



## **Title IX Training Webinar**

**June 24, 2020**

### **New Title IX Regulations: K-12 Decision Makers**

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#### **TOPIC #1: Decision Maker Roles and Responsibilities**

##### **Who Should the Decision Maker Be?**

- Cannot be the same as the Title IX Coordinator or Investigator for that case
- Cannot be the same as the Appeal Decision Maker
- May be one person or a multi-member panel

##### **What is the Decision Maker's Role?**

- Act as a neutral
- Determine what questions are relevant to the case
- Objectively evaluate all relevant evidence both inculpatory and exculpatory
- Reach a determination regarding responsibility without giving deference to the investigative report

##### **Decision Making Process**

- Written or
- Live Hearing

##### **Cross Examination**

- Occurs in some form in both the written and live hearing options
- DOE determined it is necessary for due process
- DOE presumes Decision Maker will control advisors and advocates to ensure no party is abused by cross-examination process

##### **Live Hearing Requirements**

- Each party is permitted to have an "advisor," who could be attorney or other representative

- Each party's advisor is permitted to ask the other party and any witnesses all relevant questions, challenge credibility, and conduct cross-examination
- If a party does not have an advisor, the District must provide one free of charge to conduct cross-examination on behalf of that party
- The District must provide technology to all the live hearing to take place with parties in separate rooms if requested
  - Technology training must be provided to decision maker
- The District must create an audio or video recording, or written transcript, of the live hearing and make it available to the parties

### **Written Option**

- Instead of a live hearing, the decision maker may allow each party to submit written questions to any party or witness
- Decision maker provides each party with the answers, and allows for additional, limited follow-up questions from each party

### **Cross-Examination Procedure**

- Each party's advisor will submit questions for cross-examination
- Your role: Decide if the questions are relevant and:
  - 1) Ask the question if relevant; or
  - 2) Decline to ask an irrelevant question, and explain why the question is irrelevant to the asking party in writing

### **Relevance**

- Evidentiary definition: Evidence having any tendency to make the existence of any fact of consequence to the determination at issue more or less probable than it would be without the evidence
  - Determining relevance is different than determining how much weight to give the evidence
    - Irrelevant evidence: Excluded
    - Relevant, but not much weight: Included for consideration

### **Relevance: Privileged Information**

- Any party's medical, psychological, and similar records are not relevant unless voluntarily provided by that party
- Any information protected by a legally recognized privilege (like attorney-client privilege) is not relevant
  - Ex. Cannot ask: "What did your attorney tell you about whether these actions were consensual?"

### Questions Prohibited

- In either a live hearing or using the written option, questions concerning the complainant's sexual predisposition or prior sexual behavior are not relevant unless:
  - Offered to provide someone other than respondent committed the conduct alleged; or
  - Incidences concern prior sexual behavior with the respondent and are offered to prove consent

### Credibility Assessments

- DOE: Do not rely on "demeanor" alone – can be inaccurate, especially in traumatic situations
- Take trauma into account
- Other factors for credibility:
  - Consistency;
  - Plausibility; and
  - Reliability

### Determining Responsibility

- Following live hearing or written exchange of questions, the decision maker must determine responsibility
- Independent assessment of the evidence
- No deference to investigation report

### Evidence Standard

- Schools may utilize either a "preponderance of the evidence" OR "clear and convincing" evidence standard, HOWEVER
- School must apply this standard to:
  - *For formal complaints against students as for formal complaints against employees, including faculty, and*
  - *Apply the same standard of evidence to all formal complaints of sexual harassment*
- Preponderance of the Evidence: More likely than not
  - What is more plausible?
  - What corroborating evidence is supportive?
  - Sometimes – who do you believe more and why?
- Clear and Convincing: Highly probable; highly and more substantially likely to be true

- *Neither are as high as the standard of evidence in criminal cases – “beyond a reasonable doubt”*

### **Written Decision**

- Identification of Allegations
- Procedural Steps
- Findings of Fact
- Application of Facts to Code of Conduct
- Statement of Results and Rationale for Each Allegation
- Sanctions and Remedies
- Appeal Procedures

Ensure Title IX Coordinator receives a copy of decision and any other documents involved in process for required 7-year retention

- Decision must be provided to parties simultaneously
- Determination is not final until:
  - Date of written determination following appeal; or, if no appeal is taken
  - Date the appeal deadline expires

## **TOPIC #2: Sanctions and Remedies**

### **Sanctions**

- Range of possible sanctions must be described in policy
- Focus not just on discipline, but also on restorative remedies to prevent recurrence
- Don't forget about other legal obligations

### **Sanctions - Examples**

- Written Warning
- Suspension
- Expulsion
- Demotion
- Termination

### **Other Legal Obligations**

- Student Conduct Policies
- Suspension/Expulsion beyond 10 days
- IDEA/504 Students
- Employee Due Process Procedures

## Remedies

- Title IX Coordinator responsible for implementing remedies
- May be the same or similar to interim supportive measures
- Must be designed to restore or preserve equal access to the District's education programs or activities
- Need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent
- Range of possible remedies must be included in policy
- Evaluated by DOE under a "deliberate indifference" standard
- Examples:
  - Counseling modifications
  - Accommodations to class schedules or school work
  - Restrictions on contact between the parties
  - Increased monitoring

## TOPIC #3: Appeal Process

### Appeal Procedures

- District must notify the other party in writing when appeal is filed
- Give both parties a reasonable, equal opportunity to submit a written statement
- Issue a written decision describing result of the appeal and rationale
- Provide written decision simultaneously to both parties

### Appeal Decision Maker

- Must not be Title IX Coordinator, Investigator, or Initial Decision Maker
- Can be individual or multi-member panel
- Not the full School Board
- Avoid conflict of interest and bias

### Mandatory Appeals

- Procedural irregularity that affected the outcome of the matter
- New evidence not reasonably available at the time of the determination regarding responsibility or dismissal was made
  - Evidence could affect outcome
- Title IX Coordinator, Investigator, or Decision Maker had conflict of interest or bias for or against either party that affected the outcome

### Permissive Appeals

- May offer an appeal on any other basis, as long as the opportunity is offered to both parties equally
- Examples:
  - Whether the evidence met the identified standard of proof
  - Whether the sanction is proportional to the policy violation

## TOPIC #4: Impartiality, Bias, and Conflicts of Interest

### Impartiality

- Divorce yourself from stereotypes or generalizations about groups of people- e.g., “victim-blaming” or “believe all women”
- DOE: The Decision-Maker must endeavor not to “develop a personal relationship” with one party over another, including based on whether parties are remote for live hearing

### Implicit/Unconscious Bias

- Undergo training or obtain resources on implicit or unconscious bias;
- Recognizing and acknowledging biases
  - Potential protected class bias
  - Group bias and assumptions – athletes, certain employment positions, etc.
- Gather input from diverse sources and viewpoints, to the extent possible
- Avoid focusing on early “gut reactions” and weigh all possible outcomes

### Conflicts of Interest

- May have to recuse yourself from certain cases if a conflict of interest exists
- Disclose and recognize conflicts of interest:
  - Familiarity or connection to a party?
  - Stake in the outcome?

### Confidentiality

- Must keep confidential the identity of any individual who has made a report or complaint, any respondent, and any witness confidential except as
  - May be permitted under FERPA;
  - as required by law, or
  - to carry out the investigation and hearing procedures
- *Keep identities and information confidential to the hearing and resolution process – only talk to school officials with a “need to know”*