

Overview of Hearings Processes & Procedural Changes



Presented by Shayda Zaerpoor Le
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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!



Shayda Zaerpoor Le
Barran Liebman LLP
(503) 276-2193
sle@barran.com