

A Fair Hearing? Mastering Procedures for Title IX Sex-Based Harassment Decisions

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Today's Panel



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Insider's view on Hearings

This session will explore:

- What makes for a successful hearing under 2020 rules
- 2024 regulations – what should we do? To keep or not to keep hearings, that is the question.
- Conducting hearings with impartiality, equity, and through a trauma-informed lens



Elements of a Successful Hearing (2020 Regulations)

What do the regulations require?

- A “Decision-Maker” to determine whether the Respondent violated policy
- Treat the parties equitably; no conflicts of interest or biases
- Separation of roles (no single investigator model)
- Objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence
- Credibility determinations
- A “Live” Hearing
 - Cross - examination
 - In- person or video conference
 - Parties must have advisors conduct cross - examination



2020 Rule - Elements of a Successful Hearing cont.

Other procedural rights at the hearing:

- Notice of date, time, location, participants, etc. prior to hearing (10 day notice minimum)
- Inspect and review evidence and draft investigation report before it is finalized
- Ability to argue for the inclusion of "directly related" evidence at the hearing
- Notice of evidentiary standard being used (choice in regs)
- Presumption of non-responsibility

Preponderance of the evidence =
"More likely than not"

50% plus a penny or a feather



2020 Rule

What happened prior to hearing (simplified)?



2024 Rule - Choices!



2024 Rule - Choices, Choices (but not really)

The 2024 rules state that the institution **MUST** provide a process that enables the decision-maker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

*Standard of evidence used must be the same as what you use for all other comparable proceedings (did not change)

May establish restrictions on the extent to which advisors may participate (so long as they apply equally to the parties)

During evidence review period, institution **may** decide to allow parties to respond to the evidence prior to the hearing, during the live hearing, or after the live hearing.

Hearing is optional...so long as...

2024 Rule - Process for questioning

No Hearing

- Investigator or decisionmaker to ask questions challenging credibility during individual meetings with party or witness
- Allow each party to propose such questions, have them asked in individual meetings, including follow-up meetings
- Provide each party with an audio/video recording or a transcript with enough time for the party to have a reasonable opportunity to provide follow-up questions

2024 Rule – Process for questioning

Hearing

- Must allow decisionmaker to ask questions challenging credibility during individual meetings with party or witness
- Allow each party to propose such questions that the party wants asked of any party or witness and have those asked by decisionmaker, OR
- Allow each party's advisor to ask any party or witness such questions (if you choose this option, each party MUST have an advisor, and if they do not, institution still must appoint one)
- If advisors are allowed to ask questions, process should mirror current process (i.e., decisionmaker must determine of question is relevant, must explain any decision to exclude a question as not relevant or as otherwise impermissible, give a party opportunity to clarify or revise a question that is unclear or harassing)
- Must record and keep record available
- If a party or witness refuses to answer a question, they must not draw inference about whether sex-based harassment occurred based solely on a party or witness refusing to answer live question(s)

Choosing the "right" decision-maker(s)

Curiosity

Patience

Ability to weigh
evidence

Questioning skills

"Control" of the
hearing

Impartiality

Understands
definitions

Trauma informed

Strong writer

Understanding
of mental health
issues and impact

Effects of trauma
on the brain

Cultural
competencies

Panel Discussion

What are some challenges you have faced as a decision-maker during a hearing?



Conflicts of Interest - Panel Discussion

CONFLICT
OF INTEREST

- What is a conflict of interest?
- What creates them?
- How do you handle them being raised prior to or at the hearing?



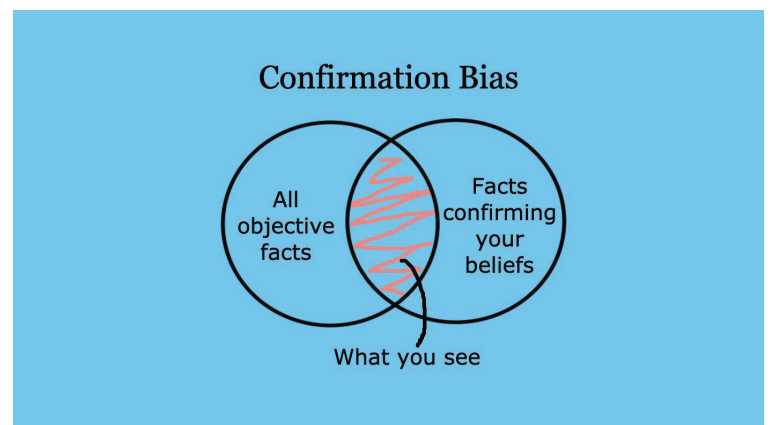
Quick Bias Overview

Why is this important?

- We all have it
- How do we define it? (did it improperly influence the decision)
 - Examples?

When must someone recuse?

Title IX Coordinator makes final call.



What tips can you provide to help avoid bias, conflicts of interest, or prejudgment



Let's Talk Due Process

Substantive

The decision must be:

- Impartial and fair
- Made in good faith
- Neither arbitrary nor capricious
- Based on policy
- Be substantially based upon the evidence

Procedural

- Did we follow our process
- Substantial compliance with policies and procedures

Reminder: Excluded Evidence

- 1) **Protected under Privilege:** Evidence protected under a privilege as recognized by Federal or State law unless person to whom the privilege or confidentiality is owed has voluntarily waived
- 2) **Medical Documentation:** A party's or witness's records that are made or maintained by a physician, psychologist, or other recognized professional unless there is voluntary, written consent
- 3) **Prior Sexual History:** Evidence that relates to the complainant's sexual interests or prior sexual conduct unless that evidence is being used to prove that someone other than the Respondent committed the alleged conduct or is evidence about specific incidents of the complainant's prior sexual conduct with the Respondent that is offered to prove consent to the alleged conduct

Written Determination

2020 Rule

- Allegations
- Description of procedural steps
- Findings of fact supporting the determination
- Conclusions regarding the application of recipient's code to facts
- Statement of, and rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions and remedies
- Bases for appeal
- Provide written determination simultaneously

2024 Rule

- Allegations
- Policies and procedures that the institution used to evaluate the allegations
- Decisionmaker's evaluation of the relevant and not otherwise impermissible evidence and determination whether sex-based harassment occurred
- Disciplinary sanctions, remedies imposed
- Appeal procedures
- Date decision becomes final

Panel Discussion and Audience Questions

