

DECISION-MAKERS AND APPEALS

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ASSIGN A DECISION-MAKER

- Someone other than Title IX Coordinator, Investigator, or Facilitator of Voluntary Resolution
- Central administrators
- Must have training - train more than one
- Must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

IMPARTIALITY

- Unbiased, disinterested
- No conflict of interest: a real or seeming incompatibility between one's private interests and one's public duties

STANDARDS FOR RECUSAL OF JUDGES

1. Personal bias or prejudice concerning a party
2. Personal knowledge of disputed evidentiary facts
3. Material witness in the matter in controversy
4. Spouse or minor child residing in household has a financial interest in the subject matter in controversy or in a party
5. Any other interest that could substantially affect the outcome of the proceeding
6. Relative is a party

STANDARDS FOR RECUSAL OF JUDGES

Recusal is required when, objectively speaking, the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.

Rippo v. Baker, 137 S.Ct. 905 (2017).

DETERMINATION OF RESPONSIBILITY

34 C.F.R. 106.45(b)(7)

DECISION = DETERMINATION OF RESPONSIBILITY

- Decision-maker makes determination of responsibility on a formal complaint
- Must provide the written determination to the parties simultaneously
- Title IX Coordinator is responsible for effective implementation of any remedies

DECISION BASED ON WHAT?

Investigator will provide decision-maker with an investigative report that "fairly summarizes relevant evidence"

- Assume this will occur when the parties receive the report
- Which must be at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided, which we don't recommend) or other time of determination regarding responsibility
- The parties have the opportunity to provide a written response to the report, which the decision-maker will also review.

HEARING V. QUESTIONS

Opportunity for Parties to Submit Questions

- Live hearing with live cross by party advisors required for higher ed, optional for K-12
- **We recommend NO live hearing.**
- With or without a hearing, after the investigative report has been sent and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.
- Questions about a complainant's prior sexual behavior or sexual predisposition only possible to establish that another person committed the alleged conduct or that the conduct was consensual.

THE QUESTIONS

- Who asks the questions of the parties?
- If the decision-maker refuses to ask a question because it is improper or not relevant, he/she must provide written rationale to the party proposing the question why the question is being excluded.

THE QUESTIONS

- The decision-maker may not draw any inference from a party's or witness's refusal to answer the questions.
- Where a party or witness refuses to answer the questions, the decision-maker must disregard statements of that party or witness but must reach a determination without drawing any inferences regarding responsibility based on the party or witness's refusal to answer.

THE QUESTIONS

For example, where a Complainant refuses to answer the questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence in making a determination.

**IT'S IMPORTANT NOT TO
PRE-JUDGE THE FACTS UNTIL YOU
HAVE SEEN ALL THE EVIDENCE!**

STANDARDS OF EVIDENCE

- The degree or level of proof demanded in a specific case.
- District choice: preponderance of evidence, clear and convincing evidence

STANDARDS OF EVIDENCE

The burden of proof and the burden of gathering evidence sufficient to reach a determination of responsibility rests on the District and not on the parties.

PREPONDERANCE OF EVIDENCE

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

CLEAR AND CONVINCING EVIDENCE

Evidence indicating that the thing to be proved is highly probably or reasonably certain.

This is a greater burden than preponderance of evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.

EVIDENCE: INCULPATORY & EXCULPATORY

Inculpatory evidence: showing or tending to show one's involvement in a crime or wrong

Exculpatory evidence: tending to establish a person's innocence

EVIDENCE: DIRECT & CIRCUMSTANTIAL

Direct evidence: Evidence that, if believed, proves the fact without inference or presumption.

Circumstantial evidence: Circumstantial evidence, on the other hand, refers to evidence that requires an inference to be made.

Circumstantial evidence and direct evidence can be equally probative, and responsibility can be established by circumstantial evidence alone.

EVIDENCE: CREDIBILITY

The investigator should provide information about the credibility of the parties and witnesses.

EVIDENCE: HEARSAY

An out-of-court statement offered for the truth of the matter asserted

There are multiple exceptions, e.g., statement of then-existing state of mind.

This isn't a court, and the Rules of Evidence don't apply.

But remember, hearsay may be less probative than a non-hearsay statement made directly to the investigator.

EXPERT WITNESSES

A person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact finder.

E.g., medical doctor, psychologist, law enforcement officer/investigator

PRIVILEGED INFORMATION

Cannot be used unless the party agrees to waive the privilege

ELEMENTS OF DECISION

The decision-maker must issue a written determination simultaneously to the parties addressing:

- Allegations
- Procedural steps taken
- Findings of fact
- Application of code of conduct to facts

ELEMENTS OF DECISION

The decision-maker must issue a written determination addressing:

- Statement of and rationale for result **as to each allegation** including:
 - Determination of responsibility
 - Any disciplinary sanctions
 - *Whether* remedies to restore or preserve equal access to the educational program or activity will be provided
- Procedures and permissible bases for either party to appeal.

FERPA – SANCTIONS AND REMEDIES

The result at the end of a grievance process under § 106.45, including any sanctions and whether remedies will be provided to a Complainant, impact both parties and can (and should) be part of the written determination simultaneously sent to both parties. The Complainant should know what sanctions the Respondent receives because knowledge of the sanctions may impact the Complainant's equal access to the school district's education program and activity.

FERPA – REMEDIES TO COMPLAINANT

The final decision must state *whether* remedies will be provided to the Complainant but not what remedies will be provided. Thus, the decision may note in the written determination only that a Complainant will receive remedies but should not note in the written determination that the district, for example, will change the Complainant's housing arrangements as part of a remedy. A Respondent should know whether the district will provide remedies to the Complainant because the Respondent should be aware that the Respondent's actions denied the Complainant equal access to the district's education program or activity. Similarly, the parties should both know the rationale for the result as to each allegation, including a determination regarding responsibility because due process principles require the district to provide a basis for its determination.

POSSIBLE REMEDIES

- Remedies are required after a Respondent has been determined responsible under the grievance process
- No list of appropriate remedies in regulations
- Left to discretion of educators
- Designed to restore or preserve the right to equal access to education
- Remedies need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent

§ 106.45(b)(1)(i)

POSSIBLE REMEDIES

- Remedies may include the same individualized services described as "supportive measures."
- **Supportive measures:** counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus and other similar measures
- **Other possibilities:** tutoring for student, removal of student from class/team/campus, policy/procedure changes, staff or student training

§ 106.45(b)(1)(i)

APPEALS

34 C.F.R. 106.45(b)(8)

APPEALS - MUST OFFER BOTH PARTIES AN APPEAL FROM A DETERMINATION REGARDING RESPONSIBILITY, AND FROM A DISTRICT'S DISMISSAL OF A FORMAL COMPLAINT OR ANY ALLEGATIONS THEREIN ON THE FOLLOWING BASES:

- Procedural irregularity that affected the outcome of the matter;
- 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
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.

APPEALS

- May offer for other reasons equally to both
- Must have a different decision-maker, but still cannot be investigator or Title IX Coordinator, and same rules about bias apply
- Must give other party reasonable, equal opportunity to submit written statement
- Appellate decision-maker must issue decision in writing and provide simultaneously to both parties

APPEALS

The District should establish a deadline for filing an appeal and may require appeals be filed on a form provided by the District.

OCR REVIEWS

The Department assures schools that when enforcing these new regulations, it will refrain from second-guessing a school district's determination regarding responsibility based solely on whether the Department would have weighed the evidence differently.

A WORD ABOUT DISMISSALS

- A recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing:
 - a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - the respondent is no longer enrolled or employed by the recipient; or
 - specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.
- So, a decision-maker could recommend dismissal if one of these circumstances is met.

QUESTIONS?

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