

Stock and Leader
ATTORNEYS AT LAW
When Decisions Matter

Title IX Decision Maker Training
October 22nd and 29th



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Agenda

- General overview Title IX and definition of sexual harassment
- Jurisdiction and District's Education Program or Activity
- Overview of the Decision-Maker Role
- Grievance process
- Bias and Impartiality
- Relevancy
- Issuing a Written Determination
- Weighing the Evidence
- Credibility Analysis
- Fact Finding
- After the Decision
- Handling Appeals

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Introduction to Title IX

- **Title IX of the Education Amendments of 1972 (Title IX) is a federal civil rights law that prohibits discrimination on the basis of sex in federally funded education programs and activities.**
 - It has been more than 45 years since enactment of Title IX.
 - Title IX states in part:
 - *"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...."*

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Definitions Throughout

- Recipient = School District
- Complainant = Alleged Victim of Sexual Harassment
- Respondent = Alleged Perpetrator of Sexual Harassment
- Title IX Coordinator = ???
- Title IX Investigator = Person authorized to conduct an investigation into the allegations
- Title IX Decision-Maker = Person reviewing evidence and determining responsibility

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Definitions Throughout

- What does "Sex" Mean?
 - Biological Sex
 - Gender
 - Sex Stereotyping
 - Sexual Orientation
 - Gender Identity
- Formal Complaint
 - "A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment"

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Review of District Obligations

- List of District Policies to Update – 103/104/247/249/317.1/824
 - 103 – Nondiscrimination in School and Classroom Practices
 - 104 – Nondiscrimination in Employment and Contract Practices
 - 247 – Hazing
 - 249 – Bullying/ Cyberbullying
 - 317.1 – Educator Misconduct
 - 824 – Maintaining Professional Adult/Student Boundaries
- Address complainant and provide supportive measures
- Mandatory reporting
- In limited circumstances, offer an Informal Resolution
- Investigation
- Formal grievance process: notice, report, decision, appeal

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Title IX Team

- Title IX Coordinator
- Title IX Investigator
- Title IX Decision-Maker

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Title IX Decision-Maker

- Who can be a Decision-Maker
- How one becomes the Decision-Maker
- Role of the Decision-Maker

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The Role of a Title IX Decision-Maker

- Conduct an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence;
- Mandatory dismissal of formal complaints that do not rise to the level of Sexual Harassment because the District does not have jurisdiction;
- 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, yet limited, follow-up questions for each party;

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The Role of a Title IX Decision-Maker

- Make a judgement call regarding whether questions are relevant and explain the reasoning for excluding questions;
- Weigh the evidence and make judgement calls on credibility;
- Determine if the Respondent is responsible; and
- Draft a written determination.

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Why do I need to know these things, especially right now?

- On August 14, 2020, new regulations to Title IX became effective – new regulations require Title IX Decision-Makers to be trained in specific areas.

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What actions constitute “Sex Discrimination” under Title IX?

- Treating one person **differently** from another based on that person’s sex / gender in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
- Providing **different** aid, benefits, or services or provide aid, benefits, or services in a different manner;
- Denying any person any such aid, benefit, or service;
- Subjecting any person to separate or **different** rules of behavior, sanctions, or other treatment.

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New definitions of Sexual Harassment

- Sexual harassment means conduct on the basis of sex that justifies one of more of the following: Quid Pro Quo, Hostile Environment, or Clery crimes.
- **Quid Pro Quo** – An employee of the school district conditioning the provision of an aid, benefit, or service of the school district on an individual’s participation in unwelcome sexual conduct;
- **Hostile Environment** – Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denied a person equal access to the recipient’s education program or activity; or
- **Clery Crimes** – Sexual assault, dating violence, domestic violence, or stalking.

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Jurisdiction

- Under the new Title IX regulations, if the District does not have jurisdiction it must dismiss the Title IX complaint.
- This does not, however, preclude supportive measures or other Code of Conduct violations.

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The Scope of District’s “Education Program or Activity”

- Why is the scope important?
- Which incidents are under the District’s jurisdiction?
 - All incidents of Sexual Harassment occurring *on-campus*;
 - All incidents of Sexual Harassment occurring *off-campus* if either of the two following conditions are met:
 - Off-campus incident occurs as part of the recipient’s “operations;” or
 - If the recipient exercised substantial control over the Respondent and the context of the alleged Sexual Harassment that occurred off-campus.

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Hypothetical #1

- Facts: Mary (a student) alleges that Mr. Gary (a teacher) had sexual relations at his house last Sunday.

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #2

- Facts: Mary (a student) alleges that Mr. Gary (a teacher) has made repeated remarks to her in the classroom of a sexual nature. In addition, Mary alleges that Mr. Gary told her, after class, that if she performs sexual acts for him, she will pass Chemistry.

Please respond to the poll.
Your answers are anonymous.

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Mandatory Dismissals

The Decision-Maker shall dismiss a formal complaint when, at any point in the investigation, it is determined that even if the facts, as alleged, occurred:

- The conduct would not rise to the definition of Sexual Harassment;
- The conduct did not occur in the recipient's education program or activity; or
- The conduct did not occur against a person in the United States.

Upon dismissal, the recipient must notify the Complainant and Respondent simultaneously.

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Discretionary Dismissals

- The Decision-Maker may dismiss a formal complaint when, at any point in the investigation:
 - It is determined that the respondent is no longer enrolled as a student or employed as an employee;
 - There are special circumstances which prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations.
- The Title IX Coordinator may dismiss a formal complaint if the Complainant notifies the Title IX Coordinator, in writing, that the Complainant would like to withdraw the formal complaint or any allegations therein.
- Upon dismissal, the recipient must notify the Complainant and Respondent simultaneously.

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Hypothetical #3

- Mary (student) files a formal complaint against Bobby (student) with the Title IX Coordinator. Mary alleges that Bobby told Mary's boyfriend, David (student), that Mary has slept with the entire baseball team and the David broke up with Mary because of it.

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #4

Bobby (student) files a formal complaint against Mary (student) with the Title IX Coordinator. Bobby alleges that Mary groped him in PE.

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #5

Bobby (student) files a formal complaint against Mary (student) with the Title IX Coordinator. Bobby alleges that Mary groped him in PE. After the investigation begins, Bobby explains that he wants to formally withdraw his complaint and does so in writing.

Please respond to the poll.
Your answers are anonymous.

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Retaliation Prohibited

“No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report, complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part...”

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Grievance Procedures - General Requirements

- Treat complainants/respondents equitably; no sanctions until process complete
- No conflict of interest or bias; trained staff
- Presumption that respondent is not responsible
- Reasonably prompt timeframes
- Range of possible sanctions/remedies

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Overview of the Grievance Process

1. Title IX Coordinator promptly contact Complainant and institute supportive measures if applicable – this could occur before a formal complaint is filed;
2. Title IX Coordinator explains the process to file a formal complaint and the grievance process that will follow;
3. Title IX Coordinator authorizes an investigation; and
4. Title IX Coordinator provides notice to Complainant and Respondent.

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Overview of the Grievance Process

5. Title IX Coordinator offers both the Complainant and Respondent voluntary informal resolution, if applicable
6. Title IX Investigator begins an investigation;
7. Title IX investigator concludes investigation and provides all evidence to Complainant and Respondent and allows each party the opportunity to submit more evidence or provide statements relative to the evidence; and
8. Title IX Investigator drafts an Investigative Report and submits the report to both parties, simultaneously, and to the Title IX Decision-Maker.

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Overview of the Grievance Process

9. Title IX Decision-Maker reviews the evidence and allows both parties to submit relevant questions to either party or witness;
10. Title IX Decision-Maker provides answers to questions, if applicable;
11. Title IX Decision-Maker drafts a Decision regarding responsibility and providing appeal rights; and
12. Appeal Decision-Maker drafts a Decision regarding responsibility if applicable.

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Pausing the Investigation for “good cause”

- While investigating, you may be directed by the Title IX Coordinator to pause your investigation
- What constitutes Good Cause?

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BREAK

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How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias

- Being impartial is greatly aided by not prejudging facts
- Conflicts of interest
- Bias—Implicit Bias
- Not relying on sex stereotypes

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Hypothetical #6

Who may be impartial?

Answer Choices:

- Superintendent--Respondent was expelled last year and the Investigator is the Superintendent who investigated the expulsion incident and asked the Board to expel respondent for one year
- Band Director—Complainant is in the band and the Investigator is the Band director
- Coach—Respondent is a football player and the Investigator is the Cheer Coach
- None

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #7

Which, if any, of the Decision Makers need to recuse themselves?

Answer Choices:

- Superintendent—Respondent was expelled last year and the Investigator is the Superintendent that investigated the expulsion incident and asked the Board to expel for one year
- Band Director—Complainant is in the band and the Investigator is the Band director
- Cheer Coach—Respondent is a football player and the Investigator is the Cheer Coach
- None

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #8

Which, if any, scenario poses a conflict of interest?

- Respondent was expelled last year and the Decision-Maker is the Superintendent that investigated the expulsion incident and asked the Board to expel for one year
- Complainant is in the band and the Decision-Maker is the Band director
- Respondent is a high school teacher and the brother of the Superintendent. Investigator is the High School Principal
- The School Board is authorized to sit as the appellate decision-maker in a case where the Respondent is a daughter to one Board member
- None

Please respond to the poll.
Your answers are anonymous.

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Important Considerations: Potential Responses to Trauma

- Delayed reporting
- Difficulty remembering specifics
- Reluctant reporting
- Remaining in a relationship with the respondent
- Failing to identify the accused
- The alleged victim thinks s/he is to blame and somehow s/he welcomed the unwanted behavior

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What Questions are relevant?

- The Decision-Maker must 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, yet limited, follow-up questions for each party – and make judgement call regarding whether questions are relevant and explain the reasoning for excluding questions;
- Questions are relevant unless specifically excluded *or the question does not directly relate to the issue at hand*:
 - Complainant's sexual predisposition or prior sexual behavior is not relevant unless...

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Hypothetical #9

Mary alleged that Bobby touched her inappropriately. During Mary's interview, Mary says this occurred during 5th period math class. Bobby wants to ask the following question to Mary: *On the day I allegedly inappropriately touched you, was I in Math class?*

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #10

- Bobby alleges that he could not have touched Mary because he was not in 5th Period Math that day. Mary wants to ask the following question to Bobby: *Don't you often skip your 5th Period History class?*

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #11

Mary's witness and class-mate, Sue, told the investigator that she saw Bobby inappropriately touch Mary. Bobby wants to ask the following question to Sue: *Haven't you and Mary been best-friends since kindergarten (approximately 10 years)?*

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #12

Mary's witness and class-mate, Sue, told the investigator that she saw Bobby inappropriately touch Mary. Bobby wants to ask the following question to Sue: *Haven't you alleged sexual harassment against every guy you've slept with in the past year?*

Please respond to the poll.
Your answers are anonymous.

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**Issues of Relevancy - Legally
Privileged Information**

- **Even if the evidence is relevant – it may be excluded from consideration!**
- Section 106.45(b)15(i): when investigating a formal complaint, recipient:
 - “Cannot 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.”

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**Issues of Relevancy - Legally
Privileged Information**

- Section 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 a privilege has waived the privilege.
 - Some legally recognized privileges are attorney-client privilege, doctor-patient privilege, and spousal privilege.

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Hypothetical #13

- Bobby wants to include evidence that Mary has had sexual encounters with 15 different boys in the class.

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #14

- Bobby wants to include evidence that Mary was having sexual relations with Bobby during the time that he allegedly inappropriately touched her.

Please respond to the poll.
Your answers are anonymous.

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Standard of Evidence

- Preponderance of the Evidence
- Clear and Convincing Evidence

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Issuing a Written Determination

- A written determination must include, at a minimum:
 - Identification of the allegations potentially constituting sexual harassment;
 - A description of the procedural steps taken;
 - To include any notifications made to parties, interviews held, site visits, methods used to gather other evidences, and hearings held.
 - Findings of fact supporting the determination;
 - Conclusions regarding the application of the recipient's code of conduct to the facts;
 - A statement of, and rationale for, the result of each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether 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; and
 - The recipient's procedures and bases for the complainant and respondent to appeal

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Weighing the Evidence

- Remember, you must base your decision solely on the relevant evidence obtained. No outside knowledge/evidence is allowed! Do not consider the potential impact of your decision on either party.
- The volume of evidence, number of witnesses, or Title of a party does not determine responsibility.
- The strength of the evidence and credibility of the witnesses/parties are most important.

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Hypothetical #15

- Bobby submits 95 pages of relevant evidence that he did not inappropriately touch Mary. Mary offers her written statement and an eye-witness.

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #16

- You, as the Decision-Maker, know of prior allegations against Bobby that resulted in his expulsion last year. You specifically know that Bobby has a history of not being able to keep his hands to himself.

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #17

- In reviewing the evidence, you learn that Mary identified Sue, her best friend, as an alleged eye-witness. After reviewing Sue's testimony, you are unsure if her account of a particular piece of evidence is accurate. You are at a 50/50 split on whether you believe Sue's story.

Please respond to the poll.
Your answers are anonymous.

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Determining Credibility

- Credibility is determined fact by fact, not witness by witness!
- It is your job to determine where the truth lies when there is a conflict
- What to consider:
 - Reasonableness or unreasonableness of the testimony;
 - Probability or improbability of the testimony;
 - Motivation for testifying;
 - Bias
 - Consistent statements – between a witness's own statements and other's statements;
 - Memory recall;
 - Implausibility, ulterior motives, and lack of credibility.
- What NOT to consider:
 - The fact that a person is the complainant;
 - The fact that a person is the respondent;

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Hypothetical #18

- In reviewing the evidence, you learn that Mary identified Sue, her best friend, as an alleged eye-witness. After reviewing Sue's testimony, you are unsure if her account is accurate.

Please respond to the poll.
Your answers are anonymous.

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Hypothetical #19

- Sue alleges that she saw Bobby walking the hallways during 5th period. Bobby alleges that he was in his class the entire time. (No other student was interviewed and there was a substitute teacher who does not recall if Bobby left or not – this fact is relevant because Mary alleges that Bobby inappropriately touched her during 5th period).

Please respond to the poll.
Your answers are anonymous.

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Fact Finding

- Separate the undisputed facts from the disputed facts;
- Undisputed facts = Findings of Fact
- Determine which disputed facts are relevant;
- Resolve the relevant disputed facts = Findings of Fact

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Making a decision

- Review Policy 103/104;
- Review the definition of Sexual Harassment;
- Breakdown the definition in to elements;
- Review each and every element;
- Sort all of your evidence by the element;
- Assess the evidence and apply all of the evidence to each and every element;
- When there is a conflict between testimony, determine based on credibility;
- 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 element is NOT present, you do NOT have a policy violation.

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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

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Hostile Environment

- Conduct on the basis of sex
- That is unwelcome
- That a reasonable person has determined is so severe, pervasive, and objectively offensive
- That it effectively denies a person equal access to the recipient's education program or activity

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After the Decision

- Written notice of possible discipline;
- Opportunity to respond;
- Appeal rights
 - If the District allows a party to appeal the sanction, the District must provide both parties that opportunity
- 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, continuation of services as applicable, etc.)

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Hypothetical #20

- After reviewing and weighing all of the evidence, and making appropriate judgement calls on credibility, you determine that Bobby IS responsible for Sexual Harassment. As a disciplinary sanction, you determine that Bobby will be expelled for 1 year.

Please respond to the poll.
Your answers are anonymous.

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Handling Appeals

- The Appellate Decision-Maker cannot be the Initial Decision-Maker, Title IX Coordinator, or Investigator;
- The Appellate Decision-Maker must be trained in the same manner as the Initial Decision-Maker;

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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 Complainant(s) or Respondent(s) generally, or the individual Complainant(s) or Respondent(s) that affected the outcome;
- Any additional basis that is offered equally to both the Respondent and Complainant (for example, the sanction)

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Appellate Procedure

- Offer the appeal to both parties;
- Let both parties know when an appeal has been filed;
- Give both parties a reasonable and equal opportunity to submit a written statement in support of or challenging the appealed decision;
- Issue a written determination *describing the result of the appeal and the rationale for the result*;
- Provide the written decision simultaneously to both parties

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Questions?

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