

# Overview of Hearings Processes & Procedural Changes



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# Hearings: § 106.45(b)(6)(i)



- Walk through each element of this section of the regulation (not necessarily in order)
- Evaluate some of the public comments to the extent they illuminate pitfalls
- Discuss best practices
- Themes you will see: due process, fairness, comparison, and differentiation from court-like procedures
- Look for: “recipients have discretion”
- Basics: post-secondary institution must provide for live hearing with cross-examination

# Live Hearing



- “Such cross-examination at the **live hearing** must be conducted **directly, orally, and in real time**”
- Purpose: resolution of Title IX complaints, fair and reliable outcomes, reducing sex bias, fundamental fairness
- No written questions. No submission for questions at a different time than the other party.

# Live Hearing – Location



- “Live hearings ... may be conducted with all parties physically present in the same geographic location or, at the recipient’s discretion, any or all parties, witnesses, and other participants **may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other**”
- Parties may request a virtual hearing, but the school may opt to allow all to participate remotely

# Advisors – Directly, Orally, in Real Time



- “Such cross-examination at the live hearing must be conducted directly, orally, and in real time **by the party’s advisor of choice and never by a party personally**”
- The advisor must ask the questions, which is a significant change from the “potted plant” approach
- Choice of advisor is up to the party
- The institution, therefore, gets to remain neutral
- The role can be limited, except for when it comes to cross-examination
- Note about exceptional conduct during the hearing

# Advisors – Cross-Examination



- “At the live hearing, the decision-maker(s) must permit each party’s advisor **to ask the other party and any witnesses all relevant questions and follow-up questions**”
- Cross-examination is in part about presenting the unique perspective of one side
- “Fair process” to test each side
- Considerations around trauma-informed procedures

# Advisors – Cross-Examination (Cont.)



- Cross-examination as a means of challenging perspective and getting to the truth
- Mitigating negative effects by using advisors, separate rooms, relevancy determinations, and other protective aspects of the regulations
- Benefits inure to both complainants and respondents, as well as to the school
- Compare and contrast: fact-finding investigations

# Advisors – School Provided



- “If a party does not have an advisor present at the live hearing, **the recipient must provide without fee or charge to that party, an advisor** of the recipient’s choice”
- Differentials in resources can result in differing levels of advocacy between parties (inequities?)
- Skill and training of the decision-maker can help in equalizing this difference

# Advisors – School Provided, Attorneys



- “The recipient must provide without fee or charge ... an advisor ... who **may be, but is not required to be, an attorney**”
- Confidentiality considerations and the attorney-client privilege
- Is there responsibility for the effectiveness of the advisor?
- What the advisor ultimately has to provide: cross-examination, not representation
- Who has ultimate responsibility for the questions?

# Credibility



- “At the live hearing, the decision-maker(s) must permit ... all relevant questions and follow-up questions, **including those challenging credibility**”
- The limitations around credibility determinations, and other factors to be considered:
  - Inherent plausibility, opportunity for observation, detail and specificity, consistency, corroboration, motive to lie, history of truthfulness, demeanor

# Relevance – Threshold



- “Only relevant cross-examination and other questions may be asked of a party or witness”
- Rules or parameters around format and conduct are permissible for the school to develop
- But otherwise, questions cannot be excluded preferentially by the decision-maker

# Relevance – Prior to Answers



- “Before a complainant, respondent, or witness answers a ... question, the decision-maker(s) must first determine whether the question is relevant”
- What the Department calls a built-in “pause”

# Relevance – Exclusion & Explanation



- “The decision-maker(s) must ... explain any decision to exclude a question as not relevant”
- The decision must be explained on the spot, in real time
- The school cannot impose other rules of evidence that result in the exclusion of any relevant evidence
- The decision-maker can, however, reasonably assign weight to such evidence accordingly

# Exclusion of Treatment Records



- § 106.45(b)(5)(i): “[T]he recipient cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional”

# Exclusion of Prior Sexual Behavior



- “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant”
- Not simply excluded, but also not relevant
- Applies to the complainant only, not the respondent
- A caution when there are counterclaims
- With two exceptions

## Allowance of Prior Sexual Behavior – Alternative Actor



- “Unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant”

## Allowance of Prior Sexual Behavior – Consent



- “Unless ... the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent”
- The school’s definition of consent may be relevant to this determination
- Relates specifically to events between the complainant and respondent

# Separated Participation



- “At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms”
- Required if asked for by a party, including cross-examination and the rest of the hearing
- Permissible if requested by a non-party

# Separated Participation – Technology



- “With the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions”
- Live visual and audio is required as part of this accommodation

# Refusal to Answer Questions – Exclusion



- “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”
- What if a party or witness participates fully through the investigation process but does not appear at the hearing?
- Use of other evidence is still permitted, but *all* untested statements have to be disregarded

# Refusal to Answer Questions – Inference



- “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”
- No presumption of guilt, but no weight placed on statement evidence otherwise

# Record of Hearing



- “Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review”
- To protect against bias and aid with appeals

# Decision-Makers



- No single-investigator model
- The regulations do not require a hearing board, but do not preclude it
- Decision-maker gets to ask questions
- § 106.45(b)(7)(ii) requires that decision-makers lay out the evidentiary basis for conclusions reached in the case, in a written determination regarding responsibility

# Written Determination



- § 106.45 (b)(7)(i): “The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility”
  - Identification of the allegations potentially constituting sexual harassment
  - A description of the procedural steps taken
  - Findings of fact supporting the determination
  - Conclusions regarding the application to the facts
  - A determination, rationale for the result, any disciplinary sanctions, and whether remedies will be provided to the complainant
  - Procedures and bases for appeal

# Training & Costs



- Decision-makers
- Advisors
- Facilities/technology

# Additional Considerations



- If a formal complaint is signed by a Title IX Coordinator, the Title IX Coordinator does not become a party to the hearing
- While section (b)(6) details requirements around hearings, there are other sections which connect to pre-hearing requirements as well (standard of evidence, resolution outside of hearing, consolidation)
- Cases of employee sexual harassment will require hearings as well
- Practical point on no-show witnesses, parties, or advisors

# Thank You!



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