2020 Title IX Regulations: Decisionmaker Training

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Housekeeping

- **Presentation Materials:** All slides will be emailed to registrants after training in a format you can post.

- **Technical Issues:** If you experience technical issues, please let us know in the chat.

- **Toolkit:** If you are interested in purchasing the toolkit, please reach out to communications@f3law.com following the session. All toolkits will be delivered electronically in 2 weeks.
Decisionmaker Responsibilities

- Review evidence collected during the investigation
- Conduct cross examination
- Make relevancy determinations
- Make independent judgment on responsibility and sanctions
Appeal Decisionmaker Responsibilities

- Review investigative report and responses
- Grant the parties an opportunity to respond
- Review party responses
- Make independent judgment on appeal questions
Decision-Making Process

Complaint
Material Under Consideration

- Formal complaint
- All relevant evidence gathered during the investigation
- Investigative report
- Written responses submitted by parties
- Questions and responses
Examination Process

- Questions
- Relevancy Ruling
- Forward Answers
- Receive Answers
- Forward Questions

Issues of Relevance and Evidence
Issues of Relevance

- Must objectively evaluate all evidence and make determinations on relevancy
- Includes inculpatory and exculpatory evidence
  - Inculpatory: tends to prove policy violation
  - Exculpatory: tends to exonerate the accused
Rulings on Relevance

- Provide reasoning for irrelevance
- Admit and consider all relevant evidence

Exceptions
- Sexual behavior (except in limited situations)
- Legal privilege
- Treatment records
Rape Shield Law

- Exclude questions related to Complainant’s sexual behavior or predisposition
- Two narrow exceptions
- Does not apply to Respondent
Rape Shield Law - Exceptions

- Used to prove that someone other than the respondent committed the conduct; or
- Concerns specific incidents of the complainant’s sexual behavior with respect to respondent and is offered to prove consent.
Treatment Records

- Do not allow questions that would lead to access, considering, disclosing, or using information from medical records made by a physician, psychologist, or other recognized professional made and maintained in connection with the provision of treatment

- Unless the party gives voluntary, written consent
Legally Privileged Information

- Do not allow questions that seek disclosure of legally privileged information, unless waived
- Consider:
  - Attorney-client communication
  - Privilege against self-incrimination
  - Confessions to a clergy member or religious figure
  - Spousal privilege
  - Confidentiality and trade secrets
POLLING

“You typically have sex after drinking at parties, don’t you?”

☐ Yes
☐ No
"You typically have sex with the Respondent after drinking at parties, correct?"

☐ Yes
☐ No
“On what date did you begin receiving treatment for depression?”

☐ Yes
☐ No
POLLING

“You told a friend that the only reason you made a complaint was because your mom made you do so, correct? What did you say?”

☐ Yes
☐ No
POLLING

“You told your attorney that the only reason you made a complaint was because your mom told you to do so, correct? What did you say?”

☐ Yes
☐ No
POLLING

“You were so drunk that you do not know who sexually assaulted you, correct?”

☐ Yes
☐ No
POLLING

“You and the Respondent had sex again the week after the alleged incident, correct?”

☐ Yes
☐ No
Written Determination Regarding Responsibility
Making a Determination

- Remain unbiased and impartial
- Render a reasoned decision based on evidence
- Base decisions on relevant evidence alone
- Evaluate witness credibility
- Consider weight of evidence (remember standard: preponderance of the evidence)
Notice - Determination

Determination

Written Determination
# Written Determination

<table>
<thead>
<tr>
<th>Identify</th>
<th>Identify the allegations</th>
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</thead>
<tbody>
<tr>
<td>Describe</td>
<td>Describe procedural steps taken</td>
</tr>
<tr>
<td>Cite</td>
<td>Cite potential policy violations</td>
</tr>
<tr>
<td>Summarize</td>
<td>Fairly summarize all relevant evidence</td>
</tr>
<tr>
<td>Provide</td>
<td>Provide statement of result, with rationale, for each allegation</td>
</tr>
<tr>
<td>Appeal</td>
<td>Appeal procedures</td>
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Factual Findings

- Separate findings for each allegation
- Demonstrate reasoning and evidentiary support for conclusion on each fact in dispute
Factual Findings

Consider both supporting/corroborating and conflicting/inconsistent information for each disputed fact

Make credibility determinations by considering corroborating evidence, inconsistencies, logic of explanation/narrative, impact of trauma

Use words of parties/witnesses

Be detailed and precise
Opportunity to Review

Document opportunities given to parties to provide information, review evidence, and provide rebuttal.

Explain if anything offered/mentioned was not considered/obtained and why.
Cameron’s Report

- Lacrosse orientation week
- Park across street from the school
- Two junior lacrosse players (Parker and Morgan) vs. Cameron
Cameron’s Report

- Verbal harassment
  - Going to violate your mother
  - Want to “smoke” (understood to mean sexual assault), will give starting position on team if do

- Grabbed Cameron by the neck and bent Cameron over; poked Cameron’s anus over the clothes
Cameron’s Report

- Coaches saw the incident
  - Laughed at first
  - Noticed Cameron looked shaken
  - Sternly reprimanded junior students in front of Cameron
  - Told Cameron if it happened again to report it

- Nonetheless, physical incidents kept occurring
Cameron’s Report

- One (same) coach observed later incident; shook her head and walked away

- Last day of orientation
  - Hazing ritual
  - Multiple upperclassmen grabbed Cameron and two other rookies
  - Pulled down pants, poked anus with broomstick
Relevant Evidence

- Cameron (CP) and Robin both report that the incident occurred as reported
- Parker and Morgan (RPs) deny that they engaged in the alleged conduct
- Other classmates, Ali and Jamison report that they did not see anything happen, but they were not close by
- Other classmate, Devon, reports not seeing anything, and says was close by
Relevant Evidence

- Coaches acknowledge that on first day, saw conduct, reprimanded; deny laughing
- Text messages from Coach Smith to Coach Brown on day of first incident said “These kids are crazy! I can’t believe they’re at it again!” Coaches said talking about something unrelated.
Consider

What is your finding?
Credibility

- Cameron recently lost a chess tournament against Parker
- Devon grew up on same street as Morgan and Parker
- Coaches did not have a good explanation for the text
Consider

Would your initial finding change?
Decision-Making Process

The Appeal
Appeal Process

- Available to both parties
- Three bases for appeal
- Notify party of appeal in writing
- Apply procedures equally for both parties
- Opportunity to submit written statement
- Issue written decision to both parties
Appeal Process

- Procedural issue affecting the outcome
- New evidence that wasn’t reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome
- TIXC, investigator, or decisionmaker had 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
Procedural Issue

- Failure to follow the rules in policy/procedure
- Can be intentional or inadvertent
- Resulted in inappropriate decision; not always the case
POLLING

Title IX Coordinator failed to meet with the Complainant to offer supportive measures

☐ Affected the outcome
☐ Did not affect the outcome
POLLING

Investigator fails to provide both parties all directly related evidence before issuing the report

☐ Impacts the outcome
☐ Does not impact the outcome
New Information

- New Information
- Not known at the time
- Would change the opinion of the decisionmaker if known at the time
- Not a review of information known at the time
POLLING

Respondent was not aware at the time of the investigation that the Complainant previously made a false report about another student the year before

- New evidence
- Now new evidence
Bias/Conflict of Interest

- Bias toward one party or one type of party – personal or institutional
- Conflict of interest – personal or institutional
- Prejudgment of facts (avoid by “showing your work”)
What Is Bias?

Bias is an inclination or preference for or against something.

"We need more people like you in our organization!"
Implicit Bias

- Attitudes or stereotypes that affect our understanding, actions, and decisions in an *unconscious* manner.
  - Do not necessarily align with our beliefs
  - Activated involuntarily and automatically through rapid association
Types of Implicit Bias

- Confirmation bias
- Affinity bias
- Actor-observer bias
- Ingroup bias
- Consistency bias
- Projection bias

Improved Decision-Making

- Slow down, be more deliberative instead of intuitive
- Remove discretion and ambiguity
- Check thought process and decisions for bias
  - Take notes
  - Articulate reasoning
Recordkeeping/File Maintenance
Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist
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