

# Title IX Training Series Part 3: Hearings and Discipline

Liebert Cassidy Whitmore | July 20, 2021

Presented By: Pilar Morin & Jenny Denny

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## Title IX Training Series Part 3: Hearings and Discipline

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### Future Changes to Title IX

- April 2021: OCR announced comprehensive review
  - Foreshadowed Q&A guidance, formal rulemaking process
- June 2021: OCR
  - Conducted virtual public hearings and collected written comments
  - Issued Notice of Interpretation that Title IX protects individuals from discrimination based on sexual orientation and gender identity
  - Notified the Office of Management and Budget of intent to publish new proposed Title IX regulations in May 2022

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### Agenda

- Hearing
  - Notice
  - Format and Procedures
  - Considering Evidence
  - Preparation
  - Testimony and Questioning
- Determination Regarding Responsibility
  - Findings and Conclusions
  - First Amendment Issues
- Discipline
- Appeals

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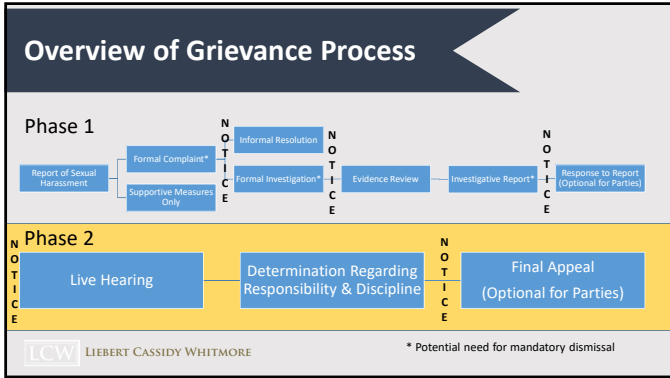
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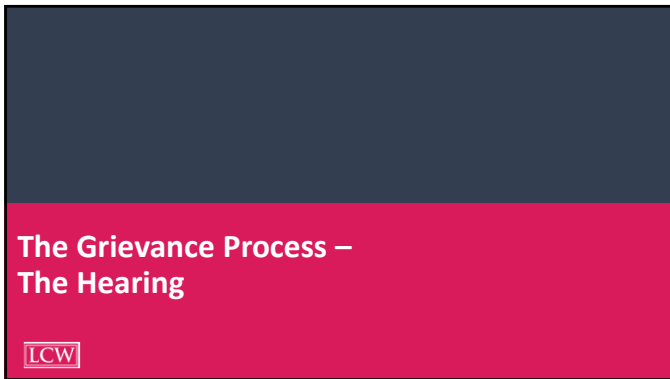
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### Hearing

- Opportunity for Parties appear before a decision maker to respond to the evidence gathered during the investigation
- Neither Party may waive the right to a live hearing
  - Can choose whether to participate in the hearing and whether to answer cross-examination questions
- 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 report 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

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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

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### 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
  - b. 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:
  - Advisors will not direct a Party or witness to refuse to answer questions unless they seek privileged information or are manifestly irrelevant or calculated to harass.
  - 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 motive/justification for an allegation
- Provide witness leads
- Provide evidence that might exonerate accused

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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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### Evidence at Hearing

- Police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent it contains statements of Party/witness who has not submitted to cross-examination
- May consider video evidence of incident even if Party refuses to participate in cross examination
  - But not “statements” on video.

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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
- Written statements cannot be relied upon in absence of witness

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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

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**Decision-Maker Hearing Preparation**

1. Review
  - Notice of allegations
  - Title IX Policy and Procedure
  - All investigative materials (report and 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 question excluded
  - If a Party or witness disagrees:
    - Abide by Decision-Maker's determination and answer question; or
    - Refuse to answer question

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### 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
- If a party or witness does not submit to cross-examination,
  - Cannot rely on his/her/their statement

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### Case Study

The Decision-Maker asked the Respondent a question that the Respondent refuses to answer. Must the Decision-Maker disregard all the testimony provided by the respondent?

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### Conducting the Hearing – Testimony and Questioning

- Eliminate missing information
- Use open-ended questions
- Don't ask compound questions
- Avoid suggesting an answer in question
- Listen carefully
- Clarify unclear terms or slang

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### Case Study – Excluding Statements

*A Respondent secretly video taped a sexual encounter he had with Complainant. 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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### Case Study – Excluding Statements

*Respondent refused to participate in the hearing because he heard the Decision-Maker cannot rely on his statements if he does not submit to cross examination. Respondent believes the video will be excluded as a statement since he will not appear.*

**Is Matt correct?**

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**Group Practice –  
Considering Evidence at Hearing**

- Would you allow or exclude the following offered during the hearing?  
*Testimony from Complainant’s classmate about what Complainant told him about the alleged stalking. (This witness was not interviewed by the investigator.)*

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**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.*

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**Group Practice –  
Considering Evidence at Hearing**

- Would you allow or exclude the following offered during the hearing?  
*Attendance records of Complainant indicating Complainant was not in class on day of some alleged stalking incidents.*

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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 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?  
*In a case where the Respondent refuses to submit to cross examination, Police report about the sexual assault submitted by Complainant’s advisor over Respondent’s advisor’s objection.*

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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**

- Would you allow or exclude the following offered during the hearing?  
*Respondent’s 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.*

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**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.*

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**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.*

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**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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### Questions to Evaluate Consent

1. Did the Respondent use force to obtain sexual access?
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 clear words or actions by Complainant gave Respondent permission for 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.
- 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 Consent

- What clear words or actions by Complainant gave Respondent permission for each sexual act as it took place?
- Definition of consent does not vary based upon participant's sex, sexual orientation, gender identity, or gender expression

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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 very 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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### Determination Regarding Responsibility

- 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

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# Title IX Training Series Part 3: Hearings and Discipline

Liebert Cassidy Whitmore | July 20, 2021

Presented By: Pilar Morin & Jenny Denny

**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.

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**Determination Regarding Responsibility**

- Becomes final either on:
  - Date district provides Parties with written determination of result of appeal, if Parties file appeal; or
  - Date on which appeal would not longer be timely if Parties do not file an appeal

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**The Grievance Process – Discipline**

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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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# Title IX Training Series Part 3: Hearings and Discipline

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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
- Then follow Ed. Code section 87670 *et seq.* to implement

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**The Grievance Process –  
The Appeal**

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# Title IX Training Series Part 3: Hearings and Discipline

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### Appeals

- Must offer both parties an appeal from 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 will respond to Party's request within 48 hours in writing and inform Parties simultaneously whether extension granted

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# Title IX Training Series Part 3: Hearings and Discipline

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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.*

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**Group Practice - Appeals**

*This new advisor asked questions and represented me at the 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.*

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**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.

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# Title IX Training Series Part 3: Hearings and Discipline

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**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?**

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# Title IX Training Series Part 3: Hearings and Discipline

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**Thank You!**

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