

# Title IX Training Series Part 3: Hearings and Determination of Responsibility

San Jose-Evergreen Community College District | November 11, 2021

Presented By: Eileen O'Hare-Anderson & Monica M. Espejo

 LIEBERT CASSIDY WHITMORE

## Title IX Training Series Part 3: Hearings and Determination of Responsibility

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Eileen O'Hare-Anderson & Monica M. Espejo / November 11, 2021

### Institutions Can Rely on Statements Not Subject to Cross-Examination

- August 24, 2021, OCR issued new guidance: will no longer enforce part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits decision-makers from considering statements not subject to cross-examination
- Follows July 28, 2021 U.S. District Court for the District of Massachusetts' decision holding provision to be arbitrary and capricious
  - Court issued a second order clarifying that it had vacated and remanded the provision and that its ruling applied nationwide

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## Institutions Can Rely on Statements Not Subject to Cross-Examination

CCD decision-makers can now consider statements even if the parties or witnesses do not submit to cross-examination at the live hearing, including:

- Statements made by the parties and witnesses during the investigation
- Emails or text messages between the parties
- Statements in Sexual Assault Nurse Examiner (SANE) reports, police reports, medical reports and other documents

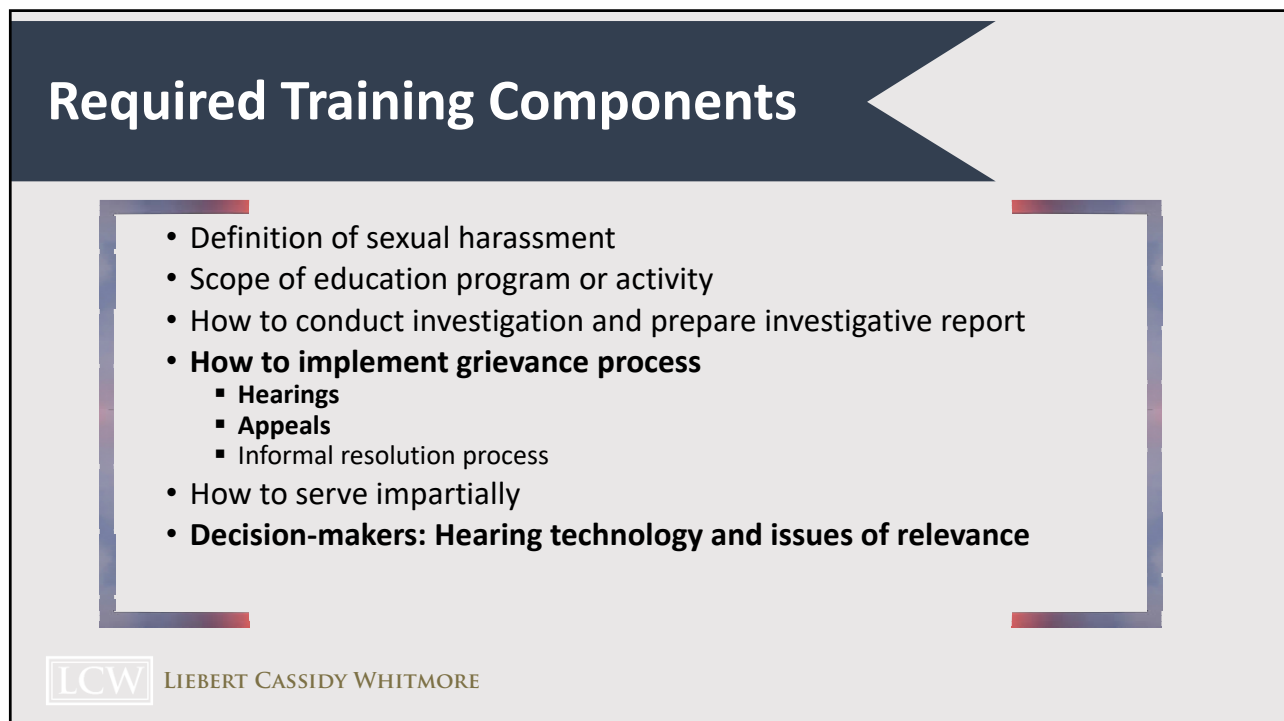
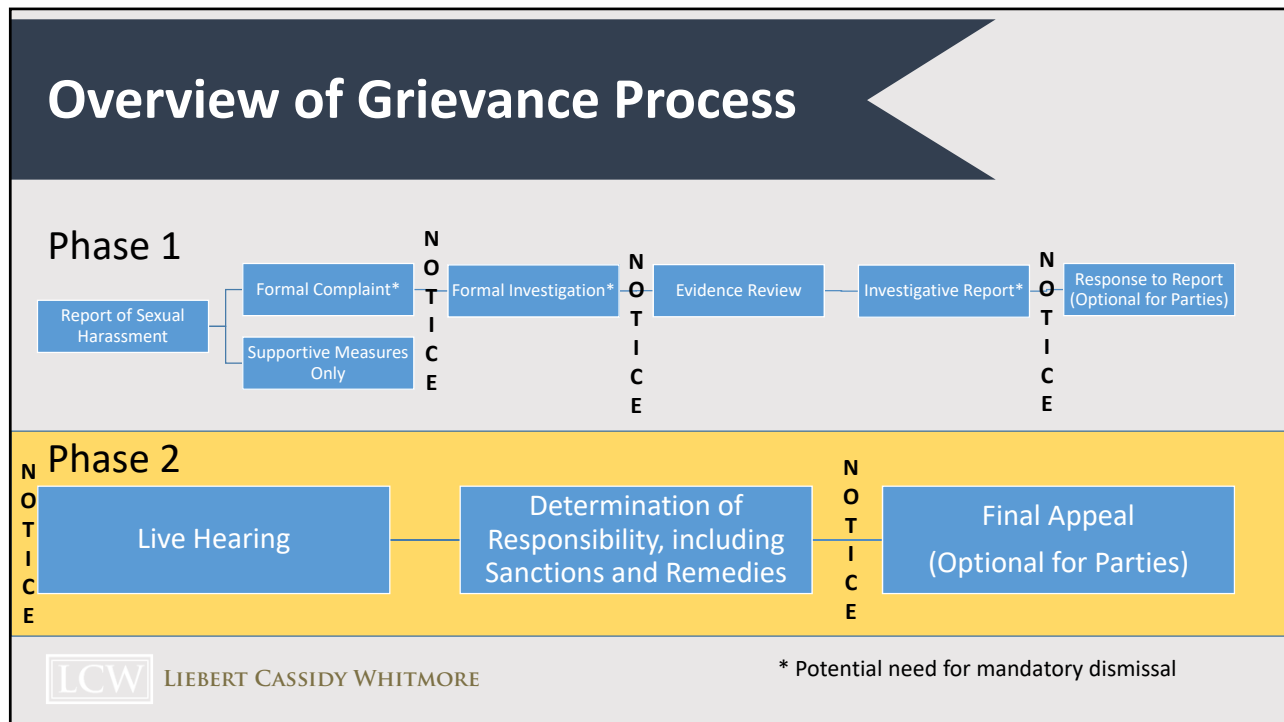
## Agenda

- Hearing
  - Notice
  - Format and Procedures
  - Considering Evidence
  - Preparation
  - Testimony and Questioning
- Determination Regarding Responsibility
  - Findings and Conclusions
  - Sanctions (Discipline) and Remedial Measures
- Appeals

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## The Grievance Process – The Hearing



### Hearing

- Opportunity for Parties to appear before a decision-maker to respond to the evidence gathered during the investigation
- Neither Party may unilaterally waive the right to a live hearing
  - Can choose whether to participate in the hearing and whether to answer cross-examination questions
  - Parties (except employee-student) can participate in informal resolution
- Must presume Respondent is not responsible for alleged conduct



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## Case Study -No, Yes, Maybe

The decision-maker is aware that the investigator is very experienced and highly respected. The investigator made recommended findings in her report. Can the decision-maker give the investigator and the findings deference in reaching a decision?



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## Notice of Hearing

- Must provide Parties written notice of date, time, location, participants, and purpose of hearing
  - With sufficient time for Party to prepare



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## Case Study – Right to Hearing No, Yes, Maybe

After the District provided the Parties notice of the hearing, the employee Respondent contacted the Decision-Maker and stated he accepts responsibility and wants to bypass the hearing in order to expedite the disciplinary decision. Because the Respondent admitted responsibility, can the Decision-Maker issue the determination regarding responsibility without the hearing?



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## Advisor

- Only the advisor can conduct cross examine, directly, orally and in real time
- Must assign an advisor even if the party is absent at the hearing



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## Role of Decision-Maker

- Conduct hearing
  - May ask Parties and witnesses questions
- Must objectively evaluate all relevant evidence
  - Including inculpatory and exculpatory evidence
  - No credibility determinations based on status as Complainant, Respondent, or witness
- Must independently reach a determination regarding responsibility
  - Without giving deference to the investigative report

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## Responsibilities of Decision-Maker

- Must ensure hearing process is impartial, objective, unbiased, neutral, and independent
- Cannot have conflict of interest or bias
  - Must be independent from Title IX Coordinator and Investigator
  - No conflicts of interest with any Party or Advisor
- Can be one person or panel, internal or external

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## Case Study – Yes, No, Maybe

The Title IX Coordinator attends the hearing to serve as a hearing facilitator. She will assist in bringing witnesses into the room, running the hearing technology, and enforcing decorum rules. Is this a violation of the Title IX regulations?

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## Case Study – Yes, No, Maybe

The District policies provide for a panel of decisions-makers to reach a determination of responsibility. During the hearing, a panel member turns to the Title IX Coordinator, who is facilitating the hearing, to ask the Title IX Coordinator for her opinion of the relevance of a document. Is this a problem?

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## Case Study – Responsibilities of Decision-Maker

If a Decision-Maker has questions about the grievance process and needs clarification about an issue raised by a Party during the Evidence Review, the Decision-Maker can consult all of the following resources, EXCEPT:

- A. Board Policies and Administrative Procedures
- B. Training Materials
- C. Title IX Coordinator
- D. Investigative Report
- E. Panel attorney

## Format of Hearing

- Live hearing with all Parties physically present in the same geographic location or virtual live hearing
  - Must be able to see and hear each other in real time
- Must create audio or audiovisual recording, or transcript, of any live hearing
  - Must make it available to Parties for inspection and review

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## Hearing Procedure

- May adopt rules of procedure, such as:
  - Whether Parties may offer opening or closing statements
  - Process for making relevance objections to questions and evidence
  - Whether Party/Advisor may discuss relevance determination with Decision-Maker during hearing
  - Reasonable time limitations on a hearing

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## Sample Hearing Procedures

1. Introduction and Overview of Hearing Procedure
2. Opening Statements
3. Testimony and Questioning
  - a. Direct questioning by Decision-Maker
  - b. Direct examination
  - c. Cross examination
4. Closing Statements

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## Hearing Decorum

- May adopt rules of order or decorum, for example:
  - Only participants to the hearing may speak, and then only when recognized by the Decision-Maker.
  - All individuals must address remarks, arguments, or objections to the Decision-Maker, and not to the opposing Advisor or the opposing Party.
  - Individuals are to avoid making disparaging or acrimonious personal remarks toward any other participant at the hearing.
  - When a question is pending, Advisors will not, through objections or otherwise, coach the person testifying, or suggest answers.

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## Hearing Decorum

- May adopt rules of order or decorum, for example:
  - Individuals must refer to all persons, including witnesses, other Advisors, and the Parties by their surnames and not by their first or given names unless directed otherwise by the Decision-Maker.
  - Advisors and parties shall be punctual and shall timely notify the Decision-Maker when they or their witnesses will be late.

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## Evidence at Hearing

- The District must make the information reviewed during Evidence Review available at hearing
- Only relevant evidence is admissible
  - Evidence that tends to prove or disprove any disputed fact material to the allegations
  - Includes evidence relevant to credibility of Party or witness

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## Relevance

- Not defined in regulations
- Evidence having any tendency in reason to prove or disprove any allegation at issue (Cal. Evid. Code CFR § 210)
- Can rely on logic, common sense, experience or science
- Includes both inculpatory and exculpatory evidence

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## Relevance Considerations

- Does the evidence:
  - Indicate bias on the part of a witness
  - Corroborate an allegation
  - Provide evidence that might exonerate accused
  - Provide motive or opportunity
  - Provide witness leads
- Direct v. Circumstantial Evidence

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## Evidence at Hearing

- Cannot exclude relevant evidence because the evidence may be unduly prejudicial, concern prior or subsequent bad acts, or constitute character evidence
  - Instead: objectively evaluate relevant evidence by analyzing whether evidence warrants a high or low level of weight or credibility

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## Evidence at Hearing

Prior or subsequent bad acts may establish:

- motive
- opportunity
- intent, preparation
- plan
- knowledge
- Identity
- lack of mistake
- pattern



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## Evidence at Hearing – Privileged Information

- Cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally-recognized privilege
  - Unless person holding privilege provides voluntary, written consent to waive the privilege



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## Evidence at Hearing – Privileged Information

### California privileges:

- Attorney-Client Privilege
- Privilege Not to Testify Against Spouse
- Privilege for Confidential Marital Communications
- Physician-Patient Privilege
- Psychotherapist-Patient Privilege
- Clergy Penitent Privileges
- Sexual Assault Counselor-Victim Privilege
- Domestic Violence Counselor-Victim Privilege
- Human Trafficking Caseworker-Victim Privilege



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## Case Study

In the hallway on the way to the hearing, the respondent admits to his wife that he sexually assaulted the complainant. Several people are in the hallway, including the Complainant's advisor, and hear the comments. The Complainant's advisor asks the Respondent about the comments to his wife during cross examination.



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## Case Study Con't True, False, or Maybe

The comments the Respondent made to his wife in the hall are not admissible because they are privileged confidential marital communications?

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## Witnesses

- Must provide Parties equal opportunity to present witnesses
  - Includes fact and expert witnesses
  - Includes inculpatory and exculpatory evidence
- Witnesses not required to participate in hearing

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## Role of Advisor at Hearing

- Can be anyone
  - Not required to be attorney
  - If Party chooses Advisor who is also witness, Decision-Maker must assess how that impacts his/her/their credibility as witness
- May represent Party during entire hearing
  - May conduct direct examination
  - Required to conduct cross examination
    - If party doesn't have Advisor or Advisor fails to appear, district must provide

34 CFR 106.45(b)(6)(i)

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## Case Study – Problems with Advisor

The District sent the required notice of the hearing to the Parties and their Advisors. The Complainant's advisor is an attorney he hired independently. On the day of the scheduled hearing, the Complainant's Attorney Advisor failed to appear. Neither the Complainant nor the Decision-Maker can get in contact with the Advisor. What should the Decision-Maker do?

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## Case Study – Problems with Advisor

The Decision-Maker should:

- A. Postpone the hearing
- B. Appoint a new Advisor so the hearing can proceed as scheduled
- C. Allow the Party to represent himself
- D. A or B
- E. None of the above

## Decision-Maker Hearing Preparation

1. Review
  - Notice of allegations
  - Title IX Policy and Procedure
  - Investigative materials (report and attached documents and other evidence)
2. Prepare list of information needed
  - What do you need to know? Why?
  - What question gets you this information?
  - Which witness has this information?

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## Decision-Maker Hearing Preparation

- Consider pre-hearing meeting with Parties and their Advisors
  - Clarify purpose and logistics of hearing
  - Establish allegations and evidence that will be considered
  - Review rights and responsibilities of Parties & Advisors
  - Confirm attendance and whether accommodations are needed
- No Ex Parte Communications: Decision-Makers should not meet or communicate with parties separately

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## Decision-Maker Hearing Preparation

- Dedicate time for preparation
- Dress professionally
- Arrive early and prepared
- Bring note-taking materials
- Dedicate time to preparing determination regarding responsibility

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## Conducting the Hearing – Cross Examination

- Cannot *require* prior submission of written questions
- Decision-Maker must explain and should document why an answer to question was excluded as irrelevant
- If a Party or witness disagrees on relevance ruling they have a choice to:
  - Abide by Decision-Maker's determination and answer question; or
  - Refuse to answer question deemed relevant

## Rape Shield

- Questions or evidence of Complainant's sexual behavior are irrelevant *unless*
  - offered to prove that someone other than the respondent committed the conduct alleged; or
  - concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. 34 C.F.R. § 106.45(6)(ii)
- If consent not at issue, all questions/evidence about Complainant's sexual behavior are irrelevant

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## Refusal to Participate or Answer

- Decision-Maker cannot draw inference based solely on Party's or witness's absence or refusal to answer question
- Can rely on his/her/their previously provided statement
  - But consider the weight provided to a statement where a witness does not testify
  - If it is a party, is it an admission



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## Case Study

The Respondent will be present at the hearing, but will not testify as he is asserting his right against self incrimination. However,, the Complainant will testify about text messages he sent her saying "sorry" for forcing her to do something she did not want to do, and stating he had been drunk when it happened. Must the Decision-Maker exclude the statements in the text if the Respondent is not subject to cross examination?



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## Decision-Maker Questioning

- Eliminate missing information
- Use open-ended questions
- Don't ask compound questions
- Don't suggest an answer in question
- Listen carefully
- Clarify unclear terms or slang
- Remember, you are a neutral

## decision-maker Questioning – Open Ended Questions

Examples of open ended questions:

- Who else was at the party?

Cross exam by Advisor:

- Isn't it true that Jake Smith was there? And so was Martina Lopez, right?

## decision-maker Questioning: Open Ended Questions

Examples of open ended questions:

- How would you characterize your relationship to them?

Cross Exam by Advisor:

- Isn't it true that they are your best friends?



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## Group Exercise

*A Respondent secretly video taped a sexual encounter he had with Complainant while she was passed out and intoxicated. Complainant was unaware of the taping. Respondent shared the video via text with his friends. Complainant learned of the video and filed a formal complaint. The District conducted a Title IX investigation and held a hearing.*



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## Group Exercise

***You are a decision-maker.***

***Prepare three questions to the complainant about her discovery of the video?***



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## Group Exercise:

How did you learn the video existed?  
When did you learn about it?  
Who showed it to you? When? Where?  
What did you do after you saw it?  
Do you know if other people had copies?  
How do you know that?



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## decision-maker Considering Evidence at Hearing – Relevance

- In a case involving stalking, would you allow or exclude the following offered during the hearing:  
*Testimony from Complainant's classmate, Vishal, that the Complainant once asked him to walk her to her car because she had spotted Respondent in the parking lot and was afraid.*

## Group Practice – Considering Evidence at Hearing

- Would you allow or exclude the following offered during the hearing?  
*Pictures of Complainant's physical injuries after alleged sexual assault. The Respondent, who has a lawyer as an advisor, objects that they are prejudicial.*

## Group Practice – Considering Evidence at Hearing

- Would you allow or exclude the following offered during the hearing?

*Complainant's attendance records showing Complainant was not in class on some of the days she claims Respondent was stalking her.*

## Group Practice – Considering Evidence at Hearing

- Would you allow or exclude the following offered during the hearing?

*Complainant's medical records submitted by Respondent's advisor over Complainant's objection.*

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### Group Practice – Considering Evidence at Hearing

- Would you allow or exclude the following offered during the hearing?

*Complainant's medical records submitted by Respondent's advisor, who happens to be her mother, over Complainant's objection. Complainant is 16 years old.*

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### Group Practice – Considering Evidence at Hearing

- Would you allow or exclude the following offered during the hearing?

*Security footage from College academic building where Complainant had class*

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### Group Practice – Considering Evidence at Hearing

- Respondent is an employee. Would you allow or exclude the following offered during the hearing?

*Respondent's certificate of completion of Title IX and Anti-Harassment Training records from the personnel file stored in the District's HR office.*

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### Group Practice – Considering Evidence at Hearing

- Would you allow or exclude the following offered during the hearing?

*In a case where the Respondent refuses to submit to cross examination, copies of Respondent's social media posts that depict sexual violence submitted by Complainant's advisor.*

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## Group Practice – Considering Evidence at Hearing

- Would you allow or exclude the following offered during the hearing?

*Written witness statements from District students who claim the Complainant is jealous of Respondent and wants Respondent to face consequences for breaking up with him.*

## Group Practice – Considering Evidence at Hearing

- Would you allow or exclude the following offered during the hearing?

*Text messages between Respondent and Complainant suggesting a consensual sexual relationship existed between the Parties.*

## Group Practice – Considering Evidence at Hearing

- Would you allow or exclude the following offered during the hearing?

*Question from Respondent's advisor to Complainant asking whether Complainant has been in a sexual relationship with another District employee since the alleged assault by Respondent.*

## The Grievance Process – The Determination Regarding Responsibility

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## Timing

- Must issue written determination after the hearing within timeline identified by District

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## Standard of Evidence

- Use preponderance of the evidence standard
  - After considering all the evidence, decide whether it is more likely than not that sexual harassment occurred
    - Note: Title IX regulations require “preponderance of the evidence” or “clear and convincing evidence standard” but *California law requires “preponderance of the evidence”*

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## Content of Determination Regarding Responsibility

### To both parties simultaneously:

- Identify allegations;
- Procedural steps;
- Findings of fact;
- Conclusions;
- Statement and rationale for each determination regarding responsibility;
- Statement regarding whether district will provide remedies for Complainant;
- Appeal procedures for Complainants and Respondents.

34 CFR § 106.45 (b)(7)(ii)



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## Reminder: Definition of Sexual Harassment

- Quid pro quo: An *employee* conditioning an aid, benefit, or service on complainant's participation in unwelcome sexual conduct
- Unwelcome conduct so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to education program or activity; or
- Sexual assault, dating violence, domestic violence, or stalking

34 CFR § 106.30



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## Consent

- Affirmative consent standard (Ed. Code § 67386)
  - Affirmative, conscious, and voluntary agreement to engage in sexual activity

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## Evaluating Consent

1. Did the Respondent use force before/during sexual interaction?
2. Was Complainant incapacitated?
  - a. Did Respondent know, or
  - b. Should Respondent have known that Complainant was incapacitated (e.g., by alcohol, other drugs, sleep, etc.)
3. What words or actions indicate consent or lack of consent for the specific sexual activity?

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## Evaluation of Consent

- Consent must be on going
- Consent must be informed, voluntary, and mutual
- Can be withdrawn at any time
- No consent if there is force, coercion, intimidation, threats, or duress
- Silence or absence of resistance does not imply consent



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## Evaluation of Consent

- Consent to one type of sexual activity does not equal consent to other types of activity
- Prior consent or sexual relations do not mean consent for future relations
- Consent cannot be provided by an unconscious, intoxicated or sleeping person who cannot communicate or understand nature or extent of the sexual activity



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## Evaluating Force

- Types of Force
  - Physical violence
  - Threats
  - Intimidation
  - Coercion



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## Evaluating Incapacity

- Individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent
  - Alcohol or drugs
  - Mental/cognitive impairment
  - Injury
  - Asleep or unconscious
- Very fact-dependent



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## Evaluating Incapacity

- Also consider
  - Did Respondent know Complainant previously?
    - Was Complainant acting differently from previous similar situations?
  - Review what the Respondent observed the Complainant consume
  - Whether Respondent provided any alcohol/drugs to Complainant
  - Other relevant behavioral cues



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## Written Determination Regarding Responsibility

- Preamble states: not required to address evaluation of contradictory facts, exculpatory evidence, “all evidence” presented at hearing, or how credibility assessments reached
  - Must evaluate admissible, relevant evidence for weight or credibility
- While preamble says not required do include what is necessary to support the findings



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## Weighing Credibility

- Decision-Maker decides degree to which inaccuracy, inconsistency, or implausibility in Party's/witness's response affects determination
- Not based solely on observing demeanor
  - Also consider other factors

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## Weighing Credibility

- Demeanor and manner while testifying
- Character of testimony
- Extent of capacity to perceive, to recollect, or communicate
- Extent of opportunity to perceive any matter about which he testifies
- Character for honesty or veracity or their opposites.
- Existence or nonexistence of a bias, interest, or other motive

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## Weighing Credibility

- Statement previously made that is consistent with testimony at the hearing
- Statement made that is inconsistent with testimony at the hearing.
- Existence or nonexistence of any fact testified to by him.
- Attitude toward the action at issue
- Admission of untruthfulness.

## Determination Regarding Responsibility

- Becomes final either on:
  - Date district provides Parties with written determination of result of any appeal filed; or
  - Date on which appeal would not longer be timely

## The Grievance Process – Sanctions and Remedial Measures



### Sanctions and Remedies

Where a determination of responsibility for sexual harassment has been made against the respondent, the District has discretion regarding disciplinary sanctions but must also provide remedies to the complainant designed to restore or preserve equal access to the District's education program or activity.

§ 106.45(b)(1)(i)



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## Remedies

### Non-exhaustive list of remedies for Complainants:

- Providing escort
- Providing academic support services, such as tutoring
- Ensuring Complainant and Respondent do not attend the same classes or work in the same work area
- Providing counseling services or medical services or referrals
- Arranging for Complainant to re-take course or withdraw from class without penalty
- Reviewing any disciplinary actions taken against Complainant



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## Sanctions

### Non-exhaustive list of sanctions for Respondents:

- Written or verbal reprimand
- Required training or counseling,
- Non-academic probation (students)
- Suspension
- Expulsion (student)
- Reduction in pay
- Demotion
- Termination of employment



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## Employee Discipline

- Follow Title IX grievance policy to reach a determination regarding responsibility and suggested discipline
- Recommend a sanction and refer for discipline determination:
  - Per Collective Bargaining Agreement (classified)
  - Per Education Code
- Remember cannot retry the facts determined by grievance procedures



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## The Grievance Process – The Appeal



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## Appeals

- Must offer both parties an appeal from dismissal or determination regarding responsibility based on:
  - Procedural irregularity;
  - Newly discovered evidence; or
  - A conflict of interest or bias by Title IX personnel.
- May offer appeal to both parties on additional bases.

34 CFR §106.45 (b)(8)(i) and (ii)

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## Appeal Procedure

- Party must state grounds for appeal and statement of facts supporting those grounds
- If either Party submits appeal, district must
  - Notify other Party in writing
  - Allow non-appealing Party opportunity to submit written statement in support of, or challenging, outcome

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## Appeal Outcome

- Appeal Decision-Maker must issue written decision on whether to grant or deny appeal and rationale for decision
  - Must provide written decision simultaneously to Parties
- Appeal Decision-Maker may extend deadlines
  - Party may seek extension by submitting written request
  - Appeal Decision-Maker must inform Parties simultaneously whether extension granted

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## Group Practice - Appeals

After the District issued the Determination, the Respondent sent the following email to the Title IX Coordinator appealing the determination of responsibility:

- *My advisor was not able to appear at the hearing because he was admitted to the hospital the morning of the hearing. My advisor spent a lot of time preparing. When he did not show, the Decision-Maker appointed another advisor to me.*

LCW LIEBERT CASSIDY WHITMORE

## Group Practice - Appeals

*The new District appointed advisor asked questions and represented me but I don't think the advisor represented me very well, which contributed to the Decision-Maker finding that I was responsible for the alleged conduct.*

- *I want the District to overturn the Determination of Responsibility because I think the outcome would have been different if my original advisor had represented me.*

## Group Practice - Appeals

- What is the Respondent appealing?
  - A. The District's dismissal of a formal complaint of harassment based on sex under Title IX.
  - B. The District's dismissal of an allegation contained in a formal complaint of harassment based on sex under Title IX.
  - C. The District's determination of responsibility of harassment based on sex under Title IX.
  - D. None of the above.

# Title IX Training Series Part 3: Hearings and Determination of Responsibility

San Jose-Evergreen Community College District | November 11, 2021

Presented By: Eileen O'Hare-Anderson & Monica M. Espejo

## Group Practice - Appeals

- What are the grounds for the Respondent's appeal?
  - A. A procedural irregularity affected the outcome.
  - B. New evidence that could affect the outcome but was not reasonably available at the time the District's determination regarding responsibility or dismissal was made.
  - C. A Title IX personnel member had a conflict of interest or bias that affected the outcome.
  - D. None of the above.



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## Group Practice - Appeals

- Does the Respondent have the right to appeal?
  - A. Yes
  - B. No
- Why?



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## Questions?



## Thank You!

**Eileen O'Hare-Anderson**

**Partner | Fresno**

[559.256.7800](tel:559.256.7800) | [eanderson@lcwlegal.com](mailto:eanderson@lcwlegal.com)

[www.lcwlegal.com/people/eileen-ohare-anderson](http://www.lcwlegal.com/people/eileen-ohare-anderson)

**Monica M. Espejo**

**Associate | Sacramento**

[916.584.7000](tel:916.584.7000) | [mespejo@lcwlegal.com](mailto:mespejo@lcwlegal.com)

[www.lcwlegal.com/people/monica-espejo](http://www.lcwlegal.com/people/monica-espejo)



LIEBERT CASSIDY WHITMORE