

Conducting a Title IX Hearing



IN THIS CHAPTER



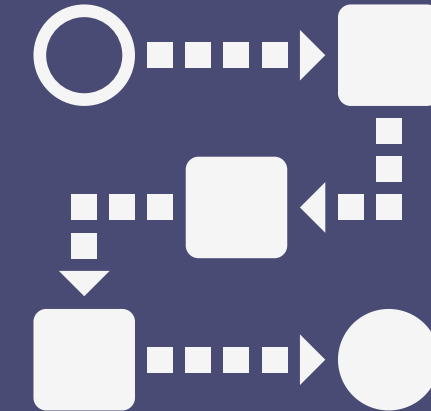
TITLE IX
REQUIREMENTS FOR
LIVE HEARINGS



CRAFTING QUESTIONS
FOR THE PARTIES



HEARING LOGISTICS



HEARING
PROCEDURES

Title IX Requirements for Live Hearings



Title IX Regulations Guidance on Hearings

The live hearing is only required for postsecondary institutions.

- K-12 schools may have hearings, but they are not subject to the same requirements under 106.45(B)(6)
- K-12 schools must allow for the written submission of relevant questions for Parties and Witnesses prior to Decision-Maker's determination is made
- K-12 Decision-Makers will need to consult policy to determine which avenue is utilized, as well as specific procedures and timelines

Title IX Regulations Guidance on Hearings

At a live hearing, the Decision-Maker:

"must permit each Party's Advisor to ask the other Party and any Witnesses all relevant questions and follow-up questions, including those challenging credibility."

34 C.F.R. § 106.45(B)(6)

Title IX Regulations Guidance on Hearings

Cross-examination must take place:

DIRECTLY

ORALLY

**IN
REAL TIME**



Must be conducted through an Advisor of choice and NEVER by the Complainant or Respondent

Title IX Regulations Guidance on Hearings

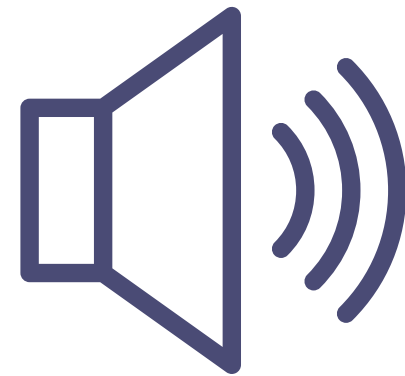
If requested by either party, the school must provide for the hearing to occur with Parties in separate rooms, supported via technology.



There is also the option for any or all Parties and Witnesses to participate remotely, via technology (at the school's discretion).

Recordkeeping

Schools must create one of the following records of the hearing to provide to the Parties for inspection and review:



Audio Recording



Audiovisual Recording



Transcript

Any Title IX records, including the live hearing record and written determination must be kept for at least seven years.

Title IX Advisors

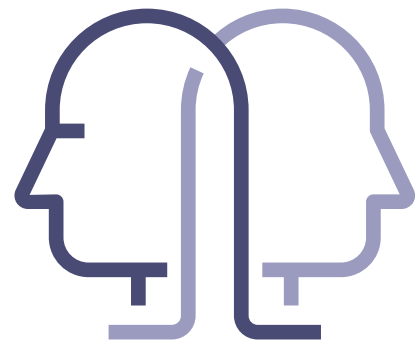
- Remember, Parties will be accompanied by an Advisor of their choice who may be, but is not required to be, an attorney
 - Advisors are allowed to attend any meeting but are required for the hearing
 - Parties may have been utilizing Advisor support throughout the full grievance process
 - Others will just engage with Advisors for the hearing
- May be a parent, friend, teacher, coach, etc.
 - Keep this in mind as cross-examination proficiency will vary greatly
 - Some may need more guidance during the hearing
- If a Party has not selected an advisor prior to the hearing, one must be provided by the school (free of charge)
- Restrictions may be placed on Advisor participation but must be applied equally to both Parties' Advisors

Crafting Questions for the Parties

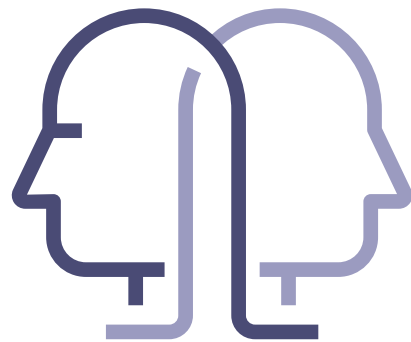


Considerations When Crafting Questions

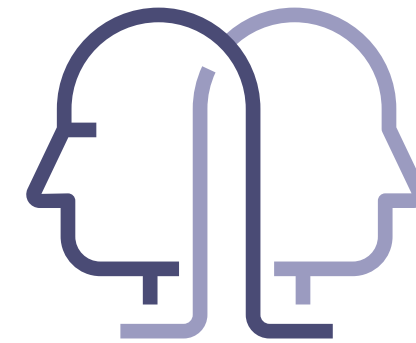
- Should be based on facts in dispute
 - Could be clear conflict between statements provided by Parties (he said/she said)
 - Parties may not dispute that events happened, but they may have disagreement about certain elements of the policy violation



Whether it was
unwelcome



Whether it was
based on sex



Whether it was
severe, pervasive,
and offensive

- Dispute could center around consent (if the Parties are legally able to consent)

Questioning Checklist

- ❓ What information do I need to know to prove or disprove an element of the policy violated?
- ❓ What is the best question to ask to generate an informative answer?
- ❓ Which Party or Witness will I need to question to obtain this information?
- ❓ Can this information be found anywhere in the investigation report or file?

Considerations When Crafting Questions

Good questions are:

Open-
ended

Open-ended questions prompt the party to share more broadly.

Non-
leading

Do not guide your parties to the answer you want to hear.

Singular

Avoid complicated, multi-part questions.

Clear

Ensure questions use the most clear, concise language aimed at arriving at the information needed.

Sensitive

Though questions need to be direct, consider emotions that may be evoked by asking. Practice empathy.

Best Practice for Questioning

Open-ended

- We shouldn't need to seek the Parties' entire narratives as they were provided during the investigative interviews
- Decision-Makers may still need to seek more information using open ended questions
- Important for obtaining more than "yes" and "no" responses

Instead of:

"Was he intoxicated?"

Try:

"Can you tell me about his behaviors that made you believe he was intoxicated?"

Best Practice for Questioning

Non-leading

- As the Decision-Maker is completely neutral, avoid leading Parties to answers through your questions
- Do not put words or emotions on a Party that are not their own
- Parties may feel boxed in to agreeing with the question

Instead of:

"That probably made you mad, didn't it?"

Try:

"How did that make you feel?"

Best Practice for Questioning

Singular

- Multiple part questions can be confusing and clunky
- Parties may not answer all questions asked in a series

Instead of:

"What did the Respondent say to you in class and how did this impact your academics and ability to participate in the marching band?"

Try:

Formulate as three separate questions.

"What did the Respondent say to you in class?"

"How did this impact your academics?"

"How did this affect your ability to participate in the marching band?"

Best Practice for Questioning

Clear

- Avoid prefacing questions with long statements
- Avoid being wordy or using complex terms when simple language will suffice

Instead of:

"You mentioned in your investigative interview on August 20, 2022 that the Complainant texted you prior to the party you both attended on the evening of July 14, 2022. I'd like to understand more about this text message exchange. Could you dissect your text message conversation?"

Try:

"Could you walk me through your text message conversation with the Complainant on the evening of July 14, 2022?"

Best Practice for Questioning

Sensitive

- Use empathy when questioning both parties, as this is a stressful and emotional process
- Avoid questions which may come across as judgmental or blaming

Instead of:

"Why did you continue your relationship with her after she allegedly punched you?"

Try:

"Can you tell me about the nature of your relationship following the alleged assault?"

Advisors



Advisors may not follow these same questioning practices.

Asking a poorly worded question is not the same as asking an irrelevant one. Recall this as you rule on each question during cross-examination.

Hearing Logistics



Preparing for the Hearing

- The Title IX Coordinator will communicate with Parties and Witnesses following the pre-hearing meeting
 - All will receive written notice with date, time, and location of the hearing with sufficient time to prepare
 - Coordination with multiple Parties and Advisors can be challenging
- The Title IX Coordinator will secure physical space, if the live hearing is taking place on-campus, or will coordinate videoconferencing (Zoom, Google Meet, Teams, etc.)

On-Campus Hearings

- Think about the physical space and determine your needs for the hearing
- Plan for assistance from the Title IX Coordinator and secure administrative assistance from someone who can be a "runner"
- Consider the following:
 - Seating arrangements and positioning
 - Access to technology, phone, Wi-Fi
 - Proximity to an office for supplies or copies, if needed
 - Provision of water, tissues etc. for Parties
 - Appropriate waiting area for Witnesses
 - Spaces for breaks or private conferring with Advisor
 - Method of recording
 - Consider any special accommodations needed by Parties or Witnesses

Remote Hearings

- Think about the technology and determine your needs for the hearing
- Plan for assistance from the Title IX Coordinator and secure assistance from a member of your campus' IT department for troubleshooting
- Consider the following:
 - Ensure all Parties, Advisors, and Witnesses have access to technology and conferencing platform needed
 - Consider any special accommodations needed by Parties or Witnesses
 - Conduct tests to ensure all technology is working
 - Set up virtual breakout rooms for the Parties and their Advisors
 - Create plan for Witnesses to be called and admitted to hearing when ready

Hearing Rules and Decorum

- Consult school policy and work with Title IX Coordinator to create a set of standard rules for the hearing
- Consider the following:
 - Rules for participation from Parties and Witnesses
 - Rules for participation from Advisors
 - Rules for breaks, both within the same day and continuation to another day, if needed
 - Consequences for not following the rules (How will this be handled?)
- General decorum for all participants should be professional, respectful, and orderly

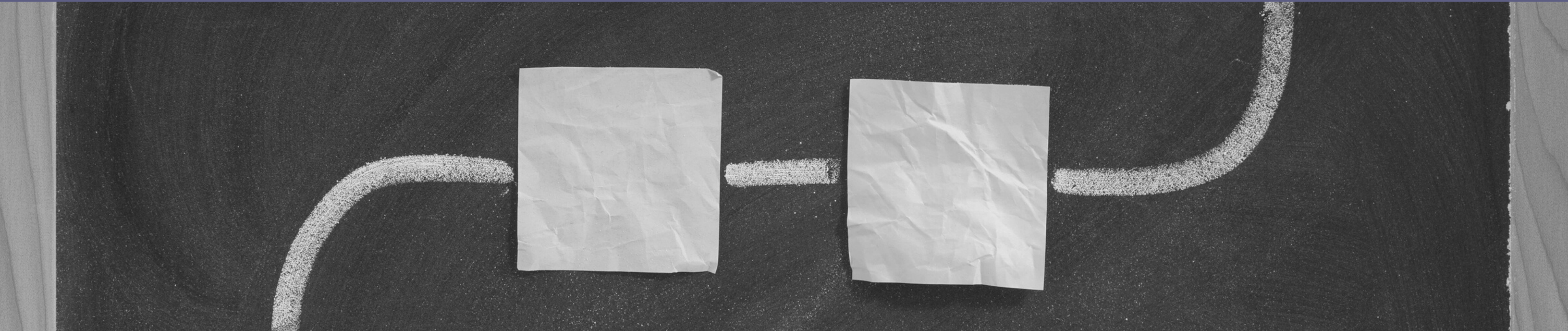
Decision-Maker Decorum

- As the facilitator of the hearing, Decision-Makers will set the ultimate example
- Set the standard of professionalism, respect, and order
 - Do not allow emotions in the room to dictate your decisions
 - Remain objective and impartial throughout
- Practice active listening and reduce all distractions
- Be mindful of posture, mannerisms, and reactions
- As this is an administrative process and not a TV court room, remember the following:
 - There are no climactic "gotcha" moments
 - You are there to instruct and assist as well- help Parties, Witnesses, and Advisors if they do not understand something

Support

- As previously mentioned, Decision-Makers will have support from the Title IX Coordinator in aspects of preparing for and facilitating the hearing
- Determine if there are other individuals from whom you will need support
- Parties receive guidance from Advisors, but who will guide you?
 - Contact your school's general counsel to attend the hearing or be on-call to assist you with legal advice
 - When in doubt, take a break and seek guidance from your resources
 - Do not force any action or decision - You can slow the process down

Hearing Procedures



Order of the Hearing

- Title IX Regulations do not provide any specific guidance on the inner-workings of the hearing
- The order and specific components of the hearing will be determined by the school and its policy - consult with your Title IX Coordinator
- The following is an example of best practice procedures, but it is just one of several ways a hearing may be structured

Hearing Agenda

Opening of the Hearing

Opening Statements

Introduction of Testimonial Evidence

Closing Statements

Closing of the Hearing

Hearing Agenda

Opening of the Hearing

Facilitated by the Decision-Maker who will:

- Welcome Complainant, Respondent, and Advisors to the hearing
- Discuss rules, decorum, and hearing procedure for all individuals involved
- State the date and time for the official record
- Answer any final questions or clarify information needed prior to the start of the hearing
- Proceed to opening statements

Hearing Agenda

Opening Statements

Facilitated by the Decision-Maker who will ask Complainant and Respondent (or their Advisors) to present an opening statement which may:

- Outline the issues that the Party and their Advisor would like to refute
- Provide an overview of the facts and evidence
- Describe the evidence that supports their statements (or their Party's statements)
- Present what the Party and their Advisor expect to prove during the hearing

Typically, the Complainant gives the first opening statement, followed by the Respondent. Parties may waive their presentation of an opening statement.

Hearing Agenda

Introduction of Testimonial Evidence

Facilitated by the Decision-Maker who will allow Advisors to conduct direct and cross-examination of the Parties and Witnesses.

Decision-Makers also conduct their own questioning of the Parties and Witnesses.



Decision-Makers will rule on relevancy of ALL questions prior to the Parties and Witnesses answering. They may also ask for clarification from Advisors on the relevancy of questions.

Direct and Cross-Examination

COMPLAINANT'S CASE

- Typically, the Decision-Maker will ask the Complainant to provide testimonial evidence first
- Opportunity to present Complainant and Witnesses called by Complainant for direct examination
- Present new evidence (if any, ideally should have been discussed at pre-hearing conference to allow for inspection by both Parties)
- Cross-examination of the Complainant and Complainant's Witnesses by the Respondent's Advisor
- Advisors may object to irrelevant questions asked of their Party or Witnesses

Direct and Cross-Examination

RESPONDENT'S CASE

- Once the Complainant has completed the sharing of their testimony, the Respondent will share theirs
- Opportunity to present Respondent and Witnesses called by Respondent for direct examination
- Present new evidence (if any, ideally should have been discussed at the pre-hearing conference to allow for inspection by both Parties)
- Cross-examination of the Complainant and Complainant's Witnesses by the Respondent's Advisor
- Advisors may object to irrelevant questions asked of their Party or Witnesses

Direct and Cross-Examination

DECISION-MAKER'S EXAMINATION

- Opportunity for the Decision-Maker to ask questions of Complainant, Respondent, and Witnesses
- Provides opportunity for final clarification before drafting the determination regarding responsibility

Hearing Agenda

Closing Statements

Facilitated by the Decision-Maker who will ask Complainant and Respondent (or their Advisors) to present a closing statement.

- Final statement by the Parties or their Advisors to the Decision-Maker
- Summarizes the relevant evidence and arguments
- Asks the Decision-Maker to find that the evidence will support the determination in that Party's favor
- May be an impact statement by the Complainant or Respondent (which may only be used to influence severity of sanction)

Typically, the Complainant gives the first closing statement, followed by the Respondent. *Parties may waive their presentation of a closing statement.*

Hearing Agenda

Closing of the Hearing

Facilitated by the Decision-Maker who will:

- Announce Parties have completed the submission of all evidence
- Announce the closing of the hearing
- State the date and time for the record
- Provide information regarding next steps and timeline
- Dismiss the Parties and begin preparing the determination regarding responsibility

Ruling on Relevance

- Remember, Decision-Makers will be determining the relevance of each question asked prior to the Parties answering such questions
- Reasons to reject questions:
 - Question is seeking information that is never relevant under Title IX (rape shield, privileged information)
 - Question is not relevant to the complaint and facts being discussed
 - Question has already been answered in the hearing
- Decision-Makers may seek clarity from the Advisor as to why the question is being asked to understand relevance
- Provide a thorough explanation as to why a particular question is not allowed - transparency is a must

Refusal to Participate in the Hearing

- It is the right of each Party and Witness not to attend the hearing. They also have the right to refuse answering any or all questions asked during the hearing.
- If the party refuses to submit to cross-examination, the Decision-Maker:

"must not rely on any statement of that Party or Witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) 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"

What does this mean?

Determining Credibility

- The live hearing is the Decision-Maker's opportunity to determine credibility of the Parties and Witnesses
- Credibility of statements and evidence by Parties and Witnesses may be weighed when making your determination
 - Ask yourself, "Is this plausible?"
- Credibility considerations
 - Motives
 - Consistency in statements (recall trauma may impact this)
 - Supporting evidence (witnesses, physical evidence to corroborate versions of events)
 - Demeanor

Helpful Tips

- Decision-Makers are the ultimate authority in the room and set the rules and tone for the hearing
 - Ensure participation from the Parties, Witnesses, and Advisors follow those rules
 - Authority \neq Authoritative. Maintain professionalism and neutrality
- Read the room
 - Cue in on non-verbal communication to mitigate any issues
 - Call breaks, if necessary, to reduce stress and emotion
- Be flexible
 - If the structure or order of the hearing or questions needs to adapt due to unforeseen circumstances, allow it (e.g. Witness having trouble accessing technology while another is ready)



Be aware, hearings can range from hours to days, depending on the complexity of the situation and the number of Parties and Witnesses to be questioned.

Pace yourself and allow for breaks when needed. Do not burn yourself or the Parties out. The proceedings can always continue on the following day.