



Sexual Misconduct Hearings

Title IX In Focus

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Bricker 
Graydon

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Disclaimers

We can't help ourselves. We're Lawyers.

- We are not giving you legal advice.
- Consult with legal counsel regarding specific situations.
- You will receive slides for today's presentation after we've concluded.

And another one...

Specific to the Title IX In Focus Webinar Series

- The 2020 Title IX regulations require training on several specific subjects
- While the Title IX In Focus webinar series will discuss *some* of the required subject matter, none of these one-hour webinars will cover *all* of the material required for Title IX training compliance
- Work with your TIXC to make sure that you are trained in accordance with Title IX, Clery, and any applicable state law

Can We Post These Materials?

YES – Post away!

Institutions are required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website.



- Compliance Overview
- IX Things to Consider for Your Title IX Hearings
 - Setting Expectations
 - Prehearing Conferences or Meetings
 - Single Decision-Maker versus Panel
 - Gaps in Evidence
 - Investigators at the Hearing
 - The Power of Pausing
 - Relevance Determinations
 - Asking Questions
 - Evaluating Credibility

Compliance Overview (1 of 3)

2020 Title IX Regulations (34 C.F.R. 106.45(b)(6))

- Must provide a live cross-examination hearing
- Parties must have an advisor, and the institution must provide an advisor for a party if the party does not have one
- Only Advisors may ask relevant cross-examination questions—no party-on-party questioning
- Hearings may be virtual, but must be recorded or transcribed
- Decision-makers must make live relevancy determinations after each question asked by advisors

Compliance Overview (2 of 3)

- Decision-maker (not Title IX Coordinator or investigator) must issue a written determination regarding responsibility
- Must include
 - Allegations
 - Procedural steps taken from receipt of formal complaint
 - Findings of fact
 - Conclusions

(Continued next slide)

Compliance Overview (3 of 3)

- Must include (cont.)
 - Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will be provided to complainant
 - Procedures and bases for appeal by both parties
- Provide written determination to parties simultaneously

Setting Expectations

- From the beginning
- Allow parties to make informed choices about how to proceed
- Explain the who, what, where, when, and why of your hearing process during intake
 - Flow charts
 - Contrast with a courtroom process
 - Discuss options for participation
- Explain the potential outcome – sanctions by the University
- Acknowledge limitations of the process (no jail time, still may be an ongoing need for mental health support, etc.)

Prehearing Conferences/Meetings

- We are big fans
- Can have one with all parties, or separate
- Gives parties and their advisors the chance to interact with the decision-maker before the actual Hearing
 - Provide an opportunity to answer procedural questions
 - Preview rules for the Hearing about the use of technology, the order of questioning, etc.
- Use a script for consistency
- Consider recording the same way you would for a Hearing

Prehearing Conferences/Meetings (cont.)

- Cons:
 - Additional time and potential expense
- Pros:
 - Helps with setting expectations just before the Hearing
 - Provides an opportunity to address evidentiary issues before the actual Hearing
 - Jurisdiction
 - Relevance issues
 - New evidence
 - Allows for rapport-building prior to the Hearing
 - Hopefully makes the Hearing process less intimidating

Single Decisionmaker versus Panel

- Consider how decisions are made for other types of conduct
 - What's your institutional ethic of care?
 - What's the composition of other panels – and does it make sense to be consistent for Title IX cases?
- Consider the practical reality of scheduling with multiple people
- Remember the training requirements for decision-makers
- External or Internal (i.e., how much is this going to cost?)
- Who will make relevance determinations? Write the decision?

- What does your Policy say about parties and witnesses who don't appear?
 - May be influenced by state law, court decisions, etc.
- *VRLC v. Cardona* & revised guidance from ED
- Cannot draw inferences based solely on absence:
 - “If a party or witness does not submit to cross-examination at the live hearing...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.” 34 C.F.R. 106.45(b)(6)(i) [emphasis added].

Gaps in Evidence (cont.)

- Acknowledge the things that are missing in the decision
- How do those gaps impact your credibility analysis?
 - Missing Complainant example
 - Missing Respondent example
 - Missing Witness example

Investigators at the Hearing

- Not required by the 2020 Title IX Regulations...
- But might be required by your Policy
- If so – why?
 - Presentation of the case?
 - Submission to cross-examination?
- Pros
 - Transparency
- Cons
 - Additional witness at the Hearing
 - Danger of offering new information for the first time at the Hearing
 - Can't substitute investigator testimony for parties or witnesses
 - Report should contain all material and relevant facts, as provided by others

The Power of Pausing

- Two areas:
 - After each question is asked by an advisor
 - Throughout the hearing, as needed

(1) After questions asked by an advisor:

"We have also revised... in a manner that builds in a 'pause' to the cross-examination process; before a party or witness answers a cross-examination question, the decision-maker must determine if the question is relevant. This helps ensure that content of cross-examination remains focused only on relevant questions and that the pace of cross-examination does not place undue pressure on a party or witness to answer immediately." (Preamble, p. 30323)

The Power of Pausing (cont.)

(2) Breaks during the Hearing:

- During emotional questioning
- When participants (including advisors and witnesses) become frustrated
- When the decision-maker needs to consult with the Title IX Coordinator or legal counsel
- If the decision-maker wants to review the Policy or the evidence before making a relevance determination

Relevance Determinations

- Remember, no definition of relevance in the 2020 Title IX Regulations
 - Your Policy may include a definition
 - General guidance from the Preamble:
 - “... [I]t is sufficient... to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not **probative** of any **material fact** concerning the allegations.” (Preamble, p. 30343 [emphasis added])
 - evidence pertinent to proving whether **facts material to the allegations** under investigation are **more or less likely to be true** (i.e., on what is relevant) (Preamble, p. 30294 [emphasis added])

Relevance Determinations - Warning

- Be careful about blanket prohibitions
 - Character evidence
 - Polygraph examinations
 - Expert witnesses
- Always come back to the issue of relevance
- Always show your work
 - If not in the moment at the Hearing, in the decision

Asking Questions

- “To the extent that a party wants the other party questioned in an adversarial manner in order to further the asking party’s views and interests, that questioning is conducted by the party’s own advisor, and not by the recipient... (Preamble, p. 30316)
- Thus, no complainant (or respondent) need feel as though the recipient is “taking sides” or otherwise engaging in cross-examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant.” (Preamble, p. 30316)
- “[O]n the decision-maker’s initiative [can] ask questions and elicit testimony from parties and witnesses, as part of the recipient’s burden to reach a determination regarding responsibility based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence. (Preamble, p. 30332)
- Thus , the skill of a party’s advisor is not the only factor in bringing evidence to light for a decision-maker’s consideration.” (Preamble, p. 30332)

Asking Questions (cont.)

- Decision-makers cannot (and should not) cross-examine
- However, they can ask questions
- In some cases, *must* ask questions
 - Ex: consent
- The institution has a burden to reach a determination based on an objective evaluation of all relevant evidence
- Cannot simply rely on the skill of a party advisor

- Toughest part
- Consider the 2001 Guidance (it's been rescinded but may still be helpful)
 - Level of detail and consistency of accounts
 - See if corroborative evidence is lacking where it should logically exist
 - Pattern of behavior by the respondent
 - Evidence of the complainant's reaction or behavior after the encounter*
 - Evidence of whether the complainant took action to protest the conduct soon after the alleged incident*
 - Other contemporaneous evidence – writing a journal, telling a friend

*Note that counterintuitive responses and delayed reaction may be normal.

Evaluating Credibility (Cont.)

Tips from the Preamble:

- Parties may benefit from the opportunity to challenge the opposing party's "consistency, accuracy, memory, and credibility so that the decision-maker can better assess" the narrative to be believed. (Preamble, 30315).
- Parties may direct the decision-maker's attention to "implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility" in a party's statements. (Preamble, 30330).

Takeaways

- Hearings are difficult for all involved
- Preparation and a clear policy will help
- Reversion to the 2020 regs may be an opportunity
- How are your colleague institutions handling things?
- Make sure to pay attention to both the emotional and the technical aspects of Title IX Hearings

Upcoming Title IX In Focus Webinars



- May 29, 2025 – Title IX Litigation Update
- More webinars coming soon for next year!! Tentative dates:
 - Aug. 28, 2025 - Trauma-Informed Intake Meetings
 - Sept. 25, 2025 (TBD)
 - Oct. 30, 2025 (TBD)
 - Nov. 20, 2025 – Title IX Litigation Update
 - Feb. 26, 2025 (TBD)
 - March 6, 2026 (TBD)
 - May 28, 2026 – Title IX Litigation Update

****All webinars will be at 12:00 p.m. CT/1:00 p.m. ET**

Upcoming Higher Ed Webinars



- Complying with the Stop Campus Hazing Act – Tomorrow at 11:00 CT/12:00 ET
- Federal Gov't Update - Thurs., May 1, at 2:00 p.m. CT/3:00 p.m. ET

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