



## The Title IX Hearing Process: Policy Development, Legal Requirements & Case Law

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### Our Objectives Today

- Outline the foundations of the hearing process
- Consider the interplay between the Title IX hearing and constitutional due process concerns for public institutions
- Discuss potential approaches to policy development
- Review the process from the perspective of the parties to understand the potential impact

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## Audience Poll #1

What is your role on your Title IX team?

- A. Coordinator
- B. Decision-Maker (Hearing Officer/Panel Member)
- C. Investigator
- D. Other

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## Audience Poll #2

What is your experience level with Title IX hearings since August 14, 2020?

- A. Have seen many
- B. Have seen one or two
- C. Have never seen one

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## A Spectrum of Approaches to Hearings

My In Laws ↔ Educational Conversation ↔ Courtroom Procedure

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## Where We Are Now

My In Laws ↔ Educational Conversation ↔ Courtroom Procedure



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## How Did We Get Here? (1 of 2)

- 1972 – Title IX enacted
- 1980 – Regulations first published – no real procedure
- 1997/2001 – Guidance shifts focus to sexual harassment
- 2011/2014 – Guidance shifts focus to sexual violence

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## How Did We Get Here? (2 of 2)

- 2015 – Clery regulations are implemented; more procedure required
- 2018 – 2011/2014 Guidance withdrawn; proposed regulations released
- 2018 (also) – *Doe v. Baum*, 903 F.3d 575 (6<sup>th</sup> Cir. 2018)
- **2020 – Final regulations released**
- [2022 – New proposed regulations...]

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## Things to Know About: Threshold Requirements

- Must meet certain threshold requirements to fall under the Title IX requirements:
  - Complaint must have been filed when the complainant was participating or attempting to participate in your education program or activity
  - Complaint must allege facts that, if true, could constitute “Sexual Harassment” under the regulatory definition (34 C.F.R. 106.30)
  - Conduct must have occurred while the complainant was standing in the United States
  - Conduct must have occurred within your educational program or activity

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## August 2020 Regulations – General Requirements – 34 C.F.R. 106.45(b)(1)

- Treat parties **equitably**
- Require an **objective evaluation** of all relevant evidence (including both inculpatory and exculpatory evidence)
- Provide that **credibility determinations** may not be based on a person’s status as a complainant, respondent, or witness
- All Title IX team members must be **trained** on topics defined in the regulations (34 C.F.R. 106.45(b)(1)(iii) and 34 C.F.R. 668.46(k)(2))
- Process must **assume the respondent is not responsible** for the reported conduct until a determination regarding responsibility is made at the conclusion of the process

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## If Not Title IX, Where Does It Go?

- Check your policies! Some options that institutions might select:
  - Refer to another disciplinary system (i.e. student conduct, employee disciplinary process) for investigation and adjudication
  - Investigate through Title IX office, refer to another disciplinary system for adjudication
  - Use exactly the same process to adjudicate both Title IX and non-Title IX sexual misconduct

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## Non-Title IX Process Considerations

- Public schools have to consider **constitutional due process**
  - What “process” is due? Case law differs by Circuit and is evolving.
  - Notice of the allegations
  - Opportunity to be heard
- Private schools have to consider their **contracts** with students; may require “**good faith and fair dealing**” under state contract law
- Both types have to consider **Clergy Act requirements** for non-Title IX sexual assault, dating violence, domestic violence, and stalking
- Both types may also have specific procedures under **state law**

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## August 2020 Regulations – General Process

Formal Complaint

Investigation

Hearing

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## Things to Know About: Formal Complaints

- The Formal Complaint is what starts the process
- If the complainant wrote the Formal Complaint, it is relevant evidence
- The Formal Complaint is not the last word on what the case is about – it's the first word!

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## Things to Know About: Notice of Allegations

- Both parties must be provided notice of the allegations, including
  - Sufficient details known at the time of the notice: identity of the parties involved, date, location, description of conduct that may constitute Sexual Harassment
  - As the investigation goes on, this may be amended
- Tip: If you are a hearing officer, look for this notice. It tells you what you have to decide!

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## Things to Know About: Investigations

- Both parties have the opportunity to participate in interviews, submit evidence, and suggest witnesses (including expert witnesses)
- The investigator will gather interview summaries/transcripts, written statements, and other evidence, and the parties have ten days to review it and provide written feedback.
- The investigator will then prepare a report that fairly summarizes the relevant evidence gathered, and the parties have another ten days to review it and provide written feedback.

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## Things to Know About: Restricted Evidence

- There are certain things that cannot be relevant in a hearing:
  - **Medical records** where the patient has not provided written consent for inclusion in the process
  - **Privileged information** (e.g. attorney-client) unless the person holding the privilege has waived it
  - Questions and evidence about the **complainant's sexual predisposition** or prior sexual behavior unless the questions/evidence are offered:
    - To prove that someone other than the respondent committed the conduct alleged;
    - Concerning specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent

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## Things to Know About: Hearing Packets

- **Investigative Report and its attachments**
  - Formal complaint
  - Notice of Allegations
  - Interview transcripts?
  - Text messages, emails, screenshots?
  - Applicable policy definitions in place at the time the conduct was committed
  - Any other relevant evidence

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## Think of Hearings Like a Potluck Table (Yes, that's my kitchen)



- Investigative evidence is on the table
- Witnesses at the hearing bring more to the table
- Advisors question everyone about what they brought
- When everyone has brought their dish, that's when you step back and look it over make decisions about what looks good

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## Also – Relevancy Determinations

- Imagine if, after each person sets down their dish, you have to say, “Edible.” I mean, “Relevant.”
  - In other words, does it get to stay on the table?

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## Some Policy Considerations (1 of 3)

- Will you hold hearings virtually or in person?
- Will you have one hearing officer, or a panel with a chair?
- Will you ask if the Respondent accepts responsibility?
- Will the parties give opening statements? (Can the advisors give them instead?)

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## Some Policy Considerations (2 of 3)

- Who questions first – the decision-maker? Complainant's advisor? Respondent's advisor?
- Will you let a party's own advisor question them at the hearing? Fully? Just follow-up questions?
- If a party or witness does not fully submit to cross-examination, can your decision-maker consider them?

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## Some Policy Considerations (3 of 3)

- Will the parties give closing statements? (Can the advisors give them instead?)
- Will the parties submit impact/mitigation statements for consideration if sanctioning is necessary?

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## Preparing for Hearing as a Decision-Maker

- Review Investigative Report
- Consider which facts are disputed and which facts are undisputed
- What questions do you need answered at the hearing?
  - Think of the elements of a policy violation.
  - What relates to an element vs. credibility determination
- What information do you want to hear the parties or witnesses recount for you?

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## Pre-Hearing Conferences (1 of 2)

- Not required, but a best practice
- Held separately with each party and their advisor
- Obtain list of requested witnesses
- Address any evidentiary issues
- Answer questions

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## Pre-Hearing Conferences (2 of 2)

- Help put the parties at ease
- Help the advisors better prepare to help you understand the evidence
- Sets behavioral standards and decorum expectations
- June 30<sup>th</sup> – Webinar on Title IX Pre-Hearing Conferences!

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## Decorum Rules: Examples

- Advisors cannot answer questions for their party.
- Advisors cannot “object” to relevancy determinations.
- All participants should treat other participants with dignity and respect.
- Repetitive or harassing questions will not be permitted.

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## Hearing Notice

- Hearing must be at least 10 days after investigative report is shared with parties/advisors
- Provide reasonable notice of the hearing, typically by coordinating with parties/advisors
  - What witnesses have been invited to attend?
  - How does one access the hearing? Where is it being held and when?
  - Reminder: supportive measures still available.

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## Who Should Attend?

- Hearing Officer or Hearing Panel
- Parties and advisors
- Witnesses
- Investigator?
- Hearing administrator?
- Interpreter if needed?

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## The Day of the Hearing: In Person

- Hearing location should be sufficiently large to accommodate all attendees
  - Think about privacy and comfort
- Entrance/exit routes for each party/advisor
- Spaces for break-out rooms for each party/advisor
- Where can witnesses wait? Do we need to separate them?
- Is there some sort of heightened risk that requires a security presence?  
Example: A party makes a threat towards a witness.
- How will you record the proceedings?

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## The Day of the Hearing: Virtual

- Set up your virtual meeting space so all attendees go to a waiting room before being admitted.
- Admit one party/advisor for sound check and place in break-out room, then do other party.
- Bring all parties together and begin recording.
- Witnesses remain in the waiting room until you are ready to take their testimony.
- How will you accommodate parties/witnesses that need a space or technology to access the hearing?

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## Order of the Hearing

- Hit record
- Read script to remind parties of rights and responsibilities
- Opening statements?
- Questioning of complainant
- Questioning of respondent
- Questioning of witnesses (each admitted only for their portion)
- Closing statements?

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## Your Goals (1 of 2)

- Get your relevant questions answered so that you have enough information to:
  - Resolve disputed issues of fact
  - Resolve credibility disputes
  - Make a determination as to whether the Policy has been violated
  - Note: July 7<sup>th</sup> Webinar on Effective Questioning!

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## Your Goals (2 of 2)

- Make relevancy determinations after every advisor question
- Follow the policy and procedures
- Help the parties feel heard
- Maintain neutrality and reserve judgment until it's time to sit back and look at the banquet table

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## Written Decision (1 of 2)

- Must Include:
  - Identification of the allegations potentially constituting “Sexual Harassment” under the Title IX regulations
  - Description of the procedural steps taken from receipt of the formal complaint through the determination, including notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather evidence, and hearings held
  - Findings of fact supporting the determination
  - Conclusions regarding the application of the recipient’s code of conduct to the facts

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## Written Decision (2 of 2)

- Must Include:
  - **Statement of, and rationale for**, the result as to each allegation, including a determination as to responsibility, any **disciplinary sanctions** the recipient imposes on the respondent, and whether **remedies** designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant
  - Recipient’s procedures and permissible bases for appeal

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## Distributing the Written Determination

- Goes to both parties simultaneously
- Will you provide it to the advisors as well?
- Do you provide a hard copy, electronic copy, or electronic access?

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## Other Policy Determinations Regarding Decision

- Will the decision-maker review impact/mitigation statements when sanctioning?
- How will you ensure that your sanctions are consistent from case to case?

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