

## **Live Hearings** for Higher Education

Training and Certification Course

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The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, violence, and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language. It is not used gratuitously, and no offense is intended.

#### Introduction



The primary focus of this course is to equip Title IX practitioners to prepare and run live hearings as required under Title IX regulations.



Title IX Coordinators and Decision-makers must understand live hearing logistics, questioning best practices, relevance determinations, and due process protections.



Our goal is to help Title IX Coordinators and Decision-makers approach live hearings with confidence.

### **Update on the 2024 Title IX Regulations**

- January 9, 2025: a federal district court in Kentucky vacated the 2024 Title IX Regulations in their entirety
  - The 2024 Title IX Regulations are now "off the books" and **not** in effect for **any** state, institution, or school effective immediately
- Implications:
  - All federal funding recipients are now subject to the 2020 Title IX Regulations
    - Revert to **2020-compliant** policies for sexual harassment
    - Ensure sex discrimination is covered under policy
  - Consult with legal counsel on strategies for handling completed and ongoing complaints initiated under the 2024 Regulations
  - Ensure compliance with all 1975 and 2020 regulatory requirements

#### **Executive Order re: Sex & Gender**

- The Executive Order (EO) defines sex as binary male or female
  - Detaches the notion of gender or gender identity from the term "sex"
- Directs all federal agencies to enforce civil rights laws in alignment with the EO
  - The Dept of Education will **not** interpret Title IX to protect gender identity
  - The Dept of Justice will issue guidance that *Bostock* does **not** apply to Title IX
  - All agencies must ensure that intimate spaces are designated by sex, not identity
  - All Biden administration EOs addressing gender identity are revoked
- Prioritize investigations/litigation to enforce rights and freedoms to express binary nature of sex
- Prohibits grant funding from promoting gender ideology
- Foreshadows attempts to codify EO's definitions into law
- Notably, the EO does **not** address sexual orientation

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# **Rescinded Prior Guidance**

#### Rescinds all guidance documents inconsistent with the EO or subsequent guidance including:

- White House Toolkit on Transgender Equality
- 2024 Title IX Regulations: Pointers for Implementation
- ED Toolkit: Creating Inclusive & Nondiscriminatory School Environments for LGBTQI+ Students
- Supporting Intersex Students
- Supporting Transgender Youth in School
- Letter of Educators on Title IX's 49<sup>th</sup> Anniversary
- Confronting LGBTQI+ Harassment in Schools
- Enforcement of Title IX...Based on Sexual Orientation and Gender Identity in Light of *Bostock* v. Clayton County
- AG's memorandum "Application of *Bostock v. Clayton County* to Title IX"
- EEOC's "Enforcement Guidance on Harassment in the Workplace"

# **Title IX Grievance Process Review**

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# **Title IX and Equity**

- Title IX is a gender equity law
- Equity refers to the understanding that not all individuals have access to the same resources and opportunities
  - Equity focuses on providing support and resources to reduce disparities in access to the education program
  - Title IX seeks to remedy the inequities sexual harassment and sex discrimination create
- Live hearings must be equitable for all parties within a complaint and across complaints

### **Essential Compliance Elements**

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The requirements to **Stop, Prevent, and Remedy** guide the institution's equity and compliance work

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**STOP** discriminatory conduct

**PREVENT** recurrence, on both individual and institutional levels 3

**REMEDY** the effects of discrimination, for both the individual and the community

#### **Title IX Grievance Process Overview**



### **Title IX Regulatory Requirements**

- Prompt resolution
- Decision-makers (DM) must operate without bias and/or conflicts of interest
- Title IX Coordinator (TIXC) and/or Investigator may not serve as DM
- DM must be trained on any hearing technology
- Hearings must be recorded
  - Parties must be permitted to have access to the recording or a transcript
- Rationale for all decisions/determinations prior to, during, or after a hearing
  - Relevance determinations, findings, final determinations, sanctions

# **Title IX Regulatory Requirements**

#### Parties have opportunity to:

- Participate fully in the grievance process
- Present inculpatory and exculpatory relevant evidence and witnesses, including expert witnesses
- Conduct cross-examination through an Advisor
- Review all relevant and directly related evidence, including all evidence the DM relies upon in reaching a final determination
- Appeal the final determination

### Title IX Higher Education Decision-Maker Course Topics



### Single Decision-Maker vs. Panel

#### **Single Decision-Maker**

- Simpler scheduling
- Easier to staff and train
- Streamlined deliberation
- Streamlined drafting process
- Only one perspective
- Bias concerns
- Can overtax a single person

#### Panel

- Additional scheduling considerations
- Costs more to staff and train
- Deliberation and drafting may take longer
- Majority vote or consensus
- Diversity of perspective
- Reduce bias concerns

# **Live Hearings**

- DM and Advisors can ask relevant questions of parties and witnesses
- DM makes relevance determinations
- DMs deliberate privately to reach a final determination
  - DMs may or may not be involved in determining sanctions and remedies
- Parties and witnesses may be in person or virtual



# **Hearing Participants and Logistics**

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# Who Will be Present at the Hearing?

- Parties
- Witnesses
- Advisors
- Investigator(s)
- Decision-maker(s)
- Hearing Facilitator



# **General Logistics**

- Party and witness attendance
- Advisor attendance
- Location and physical space
  - Accessibility
  - Parking
  - Privacy
  - Restrooms
  - Waiting areas
  - Furniture



# **General Logistics**

- Recording
- Hearing technology
- Administrative, tech, or audiovisual support
- Evidence availability for parties, Advisors, and witnesses
- Breaks



# **Virtual Hearing Considerations**

- Any party may request a virtual hearing
- Virtual hearings provide helpful flexibility
  - No travel required
  - No large physical space needed
- Choose software or platform to meet hearing needs
  - Zoom is a common option
  - Participants must be able to see and hear each other
- Prepare for Wi-Fi issues or other tech problems
- Individuals may need to participate virtually from campus
- Address any concerns related to privacy

# **Hearing Facilitator**

- Not required by the regulations, but a best practice
  - May be TIXC or a different person
- Responsibilities
  - Facilitate a smooth hearing and help problem-solve
  - Maintain hearing schedule and order of events
  - Communicate with parties, Advisors, and witnesses during the hearing
  - Manage in-person or virtual waiting rooms
  - Ensure recording; manage devices and files
  - Provide access to evidence during the hearing
  - Coordinate additional support (food, facilities, technology, materials)

# **Scheduling Considerations**

- Agenda/schedule flexibility based on availability
- Availability of:
  - Parties, witnesses, and Advisors
  - Decision-maker(s)
  - Investigator(s)
  - Interpreter or other accommodation
  - Physical space

- Reasonable number of hours per day
- Multi-day hearings
- Breaks
- Finals/Graduation
- Employees on soon-to-be-expiring contracts



#### **Advisors**

The Title IX regulations imagine two types of Advisors:

#### **Party-Selected Advisor**

- Title IX regulations (and VAWA) specify that a party may select an "Advisor of choice"
- May accompany the party throughout grievance process
- May be present for every meeting, interview, and hearing
- Institution may not limit the choice

#### **Institution-Appointed Advisor**

- Required to appoint only for the hearing
- If appointed early enough, may accompany the party throughout grievance process and be present for every meeting, interview, and hearing
- Appointed if party has not chosen an Advisor by the hearing, if crossexamination to occur

### Advisors

- Required under Title IX regulations for purposes of cross-examination at a live hearing
- No training mandate
- Can be an attorney, but attorney not required
- May regulate Advisor participation, so long as applied equally to all parties



### **Advisor Roles in the Grievance Process**

#### The Advisor may support their advisee with:

- All phases of the grievance process
- Strategic issues, such as whether to:
  - File a formal complaint
  - Participate in informal resolution
- Accessing supportive measures, community resources, and advocacy services
- Participating in the investigation, including review and comment on the investigation report
- Preparing for the hearing
- Conducting any questioning/cross-examination at the hearing
- Appeal procedures and appeal support

# **Managing Advisors Generally**

- Advisors approach the role differently, depending on training and background
  - All Advisors need management, not just attorney Advisors
- Be firm, but flexible
- De-escalate conflicts
- Advisor may be removed if disruptive, after warning
- Decorum expectations
  - Generally, parties should speak for themselves
  - Hearings are not court processes

# Chairperson/Single Decision-Maker Role and Responsibilities

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### Chair/Single Decision-Maker Responsibilities

- Follow the hearing procedures
- Guide other DMs on procedures
  - Navigate issues that are not specified in policy
- Enforce decorum expectations
- Manage Advisors
- Make relevance determinations
  - Parties/witnesses pause before responding to a question
  - Chair makes relevance determination, states rationale

#### Chair/Single Decision-maker Responsibilities

- Clarify with TIXC prior to hearing whether the Chair:
  - Determines relevance for questions from the DM panel or just from the Advisors
  - Permits Advisors to "argue" whether a question should be deemed relevant or irrelevant
  - Asks questions of parties and witnesses before or after Advisor-led questioning
- Determine how to provide an opportunity for follow-up questions
- Facilitate the deliberation discussion
- Lead rationale writing/outcome letter process
- Address evidence that DMs should not rely upon

# **Pre-Hearing Meetings**

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Pre-Hearing Meetings: Purpose and Format

- ATIXA recommends pre-hearing meetings; not required by Title IX regulations
  - Check whether institutional policy describes pre-hearing meetings
- Address questions, concerns, expectations prior to hearing
- May hold several separate meetings with each party and their Advisor
  - May hold combined meetings
  - Summarize decisions in a memo to the parties and Advisors, as needed
- May flow more efficiently if Advisors are able to speak freely with the Chair/DM
- May be virtual or in-person

# **Pre-Hearing Topics**

- Answer questions about procedures
- Review technology
- Discuss interpretation, translation, or accommodation needs
- Address scheduling questions or concerns
- Review flow and logistics for before, during, and after the hearing
- Reinforce expectations and decorum rules
- Explain cross-examination procedures

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#### Common Pre-Hearing Meeting Discussions

#### Pre-hearing meetings can provide an opportunity to:

- Discern whether parties intend to ask questions of any or all witnesses, or whether a party intends not to testify at the hearing
- Invite parties to submit questions in advance, but this is not required
- Discern any conflicts of interest/vet recusal requests
- Consider any questions regarding relevance of evidence or proposed questions and may make pre-hearing rulings
- Whether to redact directly related or not relevant information
- Address expectations or issues regarding new evidence consistent with institutional policy

# **Hearing Preparation**

#### **Hearing Preparation**

#### Prior to the hearing, DMs must review:

- Notice of Investigation and Allegations (NOIA)
- Policies alleged to have been violated and their policy elements
- Applicable procedures
- Investigation report and evidence file
  - Review more than once, as needed
  - Identify facts in dispute and not in dispute
  - Note: DM annotations or notes may be subject to FERPA or discoverable
- If investigation insufficient, a DM may request it be reopened, with specific instructions

#### **Hearing Preparation**

- Prepare questions in advance of hearing
  - Helps DMs structure their questions in a logical, organized way
  - Ensures no significant disputed fact or inconsistency is missed
  - Helps DMs understand and analyze the evidence in the report
- Meet as a panel (if applicable)
  - Discuss investigation report and evidence file
  - Review questions for parties and witnesses
  - Determine questioning order

#### **Hearing Script and Flow**



#### **Hearing Script and Flow HEARING PROCEDURES** 5 Decorum expectations Roles Order of testimony **ALLEGATIONS** Formal charges Confirmation of acceptance/non-acceptance of responsibility **INVESTIGATOR STATEMENT** Complaint introduction Questions from DMs then Advisors **PARTY STATEMENTS** 8 Complainant then Respondent Statement then DM and Advisor Cross/Direct



#### **Recommended Best Practices**

- Keep microphones muted when not speaking
- Use a different platform or breakouts for parties to actively communicate with Advisors
- Prevent distractions in video/audio backgrounds
- Facilitate DM, parties, Advisors, and other personnel introductions
- Establish confidentiality expectations
- Exclude impact/mitigation statements during hearing
  - Impact statements are considered after the responsibility determination

# **Hearing Decorum**

### **Setting the Tone**

- The hearing is a significant event in the parties' lives at that time
- Formal, administrative process
- Decision-making is a neutral role
- Clear, direct communication
- Active listening
- De-escalate as needed
- Maintain control





#### **Decorum Practices and Pitfalls**

#### DO

- Set the tone with your own behavior
- Behave professionally while around any participants
- Maintain composure
- Evaluate the relevant evidence
- Minimize distractions

#### DON'T

- Escalate tensions or conflict
- Act like a judge
- Treat the hearing like a courtroom
- Use legal terms
- Interrogate parties or witnesses
- Make sarcastic comments or jokes
- Set out to prove or disprove allegations

#### **Day of the Hearing**

- Follow attire expectations
- Arrive early and prepared
  - Investigation report, evidence file, and preparation notes
  - Notetaking materials
  - Snacks and beverages
  - Comfort items
- Do not schedule anything else that day
- Turn off or silence technology

#### **Decorum Rules**

- Institutions may have reasonable decorum expectations
- Governs behavior for parties, witnesses, Advisors, and DMs
- Addresses disruptive, disrespectful, or other prohibited behaviors
- Promotes consistency across hearings



#### **Party Decorum Expectations**

- No party should address another directly
- During cross-examination, only a party's Advisor or the DM may speak to or address another party or witness
- No participants may interrupt the proceedings with applause, heckling, outbursts, or other disruptive behavior
- Any threat of violence will be addressed immediately
- No participants may act abusively or disrespectfully during the hearing

#### **Advisor Decorum Expectations**

#### An Advisor may not:

- Act abusively or disrespectfully during the hearing
- Yell, scream, badger, or physically invade the space of a party, witness, or DM
- Approach another party or a witness without obtaining permission from a DM
  - Should remain seated
- Make irrelevant personal attacks on a party or witness
- Ask repetitive questions or make accusations in their questions
- Intimidate a party, witness, or DM

Any relevant question that violates the decorum rules will be deemed not relevant, but may be rephrased

#### **Warning and Removal**

- DMs have sole discretion to determine if decorum expectations have been violated
- DMs should provide one warning prior to removal, unless decorum violation is egregious
- If an Advisor is removed, the party may select a different Advisor, or the institution will provide one
  - Reasonable delays may be appropriate to find a new Advisor
  - A party may not serve as their own Advisor
- Any removal will be documented

# Interpersonal Skills

#### **Building Rapport**

- Be hospitable, but small talk may come across as inappropriate
- Be clear about your role and transparent about the process
  - A hearing script may be helpful
- Maintain a calm demeanor
- Listen actively
- Monitor your body language
- Treat all participants with empathy and respect



### Questioning Skills and Considerations

### **Asking Questions**

- Appropriate questions:
  - Have clear intent
  - Are relevant to the allegations or credibility
  - Are thoughtfully phrased
  - Are **not** multi-part or leading
- Goals of questioning:
  - Learn the facts
  - Establish a timeline
  - Understand each party and witness's perspective
  - Eliminate vagueness and gaps

#### **Questioning Strategies and Pitfalls**

#### DO

- Ask short, precise questions
- Use open-ended questions
- Repeat and clarify the language the parties and witnesses use
- Prepare questions from policy definitions
- Listen carefully, ask related followups
- Look for cued or rehearsed answers

#### **DON'T**

- Ask accusatory or argumentative questions
- Use a critical or sarcastic tone
- Develop compound or confusing questions
- Offer evaluative responses
- Sanitize participants' language
- Rely solely on closed-ended questions
- Chase "gotcha" moments

### **Questioning Tips**

- Outline questions in advance, but remain flexible
  - Allows for comprehensive and thorough approach
  - If working with other DMs, consult on questions to reduce potential bias
- Prior to asking a question, consider:
  - Is the answer already available in the investigation report?
  - What are the relevant issues?
  - What do I need to know?
  - Why do I need to know it?
  - What is the best way to ask this question?

### **Asking Difficult Questions**

- DMs will need to ask difficult questions about sensitive topics
- Acknowledge if a topic may be hard to discuss
  - DO NOT avoid asking questions because the topic is difficult to discuss
- Provide opportunities to take breaks
- DMs can show empathy without sacrificing their impartiality
  - Offer an empathetic response equitably to all parties and witnesses during the hearing, so that there is no appearance of favoritism

#### **Trauma-Informed Questioning**

**ATIXA Position Statement:** Application of trauma-informed practices in our field has gotten ahead of the actual science

- ATIXA Recommends: Incorporate trauma-informed questioning practices without allowing trauma to influence the evaluation of credible, relevant evidence
  - DM must only assess the available relevant evidence
  - DM must avoid substituting trauma indicators for evidence
  - Trauma is neutral; it neither enhances nor detracts from proof
  - Be attuned to potential biased thinking
- Assume that any party or witness could have trauma; therefore, treat everyone with sensitivity

### **Credibility in the Hearing**

- A key purpose of a hearing is to afford an opportunity to assess credibility
- DMs and/or Advisors can explore credibility through questioning, to the extent credibility is in dispute and relevant to evaluating one or more allegations
- Fundamental to due process
- Distinguish performance or presentation skills from believability

### **Activity: Question Asking**

#### **Activity: Question Asking**

- Using the Sample NOIA and Sample Investigation Report in the course lobby:
  - Work independently or in small groups
  - Review the relevant materials
  - Draft five questions a DM should ask the Complainant
  - Provide a rationale for asking each question
- This activity illustrates the process of developing questions prior to the hearing based on an independent review of the report

Spend no more than **half the allotted time** reading the activity materials – then move onto writing questions and their supporting rationales

# **Managing Questioning**

### **Managing Questioning**

- Advisors may ask relevant questions of parties and witnesses
  - Direct questioning
    - E.g., Respondent's Advisor questioning Respondent
    - Valuable way to elicit important information
    - Check institutional policy to determine whether direct questioning permitted
  - Cross-examination
    - E.g., Respondent's Advisor questioning Complainant
- All questions must elicit relevant information
- DMs and Advisors should ask all questions even if a party/witness refuses to answer

#### **Cross-Examination Mechanics**

- Advisor asks question; party/witness pauses before answering
- DM determines relevance, then party/witness answers
  - Permit relevant questions and follow-ups, including those challenging credibility
  - Disallow questions that are not relevant and state your rationale
- Unduly repetitive questions are not relevant
  - Reject questions already answered in the hearing unless expected to lead to additional relevant evidence
  - Advisors should not repeat questions already asked by DM
  - May ask questions answered in investigation report

#### **Cross-Examination Challenges**

- A party or witness may not attend the live hearing, despite participating in the investigation
- A party or witness may choose to not answer one or more questions
- DM(s) may not draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer crossexamination or other questions
  - Possible missed opportunity for corroborative or consistent testimony
  - Refusal to answer questions may impact credibility or reliability, but a DM may draw no inferences solely from non-participation

#### **Cross-Examination**

- Parties may opt for their Advisor not to ask any questions
- Advisors may not refuse to ask relevant questions their advisee wishes for them to ask
  - Otherwise, the institution must appoint an Advisor who will ask those questions

#### **Regulations Imagine:**

Advisors will not do more than repeat or rephrase questions framed by the party

#### In Reality:

Advisors are much more active and engaged

### **Activity: Relevance Determinations**

#### **Relevance Determinations Part I**

- Using the Questions for Respondent document in the lobby and following the directions in the document:
  - Work independently or in small groups
  - Review Sample NOIA Excerpts or Sample Investigation Report Excerpts as needed
  - Make relevance determinations for each question in the Questions for Respondent document and explain your rationale

#### **Relevance Determinations Part II**

- Course faculty will act as Respondent's Advisor posing questions to the Complainant aloud
  - Taking turns, participants will act as Chair and make relevance determinations aloud and explain rationale behind the decision
- This activity demonstrates the cross-examination mechanics

# Deliberation

#### Deliberation

- Post-hearing discussion of relevant evidence
  - Analyze relevant evidence
  - Determine credibility
  - Assign evidentiary weight
  - Evaluate reliable, relevant evidence considering standard of evidence
- If using a panel, check policy to see if consensus or majority is required
- Assign sanctions, as appropriate

**Finding** Whether the conduct occurred as alleged, by the standard of evidence

**Final Determination** Whether the conduct that is proven to have occurred violates policy

#### **Panel Considerations**

- Develop deliberation guidelines
- Provide an opportunity for each DM to independently assess the evidence and share their viewpoint
  - Be aware of power dynamics within the panel
  - Avoid any outside influence or commentary
  - Select one DM to take notes
- Choose one DM, generally the Chair, to compose initial drafts
  - All DMs should approve of final draft
  - May seek limited input/feedback from TIXC or legal counsel
- May consult TIXC on process-related questions

### **Communicating Outcomes**

### **Communicating a Decision**

- DMs communicate their decision to the TIXC in writing
- TIXC will then:
  - Deliver decision to sanctioning body, if process is bifurcated, or arrange for DM to meet with those who have sanctioning authority
  - Deliver decision simultaneously to parties in writing
    - Sharing the decision does not violate FERPA or employment record privacy
  - Inform relevant stakeholders, as appropriate
    - Residence Life
    - Campus Security/Police
    - Legal counsel
    - Employee's supervisor

# **Recordkeeping and Documentation**

### Recordkeeping

DM may need to compile all decision-making and hearing-related documentation to provide to the TIXC after the hearing

- **Timeline** of decision-making process
- Interactions and pre-hearing meetings with parties, other DMs, TIXC, etc.
- Determination with any associated sanctions
- Rationales for all determinations
- All work product from the DM and hearing process
- Recording/transcription





#### **Decision-Maker Notes and Drafts**

- A hearing creates opportunities to generate paperwork and paper trails
- Be judicious with notetaking, annotating, draft writing, and communication
- Anticipate that the parties (or others) could see your work product
  - Student FERPA rights
  - Employee personnel record rights
  - Litigation or agency investigations
- TIXC should provide guidance and clear expectations about saving work product, including personal notes



# **Questions?**

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