

Title IX and Non-Title IX Hearings

Kristan Tucker, JD

October 2020

2020 Regulations Hearing Requirements (Title IX Misconduct)

1. Live Hearing (Can be Virtual)
2. Separate Decision Maker
3. Consistent Standard of Evidence
4. All Questions on Cross-Examination are Subject to Relevancy Determination
5. Cannot Consider Statements not Subject to Cross
6. University Must Provide Advisor

The Live Hearing Requirement

Live Hearing Required

Goal - Meaningful, transparent opportunity to present both parties views of the matter to the decision-maker, reducing the likelihood of biased decisions, improving the accuracy of outcomes, and increasing party and public confidence in the fairness and reliability of outcomes.

- Location – all parties physically present in the same geographic location OR any or all parties, witnesses, and other participants may appear at the live hearing virtually (participants need to be able to simultaneously see and hear each other)
- Virtual request – Either party may request hearing to occur with parties located in separate rooms with technology enabling decision-maker and parties to simultaneously see and hear the party or the witness answering questions. Telephonic appearance is not sufficient.
- May adopt rules that govern conduct and decorum of participants. Rules need to apply equally to both parties.
- Relevance is the standard – may not exclude relevant evidence or create rules that ignore relevant evidence.

Live Hearing - Participation

Participants may refuse to submit to cross-examination for a variety of reasons, which may include self-incrimination regarding a related criminal proceeding, a complainant's reluctance to be cross-examined, or a witness studying abroad

- Decision maker must not rely on an absent or non-cross-examined party or witness's statements, decision-maker cannot draw an inferences about the determination regarding responsibility based on such absence or refusal to be cross-examined.
- University may hold entire hearing virtually utilizing technology.
- Expressly prohibits retaliation against a party, witness, or other person who exercises their rights under Title IX to include the right to participate or refuse to participate in a grievance process.
- University has discretion to dismiss a formal complaint when CP wishes to withdraw the allegations, RP is no longer enrolled or employed at University, or specific circumstances prevent the University from gathering evidence sufficient to reach determination (typically prior to hearing).
- Where University initiated a process and not the Complainant, the CP remains under no obligation to then participate in the grievance process. DOE does not believe the exclusion of the CP's statements is unfair to CP when CP did not wish to file a formal complaint and has access to supportive measures.

Live Hearing - Recording

University may create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

Role of Decision Maker

Role of Decision Maker – Determine Relevance

Facilitate hearing protocols.

Pose questions, if applicable.

Before party or witness answering cross-examination or other question, the Decision-Maker must first **determine whether the question is relevant.**

Decision-Maker must **explain** to the party proposing the question any **decision to exclude a question as not relevant.**

Role of Decision Maker – Decision, Sanction, and Notification

Determine Responsibility – Ultimate determination regarding responsibility – independent obligation to objectively evaluate relevant evidence and make a credibility determination.

Sanction – if found responsible

Issue Written Determination – simultaneous written determination regarding responsibility including:

- Identification of allegations
- Description of the procedural steps taken from the receipt of the formal complaint through determination
- Findings of fact supporting the determination
- Conclusions regarding the application of the recipient's code of conduct to the facts
- Rationale
- Appeal procedures

Standard of Evidence

Standard of Evidence – Preponderance of the Evidence*

- More likely to be true than not
- More probable than not
- The greater weight of the evidence
- Tipping the scale ever so slightly
- 51%
- Quality of the evidence, not quantity

*Based on common usage.

Advisor of Choice

AN Advisor of Choice - General

- Role is to assist and advise throughout process.
- May not limit the choice of the advisor, but may limit level of participation in the proceedings as long as restrictions apply equally to both parties.
- Attorney, friend, parent, faculty member, etc.
- Title IX personnel having conflicts of interest or bias does not apply to party advisors, thus, existence of a possible conflict of interest where an advisor is assisting one party and also expected to give a statement as a witness, does not violate final regulations.

Advisor of Choice – Hearing Role

- Ask the other party and any witnesses relevant questions and follow-up questions including those challenging credibility.
- Cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally.
- Party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear.
- At ETBU, an advisor will not provide opening or closing remarks on a party's behalf.
- If party does not have an advisor present at the live hearing, the University must provide without fee or charge to that party, an advisor of the University's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on a party's behalf. May need to stop the hearing to do so.
- Where one party does not appear and that party's advisor of choice does not appear, a University-provided advisor must still be available to cross-examine the other appearing party "on behalf of" the non-appearing party.

Advisor of Choice – Hearing Role

- A party cannot “fire” an assigned advisor during the hearing, but if the party correctly asserts that the assigned advisor is refusing to “conduct cross-examination on the party’s behalf” then the University is obligated to provide the party an advisor to perform that function – that could mean counseling the assigned advisor to perform that role, or stopping the hearing to assign a different advisor.
- If a party whom University assigns an advisor refuses to work with the advisor when the advisor is willing to conduct cross-examination, then that party has no right of self-representation with respect to conducting cross-examination, and that party would not be able to pose any cross-examination question.
- Goal would be for parties to have an advisor prior to the pre-hearing meeting to explain the police, decorum expectations, privacy protections regarding documents, etc.

Cross-Examination by Advisor

Cross-Examination

- Ask the other party and all witnesses all relevant questions and follow-up questions, including those challenging credibility.
- Conducted directly, orally, and in real time by the party's advisor of choice.
- Equal opportunity to inspect and review any evidence obtained as party of investigation that is directly related to the allegations. Made available at the hearing to be able to refer to it including for purposes of cross-examination.
- Intended to give parties opportunity to meaningfully challenge plausibility, reliability, credibility, and consistency of the other party and witnesses.
- Cross-examination consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegations at issue.

Cross-Examination

- Only relevant cross-examination and other questions may be asked of a party or witness.
- Before a party or witness answers a question, the decision-maker must first determine whether the question is relevant. Build in these pauses.
- Decision-maker must explain any decision to exclude a question as not relevant.
- May give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing. May also ask the advisor why they deem a question is relevant before making a ruling.

Rules of Decorum

- Goal – ensure all participants, including parties and advisors, participate respectfully and non-abusively during a hearing.
- If a party's advisor (regardless of whether advisor was provided by the University) refuses to comply with a University's rules of decorum, the University may require the party to use a different advisor.
- Training of advisors is not required. Also, University may not impose training or competency assessments on advisors of choice selected by parties.
- Type of rules to include?

Relevance

Relevance

- Goal – ensure all participants, including parties and advisors, participate respectfully and non-abusively during a hearing.
- If a party's advisor (regardless of whether advisor was provided by the University) refuses to comply with a University's rules of decorum, the University may require the party to use a different advisor.
- Training of advisors is not required. Also, University may not impose training or competency assessments on advisors of choice selected by parties.
- Type of rules to include?

Limitations on Relevance

Must consider relevant evidence with the following conditions:

- A CP's prior sexual behavior is irrelevant (unless questions or evidence about prior sexual behavior meet one of two exceptions);
 - To prove that someone other than the RP committed the conduct alleged by the CP, or
 - To prove consent, if the questions and evidence concern specific incidents of the CP's prior sexual behavior with respect to the RP.
- Information protected by any legally recognized privilege cannot be used; no party's treatment records may be used without that party's voluntary, written consent; and
- Statements not submit to cross-examination cannot be relied on by the decision-maker.

Relevance

2020 regs do not define relevance and the ordinary meaning of the word should be understood and applied.

“While the proposed rules do not speak to:

- Admissibility of hearsay,
- Prior bad acts,
- Character evidence,
- Polygraph (lie detector) results,
- Standards for authentication of evidence,
- Or similar issues concerning evidence,

The final regulations require to gather and evaluate relevant evidence” including inculpatory and exculpatory, and questions about a CP’s prior sexual behavior to be irrelevant with two exceptions...

Prior Sexual History

Questions and evidence about the CP's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the CP's prior sexual behavior are offered:

- To prove that someone other than the RP committed the conduct alleged by the CP, or
- To prove consent, if the questions and evidence concern specific incidents of the CP's prior sexual behavior with respect to the RP.

***Only applies to CP** – the Dept's reiterates that the rape shield language in this provision does not pertain to the sexual predisposition or sexual behavior of the RP, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.

Prior Sexual History: Motive

- Dept disagrees that the rape shield language is too broad. Scenarios described by commenters, where a respondent might wish to prove the CP had a motive to fabricate or conceal a sexual interaction, do not require admission or consideration of the CP's sexual behavior.
- RP's in that scenario could probe a CP's motive by, for example inquiring whether a CP had a dating or romantic relationship with a person other than the RP, without delving into a CP's sexual behavior; sexual behavior evidence would remain irrelevant in such circumstances.

Prior and Subsequent Misconduct

- 2020 Regs do not prohibit the use of prior or subsequent misconduct – evidence of inappropriate behavior by an alleged harasser is permitted if relevant
- Schools need to determine if the conduct is:
 - Relevant
 - May be used in determining responsibility
 - May be used in sanctioning
- If so, will need to set criteria for consideration

Prior and Subsequent Conduct Practically

- **May be relevant to demonstrate:**
 - Intent/Knowledge
 - Motive
 - Opportunity
 - Lack of mistake
 - Pattern
 - Identity
 - Information that is inextricably interwove with the facts
- Consider prejudicial vs. probative value
- May not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.

Relevance continued

- Decision maker does not have to provide a lengthy or complicated explanation when excluded a question as no relevant.
- Majority of questions will be relevant in theory except prior bad acts/history. Focus on the questions that would be excluded, but beyond that, almost all questions are “relevant.”

**Cannot Consider Statements
not Subject to Cross-
Examination**

Exclusion of statements

- If party or witness does not submit to cross-examination at the live hearing, decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
- Only statements that have been tested for credibility – cross-examination allowed for consideration by decision-maker.
- Parties are not required to cross-examine every witness or party; however, for a witness or party statement to be considered, the individual needs to “submit to cross-examination.”
- If a party or witness refuses to respond to a decision-maker’s question, the decision-maker is not precluded from relying on that party or witness’s statements.
- Consider – police reports, SANE reports – individuals would need to appear at the hearing and submit to cross-examination if there is diagnostic information, impressions provided, etc.
- Can consider evidence that does not turn on the credibility of a party or witness – videos/recordings/security camera footage/test message from RP that in and of itself constitutes harassment

Sanctioning

ETBU

PROHIBITED CONDUCT

Conduct Covered Under ETBU's *Sexual and Interpersonal Misconduct Policy*

- **Title IX Sexual Harassment**

(Verbal, Physical, Electronic)

- Title IX Quid Pro Quo Sexual Harassment
- Title IX Severe, Pervasive and Objectively Offensive Sexual Harassment
- Title IX Sexual Assault
- Title IX Domestic Violence
- Title IX Dating Violence
- Title IX Stalking

- **Non-Title IX Misconduct**

- Non-Title IX Sexual Assault
- Non-Consensual Sexual Contact
- Sexual and Gender-Based Harassment
- Sexual Exploitation
- Domestic Violence
- Dating Violence
- Stalking
- Retaliation
- Complicity

TIX Sexual Harassment

Title IX Quid Pro Quo Sexual Harassment: is conduct on the basis of sex by which an employee of the University conditions the provision of an aid, benefit, or service of the University on a student's or employee's participation in unwelcome sexual conduct.

Title IX Severe, Pervasive and Objectively Offensive Sexual Harassment: is conduct on the basis of sex that constitutes unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a student or employee equal access to the University's education program or activity.

TIX Sexual Harassment (Continued)

Title IX Sexual Assault: Includes rape, fondling without consent, incest or statutory rape, defined as follows:

- Rape is the penetration, no matter how slight, of the vagina or anus with any body part or object, or oral genital contact of another person without consent (as defined below).
- Fondling is the touching of the private body parts of another person for the purpose of sexual gratification, without consent.
- Incest is sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- Statutory rape is sexual intercourse with a person who is under the statutory age of consent. Under Texas law, individuals younger than 17 years of age are legally incapable of giving consent to sexual penetration or contact by an adult (someone 18 years of age or older) who is three or more years older than the individual.

Consent

Consent is the voluntary, informed, and freely given agreement, through words and/or actions, to participate in mutually agreed-upon sexual acts. Consensual activity happens when each partner willingly and affirmatively chooses to participate.



Consent

- <https://www.youtube.com/watch?v=fGoWLWS4-kU>

Incapacitation

- Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring.
- An individual is incapacitated if they demonstrate that they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in an act.
- A state beyond drunkenness, intoxication, or being under the influence.

TIX Sexual Harassment (Cont.)

Title IX Domestic Violence: Conduct that constitutes a felony or misdemeanor crime of violence committed:

- By a current or former spouse or intimate partner of the complainant;
- By a person with whom the complainant shares a child in common;
- By a person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- By a person similarly situated to a spouse of the complainant under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred; or
- By any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.

TIX Sexual Harassment (Cont.)

Title IX Dating Violence: conduct that constitutes violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant. The existence of such a relationship shall be determined based on the parties' statements and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition, dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse. Dating violence does not include acts covered under the definition of domestic violence.

Title IX Stalking: Conduct on the basis of sex that constitutes a course of conduct directed at a specific person that would cause a reasonable person to fear for the person's safety or the safety of others or suffer substantial emotional distress.

Non-Title IX Misconduct covered under Sexual and Interpersonal Misconduct Policy

*Not Title IX either due to the nature of the conduct or because it did not reportedly occur within a program or activity of the University in the United States.

- ***Non-Title IX Sexual Assault:*** Same behavior as Title IX, but not in program/activity of University in the U.S.
- ***Non-Title IX Non-Consensual Sexual Contact:*** Any intentional touching of a person's breast(s), buttock(s), groin, genitals, or other intimate parts without consent. May be over or under clothing. May be RP touching CP, RP making CP touch RP/other person, or RP making CP touch own body.

Non-Title IX Misconduct covered under Sexual and Interpersonal Misconduct Policy (cont.)

Non-Title IX Sexual Harassment: Unwelcome sexual advance, request for sexual favors, and/or other unwelcome, verbal, or physical conduct of a sexual nature when one of the three conditions outlined below is present.

Non-Title IX Gender-Based Harassment: Based on gender, sexual orientation, gender identity, or gender expression, which include acts of aggression, intimidation, or hostility, whether verbal or non-verbal, graphic, physical, or otherwise, even if the acts do not involve contact of a sexual nature, when one of the three conditions outlined below is present.

- Submission to, or rejection of, such conduct is made implicitly or explicitly a term or condition of a person's instruction, academic standing, employment, or participation in any University program, activity, or benefit (not TIX Quid Pro Quo).
- Submission to, or rejection of, such conduct by an individual is used as a basis for evaluation in making academic or personnel decisions, in circumstances (not TIX Quid Pro Quo).
- Such conduct creates a hostile environment.

Non-Title IX Misconduct covered under Sexual and Interpersonal Misconduct Policy (cont.)

Non-Title IX Sexual Exploitation: Any act where one person violates the sexual privacy of another or takes unjust or abusive sexual advantage of another, but that does not fall within the definition of Title IX Sexual Harassment.

- Examples that may be prohibited conduct:
 - Filming an intimate encounter without the other person's knowledge and showing it to others.
 - Posting the nude pictures that your girlfriend or boyfriend sent only you, that they asked to keep private, to Snapchat or Instagram.
 - Surreptitiously observing another individual's nudity or sexual activity or allowing another to observe consensual sexual activity without the knowledge and consent of all parties involved.

Non-Title IX Misconduct covered under Sexual and Interpersonal Misconduct Policy (cont.)

Non-Title IX Domestic Violence

Non-Title IX Dating Violence

Non-Title IX Stalking

Complicity: Any act that knowingly aids, facilitates, promotes, or encourages the commission of Prohibited Conduct by another person.

Retaliation: intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations or this policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing regarding Prohibited Conduct.

Use of Slides

- This PowerPoint presentation is not intended to be used as a stand-alone teaching tool.
- These materials are meant to provide a framework for informed discussion, not to provide legal advice regarding specific institutions or contexts.
- All rights are reserved to Tucker Consulting Group.