that the decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination” Cmts. p. 811 & fn. 1017.

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### Relevance – making the call

- Chance to address it from the investigation report.
  - “[I]f a party disagrees with an investigator’s determination about relevance, the party can make that argument in the party’s written response to the investigative report under § 106.45(b)(5)(vii).”
- Chance to address it during or even after the hearing.

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### Direct Examination of Aiden

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### Key Takeaways

- All evidence must be “relevant”
- Were the objections permissible?

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### Deciding what evidence can be part of the record

Relevant or not?



Respondent testified that he and the Complainant had consensual sex on two prior occasions.



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### Cross Examination of Aiden

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### Key Takeaways

- All evidence must be “relevant”
- Were the objections permissible?

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### Deciding what evidence can be part of the record

#### Relevant or not?



Complainant wishes to rely on a text message that the Respondent sent to a friend the day after the events in question. The text reads, “I don’t remember much from last night but I think I did something bad.” Respondent refuses to testify.



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### Cross-Examination – trouble spots

- Where concerns tend to show up:
  - Formal reports: police, SANE, medical, other investigations
  - Emails and text messages
  - Hearsay—“I heard...”; “he told me...”; etc.
- Is it really cross-examination? Look out for:
  - Which side is offering the statement into evidence? It’s the other side that must have the chance to ask the speaker about it.
  - Think: whether the person who made the statement may wish to avoid that statement by refusing to testify.

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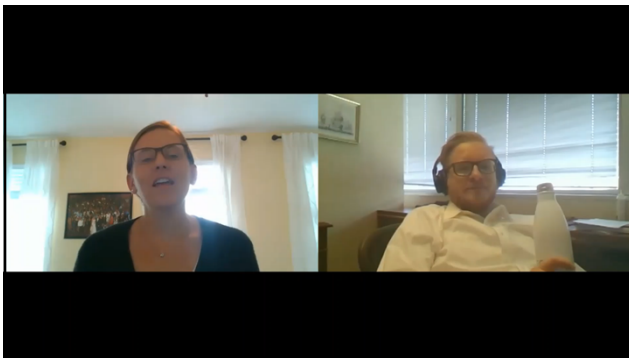
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**Deciding what evidence can be part of the record**

**Relevant or not?**



Respondent's roommate testifies that on the night in question, he walked into Respondent's room and observed clearly consensual sex. Complainant's advisor then asks him why he went into Respondent's room, whether he was intoxicated, and whether Complainant appeared intoxicated. He refuses to answer these questions.



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Presented by Taylor Hunter

## FINAL DETERMINATIONS & APPEALS



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### What happens after the final determination is made?

After the hearing has been concluded and a final determination has been made, the decision-maker prepares the written determination.



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### Evidentiary Standard

The new Rule provides the choices between 2 standards:

- the preponderance of the evidence standard; **or**
- the higher clear and convincing evidence standard.

What's the difference?



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**What are your thoughts?**

Would Aiden be found to be responsible under a PREPONDERANCE OF THE EVIDENCE standard?

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**What are your thoughts?**

Would Aiden be found to be responsible under a CLEAR AND CONVINCING EVIDENCE standard?

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**What must be included?**

- Identification of the allegations
- Description of the procedural steps taken from the receipt of the formal complaint through the determination
  - Must include:
    - Any notifications to the parties
    - Interviews with parties and witnesses
    - Site visits
    - Methods used to gather evidence
    - Hearings held

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### What must be included?

- Findings of fact supporting the determination;
- Conclusions regarding the application of the Code of Conduct to the facts;
- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility;
- Any disciplinary sanctions imposed;
- Any remedies provided to the Complainant;

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### What must be included?

- Procedures and permissible bases for an appeal (available to both parties)

The written determination must be provided to the parties **simultaneously.**

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### When does the written determination become final?

- Either the date on which an appeal would no longer be considered timely; OR
- On the date that the parties are provided the written determination of the result of the appeal.

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### Appeal Process

*Both parties must be offered an appeal from a determination regarding responsibility or from a dismissal of a formal complaint or any allegations therein.*

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### Basis for Appeals

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.

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### Appeal Procedure (mandatory)

- Notify the other party in writing when an appeal is filed;
- Implement appeal procedures equally for both parties;
- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.

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### Record Retention

The following must be retained on file for seven years:

- Records of investigation
- Records of appeals and associated materials
- Records of any informal resolution process
- All materials used to train Title IX staff and any person who facilitates an informal resolution
- Records of supportive measures taken in response to a complaint

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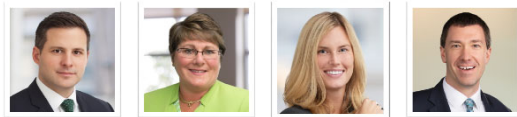
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Presented by Chris Bayh, Janilyn Daub, Taylor Hunter & Mark Scudder

### KEY TAKEAWAYS & DISCUSSION

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### Key Takeaways

- There have been significant changes in both the investigation and hearing processes as a result of the new regulations.
- Hearings are now mandatory.
  - Both parties must have an advisor for cross-examination
- Relevance is key!
- Develop a final determination report that both adequately supports the determination of the decision maker and covers your bases for potential future appeals.

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**QUESTIONS?**

Submit through the chat window!

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Presented by Janilyn Daub

**WRAP-UP**

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