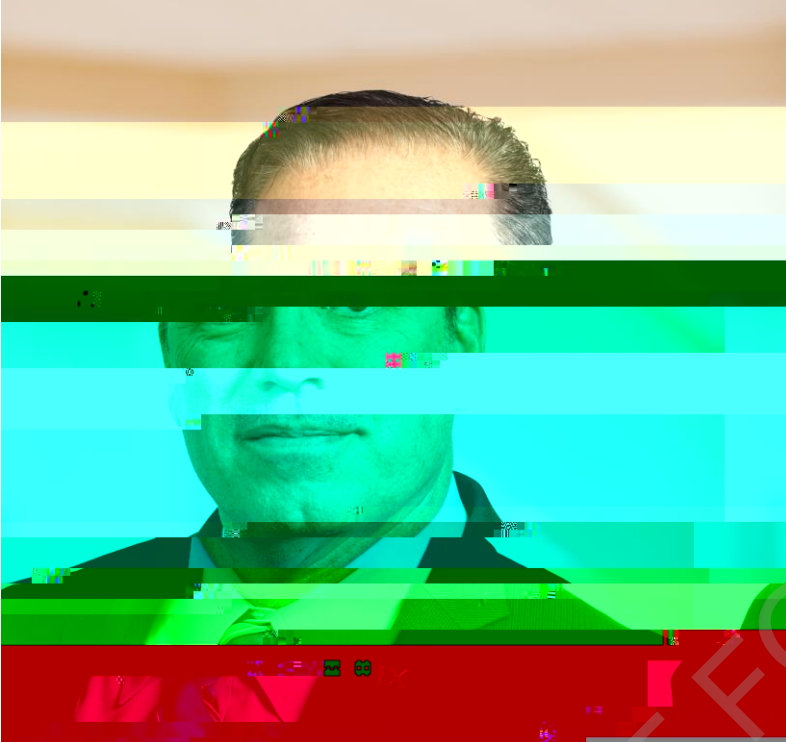


Hearing Panels and Decision- Makers

Briefing on the New Regulations with
Q&A



Your Faculty



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2020 Title IX Regulations

Issued May 6th, 2020

Effective and Enforceable August 14, 2020

Amend the Code of Federal Regs. and have force and effect of law
Some provisions already mandated by due process case law in some jurisdictions
Intervening variables may impact enforcement, e.g. lawsuits/election

The Regulations:

Significant, legalistic, prescriptive and very due process heavy
Enforceable by OCR
Preempt state law

Commitment Beyond Compliance

Industry standards = the floor. Best practices = the ceiling.

States, case law, and federal regulations set the floor.

Some states have laws that exceed federal requirements and do not conflict with the 2020 Regs. Where they conflict, Regs control.

Aiming for the floor = doing the bare minimum.

Will continue the cycle of inequity and unfairness.

Civil rights issues demand more than the bare minimum.



Complainant

Respondent

Title IX Coordinator (TIXC)

Deputy Coordinators

Investigators

Decision-makers

Hearing Panel

Chair

Appellate Decision-makers

Advisors

Hearing Facilitator(s)



Regulatory Changes for Hearings

Grievance Procedures

Neutrality/Conflict of Interest

Advisor of Choice

Grievance Procedures

Must include:

Presumption that respondent is not responsible until determination is reached

Range of possible sanctions and remedies

Description of standard of evidence

Bases and procedures for appeal

Appeal option required, equitably, on three grounds

Non-disciplinary, non-punitive, individualized services

Procedure for emergency removal

Non-student employee administrative leave



100% 100% 100%

100%

100%

100%

100%



3 Advisor of Choice

Advisor of choice may be anyone, including attorney

May restrict participation of advisors equally, except:

If a party does not have an advisor present at the hearing, the recipient must provide
-exam

The advisor must conduct thorough cross-exam (obligatory)

If an advisor is provided, this must be done without fee or charge to the party

Parents, friends, teammates, coaches?

Can a party have more than one advisor? Why would they need one?

Will advisor also conduct direct exam? If not, who will?



Investigation and Hearing

Rights of the Parties
Evidence
Investigation and Report

Live Hearing/Questioning
Relevance
Hearing Logistics
Role of the Investigator



Rights of the Parties

Investigation

- Right to present witnesses, including fact and expert witnesses
- Right to present inculpatory and exculpatory evidence
- Right to discuss the allegations under investigation without restriction
- Right to gather and present relevant evidence without restriction
- Right to inspect and review evidence and draft report before finalized and submit responses for inclusion in report

Hearing

- Advisor to ask relevant cross-examination questions and follow-up questions of parties and witnesses, including challenging credibility
- Availability of directly-related evidence
- Use of technology allowing party to simultaneously see and hear the witness answering questions on cross-exam

Evidence

All relevant evidence must be objectively evaluated and considered inculpatory and exculpatory

respondent, or witness

Access to privileged information requires waiver/consent

No restriction on parties discussing case or gathering evidence

Equal opportunity to:

- Present witnesses

- Present evidence

- Inspect all evidence, including evidence not used to support determination

No limits on types/amount of evidence which may be offered



Investigation and Report

Required investigation results in an investigation report

- Fairly summarizes all relevant evidence

- Unclear from Regs if analysis, credibility assessment included

Prior to the hearing, parties must be provided with the draft investigation report and all evidence directly related to allegations

- Parties must have two separate ten-day periods to review and submit written responses

Must also make all relevant evidence (excluded from report) available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-exam

Investigation report submission to decision-makers not addressed in Regs





Find out more at





Role of the Investigator

- The investigator is often the key witness at any hearing
- The investigation report is admitted as evidence
- The investigator may be questioned and subjected to cross-examination



Making a Determination

Standard of Evidence
Models of Proof/Analysis
Credibility Determinations

Sanctions and Remedies
Written Determination
Appeals





Understanding Evidence Thresholds

EVIDENTIARY STANDARDS





Models of Proof and Analysis

- Parse the policy definition into its constituent elements
- Establish, by the applicable standard of proof, whether each element of the definition is met, to determine whether a violation occurred
- Weigh evidence to determine its value

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Credibility Determinations

Credibility generally refers to the trustworthiness, dependability, accuracy, and believability of testimony or evidence

3 Sanctions and Remedies Upon Determination of Responsibility

Disciplinary sanctions for respondent

Any sanction must be reasonable and proportionate to the severity of the behavior

- May consider prior misconduct

- The role of precedent

- May consider attitude, aggravation, mitigation, contrition, etc.

- May be educational, but safety is primary consideration

- Remedy for loss or injury to school or persons

- Compliant with laws and regulations

Same panel/officer who decides finding should also decide sanctions



Written Determination

Decision-maker must issue written determination that will be shared with the parties:

- Allegations potentially constituting sexual harassment

- All procedural steps taken

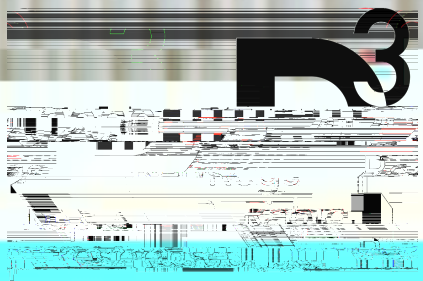
- Findings of fact supporting the determination

- A determination on each allegation regarding responsibility

- Any disciplinary sanctions, remedies provided to complainant

- and respondent to appeal

- Delivered simultaneously to all parties



Other Issues

Finality of Determination

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Finality of Determination

If an appeal is filed, the determination regarding responsibility becomes final on the date that the recipient provides the parties with the written determination of the results of the appeal

If an appeal is not filed, the determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely

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