



Title IX Determination

EASTERN OKLAHOMA STATE COLLEGE



Session Points

The Formal Complaint Framework

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts Under Applicable Evidentiary Standards

Effective Deliberations

Writing a Defensible Determination

The Formal Complaint Framework



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

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- ❖ 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.

Key Concepts

- ❖ 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.
- ❖ 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.

Format & Content



Format & Content

Allegations

- Identification of the allegations of sexual harassment.

Procedural Recitation

- A recitation of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.

Findings of Fact

- Findings of fact supporting the determination.

Format & Content

Conclusions

- Conclusions regarding the application of the school's sexual misconduct policy to the facts, including a statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the school imposes on the respondent, and whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided by the school to the complainant.

Appeal

- Procedures and permissible bases for appeal.

Format & Content

How can knowledge of the format of the written determination inform the hearing itself?

- Use the format of a written determination as a checklist and be able to answer each element before concluding the hearing.

Format & Content

Does “all evidence” need to be addressed in the written determination?

- The preamble explains: “We decline to expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, “all evidence” presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness), under § 106.45(b)(1)(ii).”



Logistics

Distribution of the Determination

The school must provide the determination to the parties simultaneously.

The determination becomes final either:

- on the date on which an appeal would no longer be considered timely; **or**
- if an appeal is filed, on the date that the school provides the parties with the written appeal determination.



Excluding Facts in Evidence

Excluding Facts in Evidence

How should a decision-maker address a situation in which a party or witness inappropriately discloses privileged information, treatment records, or irrelevant information?

- Decision-makers may not consider this information.
- In a hearing, decision-makers should consider stating for the record that such information was inappropriately disclosed but will not be part of evidence or considered.
- If the decision-maker(s) cannot ignore such information, they should recuse themselves.

A photograph of a brick building with the text "EASTERN OKLAHOMA STATE COLLEGE" and "McALESTER CAMPUS" on its facade. The image is framed by a circular vignette.

**Weighing Facts
Under Applicable
Evidentiary Standards**

Applicable Standards of Evidence

What is the preponderance of the evidence standard?

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

How should facts be evaluated under this standard?

- Does the decision-maker believe there is a greater than 50% chance that a fact or claim is true?

Applicable Standards of Evidence

What is the clear and convincing evidence standard?

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

How should facts be evaluated under this standard?

- Does the decision-maker believe the fact or claim is highly probable to be true?



Effective Deliberations

Effective Deliberations

- ❖ **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- ❖ **Demeanor:** Did the person seem to be telling the truth or lying?
- ❖ **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

Effective Deliberations

- ❖ **Motive to falsify:** Did the person have a reason to lie?
- ❖ **Past record:** Did the alleged harasser have a history of similar behavior in the past?

None of these factors is determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

Effective Deliberations

How can a decision-maker evaluate expert witness testimony and medical records?

- Ask as many clarifying questions as necessary.
- Remember, juries evaluate expert testimony and reports without training either.

How can decision-makers effectively evaluate facts and reaching consensus?

- Objectively evaluate all facts and do not jump to a conclusion before all facts are available.
- Recess prior to closing statements to make sure all decision-makers have asked all necessary questions.
- Be collegial and use the record to bolster your position; remain rooted in facts, not opinions.



Writing a Defensible Determination

Writing defensible Determinations

What should decision-makers be considering when writing determinations?

- Requirements under institutional policy.
- Gravity of the outcome for the parties involved.
- Demonstrate decision-makers took the matter seriously and came to a thoughtful outcome.

What are best practices to make written determinations as defensible as possible?

- Assume the determination could be “Exhibit 1.”
- Include all elements necessary under policy and justify your conclusions with the record.
- Ask for legal help when appropriate.

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THANK YOU!