



The Hearing Process Decision-maker TRAINING

Informal Resolution And The Hearing Process As Part
Of The Title IX Sex Harassment Complaint Procedure



MARICOPA
COMMUNITY COLLEGES

Quarles & Brady LLP

Road Map

- The Live Hearing
- The Role of the Decision-maker
- Determination of Responsibility
- Technology at the Hearing
- Quiz!
- Questions?

The Live Hearing

- Prior to the hearing, the Parties must be provided all of the evidence collected in the investigation (first review) and given a ten-day period to review and provide a written response.
- The Parties must also be provided a copy of the draft *final* investigation report at least 10 days prior to the hearing, which "fairly summarizes all relevant evidence." The Parties must be given the opportunity to provide a written response to the investigative report.

The Live Hearing

- The live hearing does not have to be done in-person (though in-person hearings are preferred)
- At the request of either party, the College **must allow for the hearing to be conducted in separate rooms**, and provide technology that will allow the parties to simultaneously see and hear each other and the witnesses.
- Any party or witness may be allowed to participate in the hearing remotely.
- The college ***must record*** all hearings.

The Live Hearing

- The Decision-maker is responsible for determining what testimony will be admitted at hearing and relied upon in the final determination.
 - It is the Decision-maker's job to determine whether a question is **relevant** to prove (or disprove) any of the specific allegations at-issue in the proceeding
 - The Decision-maker must issue a determination on relevance *before* a party answers a question and must explain why something is not relevant
 - "**Relevance**" for purposes of the hearing has additional nuance as compared to the investigation process

The Live Hearing

- The Decision-maker must allow the advisors to ask parties and witnesses:
 - **All relevant questions and follow-up questions**
 - **Questions challenging credibility**
- That must occur even if a party does not show up for the hearing and only the party's advisor is present at the hearing

The Live Hearing

- As we discussed in our prior relevancy training, questions about the Complainant's sexual predisposition or prior sexual behavior **are *presumptively not relevant***, unless such questions:
 - Are offered to prove that someone other than the Respondent committed the alleged sexual harassment; or
 - Concern specific incidents of the Complainant's prior sexual behavior with the Respondent and are offered to prove consent
- The Decision-maker should exclude such questions if they do not fall into these exceptions.

The Live Hearing

- The live hearing must provide the opportunity for cross examination, **which may only be conducted by the *parties' Advisors***
 - A party **cannot** cross examine another party directly during the hearing (or ever)
 - If a party does not have an advisor for the hearing, the College ***must provide*** the party an Advisor (at the College's expense)

The Live Hearing

- **Very Important Hearing Rule: The Decision-maker *cannot* rely on any statement by a party or witness who does not submit to cross-examination at the hearing.**
- The Decision-maker also cannot draw an inference based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

The Live Hearing

- Notably, the Decision-maker is able to ask questions of the parties and is not barred from relying on statement's from a party or witness who only refuses to respond to questions from the Decision-maker.
- Why?
 - Because these questions are not considered "cross-examination," as they come from the neutral Decision-maker.

The Live Hearing

- **Hypothetical:** Hannah is a drama student who witnessed a sexual assault at the college's theater during a rehearsal. She reluctantly agreed to be interviewed as a part of the Title IX investigation. Hannah has been struggling since this investigation interview, and has sought professional help. For her own mental health, she refuses to appear as a witness at the live hearing.
- Can Hannah's investigation interview be relied upon by the Decision-maker in making a determination regarding responsibility?

The Live Hearing

- **Answer:** No – Hannah's interview cannot be relied upon in the determination regarding responsibility.
- A Decision-maker cannot rely on the statements that Hannah made during her investigation interview because she did not present herself for cross examination during the live hearing.
- The Decision-maker-cannot draw an inference about Hannah's testimony based solely on Hannah's absence from the live hearing.

The Role of the Decision-maker

- The Decision-maker must **objectively evaluate relevant evidence presented at hearing.**
- What does this mean?
 - Impartially consider all of the evidence
 - No prejudgment of facts
 - No deference to recommendations from investigator
 - Allow the parties to have an equal opportunity to inspect and review evidence obtained in the investigation and that is relevant to the charges

The Role of the Decision-maker

- The Decision-maker (unlike the investigator) will engage in ***credibility determinations*** of the party's and witnesses
 - I.e., Determine who is telling the truth and who is not?

Role of the Decision-maker

- In reviewing the evidence presented at the hearing, the Decision-maker is responsible for properly applying:
 - The presumption of innocence;
 - The Title IX policy's burden of proof;
 - Relevancy considerations;
 - Privilege protections; and
 - Medical record protections

Determination Regarding Responsibility

- Following the hearing, the Decision-maker must consider the relevant evidence prepared at hearing and issue a written ***determination regarding responsibility***, which must include:
 - The allegations potentially constituting Title IX sexual harassment;
 - A description of the procedural steps taken;
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the school's code of conduct to the facts;
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions and remedies; and
 - Procedures and permissible bases for the Complainant and Respondent to appeal

Determination Regarding Responsibility

- The determination must be sent simultaneously to the parties (and their advisors), along with information to both parties regarding the process of filing an appeal.

Determination Regarding Responsibility

- Title IX Coordinator is responsible for effective implementation of any remedies from the determination
- This determination becomes final:
 - If an appeal is not filed, the date on which an appeal would no longer be considered timely
 - If an appeal is filed, on the date that the school provides the parties with the written determination of the result of the appeal

Technology Use at the Hearing

- Hearings will be conducted virtually, with the Complainant (and Advisor) and the Respondent (and Advisor) in separate rooms. Typically, the hearing will take place on campus, but in different rooms.
- The Decision-maker will be in a third room. This is where the witnesses, the Title IX Coordinator, and Investigators will give testimony.
- The hearing will have a Hearing Facilitator who will travel between the rooms to ensure technology is working properly and that the Parties have what they need.

More on the Technology

- The Parties MUST be able to see and hear each other during the hearing.
- The Decision-maker should work with the Title IX Coordinator prior to the hearing to ensure they are comfortable with the technology used at the hearing (i.e., Zoom, WebEx, or Google meet).
- It is always helpful to have a member of the college IT team at the hearing to ensure the recording of the hearing is properly made.

Quiz – Test Your Knowledge!

- Rico is the Respondent in a Title IX grievance process. Rico does not designate an advisor for the investigation, so the college provides him an advisor during the live hearing. Rico thinks his advisor is hindering his case because the advisor does not know the circumstances of the case as well as he does. Frustrated, Rico ignores the advisor's advice and takes the lead and tries to cross-examine the Complainant.
- Given Rico's displeasure with his advisor, can he cross-examine the Complainant and carry on defending himself?

Quiz – Test Your Knowledge

- **Answer:** No – Rico cannot conduct cross examination during the live hearing, despite his frustrations with his appointed advisor.
- **Reasoning:** During the live hearing, only the parties' advisors may conduct cross examination (even if a party is displeased with his or her advisor).

Quiz – Test Your Knowledge!

- Emily is the Complainant in a Title IX hearing against Sam, who she has accused of sexually harassing her. Sam does not appear for the Title IX hearing, but her advisor, Lucas does. Lucas begins to cross examine Sam at the hearing and Emily's advisor objects, saying that Emily should not be subject to cross-examination since Sam is not present to be cross-examined.
- How should the Decision-maker rule?

Quiz – Test Your Knowledge!

- **Answer:** The Decision-maker should over-rule the objection. The fact that Sam is not present at the hearing does not bar her advisor from cross-examining Emily.
- However, because Sam has not appeared for the hearing and has not subjected herself to cross-examination, the Decision-maker cannot relay on any of Sam's statements in the determination of responsibility.

Quiz –Test Your Knowledge!

- Who is responsible for issuing the determination of responsibility and determining potential sanctions in determining a Title IX investigation:
 - The Title IX Coordinator
 - The Investigator
 - The Decision-maker

Quiz – Test Your Knowledge!

- The **Decision-maker** is responsible for issuing the determination of responsibility and determining potential sanctions.
- The Title IX Coordinator implements sanctions but does not determine them – and the investigator is not involved in the determination of responsibility or the sanctions.

WHAT QUESTIONS DO YOU HAVE?