

Student Sexual Misconduct Hearing Board Training

Kirkwood Community College

December 18, 2020

Agenda

Part I – Title IX – Review Key Changes

Complaint and Investigative Process

Jurisdiction

Role of Advisor

Part II – Key Policy Definitions

Consent

Incapacitation

Sexual exploitation

Hostile educational or work environment

Stalking

Part III – Hearing Process Review

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Cross examination

Relevance

Exclusionary Rule

Part IV – Title IX and what hasn't changed

Hearing Chairperson

Role of the board

Objectivity

Determination

Sanctions

Informal resolution

Trauma Informed

Part I - Title IX: Review Key Changes

- Complaint and Investigative Process
- Jurisdiction
- Role of Advisor

Complaint and Investigative Process

- Title IX team reviews complaint
 - Does alleged behavior appear to rise to defined standard?
 - Does alleged behavior fall within jurisdiction?
- Assign roles
 - Advisors for complainant and respondent
 - Title IX officer
 - Investigator
- Initial meetings with complainant
 - Provide support and gather preliminary information as necessary to answer jurisdictional questions

Complaint and Investigative Process

- Notice of Investigation
 - Notification of allegations
 - Identities of complainant and respondent shared
 - Statement of the presumption of innocence of respondent
 - Rights and assurances
- Initial meeting with complainant and respondent
 - Rights and assurances
 - Gather preliminary information
 - Provide support

Complaint and Investigative Process

- Investigation
 - Investigator conducts interviews and gathers evidence
 - Investigative report completed and submitted to Title IX Coordinator
- Hearing determination and preparation
 - Title IX Coordinator determines if case will move to hearing
 - Hearing board selected
 - Parties notified and materials provided simultaneously
- Hearing
 - Board convenes hearing; makes decisions and issues sanctions
- Appeal
 - Both parties may appeal decision and sanctions issued by the board

Jurisdiction

- Applies to all employees and students
- On campus: All buildings and property owned or operated
- Off campus: Events or circumstances where substantial control over respondent and the context of the harassment (Is it in our nexus of control?)
- Must meet severe and pervasive standard
- Must occur in the U.S.

Jurisdiction

- If not in our jurisdiction = complaint is dismissed
 - Supportive measures may be offered to the parties

Role of Advisor

- Allowed for both parties
- Chosen by the parties
- May be attorney (paid by the party)
- Attend all proceedings from initial investigation through appeal
- May not directly participate except to conduct cross-exam
- College must provide advisors in absence of student advisor
- Goal of college advisor is to provide information about the process and other supports related to academic and personal needs

Part II – Definitions and Concepts

- Consent
- Incapacitation
- Sexual exploitation
- Hostile educational or work environment
- Stalking

Consent and Incapacitation

- Consent – Doug W.
- Incapacitation – Melissa J.

Case Study Review: Consent and Incapacitation

1. What aspects of consent apply most to this case?
2. What role does alcohol use play in your understanding of this case?
3. Was anyone incapacitated in this case?

Sexual Exploitation

- Emily Logan

Sexual exploitation

- When you consider the definition of sexual exploitation, what aspect of this report causes concern for you?

Hostile Educational or Work Environment

- Brooke

Hostile educational or work environment

- Unwelcome conduct that creates a hostile, intimidating or demeaning environment that is sufficiently severe, pervasive, and *objectively offensive* (reasonable person standard) that it effectively denies a person equal access to participation in the College's educational program or activity.
 - Examples
 - persistent and unwelcome efforts to develop a sexual relationship;
 - bullying/cyber-bullying of a sexual nature or for a sexual purpose;
 - sexual exploitation;
 - unwelcome commentary about an individual's body or sexual activities;
 - unwanted sexual attention; repeated and unwelcome sexually-oriented teasing, joking or flirting; verbal abuse of a sexual nature.
- Behavior could be verbal, non-verbal (e.g., gestures, touching), written or electronic.
- Q. Other than the sexual assault alleged in the case study, what other behaviors described in the study might meet this standard?

Stalking Defined

- Nick Borders

Stalking

- Are there any elements of stalking present in this case?
- What are other forms of stalking that we might consider?
- What questions could you ask to determine if the elements were met?

Part III – Hearing Process

- Impartiality/Equal Treatment
- Standard of proof
- Types of Evidence
- Cross examination
- Relevance
- Exclusionary Rule

Impartiality/Equal Treatment

- Scott Gay

Impartiality/Equal Treatment: Return to Case Study

1. As you consider the remarks of Sam (respondent), what questions about impartiality and/or bias do you think may be important to ask of the respondent?
2. What other information might you have at your disposal or other information you wish to know about these concerns before making a decision on the allegations and how might you get this information?

Impartiality/Equal Treatment

- Complainants and respondents have access to the same resources (i.e. advisors)
- Notifications and timelines for complainants and respondents must be simultaneous
- Parties have the same rights in the process, including cross-examination, appeals, presenting evidence, statements, and witnesses
- Investigators must be impartial and have no conflict of interest
- Both parties may challenge a board member for potential conflict of interest

Standard of Proof

- Brooke

Case Study Review: Standard of proof

1. What additional information would you need to know to believe it was more likely than not that the policy was violated?

Types of evidence

- Direct Evidence – Evidence that, if believed, directly proves something.
 - Ex. – “I know it rained today because I looked out and saw it raining.”
 - Scenario – The testimony of the Complainant regarding the sexual assault
- Circumstantial Evidence – Relies on an inference to prove a fact.
 - Ex. – “I know it rained today because I looked out and saw that the street was wet, so it must have been raining.”
 - Scenario Ex. – The torn shirt as evidence of forcible assault

Types of Evidence

- Exculpatory Evidence – Evidence favorable to the defendant/respondent
 - Scenario Ex. – Depends on Respondent’s theme
- Inculpatory Evidence – Evidence detrimental to the defendant/respondent
 - Scenario Ex. – Complainant’s accusation, the torn shirt
- Hearsay – An out of court statement offered to prove what it asserts. It is something somebody who is not testifying said, offered by the person who is testifying.
 - Ex. – “I know he raped her because my friend said to me that she saw it happen.”
- Weight

Cross examination

- What line of questioning was irrelevant or inadmissible under our rules?
- Why was it irrelevant?
- What if there was evidence that Shauna had had sex with another person on that trip, and that was how her shirt was torn? Would that be admissible?
 - Generally, evidence about a Complainant's prior sexual behavior or predisposition is inadmissible and shall be excluded. Unless:
 - It is offered to establish that someone other than the Respondent committed the alleged misconduct, or
 - If the questions concern specific incidents between the Complainant and Respondent and are offered to provide consent.
- Who decides whether a question is relevant?

Relevance

From Ahlers & Cooney Training – Summer 2020

Example: Cross-exam questions about the complainant's illegal drug use

Relevant: Drug use the night of a contested sexual encounter. The drug use might make the issue of whether the complainant was incapacitated more or less probable

Irrelevant: Drug use two weeks prior to the incident in question. This evidence would make the complainant look bad, and does not make an issue in the case more or less probable

Relevance

From Ahlers & Cooney Training – Summer 2020

- Evidentiary definition: Evidence having any tendency to make the existence of any fact of consequence to the determination at issue more or less probable than it would be without the evidence
- Determining relevance is different than determining how much weight to give the evidence
- Irrelevant evidence: Excluded
- Relevant, but not much weight: Included for consideration

Relevance: Rape Shield Protections

From Ahlers & Cooney Training – Summer 2020

- Questions concerning the complainant's sexual predisposition or prior sexual behavior are not relevant unless:
- Offered to provide someone other than respondent committed the conduct alleged; or
- Incidences concern prior sexual behavior with the respondent and are offered to prove consent

Relevance: Privileged Information

From Ahlers & Cooney Training – Summer 2020

- Any party's medical, psychological, and similar records are not relevant unless voluntarily provided by that party
 - Ex: Recipient cannot obtain and submit campus clinic records
- Any information protected by a legally recognized privilege (like attorney-client privilege) is not relevant
 - Ex. Cannot ask: "What did your attorney tell you about whether these actions were consensual?"

Exclusionary Rule

From Ahlers & Cooney Training – Summer 2020

If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility

DOE: The reason for the party or witnesses' refusal to appear or answer a question does not matter.

Exclusionary Rule

From Ahlers & Cooney Training – Summer 2020

If a party or witness is not at the hearing for cross-examination:

Do Not: Consider that individual's "statements" as evidence

Do: Consider other evidence supporting or not supporting that individual's "statements"

Do not: Decide the respondent is or is not responsible because a party or witness did not show; look at the evidence

Part III – Title IX and What Hasn't Changed

- Hearing chairperson
- Role of the board
- Objectivity
- Determination
- Sanctions
- Informal resolution
- Trauma informed

Hearing chairperson

- Outside Counsel
- Manage proceedings
- Relevance decisions

Role of the Conduct Board

- Doug W.

Role of Conduct Board

- Determine if respondent is responsible for alleged behavior
- Issue sanctions

Role of Conduct Board

- Come prepared for the hearing
 - The board should meet to discuss questions and case prior to the hearing
- Weigh evidence, including relevance (not all evidence should be weighed the same)
- Analyze policy
- Apply standards of evidence
- Uphold the integrity of the process
- Be respectful
 - Tone, manner, questioning. Never allow emotion or frustration to show
- Be mindful of the questions you ask

Objectivity

- Nick Borders

Objectivity – “hear the case before you decide it”

- Important to serve impartially
- Avoid prejudgment of the facts of the issue
- Conflicts of Interest and bias

Determination

- Melissa Jensen

Determination – Behavior over intent

- Just the facts
- Greater Weight of the Evidence
- More Like Than Not

Sanctions

- Brenda Steinke

Sanctions

- Responsibility determination FIRST
- Considerations
 - Severity
 - Impact
 - Prior Conduct History

Informal Resolution

- Scott Gay

Return to Case Study: Informal resolution

1. How do you proceed as a board member in this situation?
2. What impact, if any, does this revelation have on your approach to the Q and A?

Informal Resolution

- Complainant initiated only
- Both parties must agree to accept the terms
- Not mediation
- Voluntary
- Available any time prior to board decision
- If informal resolution considered and discontinued: New investigator; new report
- Final: No hearing. No appeals

Trauma Informed

- Trauma is an event or series of events that have occurred and that have caused a person to feel very threatened
- Based on perception and how a person responds to the event, rather than the event itself
- Trauma is not a disorder. It is a reaction to profoundly injurious events and situations in the real world
- Trauma is a concrete physical, cognitive, affective, and spiritual response

Trauma Informed

- Trauma can change the structure and function of the brain in response to the experience, which may result in behaviors and emotions that serve as adaptations for the individual
- Freeze response, traumatic memories, and post-trauma behaviors are common responses rooted in neurobiology

Trauma Informed

- How do you envision your role in providing trauma-informed care to hearing participants?
- How might you collaborate during a hearing to gather information to make a decision?

Questions and Feedback

- Thoughts or feedback on the approach to this training:
 - What worked well?
 - What could be improved?
 - Any concerns or challenges in finding information to explain definitions?
- Question to ponder for the future:
 - What topic(s) might we consider exploring in greater depth?
 - Are there topics we have not covered that we should consider for the future?
 - Any ideas for improvements to the way we are sharing information?