

TITLE IX

Decision-Maker & Advisor Training

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Recap – When are Response Obligations Triggered?

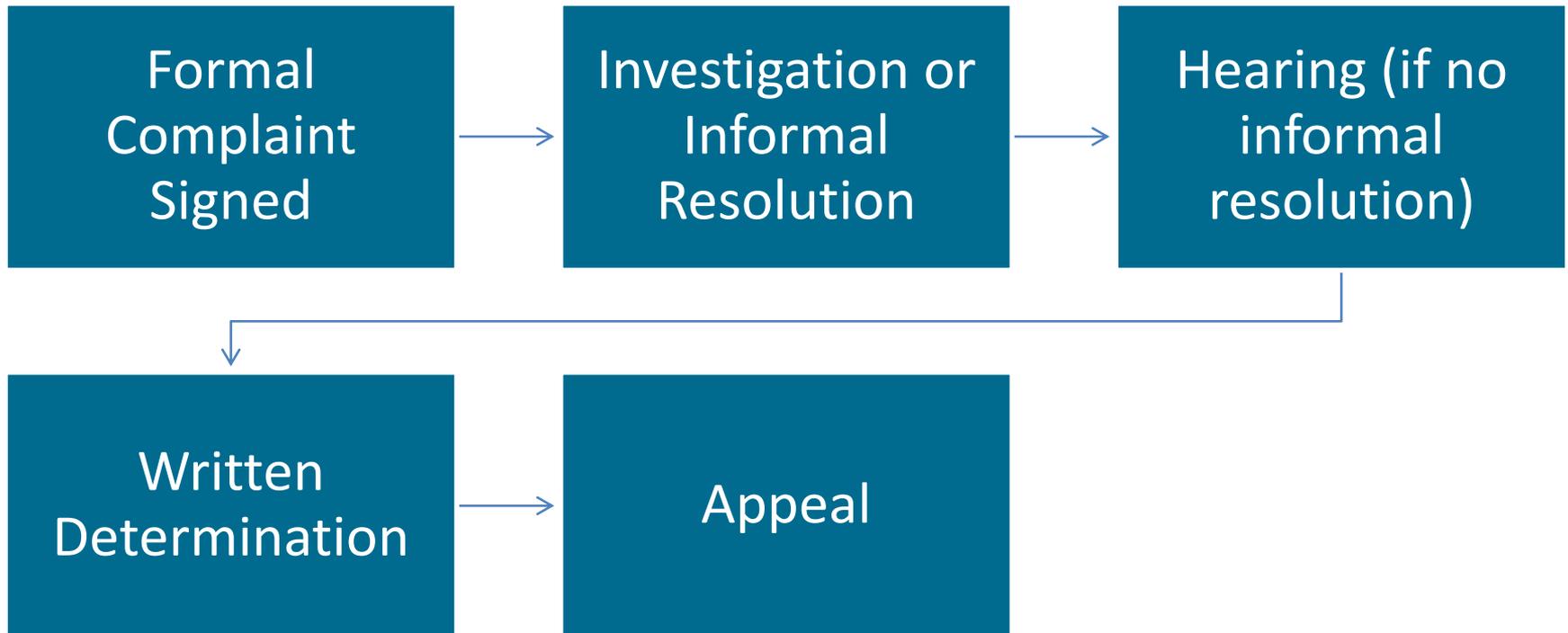
- A recipient has **actual knowledge of alleged sexual harassment**
 - Within the knowledge of Title IX Coordinator or official with authority to institute corrective measures.
- Directed against a person in the U.S.
- Within the recipient's educational program or activity.

Recap – Response Obligations

Once a recipient has actual knowledge, the Title IX Coordinator must:

1. Promptly contact the complainant to discuss the availability of supportive measures;
2. Consider the complainant's wishes with respect to the supportive measures;
3. Inform the complainant of the availability of supportive measures with or without filing a Formal Complaint; and,
4. Explain to the complainant the process for filing a formal complaint.

Recap – Grievance Process



THE HEARING PROCESS

Hearing Officers

- Must serve impartially
 - No prejudgment of the facts at issue, bias, or conflict of interest.
- Oversee the Title IX hearing
- Objectively evaluate all relevant evidence
 - Inculpatory and exculpatory
- Independently reach a determination regarding responsibility
 - Cannot give deference to an investigative report.

Requirements for the Hearing

- Live
- Cross-examination
 - The Hearing Officer will have the opportunity to ask questions of parties/witnesses, and to observe how the parties/witnesses answer questions posed by the other party.
- Results in a determination of responsibility

Live Hearing

- **The hearing may be:**
 - Held with all parties *physically present* in the same place; or
 - Held *virtually*
 - At the recipient's discretion or upon request.

*If the hearing is virtual, recipients must use technology that allows all parties to simultaneously see and hear each other (*i.e.*, no telephonic hearings).

Live Hearing

- Recipients must create an audio or audiovisual recording or transcript of the live hearing. § 106.45(b)(6)(i)
- The recording or transcript must be made available to the parties for inspection and review.
 - “Inspection and review” does not obligate an institution to send the parties a copy of the recording or transcript. 85 FR 30392.

Burden of Proof

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

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.

RELEVANT EVIDENCE AT THE HEARING

Presenting Relevant Evidence

“Throughout the grievance process, a recipient must not restrict the ability of either party...to gather and present relevant evidence.” § 106.45.(b)(5)(iii)

“The recipient must make all evidence [directly related to the allegations] subject to the parties’ inspection and review **available at any hearing to give each party equal opportunity to refer to such evidence** during the hearing, including for purposes of cross-examination.” § 106.45.(b)(5)(vi)

Determining Relevance

- Again, the final regulations do not define relevance.
- The ordinary meaning of relevance should be applied throughout the grievance process. 85 FR 30247, n. 1018.
- Fact determinations reasonably can be made by layperson recipient officials impartially applying logic and common sense. 85 FR 30343.
- Relevant evidence must include both inculpatory and exculpatory evidence. 85 FR 30314.

Determining Relevance

The following evidence is **always considered irrelevant**:

- Any party's medical, psychological, and similar treatment records without the party's voluntary, written consent;
- Any information protected by a legally recognized privilege without waiver;
- Complainant's sexual predisposition or prior sexual behavior (subject to two exceptions); and
- Party or witness statements that have not been subject to cross examination at a live hearing.

Rape Shield Protections at the Hearing

- Prohibits questions or evidence about a complainant's prior **sexual behavior**, with two exceptions. § 106.45(b)(6).
- Deems all questions and evidence of a complainant's **sexual predisposition** irrelevant, with no exceptions. 85 FR30352.

Rape Shield Protections at the Hearing

- The rape shield protections **do not apply to respondents.**
 - Questions and evidence about a respondent's sexual predisposition or prior sexual behavior are not subject to any special consideration.
 - **Evaluate these questions and evidence based on relevancy.**

Exceptions to the Rape Shield Protections

1. Evidence of prior sexual behavior is permitted if offered to prove someone other than the respondent committed the alleged offense.
2. Evidence of prior sexual behavior is permitted if it is specifically about the complainant and the respondent **and** is offered to prove consent. 34 CFR §106.45(b)(6).

Does not permit evidence of a complainant's sexual behavior with anyone other than the respondent.

Relevance: The Bottom Line

- “The final regulations do not allow [recipients] to impose rules of evidence that result in exclusion of relevant evidence” 85 FR 30336-37
- “The decision-maker must consider relevant evidence and must not consider irrelevant evidence” 85 FR 30337
- The decision-maker may apply “logic and common sense” to reach any conclusions but must explain their rationale
- No “lengthy or complicated explanation” is necessary.

Challenging Relevancy Determinations

- Parties **must** be afforded the opportunity to challenge relevance determinations. 85 FR 30249.
 - If an erroneous relevancy determination affects the outcome of a hearing, it can be grounds for appeal as a “procedural irregularity.”
- Recipients may (but are not required to) allow parties or advisors to discuss the relevance determination with the decision-maker during the hearing. 85 FR 30343.

CROSS-EXAMINATION AT THE HEARING

Cross-Examination

- 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.

Role of Advisors During the Hearing

- The parties' advisors must conduct cross-examination on behalf of the party. § 106.45(b)(6)(i).
- The recipient has the discretion as to whether advisors may also conduct direct examination, but must apply the rule equally to both parties. 85 FR 30342.

Role of Advisors During the Hearing

- Advisor may serve as proxy for party, advocate for party, or neutrally relay party's desired questions.
85 FR 30340.
- Whether a party views an advisor of choice as 'representing' the party during a live hearing or not, [§106.45(b)(6)(i)] only requires recipients to permit advisor participation on the party's behalf *to conduct cross-examination*; not to 'represent' the party at the live hearing."
85 FR 30342.

Role of Advisors During the Hearing

- The only obligation imposed on advisors by the regulations is to relay a party's questions to the other parties or witnesses. 85 FR 30341.
- Assigned advisors are not required to believe or assume that the party's version of events is accurate, but still must conduct cross-examination on behalf of the party. 85 FR 30341.
- Recipients may apply rules equally to both parties to restrict an advisor's active participation in non-cross examination aspects of the hearing or investigation process. 106.45(b)(5)(iv).

Advisor Qualifications

- The regulations do not require any specific expectation of skill, qualifications, or competence. 85 FR 30341.
- Advisors are not subject to the same impartiality, conflict of interest, or bias requirements as other Title IX personnel. 85 FR 30341.
- Recipients may not require advisors of choice to complete training or competency assessments. 85 FR 30342.
- But recipients may train and assess the competency of their own employees who are assigned as advisors. 85 FR 30342.
 - Assigned advisors may be, but are not required to be, attorneys.

The Questioning Process

Step 1

- The advisor asks the party a question.

Step 2

- The decision-maker determines whether it is a relevant question.
- If not relevant, the decision-maker must explain why.

Step 3

- If the question is deemed relevant by the decision-maker, it must be answered.

Considerations for Efficient Hearing

- The recipient could allow the decision-maker to conduct direct examination
- Hold a pre-hearing meeting to:
 - Determine relevancy of questions in advance.
 - Discuss decorum rules that must be followed at the hearing.
 - Identify advisors and witnesses and go over the scope of participation of each.

Hearing Decorum

- Recipients may enforce their own code of conduct with respect to conduct other than Title IX sexual harassment. 85 FR 30342
- If a party or advisor breaks that code of conduct during the hearing, then the recipient may respond in accordance with the code, as long as it is still complying with Title IX requirements under 106.45.

Hearing Decorum

- A recipient cannot forbid a party from **conferring** with the party's advisor. 85 FR 30339.
 - But the recipient does have discretion to adopt rules governing the conduct of hearings.
- Purpose of rules regarding hearing etiquette and decorum is to make the hearing process respectful and professional

Considerations for Rules of Decorum

- Imposing rules on timing and length of breaks requested by parties or advisors.
- Do not allow any participant in the hearing to disrupt the hearing by making gestures, facial expressions, audible comments, etc. during any testimony.
- Prohibit other disruptive behaviors like interrupting and using vulgar language (except where relevant to allegations).

Refusing Cross-Examination

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

- However, the decision-maker 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.

“Statements”

- “‘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.”

Refusing Cross-Examination

- Other evidence that does not consist of statements, such as video evidence, may be used to reach a determination.
- Hearsay prohibition **does not apply** if the Respondent's statement, itself, constitutes the **sexual harassment at issue**.

Retaliation

A party may not “wrongfully procure” another party’s absence.

If the recipient has notice of such, it must remedy retaliation, which may include rescheduling the hearing and providing safety measures.

DETERMINATIONS

The Decision-Maker's Determination

At the conclusion of the hearing, the decision-maker must make a determination regarding responsibility.

- **Burden of Proof:** The recipient has the discretion to adopt either the preponderance of the evidence or clear and convincing evidence standard.
- The same standard must be applied to all formal complaints of sexual harassment that the recipient receives. 106.45(b)(1)(vii), (b)(7)(i).

Presumption of Non-Responsibility

- The respondent **must be presumed not responsible** for the alleged sexual harassment until a determination regarding responsibility is made following the conclusion of the hearing.
- The decision-maker cannot draw any inference about responsibility of the respondent **solely based on any party's failure to appear or answer cross-examination questions at the hearing.** § 106.45(b)(6)(i).

Weighing Evidence

- The decision-maker assigns weight and credibility to evidence.
 - Recipients can have rules regarding weight and credibility. Admissibility is governed by relevance.

- “...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.”
85 FR 303337.

Excluding Evidence

- Decision-makers may not consider any evidence that is **inappropriately disclosed** by a party, such as privileged information, treatment records, or irrelevant information.
 - Decision-makers can state for the record that such information was inappropriately disclosed, but will not be part of evidence of considered.
 - Decision-makers who cannot ignore such information should recuse themselves.

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 are 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.

Decision-Making: The Bottom Line

Remember...

- The respondent must be presumed not responsible for the alleged sexual harassment until the determination regarding responsibility is made. § 106.45(b)(1)(iv).
- **The determination must be based on an objective evaluation of all relevant evidence.**
 - The decision-maker may not take into account the “skill” of the parties’ advisors. § 106.45(b)(1)(ii); 85 FR 30332.
- Credibility determinations cannot be based on whether the person is a complainant, respondent, or witness. § 106.45(b)(1)(ii).

Notice of Determination

- Decision-maker must issue a **written determination regarding responsibility** and provide the written determination to the parties **simultaneously**. § 106.45(b)(7)(ii)-(iii).
- The determination regarding responsibility becomes **final** either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely. § 106.45(b)(7)(iii).

Writing a Defensible Determination

- Identify the **allegations** alleged to constitute sexual harassment.
- Outline the **procedural steps taken** from receipt of the formal complaint through the final decision.
- Support the determination with **findings of fact**.
- Include **conclusions** regarding the **recipient's code of conduct to the facts**.
- State the **decision-maker's rationale** for the result of each allegation, as well as the determination regarding responsibility.
- Include any **disciplinary sanctions** the recipient will impose on the respondent.
- State whether the recipient will provide **remedies to the complainant**.
- Include information regarding the **appeals process**. § 106.45(b)(7)(ii)

Sanctions and Remedies

Again, the decision-maker's written determination **must** include a statement of, and rationale for, the decision as to **each** allegation, and must include **any disciplinary sanctions** that will be imposed on the respondent, and **whether remedies will be provided to the complainant** by the recipient.
§ 106.45(b)(7)(ii)(E).

Equitable Treatment

To treat the parties **equitably**, the complainant must be provided with remedies when the outcome shows the complainant was victimized by sexual harassment. The respondent must be afforded a fair grievance process before disciplinary sanctions are imposed.

Remedies

- The purpose of remedies are to “restore or preserve equal access to the recipient’s education program or activity.” § 106.45(b)(1)(i).
- The regulation does not provide a definition of remedies.
 - Remedies may include the same types of services described as “supportive measures.” § 106.30.
 - However, remedies may burden the respondent or be punitive or disciplinary in nature, unlike supportive measures. § 106.45(b)(1)(i); 85 FR 30244.
- The Department does not require or prescribe disciplinary sanctions after a determination of responsibility and leave those decisions to the discretion of recipients, **but recipients must effectively implement remedies.** 85 FR 30063.

Remedies

- The Title IX Coordinator is responsible for the “effective implementation of remedies.” 85 FR 30276.
- When remedies are part of the final decision, the complainant will then communicate with the Title IX Coordinator separately to discuss what remedies are appropriate. 85 FR 30392.

APPEALS

Mandatory and Equal Appeal Rights

- Recipients must offer both parties an appeal from **(1)** a determination regarding responsibility, or **(2)** a recipient's dismissal of a formal complaint or any allegations therein.
- Recipients generally must implement appeal procedures **equally for both parties.**
- Recipients must notify the other party in writing when an appeal is filed.
- Recipients must ensure that the **appeal officer is not the hearing adjudicator, investigator, or Title IX Coordinator.**

Mandatory and Equal Appeal Rights

- Recipients must give both parties a reasonable, equal opportunity to submit a **written statement in support of, or challenging, the outcome.**
- Recipients must issue a written decision describing the result of the appeal.
- Recipients must provide the written decision **simultaneously to both parties.**

Bases for Appeal

- **Appeals may be granted on the following bases:**
 - a procedural irregularity that affected the outcome;
 - new evidence that was not reasonably available at the time the determination or dismissal was made and could affect the outcome; and
 - the Title IX Coordinator, investigator, or adjudicator had a conflict of interest or bias that affected the outcome of the matter.
- A recipient also may offer an appeal equally to both parties on additional bases.

Bases for Appeal

If an appeal is filed, the determination regarding responsibility becomes final on the date the parties are provided the written determination of the result of the appeal.

- This means there is **no way to appeal an appeal.**
- But note that party **can file a lawsuit or complaint with the Office of Civil Rights.**

Drafting Appeal Decisions

- Appeal officers should understand the applicable grounds for appeal and be guided by applicable policy and facts.
- The appeal officer should address all claims that are raised in the appeal.
- The appeal officer should not have bias or conflict of interest.
- Keep in mind the potential for litigation.