HIGHER EDUCATION
TITLE IX

ADVISOR TRAINING

Bricker & Eckler LLP © 2020

⚠ Disclaimer ⚠

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.
- This training satisfies both annual Clery training and the generally applicable topics required by the Final Title IX regulations. *This training does not cover institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals.
- This training is not being recorded, but we will provide you with a packet of the training materials to post on your websites for Title IX compliance.

Additional Information Available At

Additional information available at:

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

Find us on **Twitter** at **@BrickerHigherEd**

Presentation Rules

Bricker & Eckler ATTORNEYS AT LAW

- Questions are encouraged
- “For the sake of argument…” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

Bricker & Eckler LLP © 2020

Aspirational Agenda

Josh Nolan jnolan@bricker.com

9:00-10:30	Intro & Overview of the Grievance Process
10:30-10:45	Break
10:45-12:00	Understanding the Grievance Process and the Advisor's Role
12:00-12:30	Lunch
12:30-1:45	Issues of Relevancy, Hypotheticals
1:45-2:00	Break
2:00-3:00	The Live Cross-Examination Hearing
3:00-3:30	Debrief/Hearing
3:30-3:45	Break
3:45-5:00	Hearing/Objectively Evaluating Evidence/Written Decision

Bricker & Eckler LLP © 2020

Training Requirements

The new Title IX regulations require training for:

- Title IX Coordinators
- Investigators
- Decision-Makers
- Informal Resolution Officers
- Appeals Officers

Under the new Title IX regulations, there are NO training requirements for advisors in the grievance process.

Bricker & Eckler LLP © 2020

Training Requirements for Title IX Officials

Bricker & Eckler ATTORNEYS AT LAW

Generally, the new Title IX regulations require training of an institution's Title IX officials on:

- Jurisdiction: understanding "the scope of the recipient's education program or activity"
- Definitions of "sexual harassment" under the new Title IX regulations
- How to serve impartially, without bias, free from conflict of interest, and without prejudgment of the facts
- Their individuals roles in the process

Bricker & Eckler LLP © 2020

What's Going On? (1 of 2)

BUT…It helps the party and the process if an **advisor** understands:

- Title IX jurisdiction
- Title IX definitions of sexual harassment
- The grievance process
- The roles of the Title IX officials in the grievance process

Bricker & Eckler LLP © 2020

What's Going On? (2 of 2)

Bricker&Eckler ATTORNEYS AT LAW

BUT…It helps the party and the process if an **advisor** understands:

- The hearing and the **advisor's** role in the hearing
- The bases for appeal

Bricker & Eckler LLP © 2020

Overview of Jurisdiction and Definitions of Sexual Harassment

Bricker & Eckler LLP © 2020

Jurisdictional Changes (1 of 2)

Bricker & Eckler ATTORNEYS AT LAW

The new Title IX regulations contain changes in what we commonly refer to as Title IX's jurisdiction over sexual harassment claims. It is helpful for advisors to know:

- Title IX jurisdiction will look differently this academic year compared to the last academic year
- Title IX regulations include employees now
- Conduct codes can be run concurrently and through the same process as Title IX (and may be)

Jurisdictional Changes (2 of 2)

- No obligation to address off-campus conduct that does not involve a program or activity of school BUT
- “Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities.”

Jurisdiction (1 of 2)

- A recipient with **actual knowledge** of sexual harassment in an **educational program or activity** of the recipient against **a person in the United States, must respond promptly in a manner that is not deliberately indifferent**.
- A recipient is only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

Jurisdiction (2 of 2)

Bricker & Eckler ATTORNEYS AT LAW

"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, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. " §106.30(a)

Education Program or Activity

Bricker&Eckler ATTORNEYS AT LAW

Locations, events, or circumstances with substantial control – the easy ones:

- Residence halls
- Classrooms
- Dining halls

Off Campus? (1 of 2)

Bricker & Eckler ATTORNEYS AT LAW

Any of the three conditions must apply to extend Title IX jurisdiction off campus:

- (1) Incident occurs as part of the recipient's "operations" (meaning as a "recipient" as defined in the Title IX statute or the Regs 106.2(h));
- (2) If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

Off Campus? (2 of 2)

- (3) Incident occurred in an off-campus building owned or controlled by a student organization officially recognized by a post secondary institution
  - Discussion specifically addresses off campus sorority and fraternity housing and, as long as **owned by or under control of organization that is recognized by the postsecondary institution**, it falls within Title IX jurisdiction
  - Must investigate in these locations (30196-97)

Not an Education Program or Activity

Bricker & Eckler ATTORNEYS AT LAW

Locations, events, or circumstances without substantial control:

- **Anything** outside of the United States;
- Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

Education Program or Activity

Depends on fact-analysis under “substantial control”:

- Conventions in the United States
- Holiday party for an academic department
- Professor has students over to house

Jurisdiction and Mandatory Dismissal (1 of 3)

Dismissal of a formal complaint— §106.45(b)(3)(i)

The recipient **must** investigate the allegations in a formal complaint.

(BUT) If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient's education program or activity, …

Jurisdiction and Mandatory Dismissal (2 of 3)

or **did not occur against a person in the United States**, ….

Jurisdiction and Mandatory Dismissal (3 of 3)

Bricker&Eckler ATTORNEYS AT LAW

then the recipient **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient's code of conduct.**

Study Abroad Programs

- Draws a bright line-not outside of the United States: plain text of Title IX “no person in the United States,” means no extraterritorial application. Must dismiss. (30205-06)

- Programs of college based in other countries? No jurisdiction and must dismiss.
- Foreign nationals in the United States covered.

Online Study

- "Operations" of the recipient may include computer and online programs and platforms "owned and operated by, or used in the operation of, the recipient." (30202)

- Still has to occur in educational program or activity
- And in United States…

Sexual Harassment Definition Changes

The new Title IX regulations contain changes to definitions that will be in the institution's policy. It is helpful for advisors to:

- Know the institution's specific policy (for variance)
- Know the Title IX required definitions and elements to make your party's case
- Know the discretionary definitions that the institution can define and how the institution is defined

Sexual Harassment

- **Sexual harassment** means conduct on the basis of sex that satisfies one or more of the following:
  - [***Quid pro quo***] An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient 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 denies a person equal access to the recipient's education program or activity; or
  - [**Clery crimes**] Sexual assault, dating violence, domestic violence, or stalking

Sexual Harassment: *Quid Pro Quo*

- Only applies to employee to student
- DOE interprets this broadly to encompass implied *quid pro quo*
- No intent or severe or pervasive requirements, but must be unwelcome
- "[A]buse of authority is the form of even a single instance…is inherently offensive and serious enough to jeopardize educational access."

Sexual Harassment: Davis/Gebser

- The second prong: severe, persistent, and objectively offensive and deny equal access (which is not the same as under Title VII)
- Does not require intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant (30159)

Severe

- Takes into account the circumstances facing a particular complainant
- Examples: age, disability status, sex, and other characteristics
- Preamble discussion states that this removes the burden on a complainant to prove severity (30165)

Pervasive

- Preamble indicates pervasive must be more than once if it does not fall into the above (30165-66)
- Preamble reminds us that quid pro quo and Clery/VAWA (domestic violence, dating violence, stalking) terms do not require pervasiveness

Objectively Offensive

Reasonable person is very fact-specific (30167)

- Because so fact-specific, different people could reach different outcomes on similar conduct, but it would not be unreasonable to have these different outcomes
- Preamble notes that nothing in the Regulations prevents institutions from implicit bias training

Disclaimer!

- This section uses the terms “rape,” “victim,” and “perpetrator” -- CRIMINAL, not POLICY, from FBI Criminal Definitions (what Clery and VAWA refer to for their definitions)

Mandatory: Sexual Assault, Dating Violence, Domestic Violence, & Stalking

Bricker&Eckler ATTORNEYS AT LAW

Third prong refers to certain statutory definitions for sexual assault, dating violence, domestic violence and stalking

- Sexual assault is defined as forcible and non-forcible sex offenses as defined in the FBI's Uniform Crime Reporting (UCR) database, which you can find in the National Incident-Based Reporting System (NIBRS) manual
- Dating violence, domestic violence, and stalking definitions are from Clery statute (not regulations) as amended by VAWA

Sexual Harassment: Sexual Assault

Bricker & Eckler ATTORNEYS AT LAW

"Sexual Assault" includes:

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape

Sexual Assault: Rape

Bricker&Eckler ATTORNEYS AT LAW

"Rape" means the carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. Carnal knowledge is defined as the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis).

Sexual Assault: Sodomy

"Sodomy" means oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sexual Assault: With an Object

Bricker&Eckler ATTORNEYS AT LAW

"Sexual Assault with an Object" means use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. An object or instrument is anything used by the offender other than the offender's genitalia, e.g., a finger, bottle, handgun, stick.

Sexual Assault: Fondling

Bricker & Eckler ATTORNEYS AT LAW

"Fondling" means the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sexual Assault: Incest

"Incest" means sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

Sexual Assault: Statutory Rape

"Statutory Rape" means sexual intercourse with a person who is under the statutory age of consent.

In Ohio:

- Under 13 → can't consent
- Under 16 → can't consent to those older than 18

Sexual Harassment: Dating Violence

Bricker&Eckler ATTORNEYS AT LAW

"Dating Violence" means an act of violence committed by a person who is or has been in a romantic or intimate relationship with the complainant. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

Sexual Harassment: Domestic Violence

"Domestic violence" is an act of violence committed by:

- A current or former spouse or intimate partner of the complainant;
- A person with whom the complainant shares a child in common;
- A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- A person similarly situated to a spouse of the victim under the domestic/family violence laws of the jurisdiction;
- Any other person against an adult or youth victim who is protected from that person's acts under the domestic/family violence l*a*ws of the jurisdiction

Sexual Harassment: Stalking

Bricker & Eckler ATTORNEYS AT LAW

"Stalking" is engaging in a course of conduct directed at a specific person that would cause a reasonable person with similar characteristics under similar circumstances to:

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress.

As mentioned before, to qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)

Stalking: Course of Conduct

"Course of Conduct"

- Under VAWA regulations: means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

Stalking: Reasonable Person

Bricker & Eckler ATTORNEYS AT LAW

"Reasonable person"

Under VAWA regulations: means a reasonable person under similar circumstances and with similar identities to the victim.

Stalking: Substantial Emotional Distress

Bricker&Eckler ATTORNEYS AT LAW

"Substantial emotional distress"

Under VAWA regulations: means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Discretionary: Consent, Coercion, Incapacitation, Exploitation

- Discretion is left to the institution on consent, coercion, and incapacitation, which, as we will discuss, allows institutional discretion on the extent of these violations, especially under "sexual assault"
- Exploitation/revenge porn: may be pervasive unwelcome conduct depending on widespread dissemination (30166)

Consent: Left to the Institutions to Define

DOE left "consent" and terms that often negate consent to the discretion of the recipients to "reflect the unique values of a recipient's educational community." (30159, see also 30174)

- No required definition in law, regs, or guidance
- Policy language is going to be critical to your analysis
- We will use standard language for discussion purposes

Who Can *NEVER* Give Consent?

- Those who are unable to consent by law (ex. minors, incarcerated persons)
- Severely cognitively disabled persons
- Those who are incapacitated

Consent (1 of 2)

- Some policies require:
  - Clear - verbal (or non-verbal?) communication
  - Knowing - Mutually understood as willingness to participate in a sexual activity and the conditions of that sexual activity
  - Voluntary - Freely and actively given

Consent (2 of 2)

- Some policies include:
  - May be withdrawn with clear communication
  - Consent for one activity is not consent for everything
  - Silence or failure to resist does not constitute consent
  - Previous consent does not constitute consent for future activities

When Does Consent *NOT* Exist?

- Use of physical force or threats of physical force,
  - Many policies also include physically intimidating behavior or coercion
- Individual from whom consent is required is incapacitated

Evidence of Consent? (1 of 2)

Bricker & Eckler ATTORNEYS AT LAW

- What words or actions did complainant use to convey consent/non-consent?
  - Must examine sexual contacts, acts in detail
- Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

Evidence of Consent? (2 of 2)

Bricker&Eckler ATTORNEYS AT LAW

- Who took off what clothes?
- Who provided the condom?
- Who initiated physical contact?
- Who touched who where?
- “They gave consent” = What did you say to them, and what did they say to you?

Not Evidence of Consent?

Some institutions include evidence that they do not consider evidence of consent:

- What a complainant was wearing
- Whether complainant had given prior consent in other sexual activities

Coercion: Left to Institution to Define

- Is this in your policy?
  - Does your TIX team, your preventive education team, and your local rape crisis center agree on a definition when working with your community?
- Often defined as unreasonable pressure for sexual activity
- Compare: “I will break up with you” versus “I will kill myself”

Incapacitation: Left to Institution to Define

Bricker&Eckler ATTORNEYS AT LAW

- State of being unconscious, asleep, or under the influence of drugs and/or alcohol to such an extent that the person cannot appreciate the nature or consequences of their actions
- Intoxicated people **can** consent. Incapacitated people **cannot** consent.

Incapacitation: Amnesty?

Bricker&Eckler ATTORNEYS AT LAW

Nothing in the Regulations precludes the postsecondary institution from providing amnesty to students for personal alcohol and/or drug use when participating in a Title IX investigation

Incapacitation (1 of 2)

- Determined by how the alcohol (or drugs) consumed impacts a person's decision-making capacity, awareness of consequences, and ability to make informed judgments
- Beyond mere intoxication
- No requirement for incapacitation to be voluntary or involuntary on the part of the complainant

Incapacitation (2 of 2)

- To be responsible where a complainant is incapacitated, policies typically require that the **respondent knew or reasonably should have known about the incapacitation**
- Incapacitation of the respondent is not a defense

Physical Effects

Some policies list physical effects that are not solely indicative of, but may indicate incapacitation:

- Conscious or unconscious?
- Vomiting?
- Slurred speech
- Difficulty walking
- Difficulty holding a coherent conversation

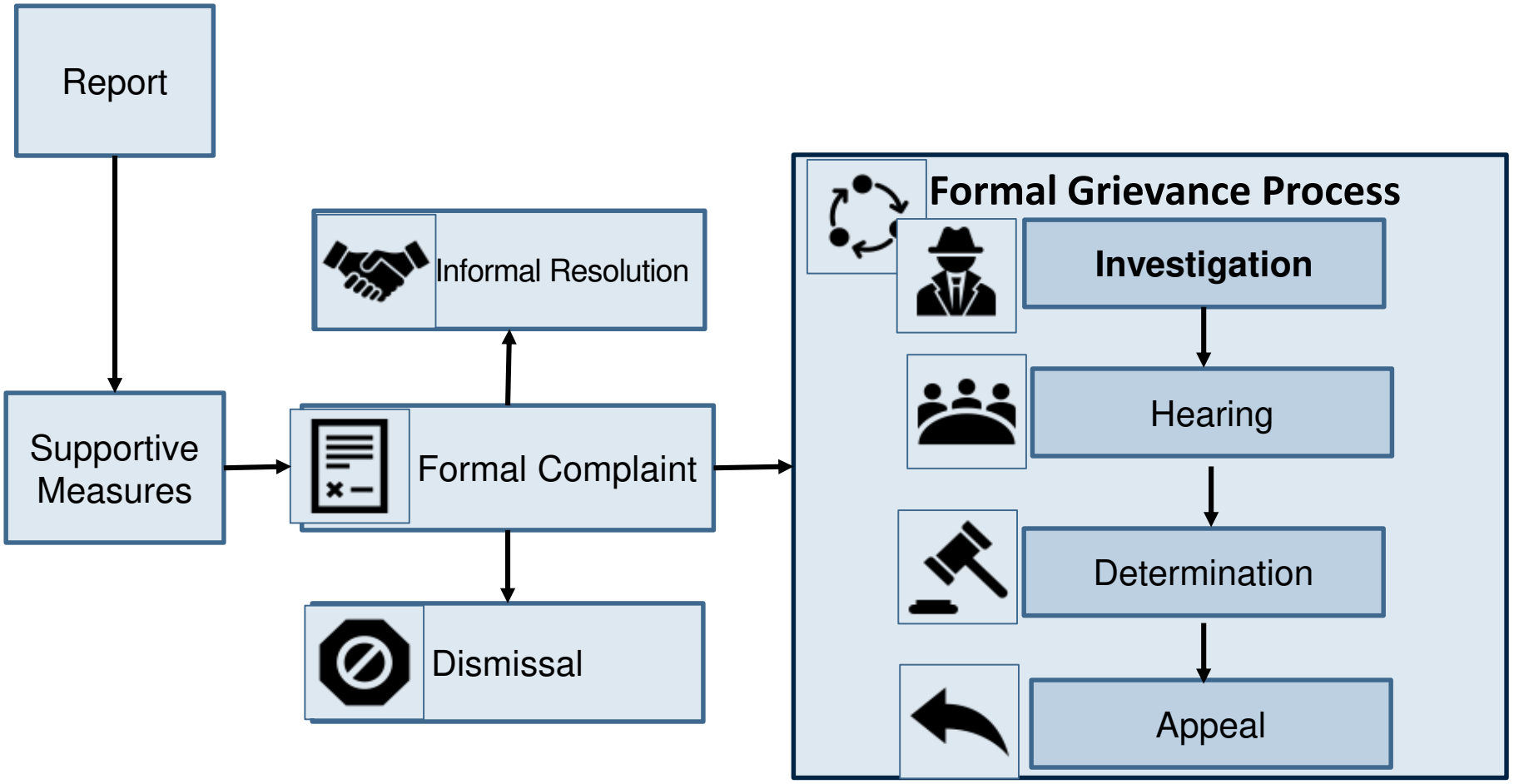
Blackout ≠ Incapacitation

- Alcohol can interfere with the ability to form memories
- May be a complete lack of memory or fragmentary blackouts
- Listen carefully to the way they describe what they remember. Does it fit with what you know about intoxication and recall?

Overview of the Grievance Process

Bricker & Eckler LLP © 2020

Overview of the Process



Overview of the Process: Actual Knowledge

Bricker&Eckler ATTORNEYS AT LAW

Notice of sexual harassment or allegations of sexual harassment **to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient** (discretion of the postsecondary institution)

- Notice to employees is no longer enough to trigger actual knowledge (ability or obligation to report not enough)
- Purpose to allow complainants to speak with employees without automatically triggering process

Overview of the Process: Formal Complaint

A document filed by a complainant or signed by the Tile IX Coordinator alleging sexual harassment against a respondent and requesting the recipient investigate the allegation of sexual harassment

- In response to a formal complaint, a recipient must follow a grievance process (set by 106.45)
- Title IX Coordinator must offer complainant supportive measures (regardless if files formal complaint – if complainant does not want to file a formal complaint)

Overview of the Process: Formal Grievance Process (1 of 4)

Any provisions, rules, or practices, other than those in the regulations, must apply equally to both parties.

Basic requirements:

- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed

Overview of the Process: Formal Grievance Process (2 of 4)

- Requires an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- Provide credibility determinations not based upon person's status as complainant, respondent, or witness
- Require individual designated by recipient as Title IX Coordinator, investigator, decision-maker, informal resolution officer, and/or appeals officer be free from conflict of interest or bias

Overview of the Process: Formal Grievance Process (3 of 4)

- Include presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process
- Include prompt time frames (some discretion)
- Describes range of possible disciplinary outcomes
- States standard of evidence (preponderance of the evidence or clear and convincing)

Overview of the Process: Formal Grievance Process (4 of 4)

- Include procedures and bases for complainant and respondent to appeal
- Describe range of supportive measures available to complainants and respondents
- Not require legally privileged evidence absent a voluntary written waiver by the holder of the privilege

Overview of the Process: Written Notice (1 of 2)

- Recipient's grievance process and informal resolution process
- Allegations with sufficient time for review with sufficient detail, such as date, location if known
- Respondent presumed not responsible for alleged conduct and determination made at conclusion of grievance process
- Parties may have an advisor of choice

Overview of the Process: Written Notice (2 of 2)

- Any provision in recipient's code of conduct that prohibits knowingly making false statements or providing false information during the grievance process
- Additional notification to parties if new allegations arise as apart of the investigation

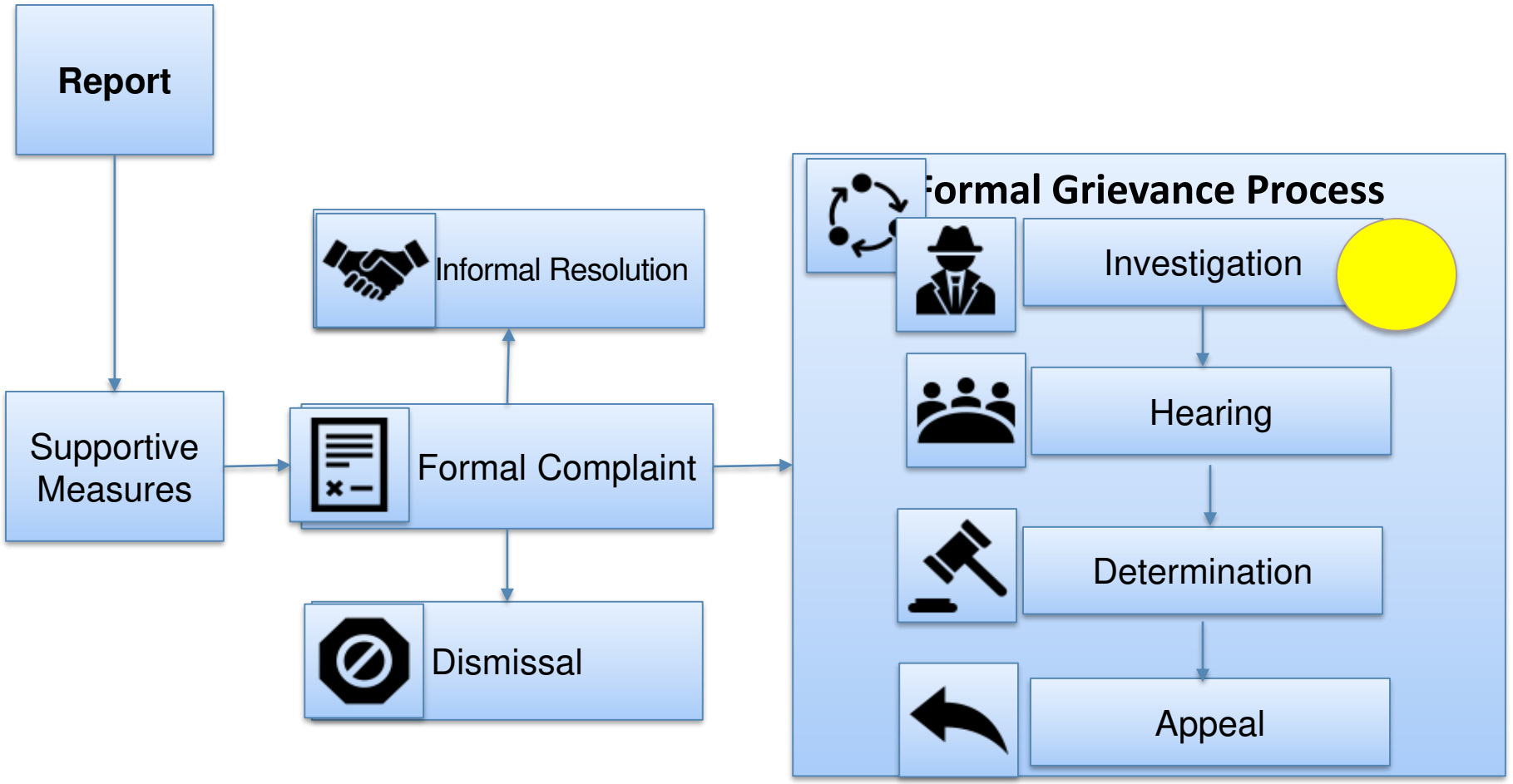
Overview of the Process: Dismissal

- Recipient MUST investigate allegations in a formal complaint
- BUT recipient MUST dismiss
  - if conduct alleged would not constitute sexual harassment, even if proven, OR
  - Conduct did not occur within recipient's education program or activity or in the United States

Overview of the Process: Investigation

- Only of a formal complaint
- Burden of proof and evidence gathering rests with recipient
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert)

Advisor May be Included



Overview of the Process: Investigation (1 of 3)

- Provide equal opportunity for parties to present inculpatory and exculpatory evidence
- Not restrict ability of either party to discuss or gather and present relevant evidence
- Provide parties same opportunities to have others present during the grievance process, including advisor of choice

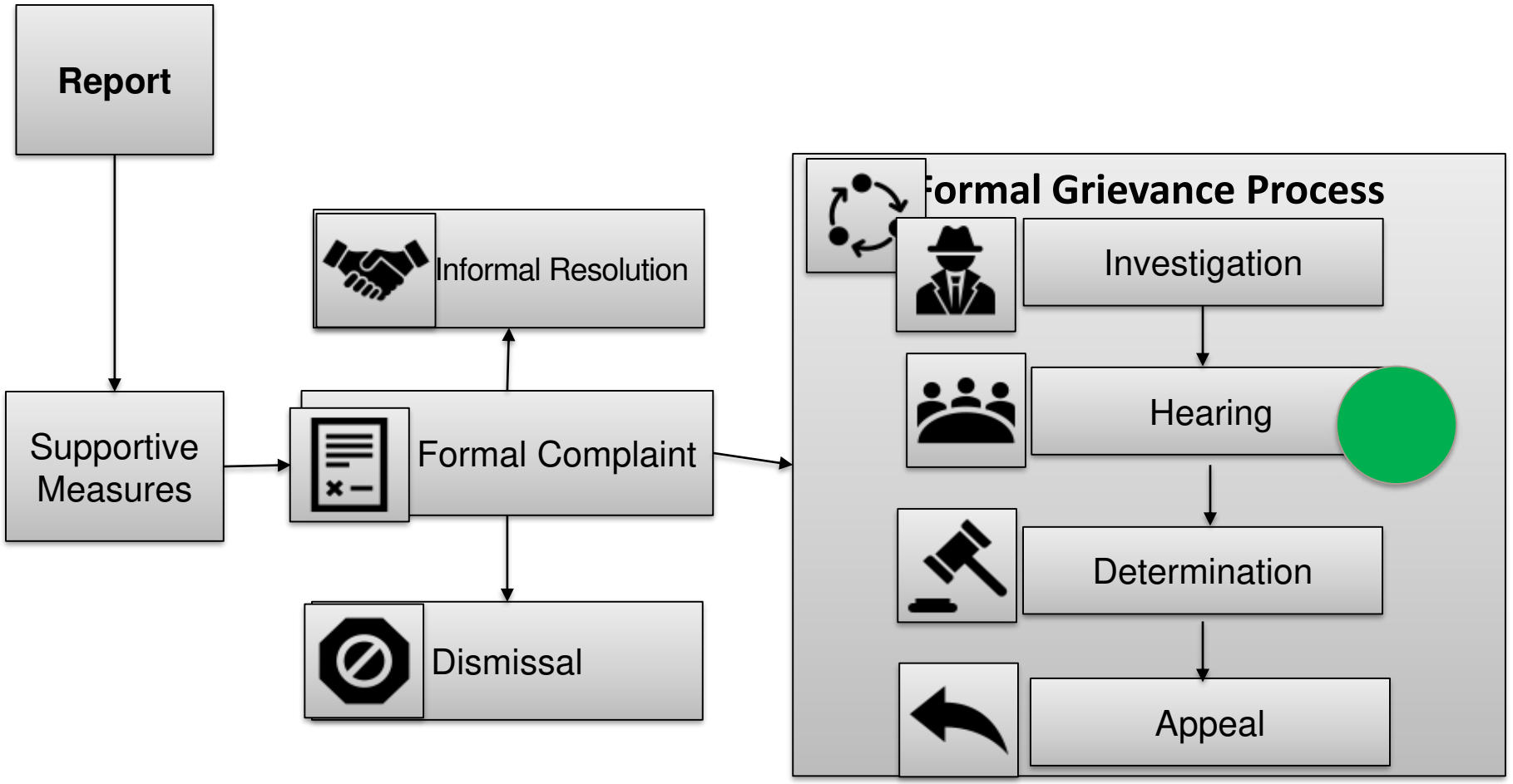
Overview of the Process: Investigation (2 of 3)

- Provide written notice of date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare
- Provide both parties equal opportunity to inspect and review any evidence obtained in the investigation – recipient must send to party and party's advisor with at least 10 days to submit a written response before completion of investigation report

Overview of the Process: Investigation (3 of 3)

- Recipient must make all such evidence subject to inspection and review at any hearing
- Create an investigation report at least 10 days before a hearing that fairly summarizes the relevant evidence and send to each party and party's advisor

Advisors Must be Included



Overview of the Process: Hearings

- Must provide a live, cross-examination hearing
- Parties must have an advisor and the recipient must provide an advisor for a party if the party does not have one
- Advisors ask only relevant cross-examination questions—no party-on-party questioning
- May be virtual, but must be recorded or transcribed

Overview of the Process: Determinations (1 of 3)

- Decision-maker (not Title IX Coordinator or investigator) must issue a written determination regarding responsibility
- Must include
  - Allegations
  - Procedural steps taken from receipt of formal complaint

Overview of the Process: Determinations (2 of 3)

- Findings of fact
- Conclusions
- Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will provided to complainant

Overview of the Process: Determinations (3 of 3)

- Procedures and bases for appeal by both parties
- Provide written determination to parties simultaneously

Overview of the Process: Appeals (1 of 2)

- Recipient must offer to both parties the following bases of appeal:
  - Procedural irregularity that affected outcome
  - New evidence not reasonably available at the time regarding responsibility or dismissal that could affect outcome
  - Conflict of interest or bias by the Title IX Coordinator, investigator, and/or decision-maker that affected the outcome

Overview of the Process: Appeals (2 of 2)

- The decision-maker for the appeal cannot be the same decision-maker from the hearing, or the Title IX Coordinator or investigator
- Must provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the determination
- Must issue a written decision describing the result of the appeal and rationale and provide the decision simultaneously to the parties

Overview of the Process: Informal Resolution (1 of 2)

- At any time prior to the determination regarding responsibility, the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- Recipient cannot require this and also cannot offer unless a formal complaint is filed

Overview of the Process: Informal Resolution (2 of 2)

- Recipient can offer informal resolution if:
  - Provides written notice to the parties
  - Obtains the parties' voluntary, written consent to the informal process
  - Does not offer for employee sexual harassment of a student

Overview of the Process: Retaliation

- Neither recipient nor any other person may retaliate against an individual for purpose of interfering with any right or privilege secured by Title IX or because made a report or complaint, or participated or refused to participate in the process

- (Further discussion in codes of conduct discussion at lunch)

Overview of the Process: Confidentiality

Bricker & Eckler ATTORNEYS AT LAW

Recipient **must keep confidential the identity of any individual** who has made a report or complaint of sex discrimination, including any individual who made a report, any complainant, any alleged perpetrator, any respondent, and any witness, **unless required by law**, permitted by FERPA, or **for the purposes of carrying out Regulations grievance process**.

Understanding the Roles of the Title IX Officials

Bricker & Eckler LLP © 2020

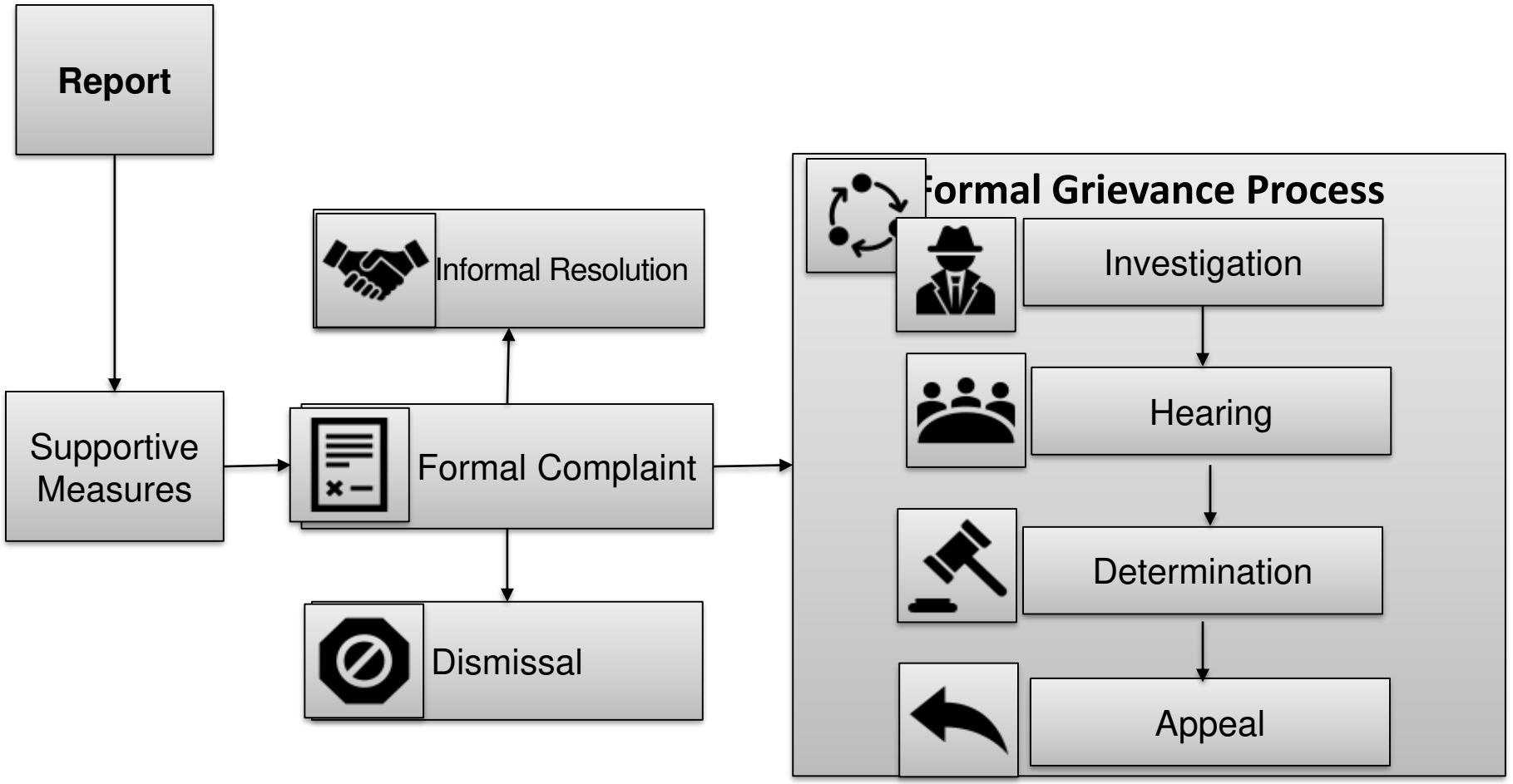
Understanding the Process: The Title IX Coordinator's Role

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
- 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 the Process…



The Title IX Coordinator (1 of 3)

For **advisor** purposes, should understand the intake process (so you know if it was done correctly).

- Title IX Coordinator (or deputy) will receive a report (this may also come in through another individual with the ability to give sanctions) 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 If not, Title IX Coordinator MUST dismiss from Title IX process

The Title IX Coordinator (2 of 3)

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 (3 of 3)

For **advisor** purposes, must understand the that the Title IX Coordinator:

- 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.

The Decision-Maker's Role

The Decision-Maker's Role (2 of 3)

1. Make relevancy determinations…before any question at the live cross-examination hearing can be answered
2. Run an orderly and truth-seeking live cross-examination hearing
3. Write a decision: apply the policy, use standard of review, and evaluate relevant evidence still in the record after the hearing

The Decision-Maker's Role (3 of 3)

The **advisor** will interact most with the decision-maker during the grievance process.

The live cross-examination hearing is where the **advisor** has the most active role.

LIVE CROSS-EXAMINATION: Theory and Practice

Cross Examination

Traditionally, cross examination questions are those that try to elicit “yes” or “no” answers, not explanations.

Examples:

- You were at the party that night, weren’t you?
- You’d agree with me that you had three beers, wouldn’t you?
- You didn’t call an Uber, did you?

Bricker & Eckler LLP © 2020

Live Cross-Examination: Theory (1 of 3)

- Essential for truth seeking (30313)
- Provides opportunity of both parties to **test "consistency, accuracy, memory, and credibility** so that the decision-maker can better assess whether a [party's] narrative should be believed" (30315)

Bricker & Eckler LLP © 2020

Live Cross-Examination: Theory (2 of 3)

- Provides parties with the opportunity to "direct the decision-maker's attention to **implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility**" in the other party's statements. (30330)
- Promotes transparency and equal access (30389)

Bricker & Eckler LLP © 2020

Live Cross-Examination: Theory (3 of 3)

Bricker & Eckler ATTORNEYS AT LAW

According to the Department, the process in 106.45 best achieves the purposes of:

(1) effectuating Title IX's non-discrimination mandate by ensuring **fair, reliable outcomes** viewed as **legitimate** in resolution of formal complaints of sexual harassment so that victims receive remedies

(2) **reducing and preventing sex bias** from affecting outcomes; and

(3) ensuring that Title IX regulations are consistent with **constitutional due process and fundamental fairness** (30327)

Bricker & Eckler LLP © 2020

Live Cross-Examination: How it should look

"[C]onducting cross-examination consists simply of posing questions intended to advance the asking party's perspective with respect to the specific allegation at issue." (30319)

Live Cross-Examination: Regulations (1 of 2)

Bricker & Eckler ATTORNEYS AT LAW

In this process:

- Decision-maker must permit each party's advisor to ask the other party and any witnesses **all relevant** questions and follow-up questions, including those challenging **credibility**
- Must be conducted directly, orally, and in real time by the party's advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

Bricker & Eckler LLP © 2020

Live Cross-Examination: Regulations (2 of 2)

Bricker & Eckler ATTORNEYS AT LAW

- Before a party or witness may answer a question, the decision-maker must first determine whether the question is relevant and explain the reason if not relevant
- Must audio record, audio-video record or provide a transcript of the hearing

Bricker & Eckler LLP © 2020

Role of Decision-Maker/questioning by (1 of 2)

Bricker&Eckler ATTORNEYS AT LAW

The preamble discussion provides some additional information on protecting neutrality of the decision-maker:

"To the extent that **a party wants the other party questioned in an adversarial manner** in order to further the asking party's views and interests, that questioning is conducted by the party's own advisor, **and not by the recipient**. Thus, no complainant (or respondent) need feel as though the recipient is "taking sides" or otherwise engaging in cross-examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant." (30316)

Bricker & Eckler LLP © 2020

Role of Decision-Maker/questioning by (2 of 2)

Bricker&Eckler ATTORNEYS AT LAW

So take that into consideration if eliciting questions:

- "[O]n the decision-maker's initiative [can] ask questions and elicit testimony from parties and witnesses,
- **as part of the recipient's burden to reach a determination regarding responsibility** based on objective evaluation of all relevant evidence including inculpatory and exculpatory evidence.
- **Thus , the skill of a party's advisor is not the only factor in bringing evidence to light for a decision-maker's consideration**." (30332)

Bricker & Eckler LLP © 2020

Confidentiality

- 106.71 requires recipients to keep party and witness identities confidential except as permitted by law or FERPA, and as needed to conduct an investigation or hearing (30316)
- Prevents anyone in addition to the advisor to attend the hearing with the party, unless otherwise required by law (30339)

Bricker & Eckler LLP © 2020

ISSUES OF RELEVANCY:
Not Rules of Evidence

Bricker & Eckler LLP © 2020

Relevancy (1 of 2)

- Per 34 C.F.R. 106. 45(b)(6)(i):
  - **"Only relevant cross-examination and other questions may be asked of a party or witness."**

"[C]ross examination **must focus only on questions that are relevant to the allegations in dispute.**" (30319)

Relevancy (2 of 2)

Party or witness **cannot** answer a question until the decision-maker determines whether it is relevant.

- Requires decision-makers to make "on the spot" determinations and explain the "why" if a question or evidence is not relevant (30343)

Bricker & Eckler LLP © 2020

What is Relevant? (1 of 4)

Bricker&Eckler ATTORNEYS AT LAW

Decisions regarding relevancy do not have to be lengthy or complicated:

"… it is sufficient… to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, **or because the question asks about a detail that is not probative of any material fact concerning the allegations.**" (30343)

What is Relevant? (2 of 4)

Bricker&Eckler ATTORNEYS AT LAW

Questions to consider:

- 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)

Bricker & Eckler LLP © 2020

What is Relevant? (3 of 4)

Under the preponderance of the evidence standard:

- Does this help me in deciding if there was more likely than not a violation?
- Does it make it more or less likely?
- Why or why not?

If it doesn't move this dial: likely not relevant.

Bricker & Eckler LLP © 2020

What is Relevant? (4 of 4)

Bricker&Eckler ATTORNEYS AT LAW

Under the clear and convincing standard of evidence:

- Does this help me in deciding if a fact is highly probable to be true?
- Does it make it more or less probable?
- Why or why not?

If it doesn't move this dial: likely not relevant.

Bricker & Eckler LLP © 2020

Not Governed by Rules of Evidence (1 of 2)

Bricker&Eckler ATTORNEYS AT LAW

The Rules of Evidence do NOT apply and CANNOT apply

"[T]he decision-maker's only evidentiary threshold for admissibility or exclusion of questions and evidence is **not whether it would then still be excluded under the myriad of other evidentiary rules and exceptions that apply under, for example, the Federal Rules of Evidence.**" (30343)

Bricker & Eckler LLP © 2020

Not Governed by Rules of Evidence (2 of 2)

Bricker&Eckler ATTORNEYS AT LAW

Examples:

- No reliance of statement against a party interest (30345)
- No reliance on statement of deceased party (30348)
- A recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice (30294)

Bricker & Eckler LLP © 2020

Relevancy

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)

- A recipient may not adopt rules excluding certain types of relevant evidence (lie detector or rape kits) where that type of evidence is not labeled irrelevant in the regulations (e.g., sexual history) or otherwise barred for use under 106.56 (privileged) and must allow fact and expert witnesses. (30294)

Bricker & Eckler LLP © 2020

Relevancy: Not Relevant

The Department has determined that recipients must consider relevant evidence with the following exceptions:

(1) Complainant's sexual behavior (except for two narrow exceptions)

(2) information protected by a legal privilege

(3) party's treatment records (absent voluntary written wavier by the party) (30337)

Relevancy: Regulations' Rape Shield Law-Complainants

- According to 34 C.F.R. 106. 45(b)(6)(i), Cross-examination **must exclude** evidence of the Complainant's "sexual behavior or predisposition" **UNLESS**
  - its use is to prove that someone other than the Respondent committed the conduct, OR
  - it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

Bricker & Eckler LLP © 2020

Relevancy: Regulations' Rape Shield Law - Respondents

- 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."

Bricker & Eckler LLP © 2020

Relevancy: Treatment Records

"[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."

Section 106.45(b)(5)(i) (see also 30317).

Relevancy: Legally Privileged Information (1 of 2)

Bricker&Eckler ATTORNEYS AT LAW

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.

Bricker & Eckler LLP © 2020

Relevancy: Legally Privileged Information (2 of 2)

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
- Confessions to a clergy member or other religious figures
- Spousal testimony in criminal matters
- Some confidentiality/trade secrets

Bricker & Eckler LLP © 2020

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).

Bricker & Eckler LLP © 2020

Relevancy: No Reliance on Prior Statements

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

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

- "Must not rely on any **statement** of that party or witness in reaching a determination"

Bricker & Eckler LLP © 2020

Relevancy: No Reliance on Prior Statements - Theory

Bricker&Eckler ATTORNEYS AT LAW

If parties do not testify about their own statement and submit to cross-examination, **the decision-maker will not have the appropriate context for the statement**, which is why the decision-maker cannot consider that party's statement.

(30349)

Bricker & Eckler LLP © 2020

Relevancy: When Parties or Witnesses Do Not Participate

The preamble recognizes that there are many reasons a party or witness may not elect not to participate in the live cross-examination hearing or answer a question or set of questions

- The decision-maker cannot make inferences from non-participation or compel participation (retaliation) (30322)
- Relevant questioning by advisor along these lines?

Bricker & Eckler LLP © 2020

Relevancy: No Reliance on Prior Statements (1 of 5)

Bricker&Eckler ATTORNEYS AT LAW

"[A] party's advisor may appear and conduct cross-examination even when the party whom they are advising does not appear." (30346)

"Similarly, where one party does not appear and that party's advisor does not appear, **a recipient-provided advisor must still cross-examine the other, appearing party**, resulting in consideration of the appearing party's statements (without any inference being drawn based on the non-appearance)." (30346)

Bricker & Eckler LLP © 2020

Relevancy: No Reliance on Prior Statements (2 of 5)

Bricker&Eckler ATTORNEYS AT LAW

Third party cross-examination of what a non-appearing party stated does not count as statements tested on cross-examination. (30347) (provides examples of family and friends showing up on behalf of the non-appearing party)

"[A] rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements." (30347)

Bricker & Eckler LLP © 2020

Relevancy: No Reliance on Prior Statements (3 of 5)

Bricker&Eckler ATTORNEYS AT LAW

When statement IS the sexual harassment…

"One question that a postsecondary institution may have is whether not relying on a party's statement—because that party has not submitted to cross-examination —means not relying on a description of the words allegedly used by a respondent if those words constitute part of the alleged sexual harassment at issue.

The answer to that question is 'no'…"

May 22, 2020 OCR blog

Bricker & Eckler LLP © 2020

Relevancy: No Reliance on Prior Statements (4 of 5)

Bricker&Eckler ATTORNEYS AT LAW

"[E]ven though the refusing party's statement cannot be considered, the decision-maker may reach a determination based on the remaining evidence so long as no inference is drawn based on the party or witness's absence from the hearing or refusal to answer cross-examination (or other) questions." (30322)

Example: "[W]here a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination" (30328)

Bricker & Eckler LLP © 2020

Relevancy: No Reliance on Prior Statements (5 of 5)

Bricker&Eckler ATTORNEYS AT LAW

"Thus, a respondent's alleged verbal conduct, that itself constitutes the sexual harassment at issue, is not the respondent's "statement" as that word is used in § 106.45(b)(6)(i), because the verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself."

- If you don't already follow the blog, add it to your favorites bar: https://www2.ed.gov/about/offices/list/ocr/blog/index.html

Bricker & Eckler LLP © 2020

Relevancy: No Reliance on Prior Statements- Examples

- But, if a party or witness does not submit to cross examination and makes a statement in a video, cannot consider that statement in the video to reach a decision on responsibility (30346)
- Remember: No rules of evidence can be imported

Bricker & Eckler LLP © 2020

Relevancy: No Reliance on Prior Statements – SANE and Police Reports

- This expressly means no statements in police reports, no SANE reports, medical reports, or other documents to the extent they contain statements of parties or witnesses who do not submit to cross examination(30349)
- If non-cross-examined statements are intertwined with statements tested by cross-examination, can only consider those that have been cross-examined (30349)

Bricker & Eckler LLP © 2020

Issues of Relevancy

"[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties." (30294)

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." (30293)

Other Considerations

- What about sex stereotyping questions?
- What about questions by advisor about why a party isn't participating?
- What about decorum?

Bricker & Eckler LLP © 2020

Relevancy Determinations

Relevancy Determination Hypotheticals (1 of 2)

Bricker&Eckler ATTORNEYS AT LAW

Okay, decision-maker, is this question relevant?

For practice, we will pose these in cross-examination format. As discussed before, the traditional cross-examination style is aimed at eliciting a short response, or a "yes" or "no," as opposed to open-ended question which could seek a narrative (longer) response.

For example, instead of, "How old are you?" the question would be, "You're 21 years old, aren't you?"

Bricker & Eckler LLP © 2020

Relevancy Determination Hypotheticals (2 of 2)

Bricker&Eckler ATTORNEYS AT LAW

For each practice hypothetical, ask yourself:

Is this question relevant or seeking relevant information?

- Why or why not?
- Does the answer to this depend on additional information?
- If it so, what types of additional information would you need to make a relevancy determination?

Bricker & Eckler LLP © 2020

Relevancy Determination 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.

Bricker & Eckler LLP © 2020

Practice Hypothetical #1

Bricker&Eckler ATTORNEYS AT LAW

"Cameron, texted Riley the week before telling Riley that you wanted to have sex with them, didn't you?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #2

Bricker&Eckler ATTORNEYS AT LAW

"Cameron, isn't it true you usually have sex with Riley while intoxicated?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #3

Bricker&Eckler ATTORNEYS AT LAW

"Riley, did your attorney tell you not to answer that question?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #4

Bricker & Eckler ATTORNEYS AT LAW

"Riley, did your counselor tell you that you have anger issues?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #5

Bricker&Eckler ATTORNEYS AT LAW

"Cameron, you didn't see who was allegedly sexually assaulting you during the alleged attack, did you?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #6

Bricker&Eckler ATTORNEYS AT LAW

"Cameron, are you choosing not to answer my questions because you lied to investigators?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #7

Bricker & Eckler ATTORNEYS AT LAW

"Riley, you're not answering my questions because you don't want criminal implications, right?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #8

Bricker&Eckler ATTORNEYS AT LAW

"Cameron, isn't it true you asked Riley to put on a condom before what you now claim is a sexual assault?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #9

Bricker&Eckler ATTORNEYS AT LAW

"Riley, have you tested positive for sexually-transmitted diseases?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #10

Bricker&Eckler ATTORNEYS AT LAW

"Riley, isn't it true you texted Cameron the next day to see if Cameron was mad at you?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #11

Bricker&Eckler ATTORNEYS AT LAW

"Cameron, if you were as drunk you just stated you were, you can't even be sure whether you had sex with Riley or, say, Wyatt, can you?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #12

Bricker & Eckler ATTORNEYS AT LAW

"Cameron, did a doctor diagnose you with anxiety?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #13

Bricker&Eckler
ATTORNEYS AT LAW

"Riley, isn't it true you tried to kill yourself the next day because you knew you did something wrong?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #14

Bricker&Eckler ATTORNEYS AT LAW

"Cameron, you've had sex with Riley after drinking before, though, haven't you?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #15

Bricker&Eckler ATTORNEYS AT LAW

"Cameron, you could be wrong about that timeline, right?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #16

Bricker & Eckler ATTORNEYS AT LAW

"Riley, this isn't the only Title IX complaint against you right now, is it?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #17

Bricker&Eckler ATTORNEYS AT LAW

"Cameron, you had consensual sex with Riley the next night, didn't you?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #18

Bricker&Eckler ATTORNEYS AT LAW

"Riley, didn't the police question you for three hours about your assault of Cameron?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #19

Bricker&Eckler ATTORNEYS AT LAW

"Cameron, your witness, Wyatt, didn't even show up today, right?"

Bricker & Eckler LLP © 2020

Practice Hypothetical #20

Bricker & Eckler ATTORNEYS AT LAW

"Riley, you're even paying for a criminal defense attorney instead of a free advisor, right?"

Bricker & Eckler LLP © 2020

The Hearing

The Setup

- Can have 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
- "At recipient's discretion, can allow any or all participants to participate in the live hearing virtually" (30332, see also 30333, 30346) explaining 106.45(b)(6)(i)

Bricker & Eckler LLP © 2020

Process (1 of 2)

- Discretion to provide opportunity for opening or closing statements
- Discretion to provide direct questioning (open-ended, non-cross questions)
- Cross-examination must to be done by the party's "advisor of choice and never by a party personally."

Bricker & Eckler LLP © 2020

Process (2 of 2)

- An advisor of choice may be an attorney or a parent (or witness) (30319)
- Discretion to require advisors to be “potted plants” outside of their roles cross-examining parties and witnesses. (30312)

Bricker & Eckler LLP © 2020

Advisors (1 of 3)

Bricker & Eckler ATTORNEYS AT LAW

If a party does not have an advisor present at the live 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)

Bricker & Eckler LLP © 2020

Advisors (2 of 3)

- Advisors do not require Title IX Training, 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)

Bricker & Eckler LLP © 2020

Advisors (3 of 3)

- Regulations permit a recipient to adopt rules that (applied equally) do or do not give parties or advisors the right to discuss relevance determinations with the decision-maker during the hearing. (30343)
- "If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing." (30343)

Bricker & Eckler LLP © 2020

Advisors: But Other Support People?

- Not in the hearing, unless required by law (30339)
- “These confidentiality obligations may affect a recipient’s ability to offer parties a recipient-provided advisor to conduct cross-examination in addition to allowing the parties’ advisors of choice to appear at the hearing.”
- ADA accommodations-required by law
- CBA require advisor and attorney?

Bricker & Eckler LLP © 2020

Recording the Hearing

- Now required to be audio, audio visual, or in transcript form
- Decision-makers have to know how to use any technology you have

Bricker & Eckler LLP © 2020

The Hearing…

- Order of questioning parties and witnesses – not in regulations
  - Consider time restraints on witnesses
  - Questioning of Complainant
  - Questioning of Respondent

Bricker & Eckler LLP © 2020

Questioning by the Decision-Maker (1 of 2)

Bricker&Eckler ATTORNEYS AT LAW

- The neutrality of the decision-maker role is 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)

Bricker & Eckler LLP © 2020

Questioning by the Decision-Maker (2 of 2)

- 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)

Bricker & Eckler LLP © 2020

The Hearing (1 of 3)

- Ruling on relevancy between every question and answer by a witness or party
  - Assumption that all questions are relevant unless decision-maker otherwise states irrelevant? Risky.
  - Set expectation that party or witness cannot answer question before decision-maker decides if relevant.
    - Pros: helps diffuse any overly aggressive or abusive questions/resets tone
    - Cons: may lengthen hearing

Bricker & Eckler LLP © 2020

The Hearing (2 of 3)

- "[N]othing in the final regulations precludes a recipient from adopting a rule that the decision-maker will, for example, send to the parties after the hearing any revisions to the decision-maker's explanation that was provided during the hearing." (30343)

Bricker & Eckler LLP © 2020

The Hearing (3 of 3)

- Confidentiality appears to preclude support persons other than the advisor from participating in the live-cross examination hearing
  - Perhaps allow support person to meet in waiting rooms or before and after hearing
  - Consistent with providing supportive services to both parties – hearings can be very stressful for both parties

Bricker & Eckler LLP © 2020

Decorum (1 of 5)

Bricker&Eckler ATTORNEYS AT LAW

The preamble to the Title IX Regulations contains many discussions of an institution's discretion to set rules to maintain decorum throughout hearings and to remove non-complying advisors, parties, or witnesses.

Note: In our experience, we have seen decorum issues more commonly with advisors than parties…and have seen this equally on both sides. This is more likely to be an issue when family members serve as advisors, because, understandably, these can be emotional matters.

Bricker & Eckler LLP © 2020

Decorum (2 of 5)

Bricker & Eckler ATTORNEYS AT LAW

"Recipients may adopt rules that govern the **conduct and decorum of participants at live hearings** so long as such rules comply with these final regulations and **apply equally to both parties**…These final regulations aim to ensure that the truth-seeking value and function of cross-examination applies for the benefit of both parties while minimizing the discomfort or traumatic impact of answer questions about sexual harassment." (30315)

Bricker & Eckler LLP © 2020

Decorum (3 of 5)

Bricker&Eckler ATTORNEYS AT LAW

"[W]here the **substance of a question is relevant**, but the manner in which an advisor attempts to ask the question is **harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically 'leans in' to the witness's personal space**), the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner." (30331)

Decorum (4 of 5)

Bricker&Eckler ATTORNEYS AT LAW

"The Department acknowledges that predictions of **harsh, aggressive, victim-blaming** cross-examination may dissuade complainants from pursuing a formal complaint out of fear of undergoing questioning that could be perceived as interrogation. However, recipients retain discretion under the final regulations to educate a recipient's community about what cross-examination during a Title IX grievance process will look like, including developing rules and practices (**that apply equally to both parties**) to oversee cross-examination to **ensure that questioning is relevant, respectful, and non-abusive**." (30316 see also 30315; 30340)

Decorum (5 of 5)

- "[T]he essential function of cross-examination is **not to embarrass, blame, humiliate, or emotionally berate a party**, but rather to ask questions that probe a party's narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue." (30319)
- Nothing in this rule prevents recipient from enforcing decorum rules in the hearing and "the recipient may require the party to use a different advisor" if the advisor does not comply and may provide a different advisor to conduct cross examination on behalf of that party (30320)

Bricker & Eckler LLP © 2020

Understanding the Bases for Appeal

Understanding the Bases for Appeal (2 of 2)

As an advisor, these can inform your approach at the hearing – especially regarding relevancy determinations that you disagree with as the advisor.

- Whether you are involved at the appeal level or not (again, regulations only require appointed advisor during the hearing process) - will need to think about how to set up those relevancy challenges for appeal while in the hearing

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

Tips for Advocating for Your Party

Bricker & Eckler LLP © 2020

Advocating for your party in the Hearing (1 of 8)

Bricker&Eckler ATTORNEYS AT LAW

Preparation

- Review the entire investigation hearing report
- Review all evidence (some may have non-relevant evidence also—know if you disagree with any relevancy determinations made by the investigator)
- Meet with your party to review what your party thinks and wants
- Discuss strategy

Bricker & Eckler LLP © 2020

Advocating for your party in the Hearing (2 of 8)

Bricker&Eckler ATTORNEYS AT LAW

Preparation

- Realize that your party may want to take a more aggressive approach – If you are not comfortable with the approach, discuss it with the party and check to see if you can advise your party
- Discuss the expectations of decorum vs. the expectations of questioning the other party and witness

Bricker & Eckler LLP © 2020

Advocating for your party in the Hearing (3 of 8)

Bricker&Eckler ATTORNEYS AT LAW

Preparation

- Determine who your witnesses are and whether your party thinks they will show up to the hearing
- Be careful of the line between asking a party to participate and explain the importance of their statements vs. coercing a party to participate who has the right not to participate

Bricker & Eckler LLP © 2020

Advocating for your party in the Hearing (4 of 8)

Bricker&Eckler ATTORNEYS AT LAW

Preparation

- Consider a script
  - List each allegation and policy definition/elements for the policy violation (e.g., sexual assault—know which definition and what must be met to show sexual assault under the policy)
  - Standard of review: this can be helpful to have written out so that you can support relevancy determinations for your questions to show why relevant

Bricker & Eckler LLP © 2020

Advocating for your party in the Hearing (5 of 8)

Bricker&Eckler ATTORNEYS AT LAW

Preparation

- Consider a script
  - List your questions you plan to ask for your party for each other party and witness AND be prepared to answer why each is relevant
  - Have a list of relevancy definitions to refer to if they come up
    - Rape shield law and two exceptions
    - Privileged information in your jurisdiction
    - Language on treatment records

Bricker & Eckler LLP © 2020

Advocating for your party in the Hearing (6 of 8)

Bricker&Eckler ATTORNEYS AT LAW

The Hearing

- Ask one question at a time and wait for the Decision-Maker to determine if it is relevant
- If the Decision-Maker has a question about why the question is relevant, be prepared to answer that question (see preparation)
- Be respectful of the process so that you can effectively ask your party's questions – if you think you or someone else is becoming too heated, ask for a break to regroup

Bricker & Eckler LLP © 2020

Advocating for your party in the Hearing (7 of 8)

Bricker&Eckler ATTORNEYS AT LAW

The Hearing

- Be aware that the other advisor may not be as prepared as you are and the decision-maker has a duty to ask questions the advisor does not—this doesn't mean the decision-maker is biased or trying to help the other side – you may not like it, but it's a requirement for the decision-maker

Bricker & Eckler LLP © 2020

Advocating for your party in the Hearing (8 of 8)

Bricker&Eckler ATTORNEYS AT LAW

Post-hearing

- The decision-maker will issue a decision to both parties at the same time.
- Under the regulations, the advisor is not required to have any further role in the process (this may be especially true if the advisor is appointed by the institution)
- Other advisors (attorney or parent), may choose to work with the party to appeal on the bases listed in the decision

Bricker & Eckler LLP © 2020

Questions?