Title IX Coordinator Training Online Course

Class Three: The Grievance Process – Hearings & Appeals

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PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.

Class Overview

- Relevance - Redux & Conclusion
- Other Violations
- Due Process / Fundamental Fairness
- Credibility Determinations
- Advisors
- The Written Determination
- Appeals
How is Relevance Defined?

The Title IX regulations do not:

- Adopt the Federal Rules of Evidence.
- Define “relevance.”
- Permit excluding evidence that:
  - Concerns prior bad acts.
  - Constitutes character evidence.
So What Is Relevant Evidence?

- Evidence is relevant if:
  - It has any tendency to make a fact more or less probable than it would be without the evidence; and
  - The fact is of consequence in proving or disproving the allegations.
- Does the evidence tend to prove or disprove the allegations?
- A determination regarding relevancy can rely on logic, experience or science.

FED. R. EVID. (401), Legal Information Institute, Cornell Law School, https://www.law.cornell.edu/rules/fre/rule_401

BUT YOU JUST SAID ...
What Is NOT Relevant?

- Review the September 4, 2020 Guidance
- The Regs direct schools to exclude the following evidence and information:
  - a party’s treatment records, without the party’s prior written consent [§ 106.45(b)(5)(i)];
  - information protected by a legally recognized privilege [§ 106.45(b)(1)(x)];
  - questions or evidence about a complainant’s sexual predisposition, and questions or evidence about a complainant’s prior sexual behavior unless it meets one of two limited exceptions [§ 106.45(b)(6)(i)-(iii)]; and,
  - a decision-maker is not permitted to rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)]. Currently, not enforced by OCR but may apply under state law or law in some federal circuits.

Evidence Rules

Guidance: September 4, 2020:
- A school may not adopt rules excluding certain types of relevant evidence (e.g., lie detector test results, or rape kits) where the type of evidence is not:
  - deemed “not relevant” (e.g., evidence concerning a complainant’s prior sexual history) or
  - otherwise barred from use under § 106.45 (e.g., information protected by a legally recognized privilege).
All Relevant Information Is Not Created Equal

- May weigh evidence
- Considerations:
  - Is it corroborated?
  - Is there a reason the source might not be reliable?
  - Is it logical given other established facts?
- Decision-maker must evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility – and must do so “objectively”
- The decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.
- Make It Easy: “Not probative of any material fact.”

Admission vs. Weight, Credibility, or Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence.
- Because § 106.45 does not address how relevant evidence must be evaluated for weight or credibility by a decision-maker, a school can adopt and apply its own rules so long as:
  - The rules do not conflict with § 106.45; and
  - The rules apply equally to both parties.
- For example: A school may adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party’s prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.
- REMEMBER: A school’s investigators and decision-makers must be trained specifically with respect to “issues of relevance” and any relevance rules adopted by the school should be detailed in the school’s publicly available training materials.
Violations of Other Policies

- Knowingly making false statements or submitting false information
  - Being alert to potential claims of retaliation
- Sexual Harassment not covered in the regulations but violating campus policies
  - Violations occurring in programs or at locations outside the current definition
  - Violations that don’t meet the standards under the regulations
- Student Conduct violations
- Employee Conduct standards

Update notice with later-discovered allegations.
Due Process (Fundamental Fairness)

A Fair Process:

- that follows the law,
- is implemented without bias, stereotypes or pre-judgment, and
- provides an equal opportunity for parties to be heard and present evidence,
- allows the decision-maker(s) to reach a determination consistent with the standard of evidence.

The Process That Is Due
Title IX Sexual Harassment Grievance Process: Elements of “Due Process”

- Notice to the Respondent of the allegations
  - Opportunity to respond
  - Adequate opportunity to prepare before responding
- Notice to the Parties of the process that will be used, including appeals
- Opportunity to present evidence and witnesses
- Cross-examination, including questioning of witnesses
- Live hearing (in separate spaces upon request and as appropriate)
- Opportunity to have advisors of choice

State the Standard of Evidence

Same standard of evidence for all.

Either:

- Preponderance of the evidence, i.e., more likely than not; or
- Clear and convincing evidence, i.e., substantially more likely to be true than not.

And Not:

- Beyond a reasonable doubt (no other reasonable explanation possible – criminal cases).
Credibility Determinations

Considerations

• What evidence is most believable?
• Corroborating evidence
  • Other testimony
  • Physical evidence
• Consider faulty memories
• Explore reasons for inconsistencies
• There are no “perfect” witnesses, complainants or respondents
Factors to Weigh

- Consider each material fact separately.
- Credibility as to the facts:
  - Credibility on one fact doesn’t make all of that person’s testimony credible, and
  - Lack of credibility on one point doesn’t make all of that person’s testimony non-credible.
- Does the testimony feel rehearsed or memorized?
- Is the testimony exactly the same as another witness?
- Does the testimony make sense?
- Is the testimony detailed, specific & convincing? If not, is there a reason?
- Is it a statement against interest?
- Less credible witness isn’t necessarily being dishonest.

Caution

- Eyewitness accounts
- Bias/Assumptions about witness credibility that may not take account of cultural norms or may stereotype.
- Assumptions about memory that may not reflect witness experiences.
- Failure of decision-maker to explain credibility determinations.
The Decision-Maker (Hearing Officer)

Getting Ready

• Self-identify any conflict of interest or bias.
• Prepare, prepare, prepare.
• Read the report carefully and repeatedly, but don’t prejudge.
• Understand the conduct at issue and the elements of the alleged violations.
• Identify areas of agreement and disagreement.
• Determine if there are areas that require further inquiry, e.g., did the investigator explore & consider all the relevant evidence?
**Hearing Decorum**

**Points to Consider:** May have rules that:
- Require advisors be respectful and prohibit abusive/intimidating questioning.
  - Deem repetition of the same question irrelevant.
  - Allow for removal of advisors.
- Specify any objection process.
- Govern the timing and length of breaks to confer, and prohibit disruption.
- Require that *parties* make any openings and closings.
- Who will enforce the rules of decorum?
  - How will you train decision-makers?

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**Advisors**
Advisors

- Parties must have the opportunity to have an advisor present during any grievance proceeding (hearing or related meeting).
- A party may choose not to have an advisor.
  - However, the institution must provide an advisor to question and cross-examine witnesses if the party isn’t accompanied by one.
  - Institutions may require parties to provide advance notice of their advisor’s attendance.
    - What if they are a no-show?
- Advisor provided by institution need not be an attorney.
  - Need not be of “equal competency.”
- May establish guidelines for advisors.
  - Role of advisors in hearings and meetings.
  - Use of non-disclosure Agreements.

More on the Advisor’s Role

- Provide support and advice to the party.
- Understand the allegations and the process.
- Understand the purpose and scope of questioning and cross-examination.
- Ask questions that elicit relevant information.
- Wait for relevancy determinations after asking a question.
- Adhere to rules of decorum and encourage the party to do the same.
- NOTE: Institutions may remove disruptive advisors ... carefully.
Working with the Parties’ Attorneys

Advisor or Legal Representative

• Clarify procedures and role in advance.
• Distinguish between advisor and legal representative.
• Emphasize the “ground rules” - provide any rules of decorum.
• Establish lines of communication and points of contact.
Written Determination

- Identification of allegations potentially constituting sexual harassment
- Description of the procedural steps
- Findings of fact supporting the determination
- Conclusions regarding the application of the code of conduct/policy to the facts
- Statement of and rationale for the result as to each allegation, including sanctions and whether remedies will be provided
- Appeal procedures and grounds
Must provide an appeal from a determination of responsibility and dismissal of a formal complaint, based on:

- Procedural irregularities that affected the outcome.
- New evidence not reasonably available at the time of determination that could affect the outcome.
- Bias or conflict of interest of the Title IX Coordinator, investigator or decision-maker that affected the outcome.
- Inappropriate or impermissible dismissal of any formal complaint or allegation.
- May include other grounds, equally available to both parties.
Appeal Process

• Notify other party upon receipt of appeal.
• Appeal decision-maker can’t be Title IX Coordinator, investigator or hearing decision-maker.
• Opportunity for both parties to submit written statement.
• Written decision with the result and rationale simultaneously to both parties.

NPRM:
REMEMBER: NOT IN PLAY NOW
Proposed Changes

- Notice of allegations may be delayed in response to legitimate safety concerns
- Live hearing permitted, not required, for hearings involving students
  - In a live hearing, parties must be permitted to participate from separate locations
  - Must provide both parties a reasonable opportunity to review and respond to evidence before the live hearing; it may provide the same opportunity during the live hearing
  - In live hearings, allow each party's advisor, never the party, to ask all relevant and otherwise permissible questions
- Provide a process that allows decision-maker to assess the credibility of the parties and witnesses to the extent credibility is relevant and in dispute
  - Decision-maker may not rely on statements of a party if the party does not respond to questions related to the party's credibility, but also may not draw an inference about whether sex-based harassment occurred based on that refusal
- Relevance is defined (!!!)
- Take reasonable steps to address unauthorized disclosure of evidence and information
- Decision-maker must determine if each question is permissible prior to the question being posed and explain the decision to exclude any question
- Use a preponderance of the evidence as the standard of proof unless the school uses a clear and convincing standard of proof for in comparable proceedings, e.g. considering other complaints of prohibited discrimination.
- No imposition of sanctions for false statements based solely on whether sexual harassment occurred
- Requirement to describe range of supportive measures and potential disciplinary sanctions applies only in response to sex-based harassment
- Title IX Coordinator is responsible for implementing remedies on a finding that sex discrimination occurred

Questions?
Note

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