



## Title IX Training Webinar

June 24, 2020

### New Title IX Regulations: Higher Education Decision Makers

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#### Decision Maker Roles and Responsibilities

*DOE has concluded: Cross-examination in Title IX proceedings is a matter of (1) due process for public institutions and (2) fundamental fairness for private institutions and is thus required.*

DOE expressed concern that “sex bias is a unique risk in the context of sexual harassment”...

#### Live Hearing

- *For higher education institutions, this means a live hearing with cross-examination before discipline can be imposed*

#### Who Should the Decision Maker Be?

- Cannot be the same as the Title IX Coordinator or Investigator for that case
- Cannot be the same as the Appeal Decision Maker
- May be one person or a multi-member panel

#### What is the Decision Maker’s Role?

- Act as a neutral
- Objectively evaluate all relevant evidence, both inculpatory and exculpatory
- Permit parties’ advisors to conduct cross-examination at the live hearing, while making decisions on the relevancy of questions
- Reach a determination regarding responsibility without giving deference to the investigative report

## Live Hearing Requirements

- Each party is permitted to have an “advisor,” who could be attorney or other representative
- Each party’s advisor is permitted to ask the other party and any witnesses all relevant questions, challenge credibility, and conduct cross-examination
- If a party does not have an advisor, the IHE **must provide one free of charge to conduct cross-examination on behalf of that party**
- The IHE must provide technology; if requested the entire live hearing can take place with parties in separate rooms
- The IHE must create an audio or video recording, or written transcript, of the live hearing and make it available to the parties
- The IHE must train the decision-maker on how to use the live hearing technology for a remote hearing, and make a recording
- Participants need to be able to see and hear each other answering cross-examination questions in real time
- Remote hearing must only be accessible to participants

## Hearing Format

- Burden of evidence gathering is on the IHE
- No “subpoena power” to make witnesses appear
- IHE may adopt “rules of decorum” to keep things civil - may be able to appoint another advisor
- Cross-examination does not have to be linear or sequential

## Cross-Examination Procedure

- Each party’s advisor will conduct the cross-examination
- Must be direct and live, cannot require pre-submitted written questions
- Decide “on the spot” if the questions are relevant before the party/witness answers and:
  - 1) Allow the question and response if relevant; or
  - 2) Rule the question irrelevant, direct the party/witness not to answer, and explain why the question is irrelevant to the asking party

## Relevance

- Evidentiary definition: Evidence having any tendency to make the existence of any fact of consequence to the determination at issue more or less probable than it would be without the evidence

- Determining relevance is different than determining how much weight to give the evidence
  - Irrelevant evidence: Excluded
  - Relevant, but not much weight: Included for consideration

### Relevance: Rape Shield Protections

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

### Relevance: Privileged Information

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

### Exclusionary Rule

- Keep in mind the new "exclusionary rule":
- ***If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility***
- ***DOE: The reason for the party or witnesses' refusal to appear or answer a question does not matter.***
- What is a "statement"?
  - Statements at hearing
  - Written statements or positions
  - Statements to the investigator(s) or others
  - Includes statements in "police reports, SANE reports, medical records, etc."
- What is not a "statement"?
  - Evidence provided by the witness or party to the investigator
  - Other evidence that corroborates a party's or witness's statement
- ***However, the decision-maker(s) also 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.***

- If a party or witness is not at the hearing for cross-examination:
  - **Do not** consider that individual's "statements" as evidence
  - **Do** consider other evidence supporting or not supporting that individual's "statements"
  - **Do not** decide the respondent is or is not responsible because a party or witness did not show; look at the evidence

## **Issuing the Decision**

### **Determining Responsibility**

- Following live hearing, the decision maker must determine responsibility
  - Did a violation of the policy occur?
  - Independent assessment of the evidence
  - No deference to investigation report

### **Credibility Assessments**

- DOE: Do not rely on "demeanor" alone – can be inaccurate, especially in traumatic situations
- Take trauma into account
- Other factors for credibility:
  - Consistency;
  - Plausibility; and
  - Reliability

### **Evidence Standard**

- Schools may utilize either a "preponderance of the evidence" OR "clear and convincing" evidence standard, HOWEVER
- School must apply this standard to:
  - *For formal complaints against students as for formal complaints against employees, including faculty, and*
  - *Apply the same standard of evidence to all formal complaints of sexual harassment*
- Major practical issue before 8/14/20: Revision to policies, collective bargaining agreements, contracts, and faculty handbooks/manuals
- **Preponderance of the Evidence**: More likely than not
  - What is more plausible?
  - What corroborating evidence is supportive?

- Sometimes – who do you believe more and why?
- Clear and Convincing: Highly probable; highly and more substantially likely to be true
- *Neither are as high as the standard of evidence in criminal cases – “beyond a reasonable doubt”*

### **Written Decision**

- Identification of Allegations
- Procedural Steps
- Findings of Fact
- Application of Facts to Code of Conduct
- Statement of Results and Rationale for Each Allegation
- Sanctions and Remedies
- Appeal Procedures
  
- Ensure Title IX Coordinator receives a copy of decision and any other documents involved in process for required 7-year period
- Decision must be provided to parties simultaneously
- Determination is not final until:
  - A written determination is issued following an appeal; or
  - If no appeal is taken, the date the appeal deadline expires

### **Sanctions**

- Range of possible sanctions must be described in policy. Examples:
  - Written Warning
  - Suspension
  - Expulsion
  - Demotion
  - Termination
  - Focus not just on discipline, but also on restorative remedies to prevent recurrence

### **Remedies**

- Title IX Coordinator responsible for implementing remedies
- May be the same or similar to interim supportive measures
- Must be designed to restore or preserve equal access to the IHE’s education programs or activities
- Need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent

- Evaluated by DOE under a “deliberate indifference” standard
- Examples:
  - Counseling or Training
  - Accommodations to class schedules or school work
  - Restrictions on contact between the parties
  - Increased monitoring

### Appeals

- **Who is your Appeal Decision-Maker?**
- Cannot be the Title IX Coordinator, Investigator(s), or Decision-Maker(s)
- No conflict of interest or bias
- Can be individual or multi-member panel

### Mandatory Appeals

- 1) Procedural irregularity that affected the outcome of the matter
- 2) New evidence not reasonably available at the time of the determination regarding responsibility or dismissal was made
  - Evidence could affect outcome
- 3) Title IX Coordinator, Investigator, or Decision Maker had conflict of interest or bias for or against either party that affected the outcome

### Permissive Appeals

- On any other basis, as long as the opportunity is offered to both parties equally
- Examples:
  - Whether there was substantial evidence for the decision;
  - Whether the sanction is proportional to the policy violation; or
  - *De novo* appeal

### Impartiality

- Disclose and recognize conflicts of interest;
  - Familiarity with parties?
  - Stake in outcome?
- Divorce yourself from stereotypes or generalizations about groups of people- e.g., “victim-blaming” or “believe all women”
- DOE: The Decision-Maker must endeavor not to “develop a personal relationship” with one party over another, including based on whether parties are remote for live hearing

### **Implicit/Unconscious Bias**

- Undergo training or obtain resources on implicit or unconscious bias;
- Recognizing and acknowledging biases
  - Potential protected class bias
  - Campus groups bias and assumptions – athletes, certain employment positions, etc.
- Gather input from diverse sources and viewpoints, to the extent possible
- Avoid focusing on early “gut reactions” and weigh all possible outcomes
- Obtain outside input and feedback mechanisms

### **Confidentiality**

- IHEs must keep confidential the identity of any individual who has made a report or complaint, any respondent, and any witness confidential except as:
  - May be permitted under FERPA;
  - as required by law, or
  - to carry out the investigation and hearing procedures
- *Keep identities and information confidential to the hearing and resolution process – only talk to school officials with a “need to know”*