Title IX Higher Ed Level 2

Appeals Officer Training

Bricker & Eckler
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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

Find us on **Twitter** at
@BrickerHigherEd

Required Training for Appeals Officers (1 of 2)

The new 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)(iiii)

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

9:00-10:30	Introduction and Understanding Title IX Process and Roles
10:30-10:45	Break
10:45-12:00	Continue with Understanding Title IX Process and Roles
12:00-12:30	Lunch Break
12:30-2:00	Impartiality, Bias, and Conflict of Interest
2:00-2:15	Break
2:15-5:00	Appeals Officer Determinations

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

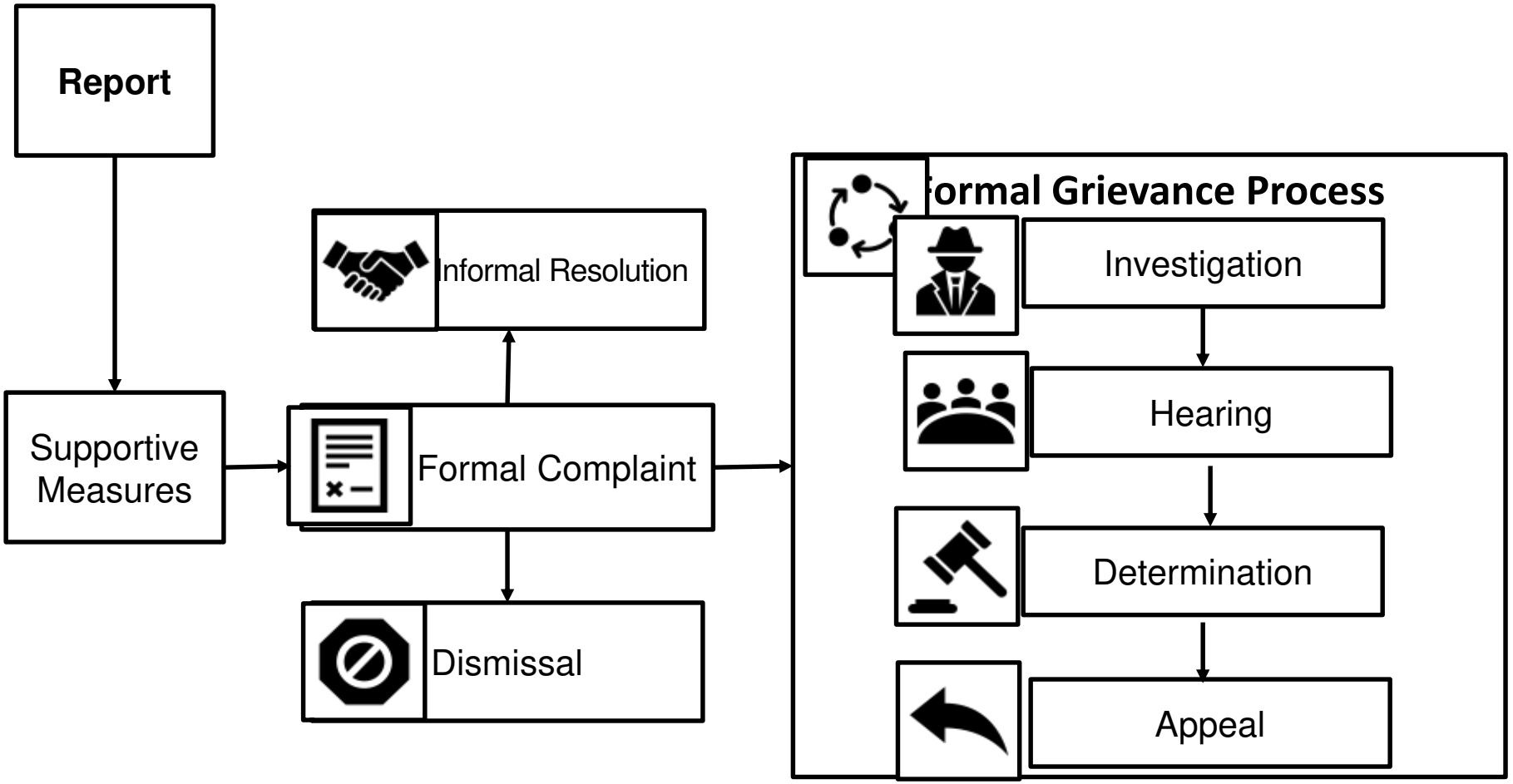
Understanding the Process: The Title IX Coordinator's Role

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 the 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 new 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 means: (1 of 2)

- 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)

This means: (2 of 2)

- Cannot rely on a statement against a party interest (30345)
- Cannot rely on a statement of deceased party (30348)

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?

1. Privileged: Information protected by a legally recognized privilege
2. Treatment: Party's medical, psychological, and similar records unless voluntary written consent
3. Rape Shield: Sexual history of complainant subject to two exceptions
4. Cross-Examined: Party or witness statements that have not been subjected to cross-examination at a live hearing*

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: What isn't relevant? – Rape Shield Provision

- 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**."

Additional information for the Investigator regarding relevancy

- There are more considerations for decision-makers regarding relevancy that are not an issue for investigators.
- Of note, if a party or witness's statement is not subject to cross-examination at the hearing, the decision-maker cannot consider that statement

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)

The Decision-Maker's Role

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

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

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: No Reliance on Prior Statements

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"

Relevancy: No Reliance on Prior Statements – The Theory (1 of 2)

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)

Relevancy: No Reliance on Prior Statements – The Theory (2 of 2)

In a blog post on May 22, 2020, OCR clarified:

"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'…"

Relevancy: No Reliance on Prior Statements (1 of 2)

- No party, no problem: "[A] party's advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear**." (30346)
- Only one side appears? Recipient must provide an advisor to cross examine the party that shows up. (30346)

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

- Cross-examination of a third party 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)

The Live Cross-Examination Hearing

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)

Process

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

Advisor of Choice

- 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)

Advisors

- 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)

No Support People, Unless Required by Law

Not in the hearing, unless required by law (30339)

- ADA accommodations-required by law
- CBA require advisor and attorney?

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.

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)

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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)

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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 wore a shirt with a Playboy symbol on it to the investigation interview. In finding against Respondent, the decision-maker noted that Respondent's actions were consistent with someone who devalued women by reading Playboy magazine.

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 no violation against the Respondent in Complainant's matter.

Hypothetical 3

You have concerns about comments one of your investigators made to you about his belief that a woman cannot rape 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 sexual assault 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 4

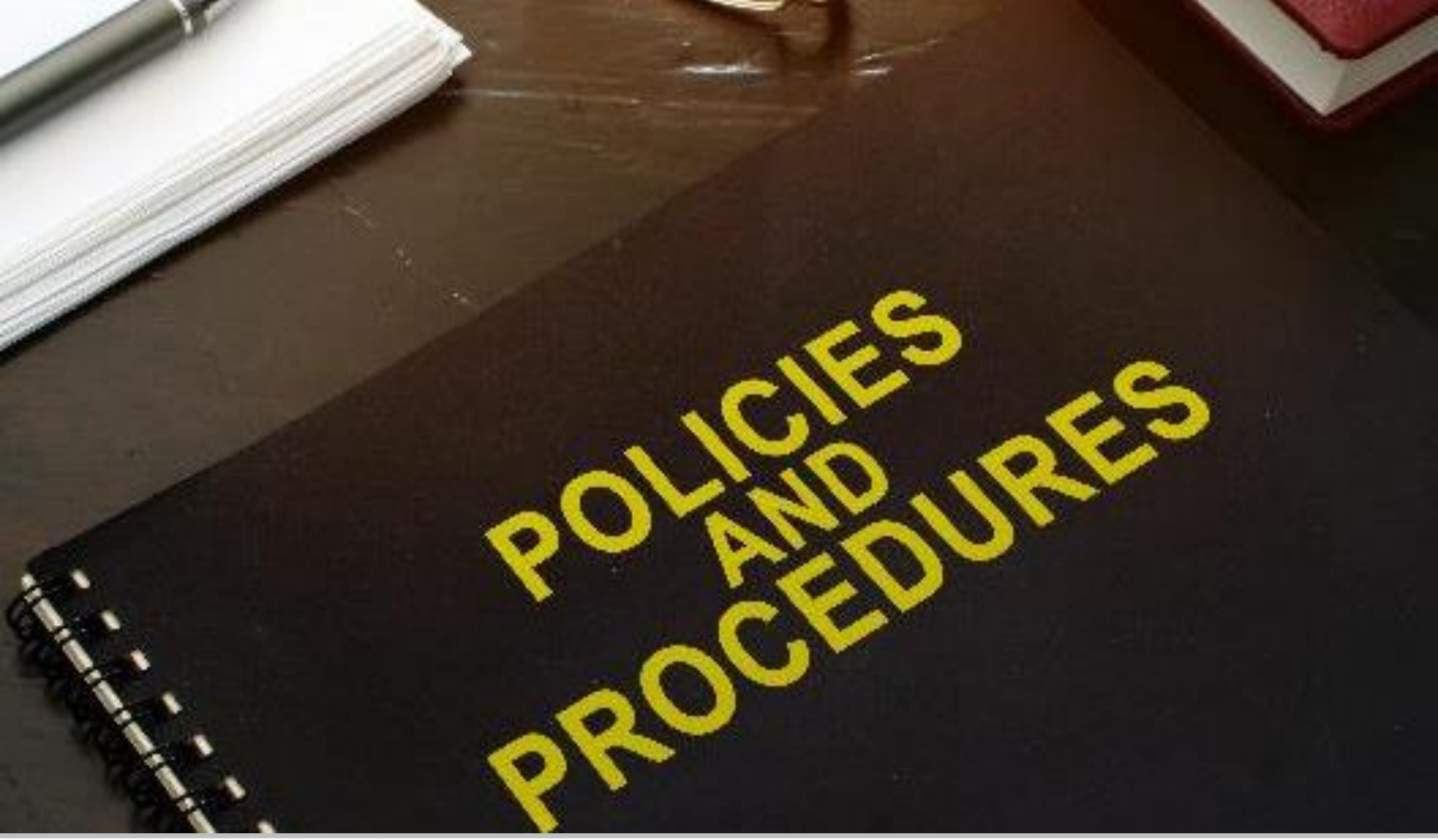
You receive an appeal from a male Respondent with an attorney challenging the bias of the decision-maker for her prior work as a rape crisis counselor. The decision-maker is a good friend of yours and shared with you before you were assigned to the appeal that Respondent's case was one of the worst she 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 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 handles Title IX decisions all the time and has been fully trained in compliance with the new regulations. The decision appears to be fully supported by the record, but it did find against Respondent in a sexual assault violation of policy. The decision-maker's record does indicate that, of the twenty cases she issued decisions on last year, eighteen of them found a violation by the Respondent and that all but one of those Respondents were male.

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.



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 (6 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

Appeal Hypotheticals

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?

Determinations from Written Decision for Hypotheticals (1 of 2)

1. Respondent violated the College's policy on sexual harassment. Specifically, the record supports by a preponderance of the evidence that Respondent committed rape on account of Complainant's incapacitation, thereby negating her ability to consent to sexual activity.

Determinations from Written Decision for Hypotheticals (2 of 2)

2. Respondent did not violate the College's policy on sexual harassment with respect to his video-recording, and sharing of said recording, because the record did not support that it was objectively "offensive, severe, and pervasive." Specifically, the record contains no evidence that anyone other than Wyatt saw the video. Additionally, the record demonstrates that neither Complainant nor Respondent were identified in the video and neither Complainant nor Respondent admitted to being present in the video.

Appeal Hypothetical 1

Procedural Irregularity

I (Complainant Cameron) asked the Investigator to speak to my roommate because she saw the video of me and Riley that Riley posted on Snapchat and she could have verified that it was me in the video. Despite my asking, and the Investigator agreeing to do so, the Investigator did not speak to my roommate.

Appeal Hypothetical 2

Procedural Irregularity/Bias

The decision-maker engaged in procedural irregularity and bias for excluding relevant evidence that affected the outcome of the matter. At the hearing, Respondent Riley's advisor appropriately asked Complainant Cameron a question about her sexual behavior that was relevant and met the Rape Shield exception. Had this questioning been allowed further, Riley would have been exonerated.

Appeal Hypothetical 3 Part 1

Procedural Irregularity/Bias

The investigator exhibited bias against Respondent Riley when he refused to answer relevant questions at the hearing that affected the outcome. Specifically, Riley's advisor called the investigator to question the investigator about statements made to him by the rideshare driver who drove Cameron and Riley home from the restaurant, Lucca, on the night of the alleged sexual assault.

Appeal Hypothetical 3 Part 2

The rideshare driver, Chris Clay, a witness, who did not appear at the hearing was interviewed by the investigator. Chris's statements prove that Cameron was not incapacitated. The investigator's refusal to answer questions on cross-examination regarding Chris's statements to the investigator and refusal to answer questions about Chris's credibility and lack of motive to lie were biased against Riley.

Appeal Hypothetical 3 Part 3

The decision-maker is also biased and should have ordered the investigator to answer questions about Chris's statements. The decision-maker also improperly did not consider Chris's statement in the investigation report because the investigator did not answer questions on cross-examination. This is proof Corona College works to discriminate against men like Riley.

Appeal Hypothetical 4

Respondent: The Title IX Coordinator is biased against respondents in general and has controlled this whole process. Last year, she posted on Twitter that she believed survivors of sexual assault. This entire process has been a sham. The finding that Respondent violated Title IX is part of this biased and illegal process and the decision should be overturned.

Questions?

Thank you for attending!

Remember – additional information available at:

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

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