



Appeals Officer Training

Title IX Training: Level 2



Bricker & Eckler
ATTORNEYS AT LAW

Disclaimers



We can't help ourselves. We're lawyers.

- We are not giving you legal advice
- 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

Presentation Rules



- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

Posting These Training Materials?



- Yes!
- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution electronically to post

Additional information available at:

**Title IX Resource Center at
www.bricker.com/titleix**

Required Training for Appeals Officers (1 of 2)



The Title IX regulations require specific training for the Title IX Coordinator, investigator, decision-maker, and any other person designated to facilitate an informal resolution process.

- Section 106.45(b)(8)(iii)(C) clarifies that the **appeal “decision-maker”** has to have some of the same training, as set forth 106.45(b)(1)(iii)

Required Training for Appeals Officers (2 of 2)



An appeals officer must be trained on:

- Jurisdiction: understanding “the scope of the recipient’s education program or activity” (Level 1)
- Definitions of “sexual harassment” under the new Title IX regulations (Level 1)
- Serving impartially, and without bias, conflict of interest or pre-judgment of fact
- Issues of relevance (not Rules of Evidence)
- How to conduct appeals

Topics



- The role of the Appeals Officer
 - Understanding the process: the Title IX Coordinator's role
 - Understanding the process: the Investigator's role
 - Understanding the process: the Decision-Maker's role
- Bias and conflicts of interest
 - Relevancy
 - How and what to review on appeal.
 - The written decision on appeal.

Aspirational Agenda



Day 1:

2:00 – 3:15 EST: Introduction and Understanding Title IX Process and Roles

3:15 – 3:30 EST: Break

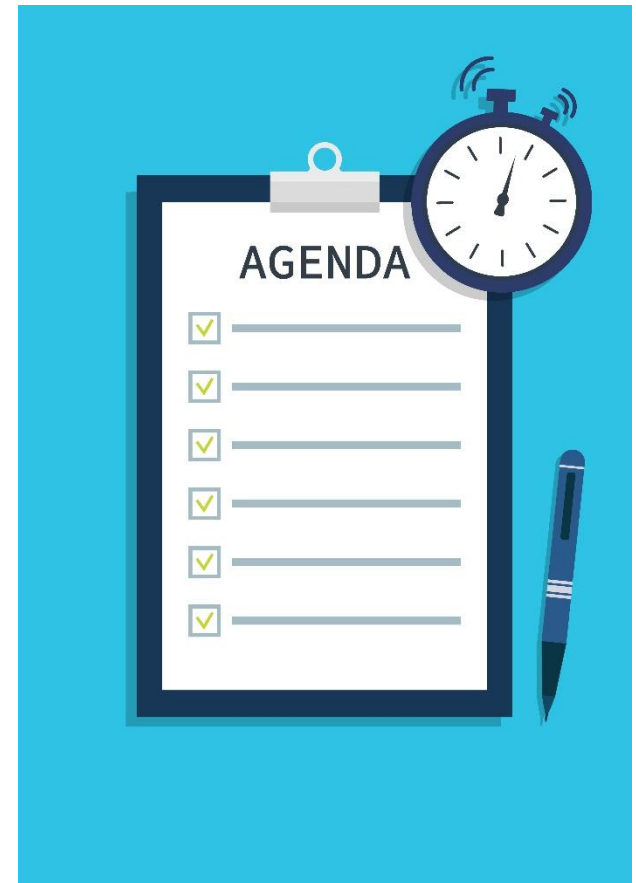
3:30 – 5:00 EST: Continue Understanding Title IX Process and Roles

Day 2:

2:00 – 3:15 EST: Appeals Officer Determinations

3:15 – 3:30 EST: Break

3:30 – 5:00 EST: Avoiding Bias, Conflict of Interest, and Prejudgment of Facts





The Appeals Officer's Role

The Appeals Officer's Role(s)



Be able to see the forest and the trees

- **Know the process in your policy** (how it should function) and **know the process as applied** (how it actually functioned in each case) from intake to the time it hits your desk.
- **Know your big picture role** (the limited scope of your review) and **know the specific details of your case** (the often think and detailed case file) and be able to move back forth between these perspectives

Bases for appeal: Procedural Integrity (1 of 2)



The three required base for appeals are (your institution can add to this):

1. **Procedural integrity** that affected *the outcome of the matter*

- Does the process in policy align with process as applied?

Bases for appeal: Procedural Integrity (2 of 2)



What you need to know to answer this question:

- The process in your specific policy (to the extent it adds to the detailed process in the Regulations)
- The Title IX Coordinator's role
- The Investigator's role
- The Decision-Maker's role (relevancy determinations)
- How to determine if any deviation from the process actually affected the outcome

Bases for appeal: New Evidence



2. **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

Bases for appeal: Conflict of Interest or Bias (1 of 2)



3. **Conflict of interest or bias** against a party by the Title IX Coordinator, investigator(s) or decision maker(s) that affected the outcome of the matter

This will require the appeals officer to be able to make determinations on bias and conflict of interest, usually on peers and understand the case to know if any bias or conflict of interest would impact the outcome of the matter

Bases for appeal: Conflict of Interest or Bias (2 of 2)



- How do you make these determinations of conflict of interest or bias, especially with coworkers or supervisors?
- How do you determine if this actually affected the outcome?

Bases for appeal: Dealer's Choice



4. Any other bases the recipient establishes provided it is equally available or applies equally to both parties.
 - This will require the appeals officer to understand the institution's specific bases for appeals.
 - Many institutions provide a basis for appeal for arbitrary and capricious outcomes or sanctions not proportionate to the findings



Understanding the Process: The Title IX Coordinator's Role

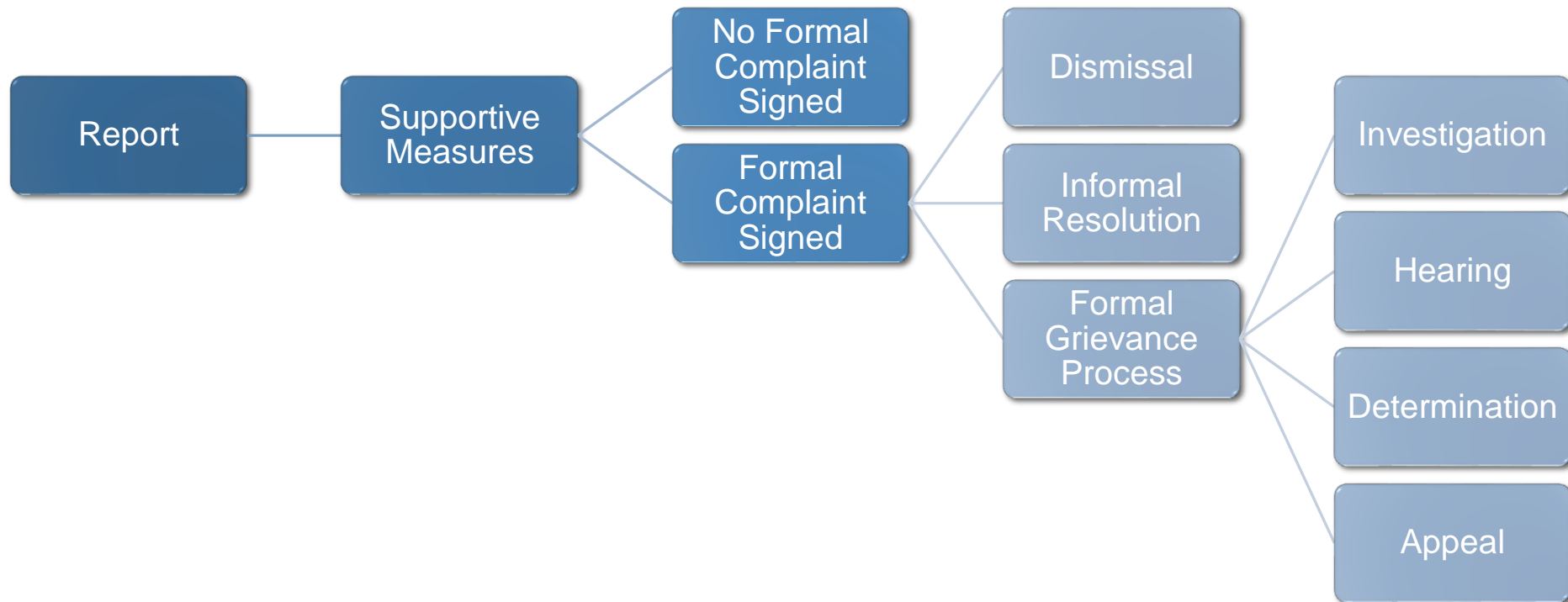
The Title IX Coordinator



Oversees procedural integrity

- Oversees the whole process and helps to ensure the written process and the as applied process are the same (and you, as the Appeals Officer, are a part of this).
- Often is the person who ensures the investigators, decision-makers, informal resolution officers and appeals officers are properly trained
- Often is the person who ensures advisors are available for hearings
- Makes decisions on new issues that arise to keep them in compliance with the policy

Overview of Process



The Title IX Coordinator (1 of 4)



For Appeals Officer purposes, must understand the intake process.

- Title IX Coordinator (or deputy) will receive a report (this may also come in through another individual with the ability to give sanctions) (Level 1 actual knowledge)
- Title IX Coordinator will provide supportive measures to a Complainant
- Title IX Coordinator will determine if the report falls within the “education program or activity” of the institution (Level 1)
 - If not, Title IX Coordinator MUST dismiss from Title IX process

The Title IX Coordinator (2 of 4)



For Appeals Officer purposes, must understand the intake process.

- Title IX Coordinator will determine if a report (that satisfied jurisdiction) includes a claim of “sexual harassment” under Title IX (Level 1)
 - If not, Title IX Coordinator **MUST** dismiss from Title IX process
- If it passes these tests, Title IX Coordinator will determine if Complainant wishes to file a formal complaint by signing or by a verifiable email **OR** if the Title IX Coordinator will sign a formal complaint without a complainant.

The Title IX Coordinator (3 of 4)



When a Title IX Coordinator may elect to sign and issue a formal complaint without a complainant:

- Complainant has not yet been identified or cannot be identified, but evidence indicates that sexual harassment took place within the institution's jurisdiction (e.g., video, multiple student reports, anonymous social media allegations)

The Title IX Coordinator (4 of 4)



For Appeals Officer purposes, must understand the intake process.

- Often is the person who selects and assigns a specific investigator, decision-maker, and appeals officer to a matter
- May be the person who supervises the Title IX Office
- May be the investigator



The Investigator's Role

The Investigator (1 of 2)



1. The **gatherer** of all relevant evidence.
2. The **organizer** of all relevant evidence

The Investigator (2 of 2)



- Does not make a determination on the facts
- Determines some level of whether evidence is relevant.



Issues of Relevance for the Investigator

What is Relevant? (1 of 3)



The regulations don't really tell us directly.

The preamble discussion indicates that it may include: evidence that is “probative of any material fact concerning the allegations.” (30343)

What is Relevant? (2 of 3)



The preamble also tells us:

“evidence pertinent to proving whether **facts material to the allegations** under investigation are **more or less likely to be true** (*i.e.*, on what is relevant)” (30294)

What is Relevant? (3 of 3)



Does this question, topic, evidence help **move the dial** under the standard of evidence?

- **Preponderance of the evidence**: a fact is **more likely** than not to be true (30373 fn. 1409)
- **Clear and convincing**: a fact is **highly probable** to be true (30373 fn. 1409)

Issues of Relevancy (NOT Rules of Evidence)



- The Rules of Evidence do **NOT** apply and **CANNOT** 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.” (30336-37)

This also means:



Cannot exclude
redundant
evidence

Cannot exclude
character
evidence

Cannot exclude
hearsay

Cannot exclude
evidence where
the probative
value is
substantially
outweighed by
the danger of
unfair prejudice
(30294)

Issues of Relevancy (NOT Rules of Evidence).



“[A] recipient may **not** adopt rules **excluding** certain types of **relevant evidence** (e.g., **lie detector test results**, or rape kits) where the type of evidence is not either deemed “not relevant” (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred for use under 106.45 (as is, for instance, information protected by a legally recognized privilege).”

Issues of Relevancy: What isn't relevant?



Privileged Information

- Information protected by a legally recognized privilege

Treatment

- Party's medical, psychological, and similar records unless voluntary written consent

Rape Shield

- Sexual history of complainant subject to two exceptions

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 privilege has waived the privilege.

Relevancy: Legally Privileged Information – What does this include?



- Preamble identifies medical and treatment records.
- Jurisdiction-dependent
 - Attorney-client communications
 - Implicating oneself in a crime
 - Confessions to a clergy member or other religious figures
 - Spousal testimony in criminal matters
 - Some confidentiality/trade secrets

Relevancy: Medical treatment and Investigations



Section 106.45(b)(5)(i): when investigating a formal complaint, recipient:

- “[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.”

Issues of Relevancy: What isn't relevant? – Rape Shield Provision



- Evidence about complainant's prior sexual history (must exclude) unless such questions/ evidence:
 - are offered to prove that someone other than the respondent committed the conduct, or
 - if the questions/evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Issues of Relevancy: Rape Shield Provision (1 of 3)



- Rape shield protections do not apply to Respondents
- “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

Issues of Relevancy: Rape Shield Provision (2 of 3)



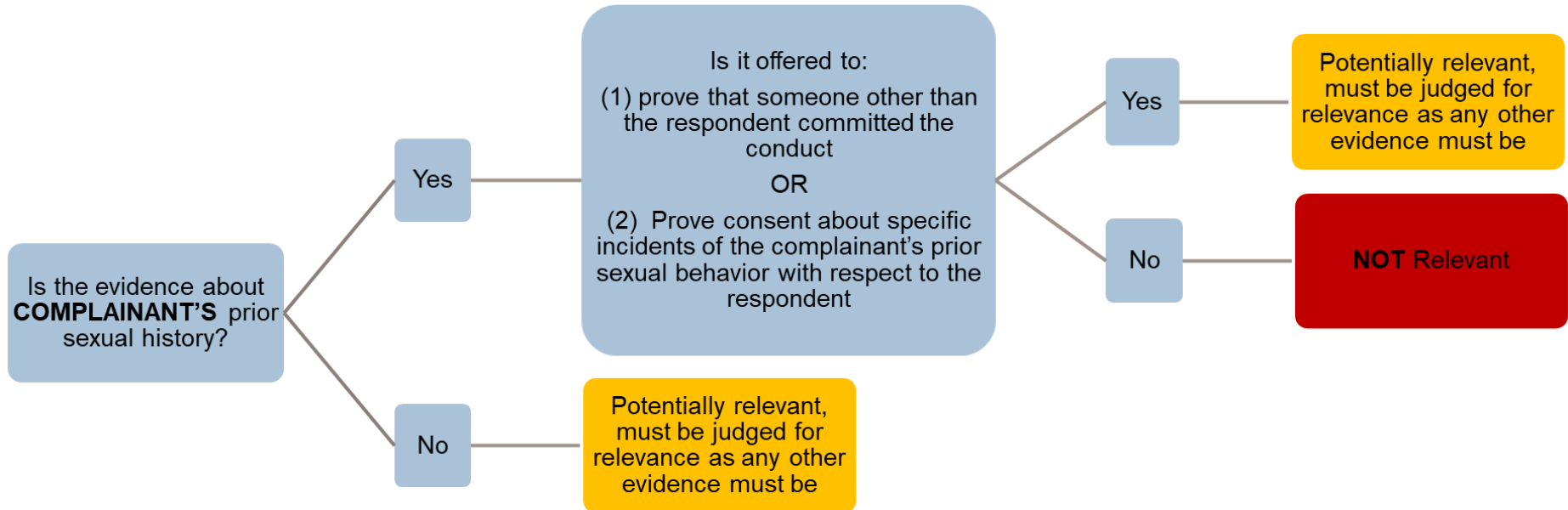
Evidence of a respondent's sexual history may be relevant to demonstrate a pattern of behavior by the Respondent or resolve other issues of importance in the investigation.

What is *not* relevant?

- Questions about Respondent's sexual history intended to harass the Respondent
 - Decorum considerations at the hearing.

See the September 2021 Q&A.

Issues of Relevancy: Rape Shield Provision (3 of 3)



Additional information for the Investigator regarding relevancy



- There are more considerations for decision-makers regarding relevancy that are not an issue for investigators.

Retaliation



When parties elect not to participate, a recipient cannot retaliate against them (30322)

- It is the right of any party or witness not to participate in the investigation

Relevancy and the Investigator



The **gatherer** of all *relevant* evidence

- **Recipient** must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (30331)

Relevancy and the Investigation and Report



“The requirement for **recipients** to **summarize** and evaluate **relevant evidence**, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to section 106.45, appropriately direct **recipients** to **focus investigations** and adjudications **on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on that is relevant.)**” (30294)



Make No Assumptions

The Decision-Maker's Role

The Decision-Maker's Role



Relevancy Determinations

- Make relevancy determinations...before any question at the live cross-examination hearing can be answered

Hearing

- Run an orderly and truth-seeking live cross-examination hearing

Decision

- apply the policy, use standard of review, and evaluate relevant evidence still in the record after the hearing

Issues of Relevance for the Decision-Maker

Everything the Investigator Had to Consider + More!



- The decision-Maker has to consider all of the relevance issues the investigator did
- And has additional considerations that come into play at the hearing and decision-writing level

Relevancy: Improper Inference



When parties do not participate:

“If a party or witness does not submit to cross-examination at the live hearing...the **decision-maker(s) cannot draw an inference about** the determination regarding **responsibility based solely on a party’s or witness’s absence** from the live hearing **or refusal to answer** cross-examination **or other** questions.” 34 C.F.R. 106.45(b)(6)(i).

Relevancy: Reliance on Prior Statements



What if a party or witness gave a statement during the investigation but is not participating in cross-examination?

- On August 24, 2021, OCR issued guidance regarding this subject. Specifically OCR indicated that a decision maker at a post-secondary institution may consider statements made by parties and witnesses even if those witnesses/parties did not participate in cross-examination at the hearing.
- A decision maker may not make any decisions about a party's credibility based solely upon their decision not to participate in a hearing or submit to cross-examination.

Note: Make sure your policy is updated to include the ability to review prior statements.



Make No Assumptions: The Decision-Maker's Role

More Responsibilities of the Decision-Maker



- Must determine relevance after each individual question asked and provide an explanation if determine it is not relevant
- Has leverage to control decorum of the hearing and can ultimately remove individuals that do not respect decorum of the process

Process: The Set up



The setup

- Can have hearing in one room if a party doesn't request separate rooms and recipient chooses to do so.
- Separate rooms with technology allowing live cross examination at the request of either party
- Can be fully virtual.
- Must be recorded or transcribed

(30332, see also 30333, 30346) explaining 106.45(b)(6)(i)

Cross-examination must to be done by the party's
**“advisor of choice and never by a party
personally.”**

- May be an attorney or a parent (or witness) (30319)
- Can prohibit speaking other than when questioning. (30312)
- If party does not have an advisor present at the hearing, the **recipient** “**must provide** without fee or charge to that party, an advisor **of the recipient’s choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.”
(106.45(b)(6)(i) and preamble 30339)

- Title IX Training not required (however a recipient may train its own employees whom the recipient chooses to appoint as party advisors) (30342)
- A party cannot “fire” an appointed advisor (30342)

“But, **if** the party correctly asserts that the **assigned advisor is refusing to ‘conduct cross-examination on the party’s behalf’** then **the recipient is obligated to provide the party an advisor to perform that function**, whether counseling the advisor to perform the role or stopping the hearing to assign a different advisor” (30342)

Support People (1 of 2)



In previous trainings...

- Advised that support persons were not permitted in hearings based on Preamble
 - “The sensitivity and high stakes of a Title IX sexual harassment grievance process weigh in favor of protecting the confidentiality of the identity and parties to the extent feasible (unless otherwise required by law), and the Department thus declines to authorize that parties may be accompanied to a live hearing by persons other than the parties’ advisors, or other persons for reasons ‘required by law’...” (Preamble, p. 30339)

Support People (2 of 2)



Example Language in July 20, 2021 Q&A (p. 46)

- Example Policy 2: The decision-maker will discuss measures available to protect the well-being of parties and witnesses at the hearing. These may include, for example, use of lived names and pronouns during the hearing, including names appearing on a screen; **a party's right to have their support person available to them at all times during the hearing (in addition to their advisor)**; and a hearing participant's ability to request a break during the hearing, except when a question is pending. (Emphasis added).

Questioning by the Decision-Maker and Neutrality



- The **neutrality** of the **decision-maker** role, and the role of the advisor to ask adversarial questions, protects the decision-maker from having to be neutral while also taking on an adversarial role (30330)
- “[P]recisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties” (30330)

Questioning by the Decision-Maker: Responsibility



BUT “the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-makers own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party’s unique perspective about the evidence.” (30331)



The Decision-Maker's Written Determination

More Responsibilities of the Decision-Maker – The Written Determination (1 of 6)



The decision-maker's 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;

More Responsibilities of the Decision-Maker – The Written Determination (2 of 6)



The decision-maker's written determination **MUST** include:

- **Identification** of the **allegations** potentially constituting sexual harassment;

More Responsibilities of the Decision-Maker – The Written Determination (3 of 6)



The decision-maker's written determination **MUST** include:

- 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;

More Responsibilities of the Decision-Maker – The Written Determination (4 of 6)



The decision-maker's written determination **MUST** include:

- **Key elements of any potential policy violation** so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

More Responsibilities of the Decision-Maker – The Written Determination (5 of 6)



The Decision-Maker's Written Determination **MUST** include:

A Statement of each allegation

The result of each allegation

The rationale for each allegation

A determination regarding responsibility

Any sanctions

Bases for appeal

More Responsibilities of the Decision-Maker – The Written Determination (6 of 6)



Written decision **MUST** be provided to parties simultaneously.

Refresher: Bases for Appeal



1. **Procedural integrity** that affected the outcome of the matter
2. **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
3. **Conflict of interest or bias** against a party by the Title IX Coordinator, investigator(s) or decision maker(s) that affected the outcome of the matter
4. **Dealer's Choice**: Does your institution have other bases for appeal written into the policy?

We will use hypotheticals to help you understand some of these bases in the context of an appeal.



Appeal Live Action Examples

Determinations from Written Decision for Hypotheticals (1 of 2)



Claims by Charlie against Rook:

- The Resolution Officer finds that the record **does not** support by a preponderance of the evidence that Rook engaged in conduct prohibited by Point Break College's Title IX Policy for **sexual harassment (fondling)** under Title IX.
- The Resolution Officer finds that the record **does** support by a preponderance of the evidence that Rook engaged in conduct prohibited by Point Break College's Title IX Policy for **stalking** on the basis of sex under Title IX.

Determinations from Written Decision for Hypotheticals (2 of 2)



Claims by Rook against Charlie:

- The Resolution Officer finds that the record **does not** support by a preponderance of the evidence that Rook engaged in conduct prohibited by Point Break College's Title IX Policy for **sexual harassment (fondling)** under Title IX.
- The Resolution Officer finds that the record **does** support by a preponderance of the evidence that Charlie engaged in conduct prohibited by Point Break College's Title IX Policy for **dating violence** on the basis of sex under Title IX.

Appeal Hypothetical 1



Charlie's Appeal on the Basis of Bias of the Investigator and Procedural Irregularity

The Investigator was biased against me and procedural irregularity existed, both effecting the outcome of the decision against me for the domestic violence finding against me. Specifically, the Investigator failed to interview any of the witnesses I requested who witnessed my fear and need to use self-defense when slapping Rook and that I was not motivated by anger. I requested the Investigator interview Juan Juarez and Kylie Kelp, both of whom I remember leaving the main door at North Hall on January 6, 2023. The Investigator did not interview them and they would have provided information that changed the outcome – which I raised in response to the evidence packet before the hearing, but nothing was done.

Appeal Hypothetical 2



Charlie's Appeal on the Basis of New Evidence

New evidence from the criminal case has come out since the decision that may change the outcome of the decision. Specifically, the attached video interview of Rook by the police supports that Rook was untruthful in their statements in the hearing, where they talked about never having lost memories from drinking. Although I made a FOIA request for this information months ago, the police just produced it to me yesterday, two days after the Decision.

Appeal Hypothetical 3



Rook's Appeal on the Basis of Bias of the Decision-Maker and Procedural Irregularity (Relevancy Determination)

The Decision-Maker erred in making a relevancy determination that prevented my attorney from asking Wendy Wallis a question that supports that she was lying about my ability to consent. Since the Decision-Maker found that the evidence did not support by a preponderance of the evidence that Charlie assaulted me because of the alleged message provided by Wendy in the investigation, this would have changed the outcome. The Decision-Maker should have allowed my attorney to ask Wendy why she did not produce the Snapchat messages during the investigation. She didn't do it because they don't exist and never did. She made up what she told the investigator.

Appeal Hypothetical 4



Rook's Appeal on the Basis of Bias of the Decision-Maker and Procedural Irregularity

The Decision-Maker was biased against me as a party, often rejecting my advisor's questions as not relevant when my advisor questioned Charlie about the sexual assault, but not providing the same protection for me when Charlie's advisor questioned me. This bias negatively affected the outcome of the decision because the Decision-Maker removed my attorney from the hearing and should have found that Charlie violated the Title IX Policy for fondling under Title IX. Had the Decision-Maker allowed my attorney to continue and properly question Charlie, the Decision-Maker would have found that Charlie violated the Title IX Policy. This entire process is biased against Respondents and that's exactly how I'm being treated here!



The Appeal

The Appeal Process (1 of 2)



- Again, know your own policy—have your Title IX Coordinator train you—sign it in writing and have it on record.
- Regulations require an appeals process if formal complaint dismissed or after responsibility determined following a live cross-examination hearing and written determination from that decision-maker.

The Appeal Process (2 of 2)



MUST:

- Notify the other party in writing when an appeal is filed and implement procedures equally for both parties
- Ensure that you were not also the decision-maker below, investigator, or Title IX Coordinator
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- Issue and provide to both parties simultaneously a written decision “describing the result of the appeal and the rationale for the result”

Standard of Review of Appeal (1 of 3)



- Not expressly stated in the Regulations, so discretion left to institutions
- But, with the required bases of appeal, none of them require the appeal decision-maker to reexamine all of the evidence to see if they would reach the same conclusion (known as a *de novo* review)

Standard of Review of Appeal (2 of 3)



The bases the Regulations set are very limited and don't necessarily require a "standard of review":

- Was there a procedural issue? If yes, did it affect the outcome of the matter?
- Is there new evidence? If yes, was the evidence reasonably available at the time of the determination regarding responsibility or dismissal? If not, could its inclusion affect the outcome of the matter?

Standard of Review of Appeal (3 of 3)



- Did the Title IX Coordinator, investigator(s), decision-maker(s) have a conflict of interest or bias? If yes, was it for or against a party generally or specifically? If yes, did it affect the outcome of the matter?
- Additional grounds at the institution's discretion....select own standard of review? Abuse of discretion?

The Difficult Issue on Appeal: Relevancy Determinations (1 of 2)



- There will be challenges on appeal to relevancy decisions made by the decision-maker at the live cross-examination hearing. The argument will be that, had that decision been different, the outcome would have been different.
- How do you handle these?

The Difficult Issue on Appeal: Relevancy Determinations (2 of 2)



- Ask, does this fit into one of the bases for appeal? Does this constitute a procedural issue if you would have made a different relevancy determination? What if it is just wrong and contrary to the Title IX regulations?
- Can a relevancy determination by a decision-maker at the live-cross examination hearing a sign of conflict of interest or bias?

Considerations for Additional Grounds for Appeal (1 of 2)



- Do you want a control valve for an decision that has the record wrong?
- If so, you must make such grounds available evenly to parties.

Considerations for Additional Grounds for Appeal (2 of 2)



You agree with a ground for appeal.
What do you do?

- Send it back to the decision-maker below?
- Overturn the decision below?
- Remand to the Investigator (or a new Investigator)?

Written Appeal Decision (1 of 2)



The Regulations do not detail what must be included in the written appeal decision in the same way that they detail what must be included in the decision-maker's determination after the live cross-examination hearing.

Written Appeal Decision (2 of 2)



Regulations are clear that must describe the result and rationale for the result

Written Decision: Best Practices



- Address each basis for appeal individually, with a result and rationale for that result
- Refer back to the policy for support
- Be clear and transparent in the rationale for the result

Does the hypothetical fall into one of the bases of appeal?

Procedural Issue?

- Was there a procedural issue?
- If yes, did it affect the outcome of the matter?

New Evidence?

- Is there new evidence?
- If yes, was the evidence reasonably available at the time of the determination regarding responsibility or dismissal?
- If not, could its inclusion affect the outcome of the matter?

Conflict of Interest or Bias?

- Did the Title IX Coordinator, investigator(s), decision-maker(s) have a conflict of interest or bias?
- If yes, was it for or against a party generally or specifically?
- If yes, did it affect the outcome of the matter?

Make No Assumptions

Being Impartial and Avoiding Bias,
Conflict of Interest, and Prejudgment of
Facts for the Appeals Officer

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts (1 of 3)



Section 106.45 **requires** that investigators (and Title IX Coordinators, decision-makers, informal resolution officers, and appeals officers)

- be free from **conflict of interest, bias,** and
- be trained **to serve impartially** and **without prejudging facts.**

(30053)

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts (2 of 3)



For the Appeals Officer, this means that not only do you have to be free from partiality, bias, conflict of interest, and avoid prejudgment of facts, but **ALSO:**

You must be able to assess whether the Title IX Coordinator, investigator, and decision-maker on each case you review was free from ***bias*** and ***conflict of interest*** (as a basis for appeal).

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts (3 of 3)



- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.

(30249-30257; 30496)

Impartiality



- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible [and it's contrary to your neutral role] (30323)

Bias: Concerns raised in comments in preamble



- Neutrality of paid staff in Title IX positions
- Institutional history and “cover ups”
- Tweets and public comments
- Identifying as a feminist

Perceived v. Actual Bias



- Both can lead to the same perception (30252)
- On appeal of decisions, the Department requires the bias “that affected the outcome of the matter”

How the Department tried to prevent bias



No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

Bias: Objective Rules and Discretion (1 of 2)



“[R]ecipients *should* have objective rules for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...” (30250)

Bias: Objective Rules and Discretion (2 of 2)



- **Discretionary**: Recipients have the discretion to have a process to raise bias during the investigation.
- **Mandatory**: Basis for appeal of decision-maker's determination per 34 C.F.R. 106.45(b)(8)(i)(C).

Conflict of Interest: Concerns raised in comments in preamble



- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

Preamble Discussion on Bias and Conflict of Interest (1 of 3)



Final regulations “leave recipients **flexibility to use their own employees, or to outsource** Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.” (30251)

Preamble Discussion on Bias and Conflict of Interest (2 of 3)



- No *per se* prohibited conflicts of interest in using employees or administrative staff
 - including supervisory hierarchies (but see portion about decision-makers and Title IX Coordinator as supervisor)
- No *per se* violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process

(30352-30353)

Preamble Discussion on Bias and Conflict of Interest (3 of 3)



- Example: it is **not** a **per se bias** or **conflict of interest** to hire professionals with **histories of working in the field of sexual violence** (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead **recommends** using a **reasonable-person test** to determine whether bias exists.

Example of Unreasonable Conclusion that Bias Exists



“[F]or example, **assuming** that all self-professed **feminists**, or self-described **survivors**, are biased against men, or that a **male** is incapable of being sensitive to women, or that prior work as a **victim advocate**, or as a **defense attorney**, renders the person biased for or against complainants or respondents” is **unreasonable** (30252)

Training, Bias, and Past Professional Experience



This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience

(30252)

Department: Review of Outcomes Alone Does Not Show Bias



- Cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.”
- Explained: the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.” (30252)

Examples of Bias



- An investigator used to supervise one of the parties;
- Information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

Avoiding Prejudgment of Facts at Issue



A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

Appeals Officer's role in review (1 of 2)



A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

Appeals Officer's role in review (2 of 2)



Be able to see the forest and the trees

- You may otherwise respect or be friends with your coworker, but be able to check your own bias on determining whether they were biased or had a conflict of interest (check yourself and your Title IX peer)

Hypotheticals Disclaimer



Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

Hypotheticals on Bias and Conflict of Interest (1 of 2)



You are the Appeals Officer for a matter in which you were not the investigator, decision-maker, or Title IX Coordinator. You have been handed the investigator report, the decision of the decision-maker, the bases for appeal, and the written responses of the parties on appeal. All of the appeals raise bias and conflict of interest.

Hypotheticals on Bias and Conflict of Interest (2 of 2)



For each hypothetical, there will be a series of three polls. You will need to determine by polling if there if (1) there was bias or conflict of interest, and if so (2) whether it affected the outcome of the matter... (this is so case-by-case, we'll do it to learn it!)

Hypothetical 1

Respondent appeals stating that the decision-maker was biased against them. Respondent states that information the investigator knew, but that was not in the investigator's report or disclosed in the hearing, somehow made it into the decision-maker's written decision. Specifically, that Respondent had been reported for similar conduct by a prior romantic partner. In finding against Respondent, the decision-maker noted that Respondent's actions were consistent with someone who would engage in stalking behavior.

Hypothetical 2

Complainant appeals alleging bias in the whole Title IX process. Specifically, Complainant alleges that the TIXC's prior work as the TIXC at another school, which did not properly investigate complaints, has carried over.

Complainant cites news articles critical of the TIXC. The TIXC has previously shared with you personal frustrations she had at the other school and feeling like her hands were tied by the administration. The process and outcome before you in Complainant's matter seems otherwise to have followed procedures. The decision ultimately determined that there was a violation against the Respondent in Complainant's matter.

Hypothetical 3

You receive an appeal from a Complainant with an attorney challenging the bias of the decision-maker for her prior work as a domestic violence victim advocate and expert witness. The Respondent provided a transcript from a domestic violence trial in which the decision maker was an expert witness. The decision-maker testified that a female could *never* be responsible for domestic violence and posited that the female perpetrator of domestic violence likely engaged in “reactive abuse.” The decision-maker handles Title IX decisions all the time and has been fully trained in compliance with the regulations. The decision appears to be fully supported by the record, but it did not find against the female Respondent in this domestic violence matter. The decision-maker’s record indicates they have presided over 10 dating and domestic violence cases, 3 of which involved a female respondent. The decision-maker found 1 of the 3 female Respondents responsible for domestic violence.

Hypothetical 4

You have concerns about comments one of your investigators made to you about his belief that a woman cannot commit an act of dating or domestic violence against a man. You've shared this with your TIXC, but you don't know if anything came of it. You receive an appeal from a male Complainant in a dating violence matter. The Complainant says the decision-maker was biased in that the decision did not find a violation of policy against a female Respondent. You know that the decision-maker and investigator are close friends outside of work. On the face of the file on appeal, everything appears to have otherwise followed the process.

Hypothetical 5

You receive an appeal from a male Respondent with an attorney challenging the bias of the decision-maker for her prior work as a rape crisis counselor. The decision-maker is a good friend of yours and shared with you before you were assigned to the appeal that Respondent's case was one of the worst she had ever reviewed and wished the Complainant had pursued a criminal charge against Respondent because he shouldn't be on the streets. You believe her because she would know; she's seen a lot. You review the decision and decide that it is supported by the record.

Hypothetical 6

You receive an appeal from a Respondent alleging bias and conflict of interest against the decision-maker. The decision-maker also serves as a Dean at your institution's law school. Respondent alleges that Complainant was a student in one of the Dean's courses last summer and the class only had ten students enrolled. Your review of the decision by the Dean makes you question how the Dean got through law school, let alone teach future attorneys, because it is full of poor grammar and irrelevant references to archaic case law. However, the decision does appear to be supported by the record, although you would have come out differently.

Hypothetical 7

You receive an appeal from a Respondent citing bias and conflict of interest. The decision-maker oversees your student conduct hearing panels and previously found the Respondent's roommate, Rhiannon, responsible for a violation of the student code of conduct's academic dishonesty provisions. Rhiannon was the sole witness to the reported Title IX fondling incident. At the hearing, Rhiannon give evidence that the Complainant was not intoxicated on the date of the reported incident. In their written decision, the decision-maker found Rhiannon's statements lacked credibility but did not explain the determination. The Respondent speculated the decision-maker was biased against Rhiannon based on their involvement in an unrelated academic dishonesty violation.

Hypothetical 8

You receive an appeal from a Complainant arguing that the finding was arbitrary and capricious, a basis of appeal permissible under your policy. The Complainant argued that the decision-maker failed to consider a statement from their Roommate, Reilly, regarding Complainant's level of intoxication. During the investigation and at the hearing, Reilly said they knew Complainant was incapacitated but said they were out of state and did not communicate with Complainant on the day of the incident. The decision does not address evidence provided by Reilly. The decision otherwise appears supported by the record—particularly evidence provided by two other witnesses who reported they were with Complainant on the date of the reported incident and observed that Complainant did not appear incapacitated.

Questions?

Thank you for attending!



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