

TITLE IX HEARINGS AND APPEALS FOR DECISION-MAKERS

August 10, 2022



HIGHER
EDUCATION

THIS SESSION'S TOPICS:

- Hearing Basics
- Standard of Evidence
- Relevance
- Weight and Credibility
- Consent
- Cross-Examination and Relevance Determinations
- Prior Bad Acts Evidence
- Hearing Format
- Written Determinations
- Appeals

HEARING BASICS

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- All cases that are being resolved via a formal investigation/adjudication require a live hearing in which the parties can see and hear each other, however, parties need not be in the same room with each other.
- Audio or audiovisual recordings or transcripts must be created of all live hearings and made available to the parties for inspection and review.
- The following people should be present at the hearing: the Title IX investigator, the Title IX Coordinator or representative, the hearing coordinator, the hearing chair and panel, the parties, their advisors, and their support persons.

HEARING BASICS

- The Title IX Coordinator cannot be the decision-maker, but the decision-maker can be a single person or a panel.
- All parties must have a process advisor for cross-examination in the hearing. If they do not provide one of their choice, the institution must provide one to them, free of charge.

DECISION-MAKER'S ROLE

The decision-maker's role is to:

- Objectively evaluate all relevant evidence,
- Determine whether a question is relevant before a party or witness answers,
- Apply the standard of evidence to determine whether the respondent engaged in sexual harassment in violation of institution policy, and
- Issue a written determination.

STANDARD OF EVIDENCE

PRESUMPTION OF NOT RESPONSIBLE

Respondent is **presumed not responsible** until the decision-maker has made a determination following a hearing on the evidence.

The institution, rather than a party, bears the burden to prove that respondent committed the policy violation.

STANDARD OF EVIDENCE

A respondent is not responsible unless there is a **preponderance of evidence** that respondent committed the alleged policy violation. In other words, the evidence must show that it is **more likely than not**, or more than 50 percent in favor, that the respondent engaged in sexual harassment.

STANDARD OF EVIDENCE

Many sexual harassment allegations have multiple elements and for a decision-maker to find a policy violation, each of those elements must be proven by a preponderance of the evidence.

Ex. **Stalking** is a:

- 1) Course of conduct
- 2) Directed at a specific person
- 3) That would cause a reasonable person to either:
 - a) Fear for their safety or the safety of others; or
 - b) Suffer substantial emotional distress.

STANDARD OF EVIDENCE

To find a respondent has engaged in stalking, the decision-maker must find a preponderance of evidence supporting elements 1, 2, and either 3a or 3b. If there is a preponderance of evidence as to 1 and 2, but not 3, the decision-maker cannot find that respondent violated the policy as to stalking.

RELEVANCE

WHAT IS RELEVANCE?

Relevance is the sole admissibility criterion for evidence set forth in the Title IX regulations. The regulations do not define “relevant”, so the ordinary meaning of the word should be understood and applied.

Questions and Answers Regarding the Department’s Final Title IX Rule, U.S. DEP’T OF EDUC. OFF. OF C.R. 1, 5 (Sept. 4, 2020), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-20200904.pdf>.

RELEVANT EVIDENCE

Federal Rule of Evidence 401: Relevant evidence “has a tendency to make a fact more or less probable than it would be without the evidence” and “is of consequence in determining the action.”

Relevant evidence is evidence or information that makes something more or less likely to be true.

Evidence may be relevant to:

- An allegation; and/or
- A credibility determination

RELEVANT EVIDENCE

Ex. The interview of a person who saw the parties immediately before and after the incident, text messages or emails exchanged between the parties about what happened, etc.

EXCULPATORY AND INCULPATORY EVIDENCE

Relevant evidence includes both **exculpatory** (evidence that proves respondent is not responsible) and **inculpatory** (evidence that proves respondent is responsible) and both types of evidence should be considered in the determination.

RELEVANT EVIDENCE

The investigation report should include a summary of all relevant evidence.

However, the Title IX regulations do not deem the investigation report or the parties' responses to it to be relevant evidence and the decision-maker has an independent obligation to evaluate the relevance of available evidence.

IRRELEVANT EVIDENCE

Irrelevant evidence is **inadmissible** and includes:

- A party's medical, psychiatric, or psychological treatment records without the party's prior written consent;
- Information protected by a legal privilege unless specifically waived by the party to whom it attaches:
 - Attorney/client
 - Spousal
 - Priest/penitent
 - Doctor/patient

IRRELEVANT EVIDENCE

- Evidence of a complainant's sexual predisposition or prior sexual behavior, **UNLESS**:
 - The questions and/or evidence are **offered to prove that someone other than respondent committed the conduct alleged** by complainant; or
 - The questions and/or evidence **concern specific incidents of the complainant's prior sexual behavior with respect to the respondent** and are **offered to prove complainant consented** to the conduct

IRRELEVANT EVIDENCE

- Repeated cross-examination questions; and
- Evidence that is unduly repetitious (e.g., four witnesses with the same information)

Decision-makers should typically disregard character evidence and impact statements (the latter being important to sanctioning, but not the underlying determination).

WEIGHT AND CREDIBILITY

WEIGHT AND CREDIBILITY

The final rule “does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties.”

WEIGHING EVIDENCE

- Weighing evidence means assessing the accuracy, impact, and importance of the evidence in the Record.
- You as the decision-maker determine how much weight or importance to give particular evidence. What weight you give depends on how credible the evidence is.
- A decision-maker may give a piece of evidence including a statement by a party or witness no weight, little weight, or a lot of weight.

WHAT IS CREDIBILITY?

- Not defined by regulations.
- Credibility is the quality that makes someone or something (a witness or some evidence) **worthy of belief**. – Black's Law Dictionary (11th ed. 2019)
- Credibility is determined by logic and comparisons to evidence in the Record, **not based on a hunch or a feeling**.
- Credibility cannot be based on a person's status as a complainant, respondent, or witness.

WHAT IS CREDIBILITY?

In making weight and credibility determinations, factors the decision-maker might consider include whether:

- The evidence is corroborated,
- There is a reason that the source of the evidence may or may not be reliable, and/or
- The evidence is logical given the other established facts.

Corroborating evidence is the strongest indicator of credibility.

WHAT IS CREDIBILITY?

“A [Claimant]'s account must be sufficiently detailed . . . so as to be plausible, and lack of corroborative evidence where such evidence logically should exist would undermine the allegation. By the same token, a general denial by the alleged harasser will carry little weight when it is contradicted by other evidence.”

--Appendix B: EEOC Guidance

WHAT IS CREDIBILITY?

Credibility issues should be assessed when:

- The parties disagree on the materially relevant facts of the case and there is no external evidence that supports one of the parties' version of events over the others;
- A person makes statements that are self-inconsistent;
- A person makes statements that are inconsistent with the Record;
- A person makes statements that are implausible or incoherent in light of the Record;
- There is existence of evidence of a motive by a person to lie; and/or
- A person engages in personal attacks or other "defenses" that are not supported by the record.

WHAT IS CREDIBILITY?

Ex. A respondent asserts that there was consensual sexual contact; however, multiple witnesses who testified to seeing the parties shortly before the alleged incident claimed that complainant was intoxicated to the point that they needed help standing up. *Is this credible?*

Ex. Respondent's story is credible because it was confirmed by two of the three eyewitnesses and the text messages the parties exchanged following the incident vs. Respondent's story is credible because he seemed more convincing than Complainant. *Is this credible?*

HEARSAY

Hearsay is a statement provided by someone who does not testify in the hearing.

Hearsay is not excluded solely because it is hearsay but the decision-maker should assess it for credibility.

ABSENCE OR REFUSAL TO ANSWER

The decision-maker may not:

- Draw an inference regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer questions, but a person's absence may make it more difficult to assess their credibility.
- Render a determination of responsibility against the respondent, when such determination depends on complainant or witness credibility, without first providing the respondent an opportunity at a live hearing to ask the complainant and adverse witnesses relevant questions.

CONSENT

CONSENT

- Not defined by regulations, but the definition here is from the USHE Model Policy. Your institution's may differ.
- Hearing panels must analyze the presence or absence of consent in any case where consent is an element of the alleged policy violation.
- The hearing panel may need to ask questions of parties and witnesses that will help them evaluate the presence or absence of consent (such as whether either or both of the parties were incapacitated or under the influence of alcohol or other drugs; whether consent was coerced or obtained through force, etc.). It is important to remember to be trauma-informed when questioning the parties and witnesses.

CONSENT

- Under the USHE model policy, “consent to engage in a sexual encounter must be given by all participating parties; must be clear, knowing, and voluntary; and may be given only by someone who is 18 years of age or older and is not mentally and/or physically incapacitated. Consent is active, not passive.”
- Silence, in and of itself, may not be interpreted as consent.
- Consent cannot be assumed based on silence, the absence of “no” or “stop”, the existence of a prior or current relationship, or prior sexual activity. Consent can be indicated verbally and non-verbally (with a head nod, thumbs up, pulling someone closer, nodding yes, making direct eye-contact, actively touching someone, initiating sexual activity, etc.).

CONSENT

- There is no consent in the presence of coercion, incapacitation, force, or where the sexual activity violates state law relating to the age of consent.

INCAPACITATION

An individual who is **incapacitated** cannot give consent to engage in a sexual encounter. Incapacitation is defined as **the physical and/or mental inability to make informed, rational judgments**. Factors that could be indications of incapacitation include but are not limited to mental or physical disability; lack of sleep; alcohol; illegal, date-rape, or prescription drug use; unconsciousness; blackout; or involuntary physical restraint. Being intoxicated by drugs or alcohol does not diminish one's responsibility to obtain consent. The factors to be considered when determining whether consent was given include whether the accused knew, or whether a reasonable person should have known, that the complainant was incapacitated.

CROSS-EXAMINATION AND RELEVANCE DETERMINATIONS

CROSS-EXAMINATION

- All hearings must allow for cross-examination that is direct, oral, and made in real time.
- Cross-examination of the opposing party and witnesses is conducted on behalf of each party by the process advisor and the process advisor must be allowed to ask all relevant questions and follow-up questions, including those challenging credibility.
- Parties must never personally question each other.
- Only relevant cross-examination and other questions may be asked.

CROSS-EXAMINATION

The decision-maker or hearing officer shall exclude irrelevant questions directed at a party or witness.

Before a party or witness answers a cross-examination or other question, the hearing officer or decision-maker must:

- **Determine** whether the question is relevant, and
- **Explain any decision to exclude** a question as not relevant on the record.

QUESTIONING BY THE DECISION-MAKER

During the examination portion of the hearing, ask questions of the parties and witnesses to determine:

- Who engaged the conduct?
- What was the conduct?
- When did it happen?
- Where did it happen?
- How did it happen?

QUESTIONING BY THE DECISION-MAKER

The decision-maker may use questions to:

- Learn the facts
- Establish a timeline
- Consider:
 - What do I need to know, e.g., what are the elements of the alleged misconduct?
 - Why do I need to know it?

QUESTIONING BY THE DECISION-MAKER

- Does the question elicit information relevant to whether a policy violation occurred?
- What is the best way to ask the question?
- Who is the best person to get this information from?
The investigator? A party? A witness?

PRIOR BAD ACTS EVIDENCE

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Some cases may involve evidence of a prior complaint or evidence of similar behavior against the respondent. Not only are institutions allowed to consider such “prior bad acts” evidence, but they also must not adopt a rule that prohibits the consideration of such evidence so long as it is relevant.

85 Fed. Reg. 30,026, at 30,248 (May 19, 2020) (explaining that institutions “may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence”).

HEARING FORMAT

HEARING FORMAT

A hearing could be organized as follows:

- The decision-maker resolves various procedural matters (such as confirming receipt of the required investigation report, introducing those who are present at the hearing, outlining expectations for the hearing, etc.)
- The Title IX Coordinator/investigator gives a summary of their investigation and the recommendation in the written determination regarding responsibility

HEARING FORMAT

- Complainant gives an opening statement
- Respondent gives opening statement
- Complainant's presentation of evidence
 - Respondent's advisor cross-examines complainant
- Complainant calls and questions witnesses
 - Respondent's advisor cross-examines complainant's witnesses
- Respondent presentation of evidence
 - Complainant's advisor cross-examines respondent
- Respondent calls witnesses
 - Complainant's advisor cross-examines respondent's witnesses

HEARING FORMAT

- Complainant gives a closing statement
- Respondent gives a closing statement
- The decision-maker deliberates outside of the presence of the parties, makes a determination regarding responsibility, and prepares a written determination within the required timeframe.

WRITTEN DETERMINATION

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- The USHE Model Policy requires the decision-maker to issue a written determination to the parties, the Title IX Coordinator, and the relevant administrator within 30 days of the hearing.
- If there is a finding that respondent violated the policy, the written determination must be issued simultaneously with the sanction.

WRITTEN DETERMINATION

- Must include:
 - Identification of the allegations potentially constituting sexual harassment;
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination including any notifications to the parties, interviews, site visits, methods used to gather other evidence, and hearings held;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of institution policy to the facts;

WRITTEN DETERMINATION

- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, and disciplinary sanctions the institution imposes on the respondent and whether the institution will provide remedies to the complainant; and
- The institution's procedures for the parties to appeal.

34 C.F.R. § 106.45(b)(7)

The determination regarding responsibility and sanctions becomes final either on the date that an appeal decision is provided if an appeal is filed, or if an appeal is not filed, on the date on which an appeal would no longer be timely.

APPEALS

APPEALS ON WRITTEN DETERMINATION

The regulations require an institution to allow either party to appeal a written determination based on:

- A procedural irregularity that affected the outcome of the hearing;
- New evidence that was not reasonably available at the time of the decision or dismissal; and/or
- The Title IX Coordinator, the investigators, or the hearing officer had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome.

An institution may, but is not required to, offer an appeal equally to both parties on additional bases.

APPEALS ON SANCTION

Any party may simultaneously appeal the decision regarding sanctions for any of the following reasons:

- The decision-maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome, or
- The sanction is clearly unreasonable in light of the known circumstances.

ALL APPEALS

For all appeals an institution must:

- Notify the other party in writing when an appeal is filed and 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;
- Ensure that the decision-maker(s) for the appeal comply with the regulations;

ALL APPEALS

- 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.

The appeal officer's decision is final.

34 C.F.R. § 106.45(b)(8)(iii).



QUESTIONS
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