

Cross-Examination and Relevancy in Title IX

Live
Hearing
Required
for Post-
Secondary
Institutions

A live hearing required under the Title IX grievance process complies with the requirements for a fair hearing and an opportunity for direct or indirect cross-examination before a neutral adjudicator who has independent power to find facts and make credibility assessments.

Role of Hearing Officer



- Facilitates “live cross-examination” for parties through the parties’ advisors.
- Makes conclusions about whether alleged conduct occurred and the decision about responsibility for a policy violation.
- Prepares written determination with findings of fact, conclusions, and rationale for the result as to each allegation.
- Recommends sanctions., if applicable.

Live Hearing With Cross-Examination

- Each party's advisor may ask the other party and any witnesses all relevant, follow-up, and questions challenging credibility.
- Cross-examination must be conducted directly, orally, and in real time by the party's advisor of choice and not by a party personally.
- Before a party or witness answers the cross-examination or other question, the decision-maker must first determine whether the question is relevant.
- The decision-maker must explain any decision to exclude a question as not relevant.

Cross-
Examination
(Cont.)

If a party or witness does not submit to cross-examination at the live hearing, the decisionmaker cannot rely on any statement of that party or witness in reaching a determination regarding responsibility.

The decisionmaker cannot draw an inference about the responsibility based *solely* on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

Exclusionary Examples

- Complainant gives an emotional account of sexual assault and answers questions from the decisionmaker. Complainant then answers only one question from respondent's advisor before breaking down and refusing to answer any more. After the break, complainant tells the decisionmaker that complainant cannot endure cross-examination. Complainant leaves the hearing.

Exclusionary Examples

- Witness gives a statement to Title IX investigator that the witness observed complainant right before alleged sexual assault. Witness told the investigator that complainant was too drunk to stand up. Witness fails to attend hearing. Title IX investigator is prepared to relay what witness told investigator.

Inclusionary Examples

- Witness answers questions from decisionmaker. After consulting with complainant, advisor for complainant says that the advisor has no questions for the witness. Advisor for respondent then proceeds to cross-examine witness.

Relevance

Relevance requires that the evidence or testimony directly relate to the issues disputed or discussed.

- Evidence is relevant if: (1) it has a tendency to make a fact more or less probable than it would be without the evidence; and (2) the fact is of consequence in determining the action.
- Inculpatory and exculpatory evidence is considered relevant.
 - Inculpatory evidence is evidence that shows, or tends to show, a person's involvement in an act, or evidence that can establish guilt.
 - Exculpatory evidence is evidence that tends to show a person's innocence is considered exculpatory evidence.

Relevance

Relevance requires that the evidence or testimony directly relate to the issues disputed or discussed.

- Information protected by a legally recognized privilege is not relevant.
- Questions about a complainant's prior sexual behavior or sexual predisposition are not relevant, unless:
 - Offered to prove someone other than respondent committed the alleged sexual harassment
 - If the evidence offered concerns sexual behavior between the parties and is offered to prove prior consent

Decisionmaker Duties

Decisionmaker must screen questions for relevance and resolve relevance objections.

Decisionmaker must explain any decision to exclude a question as not-relevant.

Relevancy Example

- Student A has accused Student B of sexual assault by engaging in sexual activity with Student A who was incapacitated by alcohol consumption after a party. The advisor for Student B asks Student A: “Did you send any text messages or make any phone calls during the party?”

Non- Relevancy Example

- Complainant alleges respondent engaged in dating violence by punching complainant during an argument. The advisor for respondent asks complainant: “Isn’t it true that you are only dating respondent because of his family’s money?”



Relevancy Objection

- Under FSU's Title IX process, only the party (student) can object to relevance concerns.
 - The student's advisor cannot object to relevancy

Credibility

- Credibility is the quality in a witness which renders their testimony worthy of belief.
- Factors used to assess credibility:
 - Observation of a witness or participant's general demeanor.
 - Opportunity for the witness/ participant to observe and provide the information they are giving.
 - Noting consistencies or inconsistencies in their narrative by comparing or documenting any prior inconsistent statements.
 - Any bias or motive to lie.
 - Probability or improbability of the person's description of the event.

“A decision-maker may judge credibility based on, for example, factors of plausibility and consistency in party and witness statements. Specialized legal training is not a prerequisite for evaluating credibility, as evidenced by the fact that many criminal and civil court trials rely on jurors (for whom no legal training is required) to determine the facts of the case including the credibility of witnesses.” (pg. 1238)

How does the hearing work?

- Title IX regs are largely silent on specific elements.
- However, the decisionmaker must independently evaluate questions for relevance and resolve relevancy objections.
- Party's advisors must be allowed to conduct live questioning of other party and witnesses.
- Party or witness who refuses to submit to live questioning from other party's advisor must have their testimony excluded.



Party provided opportunity to provide narrative first

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graph TD; A[Party provided opportunity to provide narrative first] --> B[Next comes questioning from decisionmaker]; B --> C[Last comes questioning, including cross-examination, from advisor for other party];
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Next comes questioning from decisionmaker

Last comes questioning, including cross-examination, from advisor for other party

How does the hearing work?