

## **Title IX Coordinator Training Online Course**

### **Class Three: The Grievance Process – Hearings & Appeals**

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PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.

## **Class Overview**



- Relevance Redux & Conclusion
- Other Violations
- Due Process / Fundamental Fairness
- Credibility Determinations
- Advisors
- The Written Determination
- Appeals

# Relevance

Review and Completion

## Relevance Redux

**The Title IX regulations do *not*:**

- Adopt the Federal Rules of Evidence.
- Define “relevance.”
- Permit excluding evidence that:
  - Concerns prior bad acts.
  - Constitutes character evidence.



# What is Relevant?



## Evidence *is* relevant if:

- It has any tendency to make a fact more or less probable than it would be without the evidence; *and*
- The fact is of consequence in proving or disproving the allegations.
- A determination regarding relevancy can rely on logic, experience or science.

## The following evidence *may not* be used or considered relevant:

- Treatment records without consent.
- Protected by a legally recognized privilege.
- Questions of evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior unless it meets one of two limited exceptions.
- Is made by a party or witness who does not submit to cross-examination. **Currently, not enforced by OCR but may apply under state law or law in some federal circuits.**



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## Admission vs. Weight, Credibility, or Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence.
- Because § 106.45 does not address how relevant evidence must be evaluated for weight or credibility by a decision-maker, an IHE can adopt and apply its own rules so long as:
  - The rules do not conflict with § 106.45; and
  - The rules apply equally to both parties.
- For example:
  - An IHE may, e.g., adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.
- **REMEMBER:** An IHE's investigators and decision-makers must be trained specifically with respect to "issues of relevance" and any relevance rules adopted by the IHE should be addressed in the IHE's publicly available training materials.



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# All Relevant Information Is Not Created Equal



- May weigh evidence
- Considerations:
  - Is it corroborated?
  - Is there a reason the source might not be reliable?
  - Is it logical given other established facts?
- The Regs require the decision-maker to objectively evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility.
- The decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.
- “Not probative of any material fact.”

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## Violations of Other Policies

## Violations of Other Policies

- Knowingly making false statements or submitting false information
  - Being alert to potential claims of retaliation
- Sexual Harassment not covered in the regulations but violating campus policies
  - Violations occurring in programs or at locations outside the current definition
  - Violations that don't meet the standards under the regulations
- Student Conduct violations
- Employee Conduct standards



*Update notice with later-discovered allegations.*

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**Due Process  
(Fundamental  
Fairness)**

## The Process That Is Due

### A Fair Process:

- that follows the law,
- is implemented without bias, stereotypes or pre-judgment, and
- provides an equal opportunity for parties to be heard and present evidence,
- allows the decision-maker(s) to reach a determination consistent with the standard of evidence.



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## Title IX Sexual Harassment Grievance Process: Elements of “Due Process”



- Notice to the Respondent of the allegations
  - Opportunity to respond
  - Adequate opportunity to prepare before responding
- Notice to the Parties of the process that will be used, including appeals
- Opportunity to present evidence and witnesses
- Cross-examination, including questioning of witnesses
- Live hearing (in separate spaces upon request and as appropriate)
- Opportunity to have advisors of choice



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# State the Standard of Evidence



Same standard of evidence for all.

**Either:**

- *Preponderance of the evidence, i.e., more likely than not; **or***
- *Clear and convincing evidence, i.e., substantially more likely to be true than not.*

**And Not:**

- *Beyond a reasonable doubt (no other reasonable explanation possible – criminal cases).*

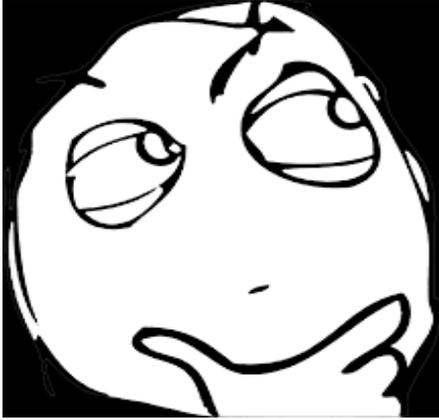


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# Credibility Determinations

## Considerations



- What evidence is most believable?
- Corroborating evidence
  - Other testimony
  - Physical evidence
- Consider faulty memories
- Explore reasons for inconsistencies
- There are no “perfect” witnesses, complainants or respondents



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## Factors to Weigh

- Consider each material fact separately.
- Credibility as to the facts:
  - Credibility on one fact doesn't make all of that person's testimony credible, and
  - Lack of credibility on one point doesn't make all of that person's testimony non-credible.
- Does the testimony feel rehearsed or memorized?
- Is the testimony exactly the same as another witness?
- Does the testimony make sense?
- Is the testimony detailed, specific & convincing? If not, is there a reason?
- Is it a statement against interest?
- Less credible witness isn't necessarily being dishonest.



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## Caution



- Eyewitness accounts
- Bias/Assumptions about witness credibility that may not take account of cultural norms or may stereotype.
- Assumptions about memory that may not reflect witness experiences.
- Failure of decision-maker to explain credibility determinations.

## The Decision-Maker (Hearing Officer)

## Getting Ready

- Self-identify any conflict of interest or bias.
- Prepare, prepare, prepare.
- Read the report carefully and repeatedly, but don't prejudge.
- Understand the conduct at issue and the elements of the alleged violations.
- Identify areas of agreement and disagreement.
- Determine if there are areas that require further inquiry, e.g., did the investigator explore & consider all the relevant evidence?



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## Hearing Decorum

**Points to Consider:** May have rules that:

- Require advisors be respectful and prohibit abusive/intimidating questioning.
  - Deem repetition of the same question irrelevant.
  - Allow for removal of advisors.
- Specify any objection process.
- Govern the timing and length of breaks to confer, and prohibit disruption.
- Require that *parties* make any openings and closings.
- Who will enforce the rules of decorum?
  - How will you train decision-makers?



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# Advisors

## Advisors



- Parties must have the opportunity to have an advisor present during any grievance proceeding (hearing or related meeting).
- A party may choose not to have an advisor.
  - However, the institution must provide an advisor to question and cross-examine witnesses if the party isn't accompanied by one.
  - Institutions may require parties to provide advance notice of their advisor's attendance.
    - What if they are a no-show?
- Advisor provided by institution need not be an attorney.
  - Need not be of "equal competency."
- May establish guidelines for advisors.
  - Role of advisors in hearings and meetings.
  - Use of non-disclosure Agreements.

## More on the Advisor's Role



- Provide support and advice to the party.
- Understand the allegations and the process.
- Understand the purpose and scope of questioning and cross-examination.
- Ask questions that elicit relevant information.
- Wait for relevancy determinations after asking a question.
- Adhere to rules of decorum and encourage the party to do the same.
- NOTE: Institutions may remove disruptive advisors ... *carefully*.

## Working with the Parties' Attorneys

## Advisor or Legal Representative

- Clarify procedures and role in advance.
- Distinguish between advisor and legal representative.
- Emphasize the “ground rules” - provide any rules of decorum.
- Establish lines of communication and points of contact.



## Written Determination

## Written Determination

- Identification of allegations potentially constituting sexual harassment
- Description of the procedural steps
- Findings of fact supporting the determination
- Conclusions regarding the application of the code of conduct/policy to the facts
- Statement of and rationale for the result as to each allegation, including sanctions and whether remedies will be provided
- Appeal procedures and grounds



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## Appeals

## Appeals

Must provide an appeal from a determination of responsibility and dismissal of a formal complaint, based on:

- Procedural irregularities that affected the outcome.
- New evidence not reasonably available at the time of determination that could affect the outcome.
- Bias or conflict of interest of the Title IX Coordinator, investigator or decision-maker that affected the outcome.
- Inappropriate or impermissible dismissal of any formal complaint or allegation.
- May include other grounds, equally available to both parties.



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## Appeal Process

**Yes, BUT...**

- Notify other party upon receipt of appeal.
- Appeal decision-maker can't be Title IX Coordinator, investigator or hearing decision-maker.
- Opportunity for both parties to submit written statement.
- Written decision with the result and rationale simultaneously to both parties.



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# Questions?

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