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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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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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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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Scenario

- Scenario to illustrate some key concepts

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Starting the Hearing

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

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Key Issues We Tackled

- General process
- Opportunity to be heard
- Relevance
- Leading questions
- Bias

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Cross Examination of Complainant (Sophia)

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Key Issues We Tackled

- Relevance

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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 a3h (t)5 (w)10 0/0uan i

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Absent Witnesses

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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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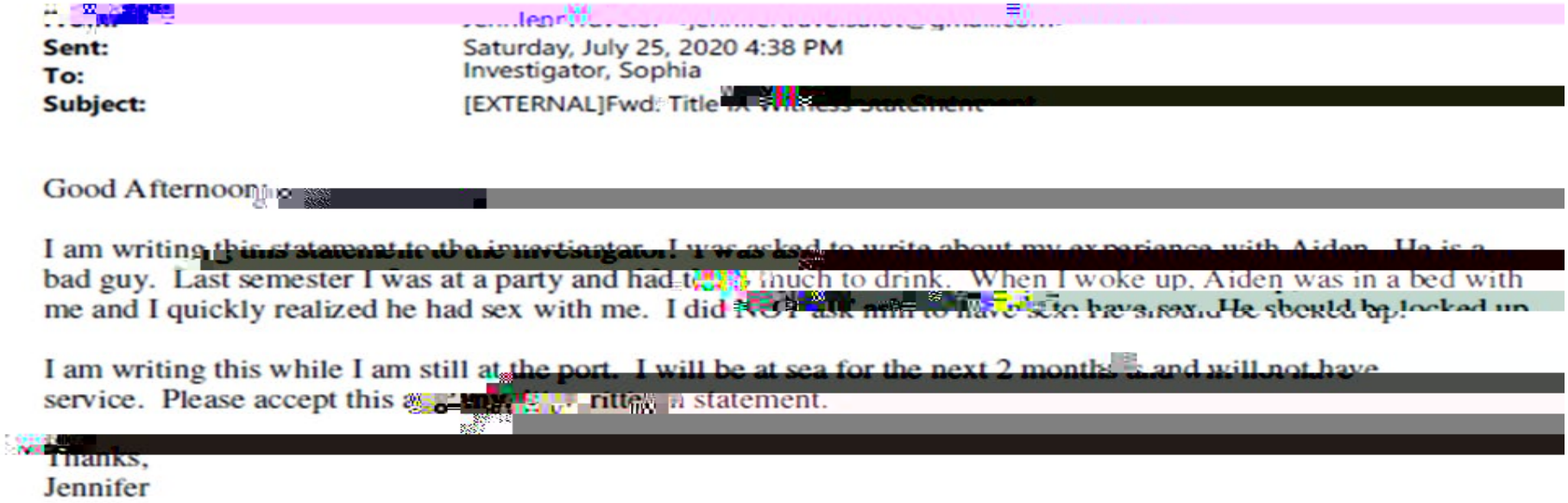
Deciding what evidence can be part of the record

Admissible or not?



Sent: Saturday, July 25, 2020 4:38 PM
To: Investigator, Sophia
Subject: [EXTERNAL]Fwd: 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.
- Think:
  - Is an affirmative statement of fact being left unchallenged?
  - Or is the original speaker the complainant or respondent?

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Direct Examination of Aiden

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Key Issues We Tackled

- Relevance

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Cross Examination of Aiden

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Key Issues We Tackled

- Opportunity to be heard
- Relevance
- Cross-examination

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Refusal to Answer Questions

- § 106.45(b)(6)(i)
  - "If

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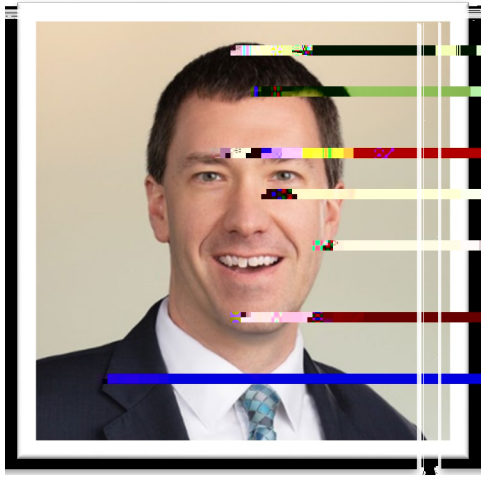

Presented by Mark Scudder

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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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;

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What must be included?

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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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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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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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Presented by Janilyn Daub

WRAP-UP

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