New Title IX Regulations: Higher Education Decision Makers

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:
  o Counseling or Training
  o Accommodations to class schedules or school work
  o Restrictions on contact between the parties
  o 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:
  o Whether there was substantial evidence for the decision;
  o Whether the sanction is proportional to the policy violation; or
  o *De novo* appeal

Impartiality
• Disclose and recognize conflicts of interest;
  o Familiarity with parties?
  o 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”