

# **Title IX Coordinator Training Online Course**

## **Class Three: The Grievance Process – Hearings & Appeals**

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PLEASE NOTE: Training Course Only. Does Not Constitute Legal Advice.

# Class Overview



- Due Process / Fundamental Fairness
- Credibility Determinations
- Advisors
- The Written Determination
- Appeals

# **Due Process (Fundamental Fairness)**

# The Process That Is Due

## A Fair Process:

- that follows the law,
- is implemented without bias, stereotypes or pre-judgment, and
- provides an equal opportunity for parties to be heard and present evidence,
- allows the decision-maker(s) to reach a determination consistent with the standard of evidence.

# Title IX Sexual Harassment Grievance Process: Elements of “Due Process”



- Notice to the Respondent of the allegations
  - Opportunity to respond
  - Adequate opportunity to prepare before responding
- Notice to the Parties of the process that will be used, including appeals
- Opportunity to present evidence and witnesses
- Cross-examination, including questioning of witnesses
- Live hearing (in separate spaces upon request and as appropriate)
- Opportunity to have advisors of choice



# **Relevance & Credibility Determinations**



# In Hearings:

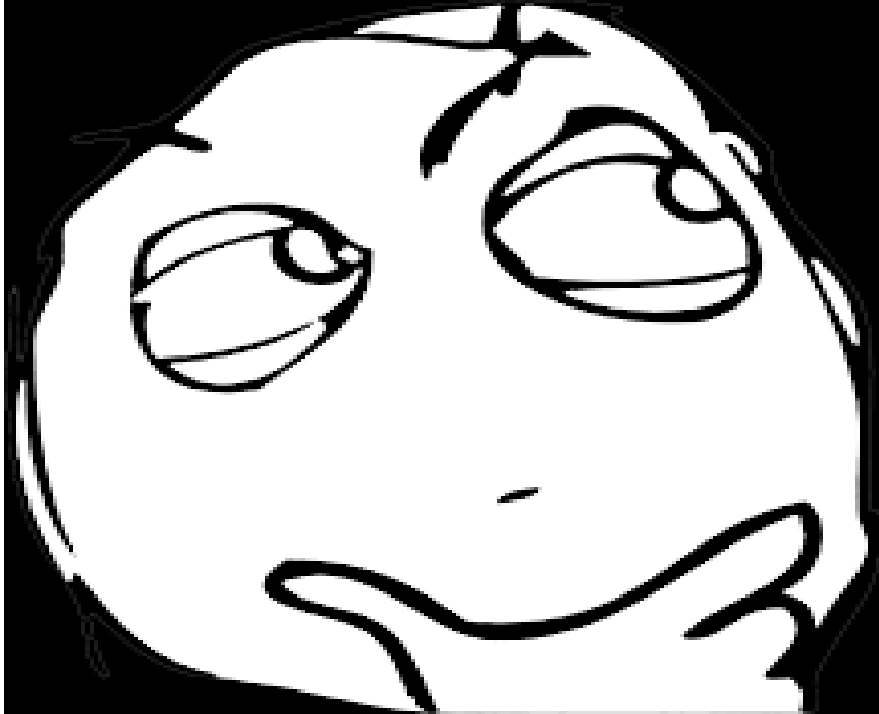
- Decision-maker must evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility – and must do so “objectively”
- The decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.
- Make It Easy: “Not probative of any material fact.”



## Weight, Credibility, or Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of evidence.
- A school can adopt rules around weighing of evidence so long as they do not conflict with the regulations and they apply equally to both parties.
  - For example: A school may adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.

# Credibility Considerations



- What evidence is most believable?
- Corroborating evidence
  - Other testimony
  - Physical evidence
- Consider faulty memories
- Explore reasons for inconsistencies
- There are no “perfect” witnesses, complainants or respondents

# Factors to Weigh

- Consider each material fact separately.
- Credibility as to the facts:
  - Credibility on one fact doesn't make all of that person's testimony credible, and
  - Lack of credibility on one point doesn't make all of that person's testimony non-credible.
- Does the testimony feel rehearsed or memorized?
- Is the testimony exactly the same as another witness?
- Does the testimony make sense?
- Is the testimony detailed, specific & convincing? If not, is there a reason?
- Is it a statement against interest?
- Less credible witness isn't necessarily being dishonest.

# Caution



- Eyewitness accounts
- Bias/Assumptions about witness credibility that may not take account of cultural norms or may stereotype.
- Assumptions about memory that may not reflect witness experiences.
- Failure of decision-maker to explain credibility determinations.

# **The Decision- Maker (Hearing Officer)**

# Getting Ready

- Self-identify any conflict of interest or bias.
- Prepare, prepare, prepare.
- Read the report carefully and repeatedly, but don't prejudge.
- Understand the conduct at issue and the elements of the alleged violations.
- Identify areas of agreement and disagreement.
- Determine if there are areas that require further inquiry, e.g., did the investigator explore & consider all the relevant evidence?

# Hearing Decorum

- Points to Consider:** May have rules that:
- Require advisors be respectful and prohibit abusive/intimidating questioning.
    - Deem repetition of the same question irrelevant.
    - Allow for removal of advisors.
  - Specify any objection process.
  - Govern the timing and length of breaks to confer, and prohibit disruption.
  - Require that *parties* make any openings and closings.
  - Who will enforce the rules of decorum?
    - How will you train decision-makers?

# **Advisors**



# Advisors



- Parties must have the opportunity to have an advisor present during any grievance proceeding (hearing or related meeting).
- A party may choose not to have an advisor.
  - However, the institution must provide an advisor to question and cross-examine witnesses if the party isn't accompanied by one.
  - Institutions may require parties to provide advance notice of their advisor's attendance.
    - What if they are a no-show?
- Advisor provided by institution need not be an attorney.
  - Need not be of "equal competency."
- May establish guidelines for advisors.
  - Role of advisors in hearings and meetings.
  - Use of non-disclosure Agreements.

# More on the Advisor's Role



- Provide support and advice to the party.
- Understand the allegations and the process.
- Understand the purpose and scope of questioning and cross-examination.
- Ask questions that elicit relevant information.
- Wait for relevancy determinations after asking a question.
- Adhere to rules of decorum and encourage the party to do the same.
- NOTE: Institutions may remove disruptive advisors ... *carefully*.

# **Working with the Parties' Attorneys**

# Advisor or Legal Representative

- Clarify procedures and role in advance.
- Distinguish between advisor and legal representative.
- Emphasize the “ground rules” - provide any rules of decorum.
- Establish lines of communication and points of contact.



# **Written Determination**

# Written Determination

- Identification of allegations potentially constituting sexual harassment
- Description of the procedural steps
- Findings of fact supporting the determination
- Conclusions regarding the application of the code of conduct/policy to the facts
- Statement of and rationale for the result as to each allegation, including sanctions and whether remedies will be provided
- Appeal procedures and grounds

# **Appeals**

# Appeals

Must provide an appeal from a determination of responsibility and dismissal of a formal complaint, based on:

- Procedural irregularities that affected the outcome.
- New evidence not reasonably available at the time of determination that could affect the outcome.
- Bias or conflict of interest of the Title IX Coordinator, investigator or decision-maker that affected the outcome.
- Inappropriate or impermissible dismissal of any formal complaint or allegation.
- May include other grounds, equally available to both parties.



# Appeal Process



- Notify other party upon receipt of appeal.
- Appeal decision-maker can't be Title IX Coordinator, investigator or hearing decision-maker.
- Opportunity for both parties to submit written statement.
- Written decision with the result and rationale simultaneously to both parties.

# **NPRM:**

**REMEMBER: NOT IN PLAY NOW**



# Proposed Changes



- Notice of allegations may be delayed in response to legitimate safety concerns
- Live hearing permitted, not required, for hearings involving students
  - In a live hearing, parties must be permitted to participate from separate locations
  - Must provide both parties a reasonable opportunity to review and respond to evidence before the live hearing. It may provide the same opportunity during the live hearing
  - In live hearings, allow each party's advisor, never the party, to ask all relevant and otherwise permissible questions
- Provide a process that allows decision-maker to assess the credibility of the parties and witnesses to the extent credibility is relevant and in dispute
  - Decision-maker may not rely on statements of a party if the party does not respond to questions related to the party's credibility, but also may not draw an inference about whether sex-based harassment occurred based on that refusal
- Relevance is defined (!!!)
- Take reasonable steps to address unauthorized disclosure of evidence and information
- Decision-maker must determine if each question is permissible prior to the question being posed and explain the decision to exclude any question
- Use a preponderance of the evidence as the standard of proof unless the school uses a clear and convincing standard of proof for in comparable proceedings, e.g. considering other complaints of prohibited discrimination.
- No imposition of sanctions for false statements based solely on whether sexual harassment occurred
- Requirement to describe range of supportive measures and potential disciplinary sanctions applies only in response to sex-based harassment
- Title IX Coordinator is responsible for implementing remedies on a finding that sex discrimination occurred

**Questions?**

# Note

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