

Title IX Hearings

EASTERN OKLAHOMA STATE COLLEGE

Session Points

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

Formal Complaint

- ❖ A **formal complaint** of Title IX sexual harassment means a document filed by a complainant **or** signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
- ❖ For the purpose of addressing formal complaints of sexual harassment, a school's formal Title IX complaint policy and process must comply with **specific requirements** set out in the new rule.

Formal Complaint Process

Core Requirements	• Details 10 core requirements of formal complaint process
Complaint Dismissal	• Grounds for dismissal and procedural requirements
Consolidation	• Complaint consolidation in specific circumstances
Notice of Allegations	• Requirements for initial and ongoing notice to parties
Investigations	• 7 required elements of formal investigation
Informal Resolutions	• Permits informal resolution where appropriate
Hearings	• Hearing requirements, including cross-x and advisors
Determinations	• Requirements for adjudicators and determinations
Appeals	• Grounds and procedures for appeals
Recordkeeping	• Record maintenance requirements for specified periods



Key Concepts

Key Concepts

- ❖ Treat complainants and respondents equitably.
- ❖ Objectively evaluate all relevant evidence – including both **inculpatory** and **exculpatory** evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness.
- ❖ Understand the **presumption** that the respondent is not responsible for the alleged conduct until a determination is made at the end of the grievance process.

Key Concepts

What is “relevance” and “relevant evidence”?

- Evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.
- Repetition of the same question or duplicative evidence may be deemed irrelevant.

Key Concepts

What does it mean to objectively evaluate relevant evidence?

- Impartial consideration of available evidence.
- No prejudgment of parties, witnesses, facts at issue, or how facts at issue are presented.
- No deference to recommendations of an investigator.

What is inculpatory and exculpatory evidence?

- **Inculpatory evidence** shows or tends to show respondent's responsibility.
- **Exculpatory evidence** shows or tends to show the respondent is not responsible.

Key Concepts

What are credibility determinations and why are they significant?

- A determination by adjudicators of what statements to believe and what statements not to believe.
 - Adjudicators may believe everything a party or witness says, part of it, or none of it.
- In some situations, there may be little to no evidence other than the statements of the parties themselves.

Key Concepts

What does the presumption of innocence mean for the respondent?

- “The presumption does not imply that the alleged harassment did not occur; the presumption ensures that recipients do not take action against a respondent as though the harassment occurred **prior to the allegations being proved**, and the final regulations require a recipient’s Title IX personnel to interact with both the complainant and respondent in an impartial manner throughout the grievance process without prejudgment of the facts at issue, and without drawing inferences about credibility based on a party’s status as a complainant or respondent.”

Key Concepts

- ❖ Ensure decision-makers do not have a **conflict of interest** or bias for or against complainants or respondents generally or an individual complainant or respondent.
- ❖ Understand the **standard of evidence** – either the preponderance of the evidence or clear and convincing evidence standard.
- ❖ Do not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a **legally recognized privilege**, unless the person holding such privilege has waived the privilege.

Key Concepts

What is the preponderance of the evidence standard mean?

- Proof that a particular fact or event was more likely than not to have occurred.

What does the clear and convincing standard mean?

- Proof that a particular fact or event was highly and substantially more likely to be true than untrue.



Live Hearings

Live Hearings Required

Institutions are **required** to include a **live hearing** in their formal complaint process.

- The adjudicator cannot be the same person as the Title IX Coordinator or the investigator.

Absent any request from the parties, live hearings **may** be conducted either with all parties physically present or with participants appearing virtually, with technology enabling them to see and hear each other.

Keep 'Em Separated

At the **request** of either party, schools must provide for the live hearing to occur with the parties located in **separate** rooms, with technology enabling the adjudicator and parties to simultaneously see and hear the party or the witness answering questions.

Schools must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

Rules for Hearings

What rules can institutions adopt regarding the conduct of hearings?

- So long as **all rules** comply with the final regulations and apply equally to both parties, schools can adopt rules concerning:
 - Rules of decorum.
 - Timing and length of breaks.
 - Prohibition on disturbing the hearings.
 - Prohibition on badgering witnesses.
- Make sure to review your school's policies thoroughly.

Rules for Hearings

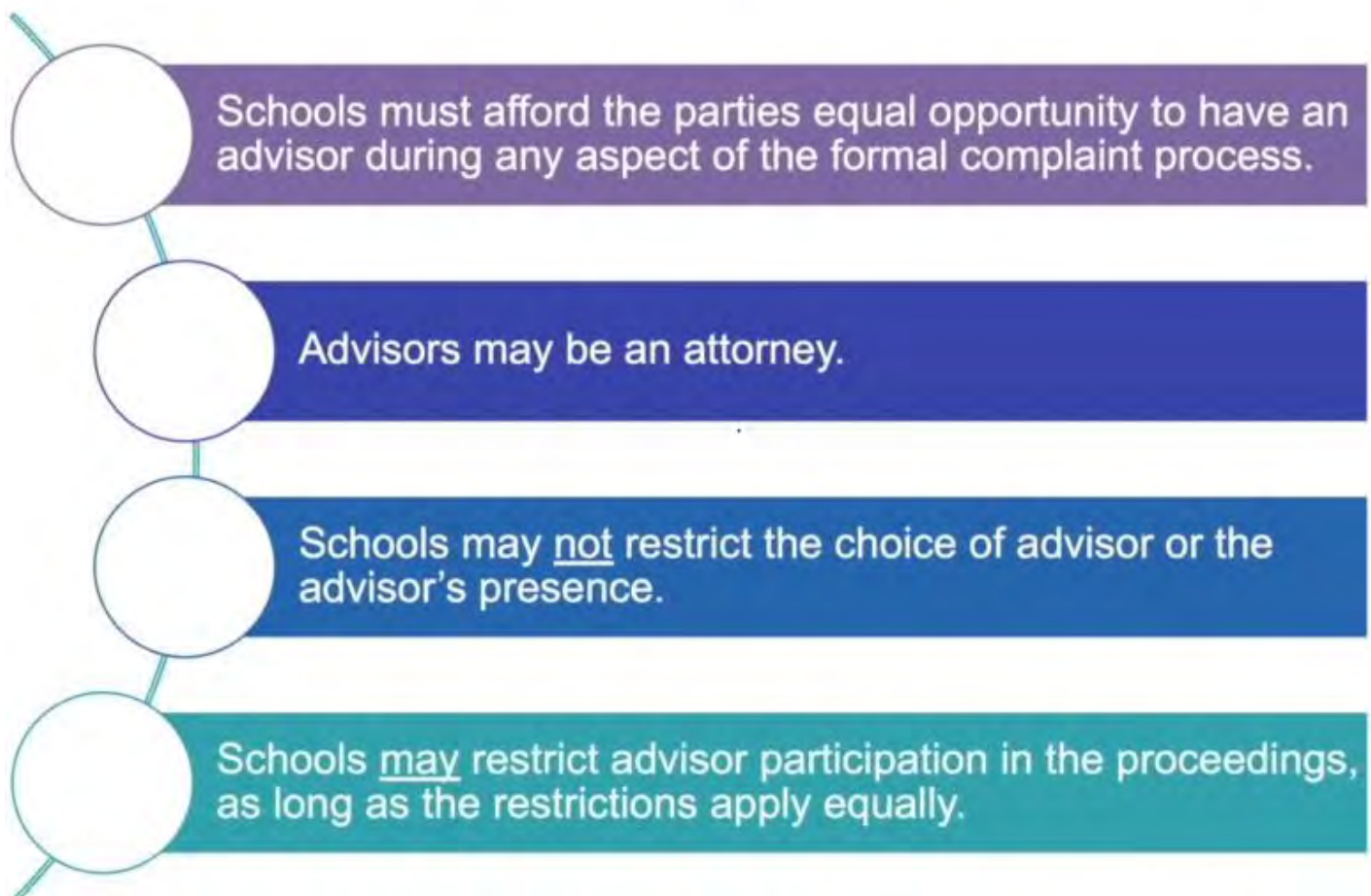
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Advisors



Advisors



Schools must afford the parties equal opportunity to have an advisor during any aspect of the formal complaint process.

Advisors may be an attorney.

Schools may not restrict the choice of advisor or the advisor's presence.

Schools may restrict advisor participation in the proceedings, as long as the restrictions apply equally.



Cross-Examination

Cross-Examination Required

- ❖ Adjudicators **must** permit each party's advisor to cross-examine the other party and any witnesses.
- ❖ Cross-examination at the live hearing must be conducted **directly, orally, and in real time** by the party's advisor and **never** by a party personally.
- ❖ If a party does not have an advisor, the school must provide an advisor of **its** choice, free of charge, to conduct cross-examination. The advisor may be, but is not required to be, an attorney.

Why Advisors?

“...the Department does not believe that the **benefits of adversarial cross-examination** can be achieved when conducted by a person ostensibly designated as a “neutral” official. This is because the function of cross-examination is precisely *not* to be neutral but rather to point out in front of the neutral decision-maker each party’s unique perspective about relevant evidence and desire regarding the outcome of the case.”

Adversarial Advisors

If a party's advisor of choice refuses to comply with a school's rules of decorum (for example, by insisting on yelling at the other party), can the school require the party to use a different advisor?

- Yes. Similarly, if the advisor refuses to comply with a school's rules of decorum, the school may provide that party with a different advisor to conduct cross-examination on behalf of that party.

Adversarial Advisors

Assuming one or both advisors are attorneys, how should decision-makers and presiding officers maintain order?

- Clearly explain the order of proceeding, as well as any other requirements and expectations of each party at the outset of each hearing.
- Enforce rules of order or decorum equally and compassionately.
- Take breaks and ask for help if needed.
- Do not be afraid to adjourn or postpone.

Refusing Cross-Examination

If a party or witness does not **submit to cross-examination** at the live hearing, the adjudicator must not rely on any **statement** of that party or witness in reaching a determination regarding responsibility.

- However, the adjudicator 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.

Examining Cross-Examination

What does “submit to cross-examination” mean?

- Answering cross-examination questions that are relevant.

Does the same “exclusion of statement” rule apply to a party or witness’s refusal to answer questions posed by the adjudicator?

- No, because questions posed by a neutral fact finder is not cross-examination.
- “If a party or witness refuses to respond to a decision-maker’s questions, the decision-maker is not precluded from relying on that party or witness’s statements.”

Examining Cross-Examination

What does “statements” mean?

- “Statements’ has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person’s intent to make factual assertions, or to the extent that such evidence does not contain a person’s statements. Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination.”
- “The prohibition on reliance on ‘statements’ applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination.”

Examining Cross-Examination

Can a decision-maker ask questions of the parties and witnesses?

- Yes.

When is an advisor's cross-examination "on behalf of that party" satisfied?

- "An advisor's cross-examination 'on behalf of that party' is satisfied where the advisor poses questions on a party's behalf, which means that an assigned advisor could relay a party's own questions to the other party or witness, and no particular skill or qualification is needed to perform that role."

Examining Cross-Examination

Can a party's advisor appear and conduct cross-examination even when the party whom they are advising does not appear?

- Yes.

What happens where a party does not appear but the party's advisor of choice does?

- "...a recipient-provided advisor must still cross-examine the other, appearing party on behalf of the non-appearing party, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance). Because the statements of the appearing party were tested via cross-examination, a fair, reliable outcome can result in such a situation."

Managing a Live Hearing

If a party does not appear or submit to cross-examination, can the party's family member's or friend's recount the statement of the party?

- No. "Even if the family member or friend did appear and submit to cross-examination, where the family member's or friend's testimony consists of recounting the statement of the party, and where the party does not submit to cross-examination, it would be unfair and potentially lead to an erroneous outcome to rely on statements untested via cross-examination."

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Relevance

Relevance

Only **relevant** cross-examination and other questions, including those challenging credibility, may be asked of a party or witness.

Before a party or witness answers a cross-examination or other question, the adjudicator must **determine** whether the question is relevant, **and explain** any decision to exclude a question as not relevant.

Relevance

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are **not relevant**, unless such questions and evidence:

- are offered to prove that someone other than the respondent committed the alleged conduct; **or**
- concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Relevance

What is required of the decision-maker during a relevance determination?

- Lengthy or complicated explanation not required. “[I]t is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question 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.”

Relevance

Can a school adopt a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss relevance determinations with the decision-maker during the hearing?

- “If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker’s explanation) during the hearing.”

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Credibility

Managing a Live Hearing

Can relevant character evidence or evidence of prior bad acts on cross-examination be excluded?

- No. "...where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker **cannot exclude or refuse to consider the relevant evidence**, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decision maker's evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence."



Burden of Proof

Burden of Proof

The burden of proof and burden of gathering evidence sufficient to reach a determination is on **the institution**.

- The institution may **not** access, consider, disclose, or otherwise use a party's medical records without written consent.

Burden of Proof

What does the burden of proof mean in terms of reaching a determination?

- Complainants are not required to prove responsibility.
- Respondents are not required to prove non-responsibility.
- The institution is required to draw accurate conclusions about whether sexual harassment occurred in an educational program or activity.

Evidence



Types of Evidence

What are the different types of evidence that may be presented?

- Direct
- Circumstantial
- Hearsay
- Character Evidence
- Prior Bad Acts

How can relevant evidence be weighed?

- Institutions can have rules regarding weight and credibility. **Admissibility is governed by relevance.**

Access to Evidence

Throughout the hearing, institutions must afford both parties equal opportunity to review and inspect any evidence that:

- was obtained as part of investigation; and
- is directly related to the allegations.

This includes evidence upon which the school does not intend to rely in reaching a determination, and inculpatory or exculpatory evidence, whether obtained from a party or other source.

Timing of Access

Generally

- Must provide access early enough that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

Prior to issuing investigative report

- Must send parties all evidence subject to inspection and review and afford at least 10 days to submit a written response.

10 days prior to hearing or other determination

- Must send investigative report to parties for review and written response.

At and during any hearing

- Must make all evidence available to parties' and afford equal opportunity to review, including for purposes of cross-ex.



Legal Privileges

Legal Privileges

What are legal privileges and how may they arise at the hearing?

- Attorney – Client
- Priest – Penitent
- Doctor – Patient
- Spousal



THANK YOU!