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# Hiring and Training Competent Title IX Hearing Officers

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# Hiring and Training Competent Title IX Hearing Officers

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ABSTRACT

*American colleges and universities are not ready to comply with new Title IX regulations concerning campus hearings. Regulations released in May 2020 by the U.S. Department of Education, effective in August 2020, require that colleges and universities use hearing officers who are "trained on issues of relevance, including how to apply. . .rape shield provisions" and legal privileges. Institutions must conduct "a live hearing" at which the hearing officer "must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility." This "cross-examination ... must be conducted directly, orally, and in real time."*

*Even well-meaning and diligent university faculty and staff members cannot serve as competent hearing officers under the revised regulations, at least not without robust training that campus officials will have trouble providing. Under the prior regime, faculty and staff hearing officers often required that parties submit written questions, which the officer would then consider asking of witnesses. Further, many universities prohibited parties' advisors from speaking at hearings, other than by whispering to their clients, who might then propose a question suggested by counsel. These practices are forbidden under the revised regulations. A marketing or biology professor who muddled through under the old system – carefully considering questions scribbled by college students – will encounter an entirely new challenge when asked to rule in real time upon the propriety of questions asked by skilled lawyers. Necessary training would be expensive.*

*This Article proposes that colleges and universities solve this problem by hiring external hearing officers. At the same time, institutions can retain autonomy over internal discipline decisions by using faculty and staff as jurors*

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*who decide the merits of a case after a trained professional has presided at a hearing.*

## TABLE OF CONTENTS

## I. INTRODUCTION

Risks abound when a college or university conducts a hearing about sexual assault, misconduct, or harassment. For the complainant (sometimes known as the "alleged victim"), the process can add trauma to an already terrible experience. For the respondent (sometimes known as the "accused" or the "alleged perpetrator"), the result may be suspension or expulsion from school. For the institution, a botched hearing can anger stakeholders such as students and parents, and it can also generate litigation. An especially bad hearing process may inspire investigations and enforcement actions by the U.S. Department of Education ("the Department"). Hearings that fail to uncover genuine misconduct risk leaving victims without justice. Hearings that find nonexistent misconduct risk punishing the innocent. Poorly run hearings risk causing needless pain to participants, regardless of the ultimate outcome. For all these reasons, colleges and universities need competent hearing officers, and these officers will be difficult to find because of new federal law.

In its May 2020 regulations related to Title IX,[1] the Department ordered higher education institutions to "to require investigators and decision-makers to be trained on issues of relevance, including how to apply . . . rape shield provisions."[2] This mandate may prove more difficult than it first appears. Law students enrolled in evidence classes, who usually have at least one year of postgraduate legal education, often struggle to apply legal definitions of relevance.[3] "Rape shield" provisions, such as those codified in Federal Rule

1. "Title IX" refers to Title IX of the Education Amendments Act of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified at 20 U.S.C. § 1681–88). This Article presumes familiarity with recent controversies surrounding Title IX enforcement on campus, including guidance released by the Department during the administration of President Barack Obama, the rescission of that guidance by the Department during the administration of President Donald Trump, and debates about the wisdom of actions taken during each administration. For background, readers can *see* Jeannie Suk Gersen, *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault [https://perma.cc/23UZ-CZUQ].

2. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026-01, 30,125 (May 19, 2020) [hereinafter Revised Regulations] (codified at 34 C.F.R. § 106.45(b)(1)(iii)); 34 C.F.R. § 106.45(b)(1)(iii) (2020). Note that all citations to portions of the Revised Regulations refer to part 106 of Title 34 of the Code of Federal Regulations, as it reads since the revisions took effect in August 2020.

3. Law students should not feel bad. Learned professors also disagree about what "relevance" really means. *See* David S. Schwartz, *A Foundation Theory of Evidence*, 100 GEO. L.J. 95, 98 (2011) (arguing that "a focus on the primary importance of relevance without an understanding of foundation has led a number of evidence scholars into serious mistakes"); *id.* at 100–01 (discussing confusion among law students).

of Evidence 412 and similar state provisions,[4] create similar difficulties. Legal privileges add yet more complications. The new regulations present these challenges to hearing officers at colleges and universities across the nation.[5]

Title IX investigators may have legal training and licensure, and even those without such education and credentials have the chance to gain a working knowledge of legal concepts such as relevance. Knowing these concepts is an important part of their jobs. By contrast, Title IX "decision-makers," the people who decide whether the accused party has committed an offense against institutional rules, are often drawn from the ranks of university faculty and staff who neither possess legal training nor devote substantial portions of their work time to Title IX.[6] These hard-working, committed university employees – such as English professors, residence hall managers, student affairs professionals, and physicians – have limited time for learning complex legal doctrine they may apply once or twice annually, if at all. To increase the degree of difficulty, the person presiding at the hearing must apply these doctrines in real time, ruling on the relevance of questions asked of witnesses at live hearings.[7] The presider must also decide whether a witness may avoid answering a question because of a "rape shield" provision, a legal privilege (such as the Fifth Amendment guarantee against self-incrimination), or the regulations protecting certain medical records.[8] Concurrently, the presider is prohibited from excluding *other* kinds of relevant evidence that would normally be excluded from court proceedings, such as hearsay and "prior-bad-acts" character evidence; that evidence must instead be admitted and then given whatever weight the decision-maker deems

4. FED. R. EVID. 412 (titled "Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition"); *see also* MO. REV. STAT. § 491.015 (2016); TEXAS R. EVID. 412.

5. The new administration is considering whether to change these rules and will conduct public hearings as part of a "comprehensive review" of the 2020 regulations, which "remain in effect." *See* Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights, "Letter to Students, Educators, and other Stakeholders re Executive Order 14021," available at https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf.

6. *See* Courtney Bullard, *Whom to Look for in a Title IX Hearing Panel*, CHRON. OF HIGHER EDUC. (Jan. 21, 2018), https://www.chronicle.com/article/whom-to-look-for-in-a-title-ix-hearing-panel/ [https://perma.cc/TCC8-99ET] (discussing traits of "faculty and staff members" whom institutions may wish to choose).

7. 34 C.F.R. § 106.45(b)(6)(i) ("Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant."); *id.* (requiring a "live hearing" at which the institution "must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility").

8. *See id.* ("rape shield" and legal privileges); *id.* at 106.45(b)(5)(i) (medical and therapy records).

appropriate.[9] Good luck to the local Chaucer scholar. Better you than me, Assistant Director of Greek Life.

This Article aims to help colleges and universities do what federal law now demands of them: retain Title IX hearing officers capable of deciding whether questions will elicit relevant evidence, of applying the "rape shield" now embedded in federal regulations, and of evaluating whether evidence is inadmissible for some other reason.[10] The Article aims to help decision-makers avoid becoming overwhelmed with legal analysis, lest they fail in their true purpose – providing a fair hearing to all parties and issuing a sensible decision based on the evidence. Part II uses a well-known fictional trial to illustrate how hearing officers must decide what evidence is relevant; it also offers a lesson on the definition of relevance. Part III suggests how colleges and universities can avoid the task of training competent Title IX hearing officers by hiring external personnel. It also argues that – regardless of whether internal employees or external personnel preside at a Title IX hearing – institutions may wish to separate the role of judge (that is, the person who presides and decides what evidence to admit) from that of jury (that is, the persons who decide the result). Part IV discusses relevant evidence that must be excluded from campus hearings under federal law, including evidence covered by a "rape shield" and evidence protected by a legal privilege. Part V considers some larger policy issues, including why quality campus hearings are so important as well as special problems presented by virtual hearings. The portions of the Article discussing rules of evidence applicable to campus hearings – especially Part II and Part IV – have two primary purposes. First, they aim to convince campus leaders that faculty and staff lacking legal training and experience will not easily gain the knowledge and skills needed to conduct quality hearings under revised federal regulations. Leaders persuaded by this argument should hire external hearing officers. Second, these Parts aim to provide material useful to whoever will conduct trainings on what evidence is admissible at Title IX hearings. Title IX coordinators, campus investigators who present evidence at hearings, officers who preside at hearings, and faculty and staff deciding results can all benefit from a better understanding of the new evidence law created by the revised federal regulations. Even complainants and respondents may benefit from a primer. Trainers may freely borrow any material in this Article they find useful.

## II. MAGIC GRITS AND THE CHALLENGE OF RELEVANCE

To illustrate the difficulty of contemporaneously assessing whether a question is likely to elicit relevant evidence if answered by a witness, consider an anecdote about grits that arose during a fictional but well-known murder trial. Readers may recognize it. In any event, here is how a prosecution

9. *See* Revised Regulations, *supra* note 2, at 30,337 (explaining decision to prohibit hearing officer from excluding other forms of relevant evidence and giving as example evidence that "concerns a party's character or prior bad acts").

10. 34 C.F.R. §§ 106.45(b)(5)(i), (6)(i).

witness answered a question asked by defense counsel during cross-examination:

"No self-respecting southerner uses instant grits. I take pride in my grits."[11]

With that answer, Mr. Tipton, the witness under cross-examination by Vincent LaGuardia Gambini, stepped into the lawyer's trap.[12]

For university faculty and staff, the sinking feeling experienced by a witness during skilled questioning may soon become all too familiar. Regulations published in May 2020 by the Department mandate that campus Title IX hearings include "cross-examination conducted by the parties' advisors," who may be, but need not be, attorneys.[13] Are campus hearing officers – often selected from faculty and staff with no legal training – ready to supervise this process? The Department has set a high bar, requiring that "the decision-maker must determine relevance prior to a party or witness answering a cross-examination question."[14] In my experience teaching evidence, determining whether something is relevant is challenging even for law students.[15]

When I chaired a Title IX hearing panel, in a case of a faculty member accused of misconduct, the job was complex yet manageable. But we conducted it under now-defunct rules that prohibited lawyers (or other "advisors") from speaking.[16] Questions were submitted to me in writing, and I decided which ones to ask the witnesses.[17] In future hearings, the chair must oversee dueling lawyers – or non-lawyer advisors – asking questions of witnesses directly, all while evaluating the merits of evidence presented.[18]

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11. MY COUSIN VINNY (20th Century Fox 1992), https://www.americanrhetoric.com/MovieSpeeches/moviespeechmycousinvinny3.html [https://perma.cc/L3UJ-QX9C].

12. *Id.*

13. 34 C.F.R. § 106.45(b)(6)(i).

14. Revised Regulations, *supra* note 2, at 30,314.

15. It can be tricky for judges too. *See, e.g.*, United States v. James, 139 F.3d 748, 754 (9th Cir. 1998) (finding that trial judge "was within his discretion in excluding as irrelevant the evidence the defense offered"), *rev'd en banc*, 169 F.3d 1210, 1211 (9th Cir. 1999) (holding that the evidence was relevant and its exclusion was erroneous).

16. University of Missouri System, Collected Rules and Regulations [hereinafter UM CRR] 600.040.J (as amended Feb. 9, 2017 with effective date of Mar. 1, 2017) https://web.archive.org/web/20210317140915/https://www.umsystem.edu/ums/rules/collected_rules/equal_employment_educational_opportunity/ch600/600.040_equity_resolution_process_for_resolving_complaints_of_harassment ("The Advisor may not make a presentation or represent the Complainant or the Respondent during the hearing. At the hearing, the Parties are expected to ask and respond to questions on their own behalf, without representation by their Advisor.").

17. *See* UM CRR 600.040.N.3 (describing how at most hearings, "written questions [that one party wishes to be asked of the other] will be directed to the Chair in the Hearing Panel Resolution Process, and those questions deemed appropriate and relevant will be asked on behalf of the requesting Party").

18. 34 C.F.R. §§ 106.45(b)(5)(i), (6)(i).

Non-lawyer advisors present special problems. Lawyers, at least in theory, are familiar with rules of evidence and will generally avoid offering evidence that is obviously inadmissible. They have professional pride and reputations to protect, and they can anticipate what actions will draw objections from opposing counsel and arouse the ire of judges. But the non-lawyer advisors brought by parties to campus hearings – which include parents, spouses, and friends – may act in unexpected ways, with no knowledge of how they have missed the mark. Hearing officers must prepare for both the sort of overreaching attempted by lawyers and the blunders of the uneducated.

Take a moment to test your own knowledge of evidence law: If a lawyer asks a witness what he ate for breakfast on the day of a murder, should the witness be required to answer, or would you instead sustain an objection based on relevance?[19] Moments before boasting about his grits, Tipton had testified (during direct examination) that he once saw two young men enter a convenience store before turning away to make his breakfast.[20] When he was about to eat, he heard a gunshot, looked back toward the store, and then saw the same men exit the store.[21] Now is the content of Tipton's breakfast relevant? To make things easier, feel free to consult the definition of relevant evidence, which appears at Rule 401 in the Federal Rules of 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."[22]

How would you rule?

Defense counsel had suggested that the two youths (that is, the two defendants) entered the store, chose items, paid the clerk, and left.[23] Subsequently, *two different men* entered the store, robbed the clerk, murdered him, and sped off.[24] Perhaps it was that second pair of men that Mr. Tipton saw after cooking his breakfast. "No," Tipton had said.[25] "They didn't have enough time" because they were only in the store for "five minutes."[26] Tipton insisted he saw the same two men both times.[27]

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19. I realize that because this Article appears in a law journal, the average reader will be better-informed about evidence law than would be true of general audiences. I hope readers can, if necessary, imagine intelligent readers with no legal training – that is, the sorts of well-meaning laypersons often selected to chair university hearings.

20. MY COUSIN VINNY, *supra* note 11.

21. *Id.*

22. FED. R. EVID. 401.

23. MY COUSIN VINNY, *supra* note 11.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

In the 1992 comedy "My Cousin Vinny," no one objected to the breakfast questioning.[28] Attorney Gambini, the protagonist, elicited testimony from Tipton that he ate "eggs and grits," leading to the query about instant grits, which can be cooked in about five minutes.[29] When Tipton denied using instant grits, hinting to the Alabama jury that the product was some kind of Yankee monstrosity, Gambini pounced.[30] "So, Mr. Tipton, how could it take you five minutes to cook your grits, when it takes the entire grit-eating world 20 minutes?"[31] Only now is the relevance apparent. Knowing that Tipton cooked "regular" grits helps the jury evaluate how much time elapsed between when Tipton saw two men enter the store and when he saw two men leave, a fact that is "of consequence in determining" whether the defendants are guilty of murder.[32]

The remainder of the scene is a comic masterpiece, during which Gambini, after suggesting that perhaps Tipton used "magic grits" or that "laws of physics cease to exist" on his stove, forced Tipton to admit that he might have been mistaken about the five minutes.[33] In other words, perhaps the two youths whom Tipton saw enter the store – the two defendants – might not have been the same men as the pair who killed the clerk.[34]

In my evidence course, students practice determining whether evidence is "probative" and "material," the two requirements for legal relevance.[35] They have graduated from college and finished at least two semesters of law school, yet the concept takes time to master. How well will my colleagues from the Physics and English departments determine the relevance of evidence so rapidly? How will their performance compare to that of staff members from residential life and facilities?

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28. *Id.*

29. *Id.*; QUAKER, *QUAKER INSTANT GRITS ORIGINAL FLAVOR*, https://www.quakeroats.com/products/hot-cereals/grits/instant-grits-plain (last visited Oct. 20, 2020) (providing cooking instructions that read "1. Empty packet into bowl. 2. Add 1/2 cup boiling water, stir.").

30. MY COUSIN VINNY, *supra* note 11.

31. For readers trying this at home, note that grits may actually take far longer to cook. *See, e.g.*, Diana Rattray, *How to Cook Delicious Stone-Ground Grits*, SPRUCE EATS (Sept. 23, 2020), https://www.thespruceeats.com/how-to-cook-stone-ground-grits-4134326 [https://perma.cc/4E8K-XB3C] ("Cook, stirring frequently, for about 40 to 50 minutes, or until the grits are very thick. Depending on the grind, cooking can take longer.").

32. MY COUSIN VINNY, *supra* note 11; FED. R. EVID. 401.

33. MY COUSIN VINNY, *supra* note 11.

34. *Id.*

35. *See* GEORGE FISHER, EVIDENCE 22 (3d ed. 2013). I thank Professor Fisher for creating an excellent casebook, which I have assigned to students for many years and in which I first encountered some cases cited later in his Article.

In the end, Vinny Gambini helped the sheriff track down the real killers, leading to the dismissal of all charges against his clients.[36] The youths continued their journey to college in California, and Vinny headed home to Brooklyn.[37] In the real world, the wrongfully accused rarely discover the true perpetrators during trial. And in cases of alleged sexual harassment or misconduct, identity is rarely in dispute. The question is not "who did it" but rather "what happened." Was it consensual sex or rape? Was it friendly workplace banter or harassment? Was it stalking or just a few chance meetings on a busy campus?

Lawyers, judges, and law professors often tout cross-examination as a crucible for finding truth.[38] That may or may not accurately reflect what happens in court, where all too often the innocent are convicted and victims are denied justice. But the claim has at least some plausibility when the process is overseen by a judge with legal training and experience. Some universities will find it relatively easy to train their hearing officers to determine relevance as required by the new federal regulations. They have well-staffed Title IX offices, as well as university lawyers with time to amend campus rules to conform to federal mandates. A lucky few even have law schools whose faculty may provide help. Smaller institutions will rely instead on materials and trainings provided by law firms and national associations, which will do their best to help colleges prepare their faculty and staff.

Watching "My Cousin Vinny," the audience never really worries that the two innocent boys will be sent to Alabama's rickety electric chair, the disrepair of which is played for laughs. After all, the movie is a comedy. Campus hearings concern real life, and the officers and advisors who conduct them will determine whether victims get justice, whether the accused gets a fair process, and whether the institution complies with its legal obligations. Somehow, university hearing officers must become adept at applying legal concepts that challenge law students every year.

### *A. Probative Evidence: Making Things More (or Less) Likely to Be True*

The standard for relevance in the Federal Rules of Evidence is not high. In essence, the requirement is that (1) a piece of evidence must make some fact more or less likely to be true than would be the case absent the evidence and (2) that fact must matter to deciding who wins the case.[39] This Subpart

36. *My Cousin Vinny Synopsis*, IMDB, https://www.imdb.com/title/tt0104952/plotsummary [https://perma.cc/P3KQ-5X6F] (last visited Oct. 21, 2020).

37. *Id.*

38. *See, e.g.*, Crawford v. Washington, 541 U.S. 36 (2004) (claiming that the Sixth Amendment was written to require "that reliability [of witnesses against the accused] be assessed in a particular manner: by testing in the crucible of cross-examination").

39. FED. R. EVID. 401.

concerns the first prong, which is known as the requirement that relevant evidence must be "probative."[40] As the etymology of "probative" implies, for evidence to be probative, it must prove something. Or, more precisely, it must help to prove something. It need not carry the entire burden. The old evidence law saying "a brick is not a wall" illustrates the point. To count as probative, your evidence need not compose the entire wall, but you must at least have a brick.

A few examples will illustrate further: In a murder case, a video showing the defendant shooting the victim is quite probative. Indeed, it might count as an entire wall. In the same case, it would also be probative if the defendant threatened the victim two days before the shooting. While it is possible that the threat was idle or that the defendant meant the threat when shouting it but later failed to act, the threat makes it *more likely* that the defendant killed the victim. In the same case, imagine that the prosecutor calls a witness who testifies as follows: "I didn't see the murder, and I know nothing about it directly. But after seeing a newspaper article about the crime, I had a dream in which the defendant committed it." This evidence would not be probative. The witness's dream makes it no more (or less) likely that the defendant shot anyone.

### *B. Material Evidence: Shedding Light on Something that Matters*

Being probative is not enough. To be relevant, evidence must also be material.[41] Materiality depends on what facts are "of consequence" to deciding who wins the case.[42] Some facts make a difference, and others do not. Only facts that could legitimately affect the outcome are material. Again, examples will illustrate: In the murder case introduced above, the defendant's threat toward the victim is both probative and material. The fact made more likely by the threat – that is, that the defendant shot the victim – is as material as it gets. The purpose of the trial is to determine who killed the victim, so evidence that the defendant did so is material.

Now imagine in the same case that the defendant offers evidence about how wicked the victim was. Perhaps the victim was the sort of person who left shopping carts in the middle of supermarket parking lots, far from the cart return hubs. Perhaps he stole money from the offering plate at church. Perhaps he posted fliers urging people to "vote on Wednesday!" All of these behaviors are probative of the victim's bad character, but none is material. It is just as illegal to murder bad people as it is to murder good people.

By changing the facts, we can make the case trickier. Imagine the defendant has evidence that the victim abused cocaine. Is that material? If the defendant offers the evidence simply to denigrate the victim, then no. But if the defendant is claiming self-defense, and the evidence suggests that the victim was high on cocaine when the defendant shot him, then the cocaine use

40. FED. R. EVID. 401(a); FED. R. EVID. 401 advisory committee's note.

41. FED. R. EVID. 401(b).

42. FED. R. EVID. 401 advisory committee's note.

becomes material. The fact made more likely by the cocaine use – that is, that the victim was under the influence of cocaine when shot and was attacking the defendant in a drug-fueled rage – is "of consequence" to the self-defense claim.

In a Title IX hearing, it may or may not be relevant whether the complainant or respondent had been drinking alcohol around the time of events giving rise to the hearing. If offered to show general immorality, it is not relevant. If offered to show someone lacked the capacity to consent, it is likely relevant. The answer will depend not only on the proposed use of the evidence but also on the content of university rules, such as those defining consent. This mirrors one challenge presented by materiality determinations in normal courts. Unless one understands the underlying law in detail (for example, the law of contracts in a commercial dispute or the elements of offenses in a criminal case), one cannot assess what evidence is material to resolving a case.

### *C. Grits Revisited*

Armed with knowledge of what is "probative" and "material," explaining the relevance of the grits is straightforward. Under Rule 401, "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."[43] Attorney Gambini asked Mr. Tipton what he had for breakfast on the day of the murder. When the witness answered, "eggs and grits," Gambini sought clarification: instant grits or regular? Regular grits, the kind consumed by self-respecting Southerners, take longer to cook. Accordingly, testimony about the kind of grits cooked by Tipton is *probative* of how much time passed between the moment the defendants entered the store and the moment Tipton heard the fatal shot. If Tipton started cooking his grits after seeing the defendants enter the store and finished cooking them before someone murdered the clerk, the jury knows that substantial time elapsed.

Further, the amount of time that elapsed matters when deciding whether the defendants are guilty of murder, which makes the evidence *material*. If only a short time passed, it becomes hard to believe that two different men, driving a similar car, shot the clerk. If a great deal of time elapsed, then perhaps two different men committed the crime. Only the jury can decide how much the amount of time matters, but no one can argue whether the identity of the shooter is material to deciding the case. If someone else shot the clerk, then the defendants are not guilty. Nothing could be more material in a murder case then the identity of the killer.

43. FED. R. EVID. 401.

## III. CAN THIS DIFFICULT TASK BE AVOIDED?

The lesson on relevance offered above gives only a basic overview of the concept. To satisfy the revised Title IX regulations, colleges and universities will probably wish to give their hearing officers more detailed instruction. In addition to the mandated training on relevance, hearing officers will also need training on the "rape shield," the application of evidentiary privileges, and the mandated admission of certain relevant evidence that would be inadmissible in most American courts.[44] Before embarking on this challenging training mission, institutions may wish to consider whether they could possibly avoid it.

Sometimes the best way to discharge responsibility for a difficult task is to discover why it need not be completed. As educators tell students again and again, it pays to read the instructions before beginning the assignment. A close reading of the Revised Regulations reveals that institutions are not required to train their Title IX coordinators, investigators, decision-makers, and others who implement their Title IX rules.[45] Instead, institutions must ensure that these people "receive training."[46] Accordingly, this Part suggests three strategies that would save institutions from creating and conducting their own trainings of large numbers of hearing officers and other employees. First, institutions should consider hiring external hearing officers. Second, institutions should consider intensely training a small number of employees to preside at hearings, while using a larger number of less-intensely-trained employees to serve as decision-makers at hearings at which they do not preside. Third, institutions not already in the business of providing legal education should consider using outside trainers to fulfill their training obligations. In addition, this Part argues that regardless of who presides at university hearings, institutions should consider separating the duties of running hearings (the "judge") from those of deciding results (the "jurors").

### *A. Hire Someone Who Already Knows What She Is Doing*

There are two ways to employ a knowledgeable person. The first is to transmit knowledge to someone who previously lacked it. The second is to hire someone already in possession of the knowledge. In other words, if you want talent, you have two options: train or buy. When seeking Title IX hearing officers capable of evaluating questions asked by lawyers in real time at live hearings, I recommend buying talent.

Even in normal circumstances, university employees outside the Title IX office have little time and attention to devote to the Title IX process. Universities do manage to recruit faculty and staff to serve as Title IX hearing panelists, and institutions reasonably expect these employees to devote several hours annually to professional development related to Title IX. For

44. *See* discussion *infra* Section III.C–D.

45. *See* 34 C.F.R. § 106.45(b)(1)(iii) (2020).

46. *Id.*

example, when I was a member of the Equity Hearing Panelist Pool at the University of Missouri, I attended training about the social media platforms most commonly used by today's students.[47] In addition to occasional hour-long trainings during the academic year, the University also delivered a two-day training each summer to panel members, covering topics like how the Title IX process (formally known as the "equity resolution process") works, the details of how healthcare professionals gather evidence from patients in sexual assault cases, implicit bias, and the effects of alcohol on human beings.[48] The annual training also included a mock hearing.[49] In my experience, attendance at these trainings was solid, albeit imperfect.

As mentioned earlier, however, during my time as an equity hearing panelist, the advisors assisting complainants and respondents could not speak during hearings, other than during quiet side conversations with their clients.[50] As of August 2020, lawyers representing parties at Title IX hearings may ask questions directly of witnesses.[51] In addition, the new Title IX regulations have required universities across the country to change a variety of other rules and procedures.[52] The changes will be larger at some institutions than at others, depending on their current rules, but I expect every higher education institution receiving federal funds will need to make at least some changes to internal policies related to adjudicating complaints of sexual assault, harassment, and related misconduct. These changes will cost money.[53] For example, universities will hire lawyers or consultants to help them rewrite campus policies. Then, the faculty and staff members who serve as hearing panelists will need training in the revised policies.

This training will not occur during normal times; faculty and staff have even less time than usual to study hearing management principles. During the 2020-2021 academic year, institutions are reeling from the effects of COVID-

47. These platforms, along with ordinary text messages, are bountiful sources of evidence for Title IX cases. *See* Diane Heckman, *The Assembly Line of Title IX Mishandling Cases Concerning Sexual Violence on College Campuses*, 336 WEST'S EDUC. L. REP. 619, 651 (2016).

48. *See* Agenda, University of Missouri – Columbia, August Equity Resolution Training (2019) (on file with author).

49. *See id.*

50. *See* UM CRR, *supra* note 16, at 600.040.J; *see supra* text accompanying note 16.

51. Revised Regulations, *supra* note 2, at 30,028.

52. *See* Len Gutkin, *The Sex Bureaucracy Meets the Trump Bureaucracy*, CHRON. OF HIGHER EDUC. (May 27, 2020), https://www.chronicle.com/article/rhetoric-vs-reality-on-the-new-title-ix-rules [https://perma.cc/47KL-MJYE] (interview of Professor Jeannie Suk Gersen, who lists impending changes).

53. The Department estimates that the Revised Regulations will "result in a net cost of between $48.6 and $62.2 million over ten years," a cost that will be borne by educational institutions of various kinds, including universities and K-12 schools. *See* Revised Regulations, *supra* note 2, at 30,549, 30,565–67.

19. The hardest hit institutions will close, as a few already have.[54] Others, even wealthy ones, will lay off employees, as countless institutions already have.[55] The remaining faculty members will struggle to become proficient in online teaching and, at campuses that have reopened, struggle to accommodate students unable to return safely to in-person classes.[56] Hybrid classes, operating partially in person and partially online, will have their own learning curve. Meanwhile, staff will face requests to do more with less.

Unless it is absolutely necessary, institutions should not add the burden of learning evidence law to the demands already imposed on the faculty and staff who assist in their Title IX processes, often for no additional compensation beyond their normal salaries. Fortunately, it is not necessary. Under the Revised Regulations, institutions "retain significant flexibility and discretion, including decisions to . . . use a recipient's own employees as investigators and decision-makers or outsource those functions to contractors."[57] Not only does the Revised Regulations allow institutions to "outsource those functions," the accompanying commentary implies that external hearing examiners would often be preferable.[58] The Department stated:

> The Department declines to require recipients to use outside, unaffiliated Title IX personnel because the Department does not conclude that such prescription is necessary to effectuate the purposes of the final regulations; although recipients may face challenges with respect to ensuring that personnel serve free from conflicts of interest

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54. *See, e.g.*, Sasha Aslanian, *Some Small Colleges are Closing their Doors for Good Amid Pandemic*, MARKETPLACE, (Aug. 20, 2020), https://www.marketplace.org/2020/08/20/some-small-colleges-closing-for-good-covid19/ [https://perma.cc/4FV3-665D]; Education Dive Team, *A Look at Trends in College Consolidation Since 2016*, HIGHER ED DIVE, (Updated Jan. 28, 2021), https://www.highereddive.com/news/how-many-colleges-and-universities-have-closed-since-2016/539379/ [https://perma.cc/4R88-9ZF9].

55. *See, e.g.*, Emma Whitford, *Fall Brings Wave of Furloughs*, INSIDE HIGHER ED(Sept. 2, 2020), https://www.insidehighered.com/news/2020/09/02/colleges-furlough-more-employees [https://perma.cc/EF35-3VJN]; Lilah Barke, *Alternatives to Austerity*, INSIDE HIGHER ED, (Oct. 14, 2020), https://www.insidehighered.com/news/2020/10/14/college-staff-face-layoffs-some-argue-against-budget-cuts [https://perma.cc/BE6K-GEEA].

56. A few examples of this extra work will illustrate the point: I spent summer 2020 moving a new undergraduate survey course in law, initially intended for in-person delivery in the fall, fully online. My colleagues teaching in person learned how to wear a mask (and sometimes also a face shield) while projecting to the back of a lecture hall and concurrently using a microphone. Regardless of teaching modality, faculty received an unusual number of requests for student accommodations, which required case-by-case review. For many of us, the K-12 schools our children had planned to attend did not open for in-person classes.

57. Revised Regulations, *supra* note 2, at 30,097.

58. *Id.* at 30,097, 30,251–52.

> and bias, recipients can comply with the final regulations by using the recipient's own employees. . . .
>
> The Department is also sensitive to the reality that prescriptions regarding employment relationships likely will result in many recipients being compelled to hire additional personnel in order to comply with these final regulations, and the Department wishes to prescribe only those measures necessary for compliance, without unnecessarily diverting recipients' resources into hiring personnel and away from other priorities important to recipients and the students they serve.[59]

For at least some institutions, hiring external hearing officers would save time, save money, and reduce the appearance of bias,[60] all while providing better performance than would be possible (or at least practical) with internal hearing officers.

### 1. Local Lawyers, Retired Judges, and Similar Outside Experts

Even before the announcement of the Revised Regulations, some institutions have used external hearing officers, such as judges and lawyers, to oversee Title IX hearings.[61] A 2015 news article reported that Swarthmore College and Florida State University hired retired judges to hear cases.[62] In 2019, Michigan State University announced a plan to use state administrative law judges from the Michigan Office of Administrative Hearings and Rules to serve as "resolution officers."[63] The university had previously hired a retired judge.[64] University lawyers will know what reputations local judges have for treatment of lawyers and litigants, careful application of the law, work ethic, and other attributes relevant to assessing a possible external

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59. Revised Regulations, *supra* note 2, at 30,252. The Department offered this explanation in response to commenters who urged the Department to mandate the hiring of external Title IX officials. *Id.* at 30,250.

60. For example, internal hearing officers might be accused of bias against respondents (perhaps because of a desire to help institutions look like they take rape accusations seriously), bias against complainants (perhaps because of a desire to cover up instances of sexual assault on campus), and bias in favor of student-athletes (to help them remain eligible to play).

61. *See* Jake New, *Outsourced Campus Judges*, INSIDE HIGHER ED (June 30, 2015) https://www.insidehighered.com/news/2015/06/30/colleges-turning-judges-campus-sexual-assault-cases [https://perma.cc/6VHW-TB2L].

62. *Id.*

63. RJ Wolcott & Megan Banta, *Official: MSU's New Title IX hearings Won't Put Victims Face-to-Face with Abusers*, LANSING STATE J. (Apr. 24, 2019, 2:10 PM), https://www.lansingstatejournal.com/story/news/local/2019/04/24/retired-judge-michael-talbot-msu-title-ix-hearings-michigan-state/3560248002/[https://perma.cc/YLH5-5GRX].

64. *Id.*

hearing officer. Hearing officers, whether internal or external, will temporarily become the face of the university in the eyes of complainants and respondents, as well as witnesses, lawyers, and others present. Their behavior, especially whether they treat all parties with respect, will affect how the institution's Title IX process is perceived. Judges who exhibited rude attitudes while on the bench are unlikely to adopt kindlier dispositions in retirement. In other words, while the right judge can provide invaluable assistance, the wrong judge would be worse than a randomly selected faculty or staff member.

Ordinary lawyers may preside at Title IX hearings at least as well as judges. In every state, there are lawyers with experience representing parties at university proceedings, such as student discipline cases (whether related to Title IX violations[65] or other university rules such as those prohibiting academic dishonesty), faculty dismissal hearings, and grievance resolutions. In addition, lawyers who have represented parties in civil litigation concerning sexual assault will understand what evidence is likely to be presented at a university hearing called to resolve similar accusations. A university's existing lawyers – whether an internal general counsel or an outside lawyer hired to assist the university – should know who in the community has the needed skills. In particular, existing university lawyers should be able to identify who has a reputation in the community for attention to detail, listening skills, empathy, and patience, in addition to relevant legal knowledge. Once a lawyer has presided over one hearing at an institution, she will have learned about that institution's rules, customs, and practices. Hiring that same lawyer for future cases should save money because fewer hours will be necessary for preparation.

### 2. Firms that Specialize in Dispute Resolution or Title IX Consulting

At large institutions likely to have multiple hearings each year, building a relationship with a local judge or other expert may be the best option. For many other institutions, however, formal hearings are rare. It could prove inefficient to prepare a local lawyer who may hear only a single case. At schools in remote locations, attorney travel time may add further expense. When hiring a local external hearing officer is difficult or impractical – especially at institutions holding very few hearings – leaders may wish to engage firms that specialize in either Title IX consulting or in dispute resolution more generally.

Dispute-resolution professionals, such as arbitrators and mediators, assist parties with all sorts of disputes, ranging from workplace conflict to billion-dollar lawsuits. Some of these experienced "neutrals" have advertised

65. By "Title IX violations," I mean violations of university rules related to Title IX, such as rules prohibiting sexual harassment and sexual assault. As a technical matter, individual students cannot violate Title IX itself.

their interest in resolving Title IX cases.[66] Because these neutrals can hear cases at several institutions, they can develop expertise more quickly than a lawyer who works only with one or two local institutions. On the other hand, arbitration firms are expensive.[67] Institutions will want to investigate the relative costs of hiring a local lawyer, even if that requires paying for some amount of time spent on learning how Title IX hearings work, versus hiring a firm that employs neutrals who already possess much of the relevant knowledge. In addition, if an institution is considering hiring a hearing officer from a national firm, the Title IX coordinator may wish to request references from other institutions at which the neutral has heard cases. Hiring an experienced hearing officer with positive reviews could be simpler than finding a local lawyer with the right skills.

### 3. Some Concerns about External Hearing Officers

Despite my overall support of using external hearing officers, which should benefit at least some institutions, a few caveats deserve mention. First, if colleges and universities nationwide begin hiring external hearing officers, institutions may create a class of Title IX hearing experts with an incentive to promote the complication of Title IX law and the use of formal hearings to resolve complaints. These outside hearing officers would get paid only when cases require hearings; disputes resolved in mediation deprive them of business. A sufficiently large and organized group of external hearing officers might form a national association and lobby for regulatory and enforcement decisions that improve their bottom line, much like prison guards seeking punitive criminal sentences.[68]

Further, even if an institution separates the role of "judge" and "jury," using external hearing officers brings at least some outside influence into a process that might be better left to those within an academic community. Institutions must weigh the value of guarding internal autonomy against hiring external expertise. A retired judge, while learned in the law, may not have spent much time on a university campus for more than four decades. Local lawyers, perhaps with fresher memories of their own college experiences, nonetheless may have little connection to the campus life of today. Internal

66. *See, e.g.*, JAMS Mediation, Arb., ADR Servs., *Providing Fairness and Neutrality for Campus Sexual-Assault Cases*, CHRON. HIGHER EDUC. (March 12, 2019), https://www.jamsadr.com/files/uploads/documents/articles/taylor-thechronicle-providing-fairness-and-neutrality-for-campus-sexual-assault-cases-2019-05.pdf [https://perma.cc/7XX5-VYWU] (paid content not prepared by periodical's staff).

67. *See, e.g.*, *Arbitration Schedule of Fees and Costs*, JAMS, https://www.jamsadr.com/arbitration-fees [https://perma.cc/RN5R-8AVH] (last visited Oct. 24, 2020).

68. *See, e.g.*, Joan Petersilia, *California's Correctional Paradox of Excess and Deprivation*, 37 CRIME & JUST. 207, 224–25 (2008) (describing prison guard union as "one of the state's most powerful unions" that has helped to enact harsh sentencing laws through ballot initiatives and support of favored politicians).

hearing officers will need training on legal concepts such as relevance and privileges. External hearing officers may need training on the social scene inhabited by today's students.[69]

### *B. Train a Small Cadre of Employees to Preside at Several Hearings*

Some institutions will want to use internal hearing officers under the Revised Regulations. To promote efficiency and better performance, these institutions should train a small cadre of employees to preside at several hearings, rather than training a large pool of potential hearing officers from which members will be selected rarely for service. I was a member of the Equity Hearing Panelist Pool at the University of Missouri for years, and I presided as panel chair at one hearing. If institutions are going to provide their own employees with the intense training needed to preside at contested Title IX hearings with dueling lawyers, they should concentrate on a small number of employees who will then stand ready to serve repeatedly.

Because of the burdens imposed on hearing examiners, universities should give credit to these cadres of employees appropriate for significant internal service. In addition to time spent undergoing intense training (which will need to be repeated occasionally), the burden will include the time spent reviewing materials in advance of hearings, as well as the hearings themselves. Depending on the allegations presented, some cases will also impose an emotional burden on hearing officers. Different universities account for internal service work in markedly diverse ways, and no one-size-fits-all recommendation will account for how credit should be apportioned. That said, a few things are true at most, if not all, institutions. First, service burdens fall especially hard on women and on members of other underrepresented groups.[70] Second, service is not given great weight in decisions about tenure and promotion, at least when compared to research.[71] Third, the emotional labor associated with difficult service (such as hearing testimony about sexual trauma) is given limited consideration when determining the value of service work. Faculty members who gain skills necessary for hearing examiner service and then preside at multiple hearings

69. Ignorance of student life may be a problem for some internal hearing officers too. The key question is what people know (or are willing and able to learn), not where they happen to be employed.

70. *See* Joya Misra et al., *The Ivory Ceiling of Service Work*, ACADEME, Jan.–Feb. 2011, at 25 (noting how "work trends differed by gender, suggesting that women felt particularly pressured by the demands of service"); Audrey Williams June, *The Invisible Labor of Minority Professors*, CHRON. HIGHER EDUC. (Nov. 8, 2015), https://www.chronicle.com/article/the-invisible-labor-of-minority-professors/ [https://perma.cc/N32R-2XNJ] (describing "cultural taxation: the pressure faculty members of color feel to serve as role models, mentors, even surrogate parents to minority students, and to meet every institutional need for ethnic representation").

71. Misra et al., *supra* note 70, at 24; June, *supra* note 70 ("Mentorship and committee work may benefit institutions, but they don't count for tenure or promotion in the way research and publications do.").

are performing service work at least as important as those who chair the average campus standing committee. They should be recognized accordingly, either with financial compensation or a reduction in other service obligations. In addition, a simple "thank you" from university leadership might help hearing officers feel respected for their work which, by necessity, will be conducted out of sight. For staff members who serve as hearing examiners, the same principles apply. They should receive recognition appropriate for the amount of work this job will require, as well as its difficulty and its importance to the institutional mission. For all internal hearing officers, it might also provide comfort to know that the institution will indemnify them (and will provide counsel at the institution's expense) should a disappointed complainant or respondent file a lawsuit.

By choosing a small pool of potential internal hearing officers, and by giving fair recognition, institutions will become better able to choose qualified candidates. The work is difficult. Not all employees are suitable, even among those with good intentions. In addition, if hearing officers are to receive appropriate compensation (whether in the form of additional pay or release from other responsibilities), reducing the number of employees chosen will help to control costs.

### *C. Use External Trainers*

If institutions wish to train their own lay faculty and staff to oversee Title IX hearings, they must employ trainers. An effective trainer must (1) possess sufficient knowledge of Title IX law, internal university policy, evidence law, and hearing management so that the trainer would be qualified to preside at a hearing and (2) have the ability to teach this information to university employees with little-to-no legal education or experience. If an institution has hired a good Title IX coordinator, that person likely satisfies the first criterion. The coordinator is likely *qualified* to run a Title IX hearing, even though the law prohibits her from doing so.[72] Knowledge does not, however, always imply the ability to transmit that knowledge. Unless an institution's Title IX coordinator is also an accomplished educator, institutions should use external trainers to ensure that their hearing officers are prepared.

National organizations already provide training related to Title IX compliance, and they will adapt their materials in light of the Revised Regulations.[73] For example, the Association of Title IX Administrators ("ATIXA") (a professional association for school and college Title IX coordinators, investigators, and administrators) offers training courses aimed at different audiences, such as Title IX coordinators, Title IX hearing advisors,

72. *See* Revised Regulations, *supra* note 2, at 30,252 n.1035 (stating that "the decision-maker must be different from any individual serving as a Title IX Coordinator or investigator").

73. *See, e.g.*, *About ATIXA*, ATIXA, https://atixa.org/about/ [https://perma.cc/KZC7-7RVG] (last visited October 24, 2020).

hearing chairs, and civil rights investigators.[74] Knowing that institutions will need hearing officers trained in accordance with the federal mandate, they can prepare lessons specifically designed to teach relevance and other concepts hearing officers will need to learn. Law firms that provide services related to Title IX could also conduct training.[75]

To save money for member institutions, organizations like the National Association of College and University Attorneys ("NACUA") might wish to create trainings accessible to universities nationwide. Or, as law school faculty across the country develop familiarity with online education, one or more professors might create a training course for Title IX hearing officers. This course could be offered by a law school as a non-credit option, it could be offered independently by the faculty who create it, or it could be commissioned by a group like ATIXA or NACUA, which could then handle the marketing and distribution. Regardless of the details, a well-designed external course is likely to prove more effective than trainings conducted by university employees, however knowledgeable they may be about their own fields. It should also cost less if a few external organizations create materials that can be used repeatedly, rather than each covered Title IX institution devoting internal resources to this task.[76]

### *D. Use Juries to Separate Hearing Management from Decisions about Results*

Hearing officers will have trouble focusing on evidence – that is, on the facts presented that should serve as the basis for the eventual decision – while concurrently ruling on admissibility, monitoring lawyer behavior, and overseeing other aspects of the hearing.[77] Institutions should allow their hearing officers to devote their full attention to the hearing process, free of the burden of evaluating witness testimony and other evidence for the purpose of deciding how to resolve the case. The solution is simple: As courts do with

74. *See Training and Certification*, ATIXA, https://www.atixa.org/training-certification/ (last visited April 6, 2021).

75. *See, e.g.*, Sarah Hartley, *Another Challenge for Educational Institutions: Implementing the New Title IX Regulations*, BRYAN CAVE LEIGHTON PAISNER (May 7, 2020), https://www.bclplaw.com/en-US/insights/another-challenge-for-educational-institutions-implementing-the-new-title-ix-regulations.html [https://perma.cc/53QQ-672U].

76. That said, universities that use trainings designed for a national audience will need to supplement external trainings with material about their own internal procedures. Hearing officers must know the rules of the institutions at which they work.

77. I understand that judges manage this task during bench trials, and outside the English-speaking world, juries are rare. My point is not that no one can manage the task but instead that someone who is not a professional judge will find it daunting. This argument has less force if an institution hires a trained professional as hearing officer.

judges and juries, institutions should separate the role of hearing officer from merits decision-maker.

Anyone who has tried to take notes at a meeting while also chairing it understands that tending to one task makes the other more difficult. Or, to choose an example more relevant to university students, it is difficult to take good notes in class while also tending to social media. Or, for professors in the age of COVID-19, it is difficult to deliver compelling lectures while also monitoring the Zoom chat window. At a Title IX hearing, the hearing officer must closely observe parties and other witnesses to see if anyone needs a break. The officer must ensure that proceedings adhere to university rules, which may specify the order of events in detail. Under the Revised Regulations, hearing officers must oversee the conduct of lawyers who will question witnesses directly.[78] They must also rule on the admissibility of evidence, applying legal concepts such as relevance and the "rape shield."[79] In most cases, these hearing officers will not be judges with experience presiding at contested hearings. Indeed, most hearing officers will not be lawyers. Universities ask too much of hearing officers if they are also expected to weigh the evidence for the purpose of deciding which party will prevail. Perhaps under the old system, in which lawyers could not speak, attentive hearing officers could both chair a proceeding and vote on the outcome. With the added burden of managing lawyers and ruling on evidence, the task is too difficult.

Separating hearing management from decision-making provides additional benefits beyond allowing hearing officers to attend fully to overseeing the proceedings. First, if a university hires external hearing officers, divesting them of merits decision-making returns that function to internal stakeholders. The merits decision in a Title IX case reflects the values of the institution. By determining whether a respondent has violated university rules, the merits decision-maker announces what conduct is and is not acceptable. By determining what punishment is appropriate for someone found responsible for a violation, the merits decision-maker shows how seriously the institution believes the violation to be and also expresses an opinion on whether the guilty party can safely remain part of the community. These judgements do not require any more legal training than is given to jurors in civil and criminal courts. The American legal system vests awesome power in lay jurors, allowing them to decide the guilt of accused murderers – or instead to find them not guilty and to set them free. Lay jurors decide how much money the pain and suffering of a plaintiff is worth. In wrongful death cases, jurors assign monetary value to human lives. Reasonable minds may differ on whether randomly selected citizens are qualified for this work. Other nations use different methods. But in America, the concept is a foundation for our entire judicial system.[80] On a university campus, which is a

78. Revised Regulations, *supra* note 2, at 30,053.

79. *Id.* at 30,125.

80. *See* U.S. CONST. amend VI (criminal cases); U.S. CONST. amend VII (civil cases).

microcosm of society, disciplinary hearings serve a role similar to that of a trial in the larger community. Just as jurors are chosen from the local population, the decision-makers at university hearings should come from within the institution.

Regardless of whether a hearing officer comes from within or without an institution, separating hearing management from decision-making may add to the perception of fairness. Whenever parties contest the admissibility of evidence or the propriety of a proposed question, the hearing officer must resolve the dispute. These resolutions will tend to please the party whose argument prevails while disappointing the counterparty. Eventually, with or without cause, one or more parties may come to believe that the hearing officer has acted unfairly in some way. If the hearing officer is then charged with deciding who wins, the resolution of the merits will be tainted with the same perception of unfairness. If, however, the decision-making on the merits is vested in different people, each party can trust the jurors, who during the hearing should not have done or said anything to undermine their appearance as neutral, fair-minded observers of the evidence.

Internal jurors will themselves need training,[81] but the burden of providing it should be far lower than would be necessary to train competent internal hearing officers. The training of campus jurors could be similar to existing training already offered across the country to campus hearing panelist pool members. Potential jurors would learn about campus culture, about the content of university rules barring discrimination, about the campus hearing process, and about the sort of evidence likely to be presented. They would not, however, need to master legal concepts such as relevance, "rape shields," and legal privileges, nor would they be asked to rule on the admission of evidence or to decide during contested hearings whether a witness should answer a question asked by a party's lawyer.

### *E. Words of Caution About Using Hearing Officers Who Do Not Decide the Merits*

After publishing an earlier draft of this Article online, I became aware of a potential pitfall that may accompany the use of hearing officers who do not decide the merits of a Title IX case.[82] Lest this Article lead any institution astray, this Subpart explains the concern.

Section 106.45(b)(6)(i) of the Revised Regulations states, "Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is

81. *See* Revised Regulations, *supra* note 2, at 30,337 ("The Department does not believe that requiring recipients to evaluate relevant evidence results in unfairness or inaccuracy. Unlike court trials where often the trier of fact consists of a jury of laypersons untrained in evidentiary matters, the final regulations require decision-makers to be trained in how to conduct a grievance process and how to serve impartially … .").

82. I appreciate the valuable feedback I received from a reader about this issue.

relevant and explain any decision to exclude a question as not relevant."[83] One could read this to require that "decision-maker(s)," that is, the person or persons who will decide the ultimate result of the case, must be the same person or persons who rule on relevance. If so, then the role of hearing officer cannot be separated from the role of "juror." On the other hand, it may be permissible to have a certain "decision-maker" who decides questions related to hearing management, while other "decision-maker(s)" decide cases on the merits. It would be useful for the Department to provide guidance on this question.

## IV. PROPER EXCLUSION OF RELEVANT EVIDENCE

With limited exceptions, the Revised Regulations require that campus hearing officers admit relevant evidence, even if that evidence might be excluded in American courts were a party to offer it at civil or criminal trial. The Department stated:

> Thus, for example, where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence.[84]

In a federal court, such evidence might well be excluded by Federal Rule of Evidence 404. In addition, at least some use of character evidence would justify exclusion under Rule 403, which allows exclusion based on a danger of "unfair prejudice." Instead of excluding the evidence, the Department urges campus hearing officers to give it the weight it deserves:

> [They] may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decision-maker's evaluation treats both parties equally.[85]

In other words, for the bulk of relevant evidence, the Department urges campus hearing officers to apply the cliché that objections "go to weight, not admissibility." The Department, however, created two important exceptions to this principle. First, relevant evidence must be excluded if its admission would violate the "rape shield" established in the Revised Regulations.[86]

83. 34 C.F.R. § 106.45(b)(6)(i) (2020).

84. Revised Regulations, *supra* note 2, at 30,337.

85. *Id.*

86. 34 C.F.R. § 106.45(b)(6). As a technical matter, the Revised Regulations declares that certain "[q]uestions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant." *Id.* Under this theory, the Regulation is not excluding relevant evidence; the evidence is inadmissible because it is not relevant. While the ultimate result is identical (the evidence is out), the Department's wording creates needless confusion. Just like the evidence excluded by

Second, relevant evidence must be excluded if it is protected by a "legally recognized privilege," such as the attorney-client privilege or a doctor-patient privilege.[87]

### *A. The "Rape Shield" in the Revised Title IX Regulation*

The Revised Regulations set forth the following "rape shield" provision:

> 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 if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.[88]

These exceptions to the "rape shield" – the instances in which "sexual predisposition" or "prior sexual behavior" evidence is admissible – track those applicable in criminal cases under Federal Rule of Evidence 412, which sets forth the "rape shield" in federal courts, and which is the basis for rules in several states. Under that rule, admissible evidence includes "evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence" and "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent . . . ."[89]

The general rule, that "evidence about the complainant's sexual predisposition or prior sexual behavior" is not admissible, mirrors the "rape shields" codified in the Federal Rules of Evidence and in state laws.[90] The purpose of these rules is to prevent persons accused of sexual assault from arguing that because the alleged victim has consented to sex in the past, she likely either consented in this particular case or made the whole thing up.[91]

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Federal Rule of Evidence 412, the sort of evidence excluded by the Department's "rape shield" is indeed relevant (even if only minimally), as that word is used by lawyers. We exclude such evidence not because it lacks any relevance but instead because of policy concerns, such as the desire to protect complainants from needless humiliation, to encourage the reporting of sexual assaults, and fear that jurors might misuse the evidence. *See* FED. R. EVID. 412 advisory committee note to 1994 Amendment.

87. 34 C.F.R. § 106.45(b)(1)(x).

88. *Id.* § 106.45(b)(6).

89. FED. R. EVID. 412(b)(1).

90. *See* FED. R. EVID. 412; *see, e.g.*, CAL. EVID. CODE § 782; FLA. STAT. § 794.022(2).

91. *See* Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. WOMEN'S L.J. 183, 203-04 (2017) (quoting how proponents of the federal "rape shield" described its purpose at time of enactment); *see generally* Harriett R. Galvin, *Shielding Rape*

Before "rape shields" were enacted, defendants freely offered evidence of alleged victims' prior sexual activity, under the theory that such evidence either (1) showed that the alleged victim was generally immoral and therefore untrustworthy as a witness or (2) showed that the alleged victim was predisposed to consenting to sex and accordingly likely did so with the accused.[92] In 1949, the Nebraska Supreme Court justified such tactics as follows:

> In cases wherein a woman charges a man with a sex offense, immorality has a direct connection with veracity, and the accused is not restricted to proof of general reputation of prosecutrix [*i.e.*, alleged victim] for truth and veracity, but may adduce direct evidence of the general reputation of such witness for morality and may also adduce direct evidence not too remote in time of specific immoral or unchaste acts and conduct by her with others. . . .
>
> Such evidence is admissible not only for the purpose of being considered by the jury in deciding the weight and credibility of the testimony of prosecutrix but also as inferring the probability of consent, and to discredit her testimony relating to force and violence used by defendant in accomplishing his purpose and claimed resistance thereto by prosecutrix.[93]

Today, defense strategies like these are derided as "slut-shaming" and are prohibited in evidence codes nationwide.[94] (Foreclosing similar arguments by prosecutors, California excludes evidence in prostitution cases that the defendant possessed condoms.[95]) Although not perfectly executed in practice, the idea is that juries (and other triers of fact) should not be told about an alleged victim's prior sexual behavior, at least not if the purpose of the evidence is to paint the accuser as unchaste and therefore unreliable.

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*Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L REV. 763, 791-801 (1986) (describing motives of rape law reformers).

92. *See* Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to A Sex Offense Complainant's Prior Sexual Behavior*, 44 CATH. U.L. REV. 709, 714–16 (1995).

93. Frank v. State, 35 N.W.2d 816, 819 (Neb. 1949); *id.* at 822 (citing Dean Wigmore for support for this "modern realist rule"); *see also* SUSAN ESTRICH, REAL RAPE (1987) (discussing *Frank* and the movement to prohibit the tactic described by the court).

94. *See* Kim Loewen, Note, *Rejecting the Purity Myth: Reforming Rape Shield Laws in the Age of Social Media*, 22 UCLA WOMEN'S L.J. 151, 153 (2015) (arguing for further reform); *see also* Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 DRAKE L. REV. 293, 346–47 n.246 (2017) (noting failure by some colleges to apply "rape shield" provisions); *see generally* Galvin, *supra* note 91, at 791–808 (describing history of "rape shield" laws).

95. *See* CAL. EVID. CODE § 782.1.

Like the Federal Rules of Evidence, the Revised Regulations include two exceptions, each designed to include a category of prior sexual behavior that has legitimate use. The first is to show that "someone other than the respondent committed the conduct alleged by the complainant."[96] For example, if the complainant offered evidence of physical injury or the presence of semen on his or her clothes, the respondent could offer evidence of other sexual behavior by the complainant to argue that some other person caused the injury or produced the semen. The exception does not allow respondents to parade evidence of the complainant's entire sexual history. It instead covers only evidence of sexual acts that might show that a third party (someone other than the respondent) is guilty in this particular case. Hearing officers must distinguish between prior sexual behavior evidence that plausibly implicates an alternative suspect, which should be admissible, from evidence secretly offered to slut-shame the complainant, which should be excluded.[97]

The second exception covers evidence of "specific incidents of the complainant's prior sexual behavior with respect to the respondent . . . offered to prove consent."[98] The theory behind this exception is that evidence of prior sexual activity involving both the complainant and the respondent has far greater relevance than evidence of prior sexual behavior of the complainant in which the respondent played no role.[99] The latter category is evidence of sexual "immorality" that the "rape shield" exists to exclude. The former category, while perhaps also objectionable (the theory is essentially that because the complainant willingly had sex with the respondent once, she is more likely to have done so again),[100] has better arguments supporting its admission. If the complainant and respondent had a prior or ongoing sexual relationship, knowing this may help the trier of fact untangle testimony in a "swearing contest" (or "word versus word") case in which consent is

96. 34 C.F.R. § 106.45(b)(6) The Federal Rules provision is similar, allowing evidence "if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence." FED. R. EVID. 412(b)(1)(A).

97. *See* United States v. Knox, No. ACM 28628, 1992 WL 97157 (A.F.C.M.R. Apr. 20, 1992), *aff'd by* 41 M.J. 28 (C.M.A. 1994) (upholding exclusion of evidence at court martial, affirming decision of judge who held that defendant sought to "portray an alleged rape victim as a bad person who got no more than she deserved").

98. 34 C.F.R. § 106.45(b)(6); *accord* FED. R. EVID. 412(b)(1)(B) (allowing "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent.").

99. *See* People v. Jovanovic, 700 N.Y.S.2d 156, 167 (N.Y. App. Div. 1999) (describing purpose of similar New York exception and stating that a "history of intimacies" would "tend to bolster a claim of consent" (quoting Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 58 (1977))).

100. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30350–51 (2020) (summarizing arguments against having this exception).

disputed.[101] Such evidence may be particularly important on campuses with definitions of consent, including "affirmative consent," that differ markedly from those used in criminal rape trials.[102]

In the Federal Rules of Evidence, parties seeking to offer evidence under a "rape shield" exception must provide notice before trial.[103] Colleges and universities may wish to adopt a similar notice requirement, for two reasons. First, notice will help a complainant prepare for questions about a sensitive topic, perhaps reducing the emotional burden of the proceeding. Second, a statement that "specifically describes the evidence and states the purpose for which it is to be offered" will give a hearing officer time to consider how the "rape shield" and its exceptions may apply to the evidence.[104] Parties will then know in advance of the hearing what evidence may be offered. Further, this practice prevents witnesses from being asked questions about their sex lives (in front of the triers of fact, at an already stressful hearing) that are later ruled inappropriate, thereby sparing the witness needless discomfort.

### *B. Evidentiary Privileges*

Because the Revised Regulations prohibit use of "questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege,"[105] hearing officers must understand how legal privileges work. Evidentiary privileges are generally creatures of state law and will vary from place to place. Examples likely to affect campus hearings include the attorney-client privilege, the doctor-patient privilege, the psychotherapist-patient privilege,[106] and the priest-penitent privilege (also known as the clergy-communicant privilege). Privilege law is tremendously complicated,[107] and an in-depth discussion is beyond the scope of this Article. This Subpart articulates some broad principles.

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101. *See, e.g.*, *Jovanovic*, 700 N.Y.S.2d at 165–166 (considering whether intimate instant messages, emails, and phone conversations counted as sexual behavior and, if so, whether a "rape shield" exception applied).

102. *See* Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 442 n.1 ("At their core, affirmative consent standards require some outward manifestation of a willingness to engage in sexual activity, as opposed to simply an expression of unwillingness, or no indication one way or the other.").

103. FED. R. EVID. 412(c).

104. FED. R. EVID. 412(c)(1)(A).

105. 34 C.F.R. § 106.45(b)(1)(x).

106. *See, e.g.*, 34 C.F.R. § 106.45(b)(5)(i) (records related to health treatment, both physical and mental, are protected).

107. *See, e.g.*, EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILIEGES (2020) (devoting Volume 2 of a five-volume series on evidence law to the topic alone).

Privileges protect against the revelation of confidences made among persons with a protected relationship.[108] As their name implies, they grant a "privilege" to certain relationships over others. Because we want to encourage open communication among patients and therapists, for example, the law grants an evidentiary privilege that does not apply to communications among drinkers and bartenders.[109] If a privilege applies, neither the owner of the privilege (that is, the client who hired a lawyer, or the patient who saw a therapist, or the parishioner who visited a minister, etc.) nor the professional with the privileged occupation (that is, the lawyer, doctor, priest, etc.) may be compelled to reveal what was communicated.

For a privilege to apply, these three conditions must be satisfied:[110] (1) the communication involved someone in a privileged occupation,[111] (2) the communication was made in confidence, and (3) the communication was made to facilitate professional services. If the privilege exists, it is controlled by the client (or other "owner" described above); only the client can waive the privilege. For a communication to be made "in confidence," it must have occurred with the intent that it would remain confidential.[112] A client who speaks to a lawyer alone likely satisfies this condition, while a client who shouts secrets to a lawyer in a crowded elevator likely does not. The third prong distinguishes communications designed to get professional assistance (whether legal, medical, or spiritual) from casual chatter with privileged professionals. If I chat with my rabbi about the struggles of raising children during a pandemic, the conversation is likely privileged. If I chat with the rabbi about baseball, the privilege likely does not apply.

In addition to the professional privileges, some campus hearing officers must confront issues related to the Fifth Amendment's privilege against self-incrimination, which states that no person "shall be compelled in any criminal case to be a witness against himself."[113] A campus respondent may also face

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108. *See, e.g.*, Jaffee v. Redmond, 518 U.S. 1, 6–10 (discussing Court's effort to balance the need for evidence, which counsels against creating a privilege, against the desire to protect certain relationships, which can justify privileges).

109. *Id.* at 15 (creating therapist-patient privilege in federal court); *id.* at 22 (Scalia, J., dissenting) (noting lack of privilege covering conversation with "parents, siblings, best friends, and bartenders").

110. For more explanation, *see* FISHER, *supra* note 35, at 975–76.

111. This Article does not address privileges related to spousal relations, which will not affect the solid majority of campus hearings. Should it somehow be relevant to a hearing (for example, if an accused is alleged to have confessed to a spouse), hearing examiners will need to study up.

112. U.S. Dept. of J. v. Landano, 508 U.S. 165, 173 (1993).

113. U.S. CONST. amend V. This issue will arise when there is a credible risk of criminal jeopardy for a party. This is more likely in cases of alleged sexual assault, as opposed to other kinds of sex discrimination covered by Title IX. An enterprising lawyer could form plausible arguments about criminal jeopardy related to broadly worded criminal statutes related to hazing, cyberbullying, and other misconduct unrelated to sexual assault. However, absent a genuine fear of criminal prosecution,

criminal charges,[114] and the Revised Regulations state not only that an institution may not force someone to waive that privilege but also that an institution may not use a respondent's invocation of the privilege to "draw any inferences about the determination regarding responsibility."[115] In other words, just like in a criminal courtroom,[116] the trier of fact may not conclude that someone is probably guilty because he or she refused to testify. This provision gives campus respondents greater protection than they enjoy in civil litigation. Civil defendants who rely on the Fifth Amendment to avoid answering questions about their conduct should expect "adverse inference" instructions, in which judges tells juries that they may indeed base liability on a party's refusal to testify.[117] Hearing officers, including lawyers familiar with civil litigation, should be informed of the special protections granted under federal law to parties at campus hearings.

### *C. Evidence that Might Be Inadmissible in Real Courts – "Goes to Weight"*

Unlike American courts, which regularly exclude relevant evidence for myriad reasons,[118] campus Title IX tribunals must admit relevant evidence unless it falls into one of the excludable categories discussed above.[119] As the Department explained, "the final regulations do not allow a recipient to impose rules of evidence that result in exclusion of relevant evidence [other than that discussed above]; the decision-maker must consider relevant evidence and must not consider irrelevant evidence."[120] The Department listed categories of evidence regularly excluded by state and federal courts, such as "party statements made during mediation discussions, out of court statements that constitute hearsay, evidence of a party's general character or prior bad acts, or evidence that is cumulative, duplicative, or unduly prejudicial."[121] The Revised Regulations seem to require that such evidence

lawyers will likely want respondents to testify at hearings so that their side of the story is told.

114. *See* Revised Regulations, *supra* note 2, at 30,099 n.466.

115. *See id.* at 30,099.

116. *See* Griffin v. California, 380 U.S. 609, 615 (1965).

117. *See* Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).

118. *See* FED. R. EVID. 403 ("The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.").

119. *See* Revised Regulations, *supra* note 2, at 30,337 (explaining decision to prohibit hearing officer from excluding other forms of relevant evidence and giving as example evidence that "concerns a party's character or prior bad acts").

120. *Id.* at 30,336–37.

121. *Id.* at 30,336 (the provision about statements during mediation differs from the rule that would apply at a federal trial); *see* FED. R. EVID. 408. Lawyers who represent clients considering whether to participate in mediations should consider the

be admitted.[122] A campus decision-maker may decide that the evidence is unpersuasive, but it may not be excluded.[123] Objections to the evidence go to weight, not admissibility.

Commenters cautioned the Department against the use of such evidence, arguing that even if the Department did not *mandate* its exclusion (as the Federal Rules of Evidence might in some cases), the Department should at least *allow* campus hearing officers to exclude it.[124] The Department refused, and it justified its decision by noting how well-trained hearing officers must be under the Revised Regulations.

> Unlike court trials where often the trier of fact consists of a jury of laypersons untrained in evidentiary matters, the final regulations require decision-makers to be trained in how to conduct a grievance process and how to serve impartially, and specifically including training in how to determine what questions and evidence are relevant. The fact that decision-makers in a Title IX grievance process must be trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and the training required . . . allows recipients flexibility to include substantive training about how to assign weight or credibility to certain types or categories of evidence, so long as any such training promotes impartiality and treats complainants and respondents equally.[125]

In other words, because campus hearing officers will receive excellent training as required by federal law, the Department believes they can see

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risk that statements made by parties seeking to resolve a Title IX case may be offered against them at an eventual hearing.

122. Campus officials should inform parties of this rule before encouraging them to attend campus mediations aimed at resolving a Title IX complaint. Mediators may be in the habit of promising confidentiality, but the Revised Regulations prevent them from honoring such promises if a party wishes to introduce evidence at a campus hearing of statements made during a campus mediation. *But see supra* text accompanying note 121 (quoting contrary guidance from the Department).

123. Then again, a different part of the preamble to the Revised Regulations suggests that perhaps institutions can avoid admitting such evidence at campus hearings. *See* Revised Regulations, *supra* note 2, at 30,400–01 ("With respect to informal resolution facilitators potentially serving as witnesses in subsequent formal grievance processes, we leave this possibility open to recipients."). This might allow institutions to prevent mediators from testifying at hearings. Further, the preamble states, "If recipients were to accept such witnesses, then the Department would expect this possibility to be clearly disclosed to the parties," *id.* at 30401, which implies that such witnesses need not be accepted. The Revised Regulations themselves, however, do not list this category of relevant evidence as one that can be excluded.

124. Revised Regulations, *supra* note 2, at 30,336–37.

125. Revised Regulations, *supra* note 2, at 30,337.

evidence that we would not trust ordinary jurors to consider.[126] This reasoning has some flaws. Judges routinely reject inadmissible evidence in bench trials. It is not only fear of foolish jurors that shapes the rules of evidence. But the rules are what they are, and institutions must live with them. Perhaps some institutions can train their hearing officers as anticipated by the Department, but it will not be easy. Further, institutions should expect to have their training reviewed by interested members of the public, in addition to counsel representing complainants and respondents. The Revised Regulations require that institutions make available (either online or upon request) "[a]ll materials used to train Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process."[127] Creating quality materials in house – good enough to withstand public scrutiny – will consume scarce time and attention.

## V. A BRIEF LOOK AT THE BIGGER PICTURE

When deciding what resources to devote to the Title IX hearing process, college and university leaders should recall what is at stake: the welfare of students, staff, faculty, and the institution itself. Badly-run hearings hurt people whom institutions have a duty to protect. They also put the institution at risk of financial costs, bad publicity, and government investigations. This Part explores the importance of a good Title IX hearing process, and it then discusses some special problems presented by the increasingly common use of technology to conduct virtual (or remote) hearings.

### *A. Why Quality Hearings Are So Important*

Especially in times of tight budgets – which in American higher education are likely here to stay – institutions may hesitate before devoting more money to the Title IX hearing process. Institutions have endless competing demands for resources, and the quality of Title IX hearing officers may seem like a theoretical matter when compared to salaries, student scholarship, and building maintenance. Every institution must use its own judgement when spending money, and I would not presume to tell campus leaders across America how much to spend on various priorities. That said, the quality of Title IX hearings is not a theoretical concern. It has concrete, practical effects that campus leaders ignore at their peril.

First, bad Title IX hearings hurt the participants. When a hearing officer admits evidence that should have been excluded, an institution may need to

126. Because the Revised Regulations presume that decision-makers will be trained, even "jurors" in my proposed judge-jury system will need at least some training. The Department has made it impossible to completely avoid some amount of expensive training. Nonetheless, lay university employees acting as "jurors" will not need the same sort of training that would be needed for them to serve as competent hearing officers who rule on the admissibility of evidence.

127. 34 C.F.R. § 106.45(b)(10)(i)(D).

run a second hearing involving the same parties.[128] One complainant described her experience as follows: "The next morning, I woke up naked. My rapist told me he had had sex with me. I thought this was the most devastating thing that could happen to me, but the level of trauma associated with my Title IX case proved me wrong."[129] Describing the ordeal of attending a second hearing in her case, she wrote, "It was like reliving the trauma all over again. I felt betrayed by a system made to help me."[130]

In a different case, the Department found that a college violated the rights of respondents, in part by denying them the opportunity to present appropriate evidence at a campus hearing.[131] Other aggrieved respondents have sued institutions, alleging violations of Title IX associated with their campus discipline cases.[132] If nothing else, litigation is unpleasant and expensive, distracting university officials from other work. Sometimes, the

128. *See, e.g.*, Lexi Churchill & Waverly Colville, *Title IX Appeals Can Unwind Punishments—and Catch Victims Unaware*, COLUM. TRIBUNE (July 28, 2018, 3:26 PM), https://www.columbiatribune.com/news/20180728/title-ix-appeals-can-unwind-punishments—-and-catch-victims-unaware [https://perma.cc/2TQP-VLUQ] (describing case in which student found responsible for sexual assault had decision reversed on appeal); *see also* Lexi Churchill & Waverly Colville, *Title IX Process is Sensitive, Complicated and Sometimes Messy*, COLUMBIA TRIBUNE (July 29, 2018, 3:44 PM), https://www.columbiatribune.com/news/20180729/title-ix-process-is-sensitive-complicated-and-sometimes-messy [https://perma.cc/W24J-A8N4] (providing more information about cases described in previous source cited).

129. Lexi Churchill & Waverly Colville, *Title IX Appeals Can Unwind Punishments—and Catch Victims Unaware*, COLUM. TRIBUNE (July 28, 2018) https://www.columbiatribune.com/news/20180728/title-ix-appeals-can-unwind-punishments—-and-catch-victims-unaware [https://perma.cc/2TQP-VLUQ] (quoting Casey Campbell, Letter to the Editor, *Title IX needs to change*, THE MANEATER (Mar. 14, 2018), https://www.themaneater.com/stories/opinion/title-ix-needs-to-change [https://perma.cc/2SFX-JHUN])).

130. Casey Campbell, *Letter to the Editor: Title IX Needs to Change*, MANEATER (May 18, 2017), *available at* https://www.themaneater.com/stories/opinion/title-ix-needs-to-change [https://perma.cc/742M-R8QG].

131. Letter from Beth Gellman-Beer, Supervisory Attorney, Office for Civil Rights, to Robert E. Clark II, President, Wesley College (Oct. 12, 2016), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf [https://perma.cc/2XY7-JT57].

132. *See* Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 NEV. L.J. 107, 144–48 (2017) (describing several lawsuits); *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 217 (D. Mass. 2017) (denying motion to dismiss in case involving allegations that "the College did not follow its own rules and conducted the hearing in a manner that was inconsistent with the general promises of fairness contained in" its rules); Doe v. Alger, 175 F. Supp. 3d 646, 648, 662 (W.D. Va. 2016) (setting forth bizarre procedural history of campus case); Doe v. Alger, 228 F. Supp. 3d 713, 716, 729 (W.D. Va. 2016) (awarding summary judgement to student, finding he was wrongfully denied continuing enrollment).

plaintiffs win. A university's discipline decision can be set aside by a court,[133] and mistreated students can win money judgments. Lawsuits also bring bad publicity.[134]

No good statistics exist concerning how many campus Title IX decisions are overturned by internal appeals, nor can one calculate with any precision how much institutions spend defending themselves in lawsuits related to Title IX.[135] Further, one cannot quantify the relationship between more competent hearing officers and a reduction in litigation costs, bad publicity, and needless trauma inflicted upon complainants and respondents. Nonetheless, it seems safe to assume that hearing officers with better training and more experience will perform better than those with worse training and less experience. Given the difficulties associated with training internal lay hearing officers to the standard set forth by the Revised Regulations, institutions can likely hire external hearing officers for less money than it would take to train internal officers. If that assumption is accurate, then external hearing officers would probably provide better performance for less money.

### *B. Special Considerations in an Age of Virtual Hearings*

As colleges and universities responded to COVID-19 during the spring 2020 semester, institutions faced difficult questions related to Title IX hearings, including whether hearings could continue as campuses ended in-person classes in response to the pandemic. With students leaving campus, institutions weighed the costs and benefits of holding fully virtual hearings.[136] Delays risked denying justice to victims, especially those whose assailants were expected to graduate that semester. Virtual hearings risked allegations that accused students would face unreasonable disadvantages.[137] But institutions already had experience using technology platforms, and they

133. *See, e.g.*, Mock v. Univ. of Tenn. at Chattanooga, No. 14-1687-II at 23 (Ch. Ct. of Davidson Cnty. Tenn., Aug. 4, 2015); *see also* Trachtenberg, *supra* note 132; *Doe*, 175 F. Supp. 3d at 648, 662 (setting forth bizarre procedural history of campus case); *Doe*, 228 F. Supp. 3d at 716, 729 (awarding summary judgement to student, finding he was wrongfully denied continuing enrollment).

134. *See* Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases*, ATLANTIC (Sept. 11, 2017), https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/ [https://perma.cc/94PR-34EH] (discussing several universities in article about shortcomings of Title IX process).

135. *See* Trachtenberg, *supra* note 132, at 124-–28, 142–44 (describing lack of public data about Title IX cases).

136. *See* Greta Anderson, *Hold Off or Proceed?*, INSIDE HIGHER ED (Mar. 26, 2020), https://www.insidehighered.com/news/2020/03/26/coronavirus-creates-title-ix-obstacles [https://perma.cc/K25F-8ZHX].

137. *See id.*; Sarah Brown, *Sexual-Assault Investigations May Be Delayed as Coronavirus Disrupts Colleges*, CHRONICLE OF HIGHER ED. (Mar. 23, 2020), https://www.chronicle.com/article/Sexual-Assault-Investigations/248305 [https://perma.cc/Q8SK-S4VB].

managed to adapt and hold hearings during difficult circumstances. Because virtual hearings will likely remain part of the campus Title IX toolkit – even if campuses remain open despite COVID-19 – campus leaders should consider issues presented by increased reliance on virtual hearings.

Scholars of online dispute resolution have documented costs and benefits of greater use of technology in dispute resolution.[138] Benefits include opening participation to parties who might have been unable to attend in-person meetings (such as some persons with disabilities), easier scheduling, and quicker resolution.[139] Costs include "concern that online processes may diminish empathy and satisfaction that otherwise come from 'being heard'" at a proceeding and risks that some participants "may be intimidated by the use of technology."[140] This research is ongoing, and scholars will learn more as courts and other entities continue their experiments with virtual adjudication and dispute resolution.[141]

For college and universities, a few issues deserve special attention as institutions conduct virtual hearings. First, institutions must ensure that varying access to technology does not prejudice parties. Despite the stereotype that all college students are tech savvy and possess fancy devices, many students lack computers needed for full participation in a virtual hearing. When campuses are closed, students who rely on university computer labs may be out of luck. The mobile phones these students use to access the internet will disadvantage them if used to join a Zoom hearing. Relatedly, some parties may lack reliable access to private, quiet spaces from which to join a hearing.

Second, Title IX offices should perform functions analogous to those of a court clerk, helping parties and hearing officers use necessary technology.[142] Title IX offices can receive evidence from the parties in advance, allowing it to be shared as necessary during a virtual hearing. They can control who has access to screen sharing and other features of the conferencing software. They can ensure that an accurate recording of the meeting is saved. Because the Title IX office staff will participate in repeated hearings, they can help parties with less familiarity with both the procedures and the technology.

Third, because the Revised Regulations require live questioning of witnesses, institutions should consider how this will work at virtual hearings. Zoom lags, spotty Internet connections, and other technological miscues can conspire to undermine the "live" nature of virtual questioning. Title IX offices should consider in advance what kinds of problems will merit a brief recess,

138. *See* Amy Schmitz, *Measuring "Access to Justice" in the Rush to Digitize*, 88 FORDHAM L. REV. 2381, 2384 (2020).

139. *Id.* at 2383–84.

140. *Id.* at 2384.

141. *See* Joint Technology Committee, National Center for State Courts, *Managing Evidence for Virtual Hearings* (June 25, 2020) (offering suggestions for best practices), https://www.ncsc.org/__data/assets/pdf_file/0014/41171/2020-06-24-Managing-Evidence-for-Virtual-Hearings.pdf [https://perma.cc/HK32-4PEG].

142. *See id.* at 7–9 (describing role of clerks).

which will require a rescheduled hearing, and which can be tolerated as a cost of providing justice under difficult circumstances. Planning ahead will reduce the burden on hearing officers, who should receive training both on how the technology works and what to do when it fails.

## VI. CONCLUSION

The training that colleges and universities have historically provided for their Title IX hearing officers will not suffice under Revised Regulations issued by the Department of Education in May 2020. Unless institutions are prepared to provide costly and complicated training to their lay hearing officers – often drawn from faculty and staff with no legal education – institutions should hire external hearing officers who possess the necessary skills, knowledge, and experience. When external hearing officers preside at campus hearings, institutions can preserve autonomy by separating the functions of "judge" and jury,"[143] allowing external hearing officers to run hearings while reserving the ultimate decisions on the merits to internal community members, who if not asked to preside at hearings will need less robust training.

143. Assuming such a separation of roles is permissible under the Revised Regulations. *See supra* Part III.E (listing potential problem with this plan).