



Title IX Regulations: Decision Makers & Advisors

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Discussion Topics:

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

HEARING PROCEDURES

Roles Within School's Title IX Department

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

Hearings

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

Hearings

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

Advisors & Cross-Examinations

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

Advisors & Cross-Examinations

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

Limitations on Advisor's Role

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

MOCK HEARING SCENARIOS / EVIDENTIARY ISSUES

Starting the Hearing

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

Some Issues to Consider

- General process
- Opportunity to be heard
- Cross-examination of “statements”
- Relevance
- Leading questions
- Bias
- Sexual history & predisposition
- Mistaken identity
- Intoxication
- Badgering the witness / abusive hearing conduct

Relevance – how defined?

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

Relevance – any specifics?

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

Relevance – making the call

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

Cross-Examination

- To be admitted, any “statement” must be subject to cross-examination.
- “Statement” is broad.
 - It “has its ordinary meaning.”
 - It “would not include evidence (such as videos) that do not constitute a person’s intent to make factual assertions, or to the extent that such evidence does not contain a person’s statements.”
 - Includes “police reports, SANE reports, medical reports, and other documents and records... to the extent that they contain the statements of a party or witness.”
- Who makes the statement is important.
 - Rule is limited to cross-examination.

Hearsay – what about that?

- “the proposed rules do not speak to admissibility of hearsay”
- However, § 106.45(b)(6)(i) “states that the decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination” Cmts. p. 811 & fn. 1017.
- Think:
 - Is an affirmative statement of fact being left unchallenged?
 - Or is the original speaker the complainant or respondent?

Refusal to Answer Questions

- § 106.45(b)(6)(i)
 - “If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on **any statement** of that party or witness in reaching a determination regarding responsibility;”
 - “provided, however, that the decision-maker(s) **cannot draw an inference** about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.”

FINAL DETERMINATIONS & APPEALS

What happens after the final determination is made?

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

Evidentiary Standard

The new Rule provides the choices between 2 standards:

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

What must be included?

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

What must be included?

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

What must be included?

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

The written determination must be provided to the parties
simultaneously.

When does the written determination become final?

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

Appeal Process

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

Basis for Appeals

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

Appeal Procedure (mandatory)

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

Record Retention

The following must be retained on file for seven years:

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