

Title IX for Decision- Makers

Decision-maker and Appellate Decision-
maker Training

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Disclaimers

- Consult with your legal counsel regarding how best to address a specific situation
- We will send a copy of the slides after this presentation to all who registered their email address when signing in
- We will take questions at the end as time permits

Posting These Training Materials?

- Yes!
- Your Title IX Coordinator is **required** by 34 CFR 106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website
- We know this and will make this packet available to your district electronically to post

Agenda

- Required training
- Overview of Role as a Decision-Maker
- Bias and Impartiality
- Questioning Phase
- Analyzing the Elements of Prohibited Conduct
- What Is Relevant?
- Fact finding
- Credibility analysis
- Approaches to counterintuitive response
- After the Decision
- Handling Appeals

What about Live Hearings?

- K-12 schools are not required to hold live hearings
- The regulations provide little structure for live hearings at the K-12 level
- This training presumes that you do not elect to offer live hearings prior to making a determination as to whether a policy violation occurred (hint . . . Do not elect live hearings!)
- This does not excuse you from holding subsequent suspension/expulsion hearings as may be applicable

Why No Live Hearing?

- Cross examination in a live hearing is “not necessarily effective in elementary and secondary schools where most students tend to be under the age of majority and where.... parents or guardians would likely exercise a party’s rights.”
 - This applies to cases involving student and staff respondents.

Required Training

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What Training is Required for Decision-Makers?

- Issues of relevance (questions and evidence)
- When questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- If holding live hearings, must be trained on that process, as well as any technology to be used at a live hearing (this is not provided today as this is not required or recommended)

Additional Required Training

- Definition of “sexual harassment”
- Scope of the district’s education program or activity
- How to conduct an investigation and grievance process
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, bias and reliance on sex stereotypes
- 34 CFR 106.45(b)(1)(iii) contains the training requirements

Overview of Role of Decision-Maker

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What is your role as decision-maker?

- Conduct an *independent*, objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence
- If this has not occurred previously by the Title IX Coordinator, mandatorily dismiss Title IX complaint that do not rise to the level of “sexual harassment,” did not occur in the [district’s] education program or activity, or did not occur against a person in the USA”

Role Continued

- Afford each party the opportunity to submit written, **relevant** questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions for each party.
- Explain to the party proposing the questions any decision to exclude a question as not relevant

Role Continued

- Issue a written determination regarding responsibility by applying the standard of evidence chosen by the district (either “**preponderance of the evidence**” or “clear and convincing”).
- Consider appeals—you cannot be both the decision maker and the appellate decision maker.
 - This training aimed at individuals who are going to take either but not both of these roles.

Keep an Open Mind



Keep an open mind until all evidence has been heard (and tested at the live hearing, if applicable)



Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed and analyzed **all** of the evidence (which includes responses to questions) AND consider only the evidence that is permissible and relevant

Make Sound, Reasoned Decisions

- You must render a sound, reasoned decision on every charge
- Role is to determine policy violation
- You must determine the facts in this case based on the information presented
- You must determine what evidence to deem credible, the importance of the evidence, and the conclusions to draw from that evidence



Consider
All/Only
Evidence



You must make a decision based
solely on the relevant evidence
obtained in this matter



You may consider nothing but
this evidence

Be Impartial

- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
 - REMEMBER the regulations require a presumption of non-responsibility until the final determination is made!
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any actual or perceived conflict of interest
 - Be prepared to recuse yourself

Weight of Evidence



The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.



It is the **weight** of the evidence, or its **strength** in tending to prove the issue at stake that is important.



You must evaluate the evidence as a whole based on your own judgment.

Evaluate Witness Credibility

You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.

Identify all conflicts and attempt to resolve those conflicts and determine where the truth (**standard of review/proof**) lies.

Evaluate Witness Credibility



Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.



Does the witness have any motive?



Is there any bias?



The Regulations provide consideration of consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, lack of credibility

Evaluate Witness Credibility

Credibility is
determined fact by fact,
not witness by witness

The most earnest and
honest witness may
share information that
turns out not to be true

Draw Reasonable Inferences

- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you considered.
- Inferences only as warranted and reasonable.

Standard of Evidence

Use preponderance of the evidence

Preponderance of the evidence
(most common standard of evidence): Is it more likely than not true that the respondent engaged in the alleged misconduct?

ALWAYS start
with
presumption of
no violation.

Don't Consider Impact

Don't consider the potential impact of your decision on either party when determining if the charges have been proven



Focus only on the allegations and whether the evidence presented is sufficient to persuade you that the respondent is responsible for a policy violation

Standard of Evidence



LOOK TO ALL THE EVIDENCE IN TOTAL,
MAKE JUDGMENTS ABOUT WEIGHT AND
CREDIBILITY, AND THEN DETERMINE
WHETHER OR NOT THE BURDEN HAS
BEEN MET.



WHENEVER YOU MAKE A DECISION,
APPLY YOUR STANDARD OF EVIDENCE

Bias and Impartiality

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Decision-Makers Must Be Impartial



- Decision-makers “may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent”
- Decision-makers must avoid prejudgment of the facts at issue

Being Impartial

- The preamble discussion indicates that being impartial means being free from bias.
- “The Department believes that keeping this provision focused on ‘bias’ paired with an expectation of impartiality helps appropriately focus on bias that impedes impartiality.”



Conflicts of Interest

- Decision-maker and financial and reputational interest aligned with institution (or to protect institution)
- Co-mingling of administrative and adjudicative roles
- Title IX Coordinator supervises decision-maker
- Past advocacy for victim's or respondents' rights (also given as an example of potential bias)
- “Perceived conflict of interest” vs. actual conflict of interest

Bias and Conflict of Interest

- The regulations “leave [districts] flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages [districts] to pursue alternatives to the inherent difficulties that arise when a [district’s] own employees are expected to perform functions free from conflicts of interest and bias.”
- “The Department declines to define certain employment relationships or administrative hierarchy arrangements as per se conflicts ... or to state whether particular professional experiences or affiliations do or do not constitute per se violations.”

Discussion Recommendation for Assessing Bias

- “Whether bias exists requires examination of the particular facts of a situation and the Department encourages [districts] to apply an objective (**whether a reasonable person would believe bias exists**), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists...bearing in mind that the very training required by 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve **impartially** and without bias such that the **prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person** from obtaining the requisite training to serve impartially in a Title IX role.”

Avoiding Pre-Judgement of Facts at Issue

A good way to avoid
bias and ensure
impartiality =
avoiding prejudgment
of facts

Each case is unique
and different

Avoiding Sex Stereotypes

- “Must” not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Examples of sex stereotypes in comments:
 - Women have regret and lie about sexual assaults
 - Men are sexually aggressive or likely to perpetrate sexual assault

Avoiding Sex Stereotypes

- Discussion – prohibition against sex stereotypes, but not feasible to list them
 - Different from evidence-based information or peer-reviewed scientific research, including impact of trauma
 - Cautions against an approach of “believing” one party over the other and notes regulations preclude credibility determinations based on a party’s status as a complainant or respondent

Avoiding Sex Stereotypes

- Preamble discusses concerns regarding marginalized groups:
 - From commentators about stereotypes and accommodations for individuals with disabilities under the ADA, and individuals with developmental and cognitive disabilities
 - From people of color for cultural and racial stereotypes
 - Regarding stereotypes of people within the “LGBTQ community”

Questioning Phase

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After the Report



- After the school sends the investigative report to the parties, they have 10 days to provide a written response.
- Responses may address issues of relevance and credibility so Decision-maker needs to be prepared to address these issues in the written determination.

Written Questions

- Before reaching a determination regarding responsibility, the decision-maker must:
 - Afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness
 - Includes questions about credibility
 - The decision-maker must explain to the party proposing the question any decision to exclude a question as not relevant.

Written Questions

- Questions go to the decision-maker for review prior to being given to parties/witnesses.
 - Role is to screen questions
- Answers must be shared with each party.
- Decision-maker may also pose questions.
- Allow for additional, limited follow-up questions from each party based upon answers.
 - School can set reasonable limits
 - The 10-day response period can overlap with the period for follow-up questions, so no need to extend timelines

Questions about Prior Sexual Behavior

- Relevant **ONLY** in two situations:
 1. When it is offered to prove that someone other than Respondent committed the conduct alleged; OR
 2. When it is offered to prove consent with respect to specific incidents of the Complainant's sexual behavior with Respondent.
- Unless it falls within these exceptions – **EXCLUDE/DO NOT ASK.**
- Does not apply to Respondent's prior sexual behavior or predisposition.

Analyzing the Elements of Prohibited Conduct

Analyzing the Elements

- To find a policy violation, there must be evidence to show, using the standard of evidence in your policy (i.e., preponderance of the evidence), that **each and every** element of a policy violation has been met
- How do you do this?

Analyzing the Elements

- Review the definition
- Break down the definition into elements by making a checklist
- Re-read the definition.
 - Have you accounted for all of the language in the definition?
- Are there any definitions that should be included in your element checklist?
- Sort evidence according to element

Analyzing the Elements

- If you have a preponderance of the evidence* that each element is present, you have a policy violation
- If you do not have a preponderance of the evidence that each element is present, you do not have a policy violation
- If you have a preponderance of the evidence that one or more elements is not present, you do not have a policy violation

Example: Quid Pro Quo

- Conduct on the basis of sex
- By an employee of the recipient
- That conduct conditions the provision of an aid, benefit, or service of the recipient on an individual's participation in sexual conduct
- That sexual conduct is unwelcome

Example: Hostile Environment

- Conduct on the basis of sex
- That is unwelcome (subjective based on complainant)
- That a reasonable person has determined is so severe **AND** pervasive **AND** objectively offensive... (objective)
- That it effectively denies a person equal access to the recipient's education program or activity

Considerations for Hostile Environment

- High bar – not just being offended or uncomfortable
- You must evaluate “totality of the circumstances” which include:
 - Age and sex of parties
 - Size of school, location of incidents, context
 - Effect on Complainant’s mental and emotional state
 - Whether conduct was directed at more than 1 person
 - Whether conduct unreasonably interfered with Complainant’s educational or work performance
 - Whether a statement was an utterance
 - Whether speech/conduct is protected by First Amendment

Education Program/Activity

- Remember that the behavior addressed must occur in the recipient's "education program or activity"
 - "Education program or activity" means all of the operations of the recipient
 - In the Title IX grievance context, "education program or activity" includes "locations, events, or circumstances over which the recipient exercised **substantial control** over both the **respondent** and the **context** in which the sexual harassment occurs."
- Conduct must also interfere with the complainant's access or participation in the education program/activity

Example: Sexual Assault

- Conduct on the basis of sex
- Qualifies as one of the following:
 - Rape
 - Sodomy (oral/anal penetration)
 - Sexual Assault With An Object (other than genitalia)
 - Fondling
 - Incest
 - Statutory Rape

Example: Sexual Assault (cont.)

- ❑ In cases of rape, sodomy, sexual assault with an object, or fondling, there was either:
 - ❑ No consent, or
 - ❑ Victim was incapable of giving consent because of age or temporary/permanent mental or physical incapacity

Example: Dating Violence

- Conduct on the basis of sex
- Violence committed by a person
- Who has been in a social relationship of a romantic or intimate nature with the victim
- Where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - Length of the relationship
 - Type of relationship
 - Frequency of interaction between the persons involved in the relationship

Example: Domestic Violence

- Conduct on the basis of sex
- Felony or misdemeanor crime of violence committed:
 - By current/former spouse or intimate partner of the victim
 - By a person with whom the victim shares a child in common
 - By a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner
 - By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction
 - By any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction

Example: Stalking

- Conduct on the basis of sex
- Course of conduct
- Directed at a specific person
- Would cause a reasonable person to either:
 - Fear for his or her safety or the safety of others; or
 - Suffer substantial emotional distress.

Retaliation

- Did a person or institution
- Intimidate, threaten, coerce, or discriminate (i.e., adverse action) against any individual
- For engaging in protected activity?
 - For the purpose of interfering with any right or privilege secured by Title IX or
 - Because the individual has made a report or complaint, testified, assisted or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX

(**NOTE: Retaliation unlike Sexual Harassment requires evidence of an *intent* to retaliate)

Consent

- Informed, knowing, and voluntary
- Active, not passive – affirmative action through clear words or actions
- Must be present throughout and can be withdrawn at any time
- Questions:
 1. Is there evidence force used by Respondent to obtain sexual or intimate access?
 2. Is there evidence Complainant was incapacitated? (if answers to both are YES = NO CONSENT)
 3. Is there evidence of clear words or actions by Complainant gave Respondent permission for each specific sexual or intimate act that occurred?

What Is Relevant?

Relevancy: What Can You Consider?

Issues of Relevancy

- The Rules of Evidence do **NOT** apply
- “The Department appreciates the opportunity to clarify here that the final regulations **do not allow** a recipient to impose rules of evidence that **result in the exclusion of relevant evidence**; the decision-maker must consider relevant evidence and must not consider irrelevant evidence.”
 - You do not apply the complexities of the rules of evidence but you need to determine what is relevant – i.e., if the evidence has value in proving or disproving a fact at issue

Issues of Relevancy

- From the regulations, here is what we know is not relevant:
 - Information protected by a legally recognized **privilege**
 - Evidence about complainant's **prior sexual history**
 - **Unless !!!** That evidence falls within 3 exceptions
 - offered to prove that someone other than the alleged perpetrator committed the alleged conduct, or to prove consent (Consent not defined in new regulations)
 - Party's **medical, psychological, and similar records** unless voluntary written consent.

Issues of Relevancy

- “[D]oes not prescribe rules governing how admissible, relevant evidence must be **evaluated for weight or credibility** by [district]’s decision-maker, and [districts] thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with [34 CFR] 106.45 and apply equally to both parties.”

BUT

- “[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient’s training materials.”

Relevancy: Legally Privileged Information

- Section 34 CFR 106.45(b)(5)(i): when **investigating** a formal complaint, a district:
 - “[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section.”

Relevancy: Legally Privileged Information

- Section 34 CFR 106.45(b)(1)(x):
 - A recipient's grievance process must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Relevancy: Legally Privileged Information

- Preamble identifies medical and treatment records.
- Other typical privileges recognized across jurisdictions but with variations (will want to involve your legal counsel for definitions in your jurisdiction):
 - Attorney-client communications
 - Implicating oneself in a crime (as in the 5th Amendment)
 - Confessions to a clergy member or other religious figures
 - Spousal testimony in criminal matters
 - Some confidentiality/trade secrets

Rules of Relevancy

“Any rules adopted by a [district] regarding issues of relevance should be reflected in the [district’s] training materials.”



That is what we are doing here!

Relevancy

Ultimate determination of relevance is the Decision-maker's even if the investigator determines something is not relevant.



This means that the Decision-maker must look at **EVERYTHING** (both what investigator determined to be relevant and what is directly related to the complaint) and then make an independent determination on relevancy.

Fact Finding

Fact Finding when Facts are Disputed

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The Fact-Finding Process

1

- List undisputed facts -what do parties agree on?
= **findings of fact**
- List disputed facts-what do parties disagree on?

2

- What undisputed facts address each element?
- What disputed facts must be resolved for each element?

3

- Weight the evidence for each **relevant** disputed fact
- Resolve disputed facts=**findings of fact**

Credibility Analysis

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Objectively Evaluating Relevant Evidence



Preamble indicates that the decision-maker should be looking at consistency, accuracy, memory, credibility, implausibility, inconsistency, unreliability, ulterior motives, lack of credibility



Again, making relevancy determinations



Use your standard of proof to guide decision-making

What is Credibility?

- Accuracy and reliability – not about truthfulness.
 - Think of it as the source plus the content plus the plausibility.
 - Consider whether there is a reason or motive to lie.
- Decision-maker is ultimately responsible to make this determination – consider determinations by investigator but come to independent determination.
- Primarily look at corroboration and consistency – try to not focus on irrelevant inconsistencies.

Considerations for Resolving Conflicts

- Statements by any witnesses to the alleged incident
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?
 - Statements in the investigation report regarding credibility

Considerations for Resolving Conflicts

- Evidence of the complainant's reaction or behavior after the alleged harassment
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later so use caution. Do not prejudge a complainant based upon how *you* would react.

Considerations for Resolving Conflicts

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Considerations for Resolving Conflicts

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?

Approaches to Counterintuitive Response

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Everyone has a different way of thinking

- Differences in:
 - Cultural backgrounds
 - Learned responses
 - Age, gender, race, religion, height/weight, strength
 - Adverse childhood experiences
 - Trauma in the moment or prior to the encounter

Considerations: Potential Responses to Trauma

- Delayed reporting
- Difficulty remembering specifics (could also be due to drugs/alcohol)
- Reluctant reporting
- Remaining in a relationship or living arrangement with the respondent
- Being calm and composed after an assault
- Failing to identify the accused

Considerations: Potential Responses to Trauma

- Trauma isn't just something to consider from the complainant's perspective. The respondent may be dealing with trauma, as may be the witnesses.
- Trauma may cause counterintuitive responses – from your perspective. Stop and consider carefully before you decided someone is lying because they responded in a way different from how *you* would have responded.

Disclaimer

Do **not** assume that because there are signs of trauma that the respondent *therefore* caused the trauma and violated the policy

Do **not** assume that because there are no signs of trauma, nothing bad happened

Credibility Factors



Focus on your evidence



Draw reasonable inferences from that evidence



Focus on your parties and witnesses, and take them as they are



Check yourself: am I reaching my decision because of any bias that I may hold?

Weighing the Evidence

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Standard of Proof

- Standard of Evidence: Preponderance of the Evidence
- Must use same standard for formal Title IX complaints against both students and employees (including teachers) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievance procedures, teacher conduct)
- Must begin with a presumption of no violation by Respondent

Applies to
Every
Fact and
Every
Decision

When you make a
determination as to a
disputed fact, use your
standard of evidence

When you make a
determination as to whether
an element exists, use your
standard of evidence

Making Written Determination

- Determination must be based upon the actual facts, opinions and circumstances explained in the investigation report, submitted by the parties in response to the evidence and investigation report, and submitted by the parties during the questioning process.
- Do not use “outside” evidence.
- The question of a violation of the policy is separate from factors that aggravate or mitigate the severity of the violation.

Written Determination

- Written determination **must** include:
 - Identification of the allegations potentially constituting sexual harassment
 - A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
 - Findings of fact supporting the determination
 - Conclusions showing the application of the policy to the facts (i.e., showing how the facts support/do not support the elements of the policy)

Written Determination (cont.)

- A statement of, and rationale for, the results as to each allegation, including **determination** regarding responsibility (i.e., application of the standard of proof to the conclusions)
- Any disciplinary **sanctions** the recipient imposes on the respondent, and
- **Remedies** designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant
- Institution's procedures and permissible bases for complainant and respondent to **appeal**

Written Determination (cont.)

- Decision-maker(s) must author the determination.
- Determination **MUST** be provided to both parties in writing contemporaneously

After the Decision

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Disciplinary Sanctions

- If there has been a finding of responsibility (inc. retaliation), follow due process procedures in state law and Board Policy
 - Notice of possible discipline (student discipline follow policy - suspension/expulsion - or staff member discipline – follow policy or CBA)
 - Opportunity to respond to the allegations/proposed discipline
 - Only Board hearings required under MT law are for expulsion and termination (CBA may require hearing as part of grievance process for staff member discipline)
- Sanctions should not be developmental; they are intended to protect the Complainants and the school community as a whole.

Disciplinary Sanctions

- Note that under regulations, if schools permit appeals regarding sanctions, they must offer this right to the complainant and respondent.
- Before any sanction that would constitute a change of placement for a child with a disability, ensure compliance with IDEA and Section 504 (manifestation determination, provision of services as applicable, etc.)

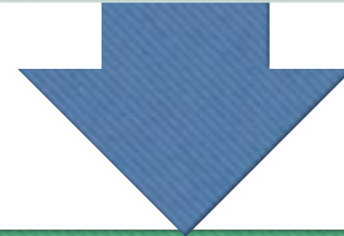
Handling Appeals

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Identity of the Appellate Decision- maker

You cannot hear an appeal of your own decisions

The Appellate Decision-maker cannot be the same investigator, Title IX Coordinator, or decision-maker that worked on the case



The Appellate Decision-maker must be trained in the same manner as the Decision-maker

Bases for Appeal

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- The Title IX Coordinator/investigator/decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome
- A district may offer an appeal equally to both parties on additional bases – NOT RECOMMENDED

Role of Appellate Decision-maker

Analyze appeal against permissible bases for appeal

Does not require hearing, meeting with parties – role is not to agree/disagree with the outcome.

Appeals

- As to all appeals, the district must:
 - Offer the appeal to either party
 - Issue a written decision describing the result of the appeal and the rationale for the result
 - Provide the written decision simultaneously to both parties.

Final Outcome

- Generally the Title IX Coordinator's responsibility to notify parties.
- Written determination by decision-maker is generally final either after the appeal is final or the time for filing an appeal has been passed.

Questions?

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