# Title IX Hearings

**Procedures, Definitions and the Law**

**By Judge Michael T. Jamison (Ret.)**

On May 6, 2020 the United States Department of Education ("DOE") issued its final regulations outlining the obligations and responsibilities of colleges and universities regarding incidents of sexual harassment, sexual assaults, dating and domestic violence, and stalking. These regulations are effective August 14, 2020.

The challenges of handling a Title IX complaint can be an emotionally charged situation even for the most experienced experts. Those challenges to institutions of higher learning present unique issues as well as opportunities for the decision-maker officer to conduct a fair and impartial hearing, free of bias and without any conflict of interest. Accordingly, it is critical that the decision-maker (sometimes called adjudicator or hearing officer) have the proper training as required by those regulations, as well as appropriate experience in order to succeed.

This outline is not meant to answers all questions relative to Title IX hearing situations, but is meant to present a quick reference on the procedures, issues and questions for the decision-maker.

## DEFINITIONS AND PROCEDURES

To better understand the process of a Title IX hearing, we first provide a summary of key definitions and procedures.

**Sexual Harassment:** conduct based on sex that satisfies any of the following: a school's employee conditioning aid, benefit or service to an individual in return for unwelcomed sexual conduct ("quid pro quo" harassment); or unwelcomed conduct determined by a reasonable person to be severe, pervasive and objectively offensive and denies a person equal access to the school's educational programs/activities; or a sexual assault including dating violence, domestic violence or stalking.

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**Formal Complaint**: A document filed by a **complainant** or signed by a **Title IX Coordinator** alleging sexual harassment by a **respondent** requesting that the school investigate the alleged sexual harassment. The **complainant** must be participating or engaging in the education program or program of the school or attempting to do the same while filing the complaint.

**Investigation of Formal Complaint:** The school **must** investigate formal complaints. The Title IX Coordinator **may** serve as the investigator and the burden of proof and gathering of the evidence is on the school. Medical and similar privileged records are not available unless the party has given written consent and both parties must be given an equal opportunity to present facts and expert witnesses and evidence without any restrictions. Both parties have the right to an **advisor**, who may be a member of the faculty, counselor or an attorney however, the advisor is not required to be an attorney. The school **may** elect to pay for the advisor throughout the investigation, but the school is only required to ensure an advisor at the hearing. If a party does not have an advisor at the hearing the school **must** provide an advisor of the school's choice, without charge to the party and this advisor may conduct cross examination of the other party and witnesses. The investigator must complete an investigative report at least ten (10) days prior to the hearing and provide copies to the parties and their advisors.

**Decision-Maker**: The decision-maker(s) can not be the same person(s) as the Title IX Coordinator, the investigator, or mediator during informal resolution process. The decision-maker must not have or demonstrate any conflict of interest, bias or prejudice towards either of the parties and must show proper decorum with respect for the parties, provide timely breaks and manage and control the hearing. The decision-maker will conduct a **live** hearing. A live hearing may be conducted either with all parties physically present, or at the school's or either of the party's election, separately with parties appearing virtually, with requisite technology enabling the parties to see and hear each other. Web cameras, laptops and cell phones meet the requirements of the regulations. The decision-maker will open and close the hearing, allow examination of witnesses, including cross examination of respective parties, determine relevance of questions and

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evidence and evaluate credibility. The decision-maker will provide a **written determination** to the parties which must include: (i) identification of the allegations that represent potential sexual harassment; (ii) a description of the procedural steps in the formal complaint (any notification to the parties , interviews, site visits, evidence gathering methods and description of the hearing held); (iii) Finding of Fact supporting the determination; (Iv) Conclusions regarding the application of the school's code of conduct to the facts; (v) a statement of the rational for the results reached on each allegation and any discipline imposed on the respondent and remedies offered to complainant, and (vi) the school's procedure for appeal by the complainant or respondent.

**The Hearing:** The live hearing, although adversarial, is to be conducted in a civil manner with respect for all parties. The school **must** create an audio or audiovisual recording or transcript of the hearing to be made available to both parties for inspection and review. The decision-maker may open the hearing by announcing the particulars of why the hearing is called, introduce the parties and their advisors, allow opening statements by the advisors and may swear in witnesses. The respondent is presumed innocent unless and until the allegation(s) of harassment have been proved. The school will elect and the decision-maker will follow the **standard of evidence** selected for the hearing using either a **preponderance of evidence** standard (proof that a particular fact or event was more likely than not to have occurred) or the **clear and convincing** standard (proof that a particular fact or event was highly and substantially likely to be true than not true). This standard of evidence **must** be the same standard used in complaints involving employees and faculty.

The new regulations do not require application of the rules of evidence and most decision-makers will be liberal in the admission of evidence to have as full and complete a record as possible. Accordingly, circumstantial and even hearsay evidence may be admitted as well as character evidence and evidence of prior bad act. There are nevertheless some rules that are specifically required in the new regulations. The decision-maker must be trained on the **issue of relevance** inasmuch as only relevant cross-examination and other questions may be asked

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of a party or witness. In fact the decision-maker must determine whether a question is relevant before the witness provides an answer and explain the decision to exclude a question as not being relevant. Relevance determinations in the middle of cross-examination may be difficult but are a requirement of the new regulations.

The accepted definition of "relevant" evidence is:

> Relevant Evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Accordingly, for the decision-maker, evidence is not relevant and may be excluded if it does not go to the proof of a fact that is of consequence to the determination of an action at issue.

Moreover, in many of these cases the decision-maker should be keenly aware and sensitive to the rules of evidence regarding the non-admissibility of evidence of complainant's sexual predisposition or prior sexual behavior. The revised regulations act much like the Federal Rules of a "rape shield" which would normally prohibit the admission of evidence offered to prove that a victim engaged in other sexual behavior or to prove a victim's sexual disposition as not relevant. The decision-maker may allow such evidence as relevant where it is offered to show that someone other than respondent committed the alleged act, or the prior incidents go to show the complainant's consent.

Also, the decision-maker should be familiar with state laws excluding evidence protected by a legal privilege unless the holder of the privilege has waived the privilege. Attorney-client, physician-patient and the Fifth Amendment privilege against self-incrimination apply and evidence protected by those privileges should be excluded and the exercise of the privilege cannot be held against the respondent by the decision-maker when reaching a decision.

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Finally, the decision-maker should remember that she or he serves as a fact finder and as such may ask questions, which the decision maker deems relevant. In the event a party fails to appear at the hearing or refuses to be cross-examined by their opponent's advisor, the decision-maker may not rely on any statements given by that party in reaching a decision. The decision-maker may consider the statements of a witness refusing to answer the decision-makers questions. The advisor of a non-appearing party may still represent the absent party at the hearing by calling witnesses and cross-examining the opponent and other witnesses.

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