



Fagen Friedman & Fulfrost LLP

2020 Title IX Regulations: Decisionmaker Training



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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

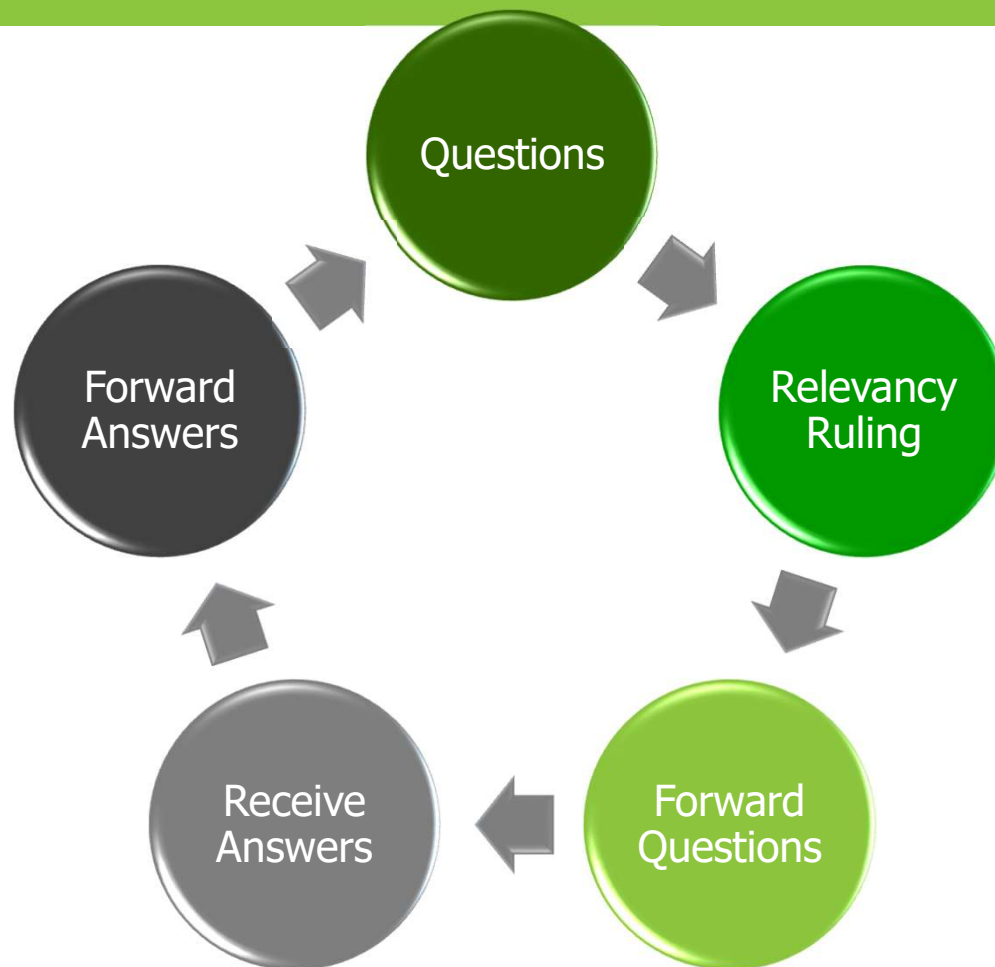


Material Under Consideration

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



Examination Process



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



POLLING

“You typically have sex with the Respondent after drinking at parties, correct?”

Yes

No



POLLING

“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

Identify	Identify the allegations
Describe	Describe procedural steps taken
Cite	Cite potential policy violations
Summarize	Fairly summarize all relevant evidence
Provide	Provide statement of result, with rationale, for each allegation
Appeal	Appeal procedures



Factual Findings

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



Factual Findings

Consider	Consider both supporting/corroborating and conflicting/inconsistent information for each disputed fact
Make	Make credibility determinations by considering corroborating evidence, inconsistencies, logic of explanation/narrative, impact of trauma
Use	Use words of parties/witnesses
Be	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?



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

Bias is an inclination or
preference for or
against something.



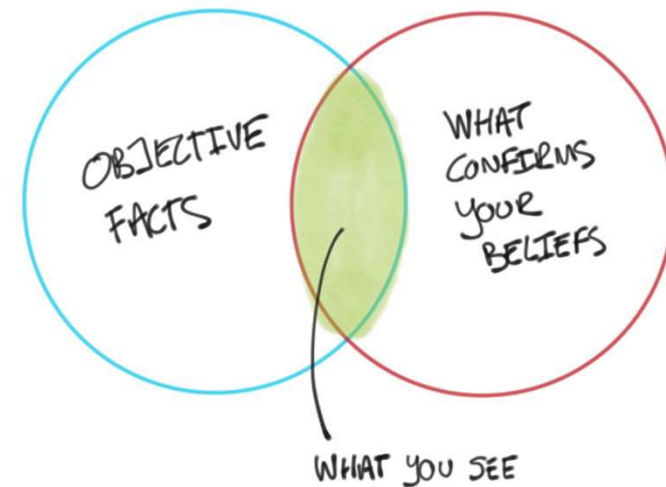
Implicit Bias

- 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



<http://www.visualcapitalist.com/wp-content/uploads/2017/09/cognitive-bias-infographic.html>



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



Thank you!





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