COSA Title IX Presentation, June 2020

William Wayne (OU) - So next up is our Title IX update. Dr. Michael Davis from Southeastern, Brandee Hancock from Board of Regents and Mackenzie Murphy-Wilfong from Tulsa Community College.

Mackenzie Wilfong (TCC) - Well, thank you all so much for inviting us to come talk about Title IX issues. I'm going to share my screen with you all. It's the PowerPoint presentation that was sent out. And for those of you all that were in the state regents meeting on the Committee for Safety and Security, there is some redundancy but we've added some new information as well. So let me share my screen with you all first and then we will get started. Let's see. All right. So I'll kick us off and we're just -- we will take turns with the slide presentation. First off, where are we now? If you haven't read the Title IX regulations, I'll just give you a highlight that's about what they look like and that's printed double sided. They were released with 100 days to become effective, it's about 2,000 pages. You all at 636,000 words. And what's really interesting is that the effective date is August the 14th, 2020. We don't anticipate there's going to be a grace period. I've had discussions with my former colleagues at the Office for Civil Rights in the Kansas City Regional Office, where I worked under the Bush administration. And they told us that they're going to start enforcement on August the 14th, barring some kind of nationwide injunction that would, you know, inhibit their authority to do so. So we anticipate that there will not be any kind of supplementary grace period. Speaking of nationwide injunctions, I think that we need to go ahead and implement and really start that planning process because we can't count on these nationwide injunctions. Right now, we've seen two lawsuits, one from the ACLU that's rather limited, another that was filed on June the 4th by 18 attorneys general and being led by California, Pennsylvania, New Jersey and Colorado. Our attorney general was not part of that group of 18, which is seeking a large and expansive injunction to stop the implementation of these regulations. But what we know about these nationwide inspections is they may only have a limited scope. They may not enjoin all parts of the regulations or they may have a limited duration. So we can't count on that, and we need to go ahead and plan appropriately to be able to implement these regulations effective August 14th. I'm going to turn it over to Brandee to talk about institutional responses.

Brandee Hancock (OSU A&M) - So the regs [inaudible] your responsibility as an institution at a minimum now is to show that you were not deliberately indifferent if you had actual knowledge. So what the regs define not to mean is that your response is not clearly unreasonable in light of the known circumstances. The big shift that we're seeing in these regs is the concept of a mandatory reporter that everybody's familiar with is shifting towards actual knowledge means only a handful of people at a minimum. So that means the Title IX coordinator or someone who actually has authority to institute corrective measures. If you think about that on your own campuses, that's probably only a few people who can actually do that. Bear in mind as you work through these, so that is the floor, that is not the ceiling on what you can do. You can designate more individuals who fall into that category. We are pondering looking at, especially on the employment side, making sure supervisors are captured in that group, potentially student advisors but maybe taking out your frontline faculty members who encounter students in class only. So those are some of the considerations there. And institution's obligations, if you get a report, you have to offer supportive measures, which basically that is what we've long called interim measures. So it's just a different name from what we've already done, and then provide an explanation of your formal complaint process. If a complainant then files a formal complaint, you have

obligations to investigate, provide a pretty robust grievance process that we'll talk about, and those are both required unless you are allowed to dismiss which we'll talk about next.

Mackenzie Wilfong (TCC) - Dismissals of formal complaint is a brand new thing within the regulations. There are mandatory dismissals where formal complaints must be dismissed from the Title IX process. And then there are permissive dismissals where the formal complaint may be dismissed. And so I want to start talking about the must be dismissed first. First, the institution must dismiss a formal complaint if what is alleged in the complaint, even if it was proved, would not constitute sexual harassment, as now defined in the regulations. That Section 106.30 of the regulations, there is now a global definition for sexual harassment. And please know it also includes sexual assault as defined by Clery, dating violence, domestic and stalking, as defined by VAWA. So no longer will we see institutions with multiple variants of sexual harassment definitions, there's one definition. And if what a person alleges, even if proved, would not constitute sexual harassment under that specific definition. You have to dismiss the complaint out of the Title IX process. And here's the kicker. It doesn't mean it can't fall into some other process like the Student Code of Conduct. It just means it must be dismissed from the Title IX process. What has been made clear in discussions with the Department of Education so far is if you are -- if you must dismiss it, and the institution chooses not to dismiss it from the Title IX process, that that in and of itself could be a violation. That is brand new territory for us. We have never had this bifurcation of what must be dismissed, what may be dismissed. And we've never seen investigations from OCR regarding you should have dismissed it and you didn't. So that will be a new area of regulatory authority for the Department of Ed. In addition, not only must you dismiss things that wouldn't constitute harassment, even if proved, but also if they did not occur in your institution's programs or activities, then that is further defined in the regulations as locations and then through circumstances where you exercise substantial control. And also in buildings owned or controlled by officially recognized student organization, [inaudible] fraternities and sororities. And so if it doesn't occur in your program or activity, and at the time of filing a formal complaint, if the complainant is not participating or attempting to participate in your program or activity, it must be dismissed. Well, that's brand new territory as well. We have not seen that in the regulations before. In the third area, which -- that really the media has picked up on and written much about is if these actions did not occur against a person in the United States, then it has to be dismissed under the Title IX process. So, for example, if the behavior occurred during study abroad, those must be dismissed from the Title IX process. But again, just because you dismiss it from the Title IX process does not mean that it cannot be taken back up in a student conduct process. And so we will talk a little bit more in the future slides, but what we know is your code of conduct folks and your Title IX folks need to be working very closely when revising both of those policies this summer prior to the August date. Because there are many issues, you probably are going to want to address, but will not be able to address them anymore under the Title IX process and they will need to go under the code of conduct process. Now the formal complaints may be dismissed. This is something where if you want to use these criteria for dismissal, you're going to need to put them in your process. Number one, if the complainant request to withdraw their complaint. Two, if the respondent is no longer enrolled or employed, because these processes apply to employees as well. And finally, when specific circumstances forbid gathering evidence sufficient to reach a determination. And -- So those may be things you would want to consider putting in your process when you look for revisions.

Mike Davis (SEOSU) - All right, I'm going to pick up here in the fifth slide, talking about what we have usually across the field called temporary suspensions or interim suspensions. Most institutions have something like this in their student code of conduct or their sexual misconduct policy that permits the institution to temporarily separate a respondent, someone accused of Title IX misconduct, from their campus for the duration of an investigation or for the duration of a hearing. And one of the things that the new regulations that will go into effect in August discuss is emergency removals, which is on the same topic as temporary suspensions, they just use different language. So we might need to get used to a slight language shift when it comes, at least too in the context of a Title IX process, temporarily removing a respondent from the campus. And it also gives us -- the regulations also give us some very specific and somewhat narrow criteria on which those decisions may be made. So, the threshold to justify an emergency removal whether or not the respondent is a student or employee from the educational program or activity, requires, and this is the exact language from the regulation, that there'd be an individualized safety and risk analysis conducted by the institution that determines that there is an immediate threat to the physical health or safety of any student or other individual, and that this arises from the allegations of sexual harassment. Sexual harassment interpreted broadly to include sexual assault and retaliation. And so, this is somewhat more narrow criteria than we maybe have been used to in our temporary suspension processes. We will want to embed in our institutional policy, at least insofar as Title IX is concerned, probably changing the language to emergency removal, and making sure that we are following that very precise checklist of individualized risk analysis, making sure there's an immediate threat, defining immediate threat. And that we are only implementing this in cases where there is a physical health or safety threat to another student or other participants in that educational program or activity. There was a lot of discussion in the notice and comment process of these regulations hesitancy about, well, why would we limit this to only physical threats? What about health and wellness that goes beyond pure physical threats? But the regulation is considerably narrow in what we may do in terms of removing respondents. We also have to consider the appropriateness. Because of the narrow criteria in terms of removal, we can consider the appropriateness of supportive measures in lieu of an emergency removal. In other words, if we figure that we can't do an emergency removal because the criteria is so narrow, then what can we do in terms of supportive measures to still keep a person safe and protected from any type of threat to either their physical or emotional wellness and well-being. And so we can certainly take into account things that fall short of temporary suspension, moving a person to another residence hall, moving a person out of campus housing, perhaps limiting campus contacts in one form or another. And we can -- we must provide the respondent in any instance of a removal with notice and an immediate opportunity to challenge the emergency removal. And one of the good things, it looks like, that Mackenzie has put on this slide is a resource to the New York University system that has a lot of really good guidance on emergency removals and the criteria for pursuing them.

Mackenzie Wilfong (TCC) - Thank you so much, Mike. One of the things that I think is really interesting about these regulations kind of wholesale is, one, the change in language, right? So we're used to calling things interim suspensions and now we're calling them emergency removals. Now we use terms. Instead of interim measures, we're using supportive measures. And so we're going to have to make all of those changes not only in our policy, but also just in the way that we discuss these issues. And then the interesting other issue is for interim suspensions, we may have that policy in a student handbook or in a student code of conduct that may not have always been included with specificity in our Title IX process. But now we know for Title IX related emergency removals, that process may look different than the

interim suspensions that we do for other types of behaviors. Do we really want to have two separate processes? Because of the narrowness of this one, we may need to. And that is -- I think that is where the SUNY materials are so helpful. But -- One, they're free, it's always helpful. And two, there is this fantastic attorney up at SUNY. His name is Joseph Storch [assumed spelling] and I want to give him all of the props that he deserves because he has got to -- he has a fantastic team working on a number of these documents that are totally free and available to us that goes through step by step. When I read this emergency removals information from SUNY, it talked about the five steps that we need to go through and really analyze them well. And so I would encourage you as you're trying to review these, well, the regulations, right? They set the basis. Sometimes it's really hard to read those regulations to make [inaudible], right? So, that's why we want to provide you with these SUNY materials as well. And looking at pre-hearing evidence review, so I'll just say is a threshold matter. If you're not doing written Title IX investigative reports, you're going to now. We're all going to be doing written Title IX investigative reports unless we resolve these issues using informal process. But if you're going to be investigating a formal complaint, it is going to end up with a written investigative report. And before that report is completed, there are two opportunities where you're going to be sharing evidence now. All of the relevant evidence that your Title IX investigator is using, either be it inculpatory, right, more likely that the person committed this behavior. Or exculpatory, that evidence makes it less likely that the person committed the behavior. But all of that evidence, before the final investigative report is complete, at least three days prior, that those -- that evidence is going to need to be provided to the parties. And so what are they going to do with it, right? They're going to review it and then they're going to submit and have the ability to submit a written response, which the investigator is then going to consider before completing that investigative report. We never -- We may have provided evidence before a hearing, perhaps, in a room where people could come and look at the documentation. But often, we haven't provided evidence before the end of the investigative report is complete. And so you're going to want to think through, one, how are you going to provide that evidence. Are you going to do it electronically? Are you going to do it in person, on paper? And two, how do you plan on incorporating that written response into the investigative report? Are you going to do that in an addendum? And then you get to do that process all over again, but 10 days before a hearing, if a hearing is required or other time of determination, if you're not using a hearing process, where you're going to send the parties and their advisors the investigative report and the underlying documentation as well in electronic or hardcopy. And again, they're going to have the opportunity for review and response. And so before we move forward, there's one other portion of this we get to talk about regarding the standard of evidence. There -- This has also been kind of noteworthy and newsworthy. And what we know about, in the regulations, what's required for the standard of evidence is that you've got to apply the same standard of evidence for formal complaints against students as you provide against employees, including faculty. So, if your faculty handbook for removals or sanctions, for harassment is a burden of proof higher than preponderance of the evidence, then you're not going to be able to use preponderance of the evidence in your Title IX process for students, because those standards of evidence have to be the same for all individuals going through the process and for all formal complaints of sexual harassment. And so if it's already written somewhere, you're going to need to really consider how you're going to modify that particularly recognizing that that modification needs to happen before implementation in August.

Brandee Hancock (OSU A&M) - And to add a little bit to what Mackenzie said about faculty handbooks, obviously, we know faculty are always super receptive to changes to those handbooks, right? So, one option that is being considered, and I don't know that this will work on various campuses, is can we create a carve out within that where the handbook might use clear and convincing evidence for termination or disciplinary action for everything except Title IX? And then there's a carve out that says, Title IX cases would run through the Title IX process rely on the outcome of that, et cetera, at a potentially lower standard of evidence. So that's another option to think about as you're working through it. So next, we're talking about hearings. For good or bad, our system moved towards these live hearings with active cross-examination four or five years ago. So if anybody would like to talk offline about kind of our experience with that, I'd certainly be happy to do that. One of the things the regs now require is that the institution has to provide, they call it, an advisor to both parties in a hearing without fee or charge. The best description I've heard of this advisor is the word parrot. And basically what this individual does is they have to ask questions for their -- whoever they're representing in the hearing. So, in other words, the complainant can turn to their advisor and say, I want you to ask this person this, they then repeat that question. One of the decisions that institutions will need to make is, does the participation by that advisor go any farther than that? Does it only go farther than that if it's an advisor that the individual brings themselves? So in other words, you could allow the advisor to engage to the extent the student could, make an opening or closing, everything the student can do. Those are some decisions to make. Another key takeaway from the regs is that you can't make any inferences based on anybody's refusal to participate and you can't rely on any statement for an individual who's not subject to cross-examination. So, what we've seen is in Title IX reports, often the investigator will summarize their interviews with a witness and then they'll present that in the hearing. With this in the regs, you can no longer do that without having that witness they are subject to cross-examination. So, one question that I've seen is to have the witness there, have them say -- basically say, have you read this statement? Is it what you said? They say yes. And then you let them be subject to cross-examination. So you don't have to rehash everything they said, but you do give people a chance to ask questions. Live hearings can be conducted virtually as long as you can see and hear each other. This is not really new for -- We've been doing Zoom hearing, not -- I think it's Zoom for quite a while now. That way, the parties don't have to physically be in the same room as each other. You do have to have a recording or transcripts that has to be made available to the parties. So you want to give some thought to how you do that. Transcripts are generally going to be the more expensive option. A recording might be better and then making sure that you're complying with any record retention requirements on that. And then one last note on advisors, as you might give some thought to, you'll need to have rules of decorum for that individual. And if you're looking -- Because we did this quite a while ago -- And Mackenzie, if you want to go to the next slide, did I have that one or did someone else? I can't remember.

Mackenzie Wilfong (TCC) - That's you too.

Brandee Hancock (OSU A&M) - OK. Thank you.

Brandee Hancock (OSU A&M) - So, again, on the same note, the advisors. If you're looking for a good starting point, you want to have rules so they know what's expected of them. So that if they get out of line, you can then have them leave the hearing. At the OSU Stillwater website on the Student Code of Conduct site, has a guide that we've been using. It has not been updated for the new regs, but at least gives you a starting point for some things to think about. So also looking at what technology are you planning to use and is it accessible. So those are some things you're going to have to consider on that

side. And then give some thought to, do you want to engage external individuals as either your investigators or your decision makers. And how do you go about training the people who are participating in this process. So you need to decide, is this going to be a single decision maker? Is it going to be a panel? How do you meet the training requirements on that? How do you help them understand the rules that they have to make decisions upon as they're in that like rape shield relevance, et cetera?

Mike Davis (SEOSU) - So, in the student affairs world, I think we're no strangers to continued and continuing training when it comes to sexual assault and sexual violence, especially with the history of the Violence Against Women Act, amendments to Clery and Title IX kind of pervading our world as much as they do. You'll need to go back one slide. There we are, yup. There are training requirements embedded in the new regulations. Some of these training requirements are new. In other words, they were not required by the Dear Colleague letter which, of course, has been withdrawn and is no longer part of our Title IX guidance. And they were not required by the interim guidance, which was really in the form of a Q&A document, about a 14-page document by Department of Ed that many of us have been working under since 2017 when the Dear Colleague letter was withdrawn. And so because these are new training requirements, you're going to want to make sure whether or not your institution currently trains on these things either by chance or by design. And if not, going to have to be trained on them by the time of the implementation date of August 14th. The August 14th is not the trigger date of, OK, we start these trainings. August 14th seems like it is the date by which we must already have been trained on each of these new requirements. And so that accelerates the pace of some of the decision making that needs to take place on each individual campus. The new regulations, specifically list training requirements, but then what they did was they made a blog post that goes into further detail about what Department of Ed expects as part of these training requirements, which is kind of ironic, because one of the criticisms that the current Department of Ed had was this idea of regulating by sub-regulatory guidance or regulation by memo. And that's, of course, what they're doing to us a little bit again. These aren't on the slide, but I'm just going to list off a few of the very precise requirements that exist in terms of training. And this training should be for Title IX coordinators, investigators and decision makers, which might not all be the same person. And in some, at least in terms of the investigator and decision maker, may not any longer be the same person on any campus. And so this includes training on Title IX specifically defined definition of sexual harassment, training on the scope of your school's educational program or activity, in other words, the boundaries. What counts as an education program activity and what does not count and therefore is not protected by Title IX? How to conduct an investigation and grievance process? How to serve impartially as either an investigator or decision maker and not have a bias, including avoiding prejudgment of the facts at issuing the case? How to avoid conflicts of interest that could create bias? And very specifically mentioned in the regs, training on the technology that would be used to sort of substitute for a in-person face-to-face live hearing. In other words, the hearing officers or the hearing panelists or whoever is organizing the hearing and making it happen must, under the new Title IX regulations, have specific training on whatever the technology you implement will be, whether that be Zoom or some other platform. And in theory, the recording technology or the digitization technology for the hearing transcript if you choose to pursue that path. So, among the requirements listed in the regulations, the training must not rely on sex stereotypes. One thing I would keep in mind here is, especially in the case law on Title IX, some Circuit Courts of Appeal have expressed skepticism about training on trauma-informed victim interviewing skills under the theory that perhaps that creates a bias that if we are more lenient on people changing their story as the complainants, why would we not be similarly lenient on people changing their story as a respondent, those types of things.

Just something to flag there that has been fodder in some prior litigation. Must promote impartial investigations and adjudications of formal complaints of sexual harassment. And then, the training materials have to be posted online, they have to be posted on your website, and must be maintained as a document kept by the institution for seven years, the same as other Title IX case folders and files. And so one of the complications that came up both in the discussion in the notice and comment for this new regulation as well as afterward was, well, what do we do as institutions and as Title IX coordinators and people who are involved in this process if our training is provided by a third-party vendor that has copyrighted training materials. And many, many, many of us are trained by either NACUA or ATIXA, or these companies, agencies or affiliates who have copyrighted training materials. And one of the things that Department of Ed sort of ruthlessly put out there in their blog post was, we don't care, get permission to post them. OK. Find a vendor that is willing to allow you to post them regardless of the copyright. That's basically what they're telling you. And so some of these, you know, they're -- the concern of, you know, probably it takes in some of the other training experts is going to be, well now, their materials are going to be posted for all to see. That doesn't mean they're not still protected by copyright. You can't just lift them, copy and paste them. That's still obviously the law. But they are going to be out there for all to see and all to view. And that's the whole purpose of the regulation that if institutions post their training materials publicly, then parents and students and anyone who's interested in the rigor of the training can critique it, can view it, can see whether they believe that it was appropriate training, OK. So that's quite a bit of exposure and something that we'll have to maintain on our websites. It also says -- And I'll say this before I wrap up from this slide, it also says you must post all of your training materials. That word very specifically is used, all of your training materials. Well, what does that mean? Does that mean every single document used in the training? Does that mean -- And there's probably going to have to be a broader conversation about what all means. But, if we're erring on the side of caution, then, yeah, that means the presentation used during the training, the handouts used during the training, the forms and activities and interactive things that were used during the training to the extent that we can reduce that to a document that can be posted to the website. It sounds like the regulations require us now to post those training materials to the website. And you can advance the slide. If you can advance. You're good.

Mackenzie Wilfong (TCC) - There we go.

Mike Davis (SEOSU) - OK. One thing that I wanted to make sure that we covered in this presentation was just to make sure when we are revising our institutional policies on Title IX, which all of us are, I'm sure, neck-deep in doing or have delegated to some unfortunate person who is neck-deep in doing. We need to keep in mind that all of the rules related to Title IX investigations might not necessarily be found in the new regs. It is great to have a one-stop shop for Title IX, or at least to feel like there's a one-stop shop for all the Title IX regs and basically the last 30 pages of the regulations which are actually the meat or the substance of the regulations, not just the comments back and forth. But one thing that I really think that everyone needs to flag and keep in the back of their mind is the Violence Against Women Act amendments to Clery. The regulations for which were published in 2014, several years ago. Those are still in effect. And those are those regulations that required every institution to have an ongoing training program as well as a primary prevention training program. A lot of schools, you know, contracted with third-party vendors like EverFi and other companies to make sure that they had this individual -- very specific training program for students, faculty, incoming students and staff. And, a lot of that still has to do with things like sexual assault, and other actions that could still be Title IX misconduct, like dating

violence, domestic violence and stalking. Sort of what complicates this is there's also forms of stalking and domestic violence which might not be gender-based and therefore isn't Title IX misconduct. But since there is some overlap, please keep in mind that there are training requirements in the amendments to Clery. There are policy requirements, the hearing requirements such as simultaneous notice to the parties. And even though those regulations are specifically about the four crimes of stalking, dating violence, domestic violence and sexual assault, since there is some overlap with Title IX misconduct because much of that is going to be gender-based misconduct, gender-based discrimination or retaliation, then we want to make sure that when you're revising your Title IX policies, you're not just checking them against the Title IX checklist, you're also checking them against a Violence Against Women Act amendments to Clery checklist. One of the resources, it's not linked on the slide here, but one of the resources that I would suggest is the Clery Center, which has a really great website and a lot of free resources. I'll link to it in the comments to this Zoom. But the Clery Center does have some really great information on what institutions need to do to comply with those separate regulations as well.

Mackenzie Wilfong (TCC) - So in wrapping up our discussions with -- I recognize, this is a lot of material. I think one of the pretty significant challenges with implementing these regulations will be how this Title IX and Title VII are different. Nevertheless, we are required to use the -- this process for employment-based sexual harassment as well. And that is -- that's something else, you all. You know, not only do we define sexual harassment differently under Title VII and Title IX. The Title VII still has a new or should have known aspect to it, whereas, these new regulations require actual knowledge. The whole concept of what you must dismiss is nowhere found in Title VII. And for those institutions that rely or have a number of NSF grants, there is a particularly tricky area here that is concerning to me because, unfortunately, it highlights that not all federal agencies are on the same page. Under these regulations, the recipient, that's what they call recipients of federal funds. That's us, right? So we, the colleges and universities, have to keep confidential the identity of any individual who's been reported to be the perpetrator of sex discrimination, right? So you're going to have to keep that information confidential for a while. However, about two years ago, the NSF made changes to their terms and conditions in their grants that require that you notify the NSF through an online portal if there are allegations against a person who is paid on that NSF grant, and normally the PI, regarding issues of sexual harassment in Title IX related issues. Well, that's not keeping it confidential, right? And so it puts these contractual terms at least seemingly right now at odds with the Title IX regulations. I am hopeful that we see some flexibility with the NSF in providing guidance regarding their terms and conditions and how that will work with these Title IX regulations. But all of this highlights a very much more global issue for us. You know, we got to get HR involved. To the extent, the Human Resources has not been involved previously and extensively with the Title IX process because perhaps issues of sexual harassment that involved the respondent, employee, faculty or staff or maybe a student worker as well were dealt with under a HR type process and was unrelated to the Title IX work. We don't have the option of that anymore. And so Human Resources is when it need to be very well aware of what these changes and process look like and ideally, heavily involved as if they don't have a million other things to do really to implement these. And so I'm going to turn it over to Brandee to close this out regarding resources and some closing observations.

Brandee Hancock (OSU A&M) - All right. So resource is really just a summary of things we've already talked about. Joseph Sturge, cannot say enough good things about him. I'm really sorry that you all are stuck with us because he's phenomenal. So check out his stuff. One other thing that's not on here,

Mackenzie and I are in the process of trying to organize some virtual training for July. Because of COVID, we had plans to do it in June, didn't happen and especially with the rules coming as late as they did, that got pushed back. So, making that effort, it will be very, very minimal cost just to cover our materials. So we'll get that out just as soon as we get that finalized. And then, finally, just some closing observations just to rehash, this is going to require a big working group on your campus. You've got to have input from key stakeholders. You've got to work through all of these, look at your faculty handbook if you have one, see what you can get changed over the summer and have a backup plan. If you can't get substantive changes to that, what are you going to do in the interim? Make sure that your Title IX and student conduct processes are reviewed. And then this -- I just can't say this clearly enough, you've got to have a really good Title IX coordinator right now. This is not the time to have someone who doesn't know what they're doing. They have to know the ins and outs of this and be able to implement these policies. And then try to figure out how you're going to train in the summer. And not just in a normal summer, in a COVID summer, which adds additional complications as we all very well know. So with that, we'll wrap it up. Sorry, we were a little long-winded today. But we're -- there's a lot to cover and we're happy to answer any questions that you have.

William Wayne (OU) - Questions?

Douglas Hallenbeck (OSU) - I have a few. In terms of the advisors for the individuals, I think Brandee mentioned parroting the questions, is the idea is that the other advisor would also parrot the answers as well.

Brandee Hancock (OSU A&M) The other advisor would parrot the questions for that party. So each party would answer the respective questions. It's just the advisors asking the questions.

Douglas Hallenbeck (OSU) - OK. And is there any thought or idea of added personal liability for the advisors based on the result of the hearing?

Brandee Hancock (OSU A&M) - That is an excellent question. We would say, or I would say, it's within the scope of their employment particularly if they're internal to your institution. So, no, I do not see it increasing their liability in any way. But you'd also want to make very clear to that advisor what their role is, and they don't step beyond that because that word advisor gives the connotation that they're going to advise the student through this process. That's not what they're doing and that needs to be made very, very clear.

Mackenzie Wilfong (TCC) - So a couple of additional observations about that. Other institutions who haven't fully gotten onboard of active advisor participation in all areas of the hearing, which many institutions have not. I was there during the transition period for that particular issue. And other institutions haven't really jumped onboard with that. And so, what many institutions are looking at is an advisor who really just does a cross-examination, doesn't do an opening, doesn't do a closing, doesn't really involve themselves in other ways in the hearing. And is -- And that is still allowed under these regulations, that it's cross-examination only. And so depending on what your hearings look like now, that is an option as well.

Mike Davis (SEOSU) - Yeah. And I'll just add, your hearing officer does still have the ability to screen questions, and you might want to consider a process for screening a pause to consider the question before the person being asked the question must respond. The only thing I would caution is, if you do

bounce a question, say -- that say that that's an impermissible question, the new regs require that the hearing officer articulate the rationale for bouncing that question with specificity. And so, one of the things that will need to be included in the training is what are the permissible reasons to rule a question irrelevant, those types of things, and how would you articulate that decision.

Mackenzie Wilfong (TCC) - And having worked as a hearing officer in other states before, there are some -- there are ways that hearing officers can do that, including saying, I'm going to -- if I let the question continue, right, there's an assumption that it's relevant without objection. If I say hold on one second, right, that means the parties don't answer the question. Let me think about it. And then I'm going to articulate what -- why we may not proceed with that question and make a relevancy determination for other determination. And that should get around the issue of objections. Because what you really -- In my opinion, what you really don't want to do is have this be a quasi-judicial process where you invite objections in sitting through, I don't know at this point, hundreds of these types of hearings. Adding that additional layer of the adversarial process and -- I mean, coming from an attorney, that adversarial process as an additional layer, that isn't helpful to anybody as far as I can tell. And so, I think trying as you can to create a process that doesn't allow for objections is -- if you can, is worth it.

Amy Ayres (OkCU) - I have a quick question. In reading the guidelines, when it indicates that we will require live hearings. Do you all understand that to mean that we do or do not still have the opportunity to come to an informal agreement -- informal process that has an agreement from both parties as an outcome, or is a live hearing required regardless?

Mike Davis (SEOSU) - You absolutely still have the informal resolution process. And probably if the predictions of some are true, those are going to be massively expanded at a lot of universities to provide a off-ramp, allowing the parties to avoid the stress and the anxiety of a live hearing. And, certainly something that we're exploring expanding at Southeastern.

Mackenzie Wilfong (TCC) - In addition, I would highly encourage institutions. And I have to say, this is a change for me in my thought process. Because as you recall, under the 2011 Dear Colleague letter, right, informal processes were very frowned upon. And anyone that went through a compliance review or an investigation during the Dear Colleague letter would know. If you had an informal process, those were scrutinized harshly. And now we're seeing an about face in these regulations regarding the allowance of the informal process which we recognize will pull less scrutiny. And also doesn't require a full investigative report or a live hearing either. And so, I would encourage institutions to really look at that informal process.

Brandee Hancock (OSU A&M) - The one thing I would add -- I'm sorry, Mike. The one thing I was going to add to that is making sure that your -- the people who are engaging in that process for -- on your institution site are trained to know what they're doing. Make sure it's presented fairly, that you're not resulting in victim blaming, appearing bias, anything like that. I think that's one of the big risks with those informal resolutions.

Mackenzie Wilfong (TCC) - Absolutely.

Mike Davis (SEOSU) - Only thing to add is consent is the only key. The only way you can pursue an informal process is with the consent of both parties and the institution -- institutional consent for that to

move forward. And so if you have all three of those parties good with the process, like a mediation or an agreement-based resolution, as long as you've got consent, you're good to go on informal resolutions.

Paul Goertemiller (UCO) - It is my understanding that incidences involving employees have to go the formal process, is that correct?

Mike Davis (SEOSU) - Yes, according to the regulations, if the employees are responding.

Paul Goertemiller (UCO) - OK, right, right.

Mackenzie Wilfong (TCC) - And the complainant is a student.

William Wayne (OU) - Terri, you had a question?

Terri Pearson (WOSC) - Yes. I was going to ask, Western Oklahoma State College. Will this recording be available to us to use kind of as a springboard for training on our campus and also decision making about the training that we will purchase and, you know, how we'll invest for Title IX training?

Debbie Blanke (OSRHE) - We have not talked to our presenters about making this recording available outside of this forum today. So, I guess we need to talk to them. I'm not sure if they're agreeable to that. And I would also caution it, you know, it would be a resource, it would not be, you know, everything you need to make all your decisions. But I'll defer to my presenters to see their opinion on making this recording available.

Terri Pearson (WOSC) - Thank you.

Douglas Hallenbeck (OSU) - I have a question before they answer that. If we did that, will it then need to go on to all our websites as our formal training pieces?

MacKenzie Wilfong (TCC) - It sure might, yeah. And, you know, we kept that in mind, whenever we created the PowerPoint training materials, recognizing that, you know, you don't see a copyright on there. We're not copywriting them. And that was purposeful, because we wanted to ensure that if that was used or if you wanted to use that PowerPoint, you know, and you can send it out as a PowerPoint. It doesn't need to be a PDF because it helps start the basis of some training materials for everyone. We want to make sure that we're a resource, because we're all -- we recognize the limitations of our monetary resources.

Debbie Blanke (OSRHE) - So would all of the presenters be willing to send me an e-mail saying that we have permission to distribute it? And then council, you need to understand that we can't just pop it out there. We also have to now go back and caption it, make it accessible, I mean, we've got a lot of other things to do before we can make that recording available. So it might take us a little bit of time. But I would need to make sure I have permission from our presenters to do that.

William Wayne (**OU)** - If anyone wants to add a disclaimer, do so now [laughs].

Brandee Hancock (OSU A&M) – Don't shoot the messenger is the disclaimer I would add.

William Wayne (OU) - Perfect. Other questions?

Douglas Hallenbeck (OSU) - I do have one other question, and the answer may be too long for today. But, I'm concerned about the differentiation between Title IX cases and Student Code of Conduct cases.

Many times the institutions are -- We get blamed for kind of skirting the spirit of the rules. And so, how would we make that determination within the code to make it different than what's covered under Title IX in this guidance?

Brandee Hancock (OSU A&M) - Excellent question that we are still working through. Our working group is trying to establish that. One of the things we've talked about is letting that decision as to which way it flows, if you will, be made by whoever's taking in the complaint. So in other words, you know, the complainant doesn't get to say, this is Title IX and do this. Let student conduct, if it's on the student side, decide which process are we going through at the forefront of that. That may be a little trickier as -- because it's going to require a bit more fact gathering potentially than we have in the past to decide which way might it go. So, rather than dismiss the complaint from Title IX, they would just direct it to the right process instead, so you don't have this dismissal and then reinitiation. That's kind of what we're thinking through. How that actually looks in practice, we're still trying to figure out.