

TITLE IX MANDATED TRAINING

PROCEDURES FOR LIVE HEARINGS DECISION-MAKING ON RESPONSIBILITY

I. Live Hearings Are *Not* Required for K-12 School Districts.

- A. Title IX regulations **permit (but do not require)** K-12 school districts to include a **live hearing** that involves the participation of all the parties as part of the decision-making procedures. It will be unlikely that any school district will likely opt to permit or require live hearings in their Title IX grievance process. Instead, they will likely incorporate the question and answer process that is identified within the training materials.
- B. If a school district opts to permit such live hearings, then the school district likely **has discretion** on how such a live hearing will be conducted. The school district **could** provide for a live hearing similar to those hearings required under 34 C.F.R. s. 106/45(b)(6)(i) for **post-secondary institutions** (discussed below), or the district could set forth other procedures for a live hearing.
- C. “If an elementary and secondary school recipient chooses to hold a hearing (live or otherwise), this provision leaves the recipient significant discretion as to how to conduct such a hearing, because § 106.45(b)(6)(i) applies only to postsecondary institutions. The Department desires to leave elementary and secondary schools a much flexibility as possible to apply procedures that fit the needs of the recipient’s educational environment. The Department notes that § 106.45(b) requires any rules adopted by a recipient for use in a Title IX grievance process, other than those required under § 106.45, must apply equally to both parties. Within that restriction, elementary and secondary school recipients retain discretion to decide how to conduct hearings if a recipient selects that option.” Federal Register, Vol. 85, No. 97 (May 19, 2020), p. 30365.

II. Requirements for Live Hearings by Post-Secondary Institutions.

- A. Location
 - 1. Live hearings may be conducted with all parties physically present in the same geographic location, or at the decision-maker’s discretion, any or all parties, witnesses, and other participants may appear at the live

hearing virtually, with technology enabling participants simultaneously to see and hear each other.

2. At the request of either party, the decision-maker must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party or the witness answering questions.

B. Hearing Procedures

1. If a party does not have an advisor present at the live hearing, the institution must provide without fee or charge to that party, an advisor of the institution's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.
2. Each party's advisor must be permitted to ask any witnesses (including the other party) all relevant questions and follow-up questions, including questions challenging credibility of the witness.
3. Questions, including cross-examination questions, must be conducted by directly, orally, and in real time by the party's advisor and never by a party personally, notwithstanding the discretion of the institution under 34 C.F.R. 106.45(b)(5)(iv) to otherwise restrict the extent to which advisors may participate in the proceedings.
4. Each party's advisor will only be permitted to ask relevant cross-examination and other questions of a party or witness.
5. Before a witness (including the Complainant and the Respondent) answer a cross-examination or other question, the decision-maker must first determine whether the question is relevant. If a question is not relevant, the decision-maker will not allow the question and must explain any decision to exclude a question as not relevant.
6. Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant's prior sexual behavior are offered to provide that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

7. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility. However, the decision-maker cannot draw any inference about a determination regarding responsibility based solely on the party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

C. Record Keeping

The decision-maker must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.