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- New Title IX regulations require a “decision-maker” to determine whether a Respondent has violated policy.
  - May be a single person. Thus, you are both Decision-maker and Chair by default.
    - One role is substantive, the other procedural
  - May be a panel of decision-makers (often three), with one voting member as Chair to make all rulings on evidence and questions
  - Chair should always be a voting member
  - Most colleges will want the Chair to speak for the panel on matters of evidence, but some will want all panelists to do so collaboratively – thus all would be “Chairs”
  - May be internal or external individuals (third-party neutrals).

- Community standards identify what constitutes sexual harassment within your community.
  - The definitions and procedures used may be impacted by Title IX requirements.
- It is not a question of right and wrong, but whether there has been a policy violation, proven by the standard of evidence.
- Your role is to impartially uphold the integrity of the process.
- You may not agree with your policy, but you must be willing to uphold it.

Clear and convincing evidence: It is highly probable that policy was violated.

- Highly and substantially more likely to be true than untrue; the fact finder must be convinced that the contention is highly probable.
- 65% 75% 85% part of the problem with this standard is there is no real consensus on how to quantify it.

Preponderance of the evidence: "More likely than not."

- The only equitable standard
- 50.1% (50% plus a feather)
- The "tipped scale"

- Advisor can be anyone; no restrictions in the regulations.
  - Already required under VAWA.
- If a party chooses an advisor who is also a witness, you will need to assess how that impacts their credibility as a witness.
- If a party does not have an advisor to conduct cross-examination at the live hearing, the institution must provide an advisor of the institution's choice without fee or charge to the party.
  - Not required to be an attorney.
  - No prior training required; no mandate for institution to train.
- Institutions may still limit the role of advisors during the hearing with the exception of cross-examination and the ability to confer with the party.

Remember, you have no
“side”
other than the integrity of
the process!

- Existing mandate for impartial resolutions with fair procedures.
  - Impartial, objective, unbiased, neutral, independent.
  - What do each of these mean and how do we bring these qualities to our decision-making?
- Final regulations prohibit conflicts of interest or bias with Coordinators, investigators, and

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- Among the most significant problems for hearing Decision-makers/Chairs since
- Bias can represent any variable that improperly influences a finding and/or sanction
- There are many forms of bias and prejudice that can impact decisions and sanctions:
  - Pre-determined outcome
  - Partisan approach by investigators in questioning, findings, or report
  - Partisan approach by hearing board members in questioning, findings, or sanction
  - Intervention by senior-level institutional officials
  - Not staying in your lane
  - Improper application of institutional procedures
  - Improper application of institutional policies
  - Confirmation bias
  - Implicit bias
  - Animus of any kind, including race, religion, disability, etc.

- Decision-makers/Chairs may determine that they need to recuse themselves from hearing a particular case or a party might seek a Decision-maker's/Chair's recusal.
- This is why having an alternate Decision-maker/Chair identified and trained is always wise.
- Your policy should define the process and circumstances by which a party may seek to recuse a Decision-maker/Chair.
- Typically the Title IX Coordinator determines whether or not to honor the request.
- If you yourself discern that you are not able to hear a case impartially, please let your Title IX Coordinator know immediately.

PREPARING FOR THE HEARING

- Provide Notice of Hearing (location, time, hearing decision maker identification, conflict check, individuals attending, specdicati(e)-0.9 (ck)-0.(in)-1 (g)-37.3 (s)-3. s (ica)e) he(e)-0.9 (in)-ching, s (ica)e/ticAgg- (io4601 .493

- Arrange for any Necessary Alternates (Decision-makers and/or Advisors)
- Allow Challenge to any Decision-Maker on Basis of Bias/Conflict and Opportunity for Self-Recusal by any Decision-maker
- Prepare and Refine Hearing Script
- Prepare Questions from Decision-maker
- Prepare Checklist of all Applicable Policy Elements
- Set an "Order of Go" for Witness Testimony
- Review Logistics with Parties, Advisors, Witnesses, Decision-maker, Sanctioning Authorities (if applicable), and/or Hearing Facilitator/Case Manager (if any)
- Arrange for any Directly Related Evidence to be Available at Hearing
- Inform Parties to Prepare Impact Statements for Submission at Start of Hearing
- Check in with Parties for any Access, Accommodation, Interpreter Needs, Etc.

- Pre-hearing meetings can provide an opportunity to:
  - Answer questions the parties and advisors have about the hearing and procedures.
  - Clarify expectations regarding logistics, decorum, and technology (if applicable).
  - Clarify expectations regarding the limited role of advisors and applicable rules.
  - You may invite partiesex0.5 4(B64 [(Y)1/8/98 (s)5.68 (ex(5 (a64.9 (t)6.2 (e)1. que3 (v)5st)6.2 (e)..341 (t)5[(Y)1/8/9..3
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- Could include:
  - "Motions" hearing
  - Meeting of Panel (to sift evidence and/or to craft, share, and assign questions)
  - Review of Investigation Report (you really should know this well. Read twice?)
  - Review of file of "directly related" evidence that was not relied upon by investigators
    - Decide if this is reviewed by you only, or other panelists (if any) as well?
  - Review of any questions proposed submitted by parties (if they have been invited to do so)
    - Let's discuss the merits/demerits of this practice…
- Must include (Is this a Chair function? Who vets the Chair):
  - Vetting of decision-maker/panel
  - Conflicts check
  - Recusal protocol
- What About?
  - Can you/should you meet with investigators?
  - Should there be changes to the investigation report at this point?

All Decision-Makers/Chair Should Review:

- The Respondent's written notice (NOIA) to understand all allegations, the formal complaint, and the notice of hearing.
- Review the policy (policies) alleged to have been violated.
  - Parse all the policy elements (what does it take to establish a policy violation?)
  - Identify the elements of each offense alleged.
  - Break down the constituent elements of each relevant policy.
- Review all the materials carefully and thoroughly. Read the investigation report appendices, too!
- Review the report a second time and note all areas of consistency/inconsistency of information. You should be able to make a "focus list" from this, of what topics are most important to try to resolve at the hearing.
- Do you want to do any prequalification or review of the qualifications of any offered expert witnesses?

- Write down the following as a reminder:
  - What do I need to know?
  - Why do I need to know it?
    - If the answer to this is not that it will help you determine whether or not a policy violation occurred, and you can explain a rationale for that; then it is not something you need to know!
  - What is the best way to ask the question?
  - Who is the best person to get this information from? The investigator? A party? A witness?
- When dealing with conflicting or contested testimony apply a credibility analysis (covered later).

- Dress professionally – Jeans, t-shirts, shorts, yoga pants, sandals, etc., are not appropriate (unless they can't be seen!)
- Arrive prepared and early
- Bring snacks and water/drinks
- Silence your phone, but make arrangements for how you will reach your legal counsel, if needed.
- Bring a pen and paper or note-taking device
  - Less is better; note what you need to make a determination.
  - Be clear on policy/expectations for keeping/destroying written notes
- Clear calendar after the hearing – deliberation could take as little as 30 minutes or it could take much longer.

QUICK TIPS ON HEARING LOGISTICS

- Recording
  - How, by whom, etc.
  - Redundant devices?
- Attendance by parties and witnesses
- Location and Room setup
  - Comfort items (water, tissues, meals if needed)
  - Privacy concerns; sound machine
- Seating arrangements
- Materials

- Access to administrative support if needed (phones, copiers, email)
- Advisors
- Parties and witnesses waiting to testify
- Breaks
- Use of A/V
- Waiting for a decision

- Be professional, but you need not be lawyerly or judge-like
  - This is not Law and Order – this is an administrative process at a school.
  - You are not cross-examining or interrogating, you are striving to determine whether the Respondent(s) violated institutional policy.
- Be respectful
  - Tone, Manner, Questioning.
  - Sarcasm or being snide is never appropriate.
  - Maintain your composure: Never allow emotion or frustration to show.
  - De-Escalate or take breaks if emotions/tension are running high

- Work to establish a baseline of relaxed conversation for everyone in the room.
- Maintain good eye contact; "listen with your eyes and your ears"
- Listen carefully to everything that is said.
  - Try not to write too much when people are talking, but as Chair, you often need to track questions/answers to avoid permitting too much repetition, and in case you need to repeat a question back.
  - If questioning, focus on the answer, rather than thinking about your next question
- Nod affirmatively
- Do not fidget, roll your eyes, or give a "knowing" look to another panel member
- Do not look shocked, smug, stunned, or accusing

Hearing Testimony: The Role of the Chair/Decision-Maker

- In managing questioning, the Chair will typically work from a script in terms of flow and order of questioning/witnesses.
- The Chair will have to make decision on (or follow the script/procedure) on issues like:
  - How much of an evidence introduction an investigator should do to open the hearing
  - Whether the Chair rules on every question, or just those that are irrelevant

- How will you manage the last-minute witness or evidence that is introduced at the hearing for the first time?
- What does the policy say?
- Will the last-minute introduction work an unfairness, given that all other evidence has been reviewed and vetted for weeks prior?
- If the parties assent, can the evidence be introduced last minute, even if it has had been held back in bad faith?
- If you will re-open the investigation to consider the evidence, does that pause the hearing entirely, or just part of the hearing related to that witness/evidence?
  - How will that work in terms of the two tenday review/comment periods? Should they be observed? Can parties waive or shorten them?

DECISION-MAKING SKILLS

- Understanding Evidence
- Relevance

- Evidence is generally considered relevant if it has value in proving or disproving a fact at issue, and relevance means the evidence will be relied upon by the Decision-maker.
  - Regarding alleged policy violation and/or
  - Regarding a party or witness's credibility.
- The investigator will have made initial relevance "decisions" by including evidence in the investigation report…
- Relevance is ultim licoonor ihe evrsion

- Evidence is directly related when it is connected to the complaint but is neither inculpatory (tending to prove a violation) nor exculpatory (tending to disprove a violation) and will not be relied upon by the investigation report.
- This evidence comes to the Decision-maker(s) pre-hearing, in Bucket #1 (the investigation report) or in Bucket #2, the evidence file of what is considered directly-related.

- Evidence of the Complainant's prior sexual behavior or predisposition is explicitly and categorically **not relevant** except for two limited exceptions:
  - Offered to prove that someone other than the Respondent committed the conduct alleged, or
  - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by the Complainant.
- Does not apply to Respondent's prior sexual behavior or predisposition.

RELEVANCE EXERCISE

- The Complainant writes in her online written formal complaint form narrative that she has been experiencing significant mental health issues since being sexually assaulted, including PTSD (self

- The live hearing requirement for higher education allows the parties to ask (direct and) cross examination questions of the other party and all witnesses through their advisor.
  - Advisor of choice or an advisor provided by the institution, at no cost to the parties.
- Such cross-examination must be conducted directly, orally, and in real time by the party's advisor and never by a party personally.
- Permit relevant questions and follow-up questions, including those challenging credibility.
- Managing advisors to ensure decorum and civility.

- If the advisor seeks to ask a question that is potentially answered in the investigation report, that question should typically be permitted, if relevant.

- If the question has already been answered by a witness or party at the hearing, the decision maker or Chair may deny the question as "irrelevant because it has already been answered," or may ask the advisor why posing the question again is expected to lead to additional relevant evidence.

- Accuracy and reliability of information.
- Ultimately the decision-maker–.1 (Y?)]TJ2 0 Td (-f)-3.198.125 l 59.5 i0 Twd-6ee 98.125 1 (Y?)]Tin•

- Inherent plausibility
  - “Does this make sense?”
  - Be careful of bias influencing sense of “logical.”
- Motive to falsify
  - Do they have a reason to lie?
- Corroboration
  - Aligned testimony and/or physical evidence.
- Past record
  - Is there a history of similar behavior?
- Demeanor
  - Do they seem to be lying or telling the truth?

Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

EEOC (1999)

Corroborating evidence

- Strongest indicator of credibility.
- Independent, objective authentication.
  - Party says they went to dinner, provides receipt.
  - Party describes text conversation, provides screenshots.
- Corroboration of central vs. environmental facts.
- Not simply alignment with friendly witnesses.

Corroborating evidence

- Can include contemporaneous witness accounts.
  - More "separate" the witness, greater the credibility boost.
- Outcry witnesses.
  - Does what party said then line up with what they say now?
- Pay attention to allegiances.
  - Friends, roommates, teammates, group membership.
  - This can work both directions (ex. honest roommate).

Inherent plausibility

- Does what the party described make sense?
  - Consideration of environmental factors, trauma, relationships. • Is it believable on its face?
- "Plausibility" is a function of "likeliness."
  - Would a reasonable person in the same scenario do the same things? Why or why not?
  - Are there more likely alternatives based on the evidence?

Inherent plausibility

- One of the least used and least understood methods of assessing credibility is the triangulation method, which is rooted in abductive reasoning.
- Analysis of credibility often ignores this approach because it is less dispositive than corroboration, but it can still be enough to meet the standard of w-3.6 (i)-3.5 (t43.5 (t3 EMC EM

Motive to falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
  - Think academic or career implications.
  - Also personal or relationship consequences.
- What if the allegations are false?
  - Other pressures on the reporting party ~~y~~ failing grades, dramatic changes in social/personal life, other academic implications.
- Reliance on written document during testimony.

Past record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations.
  - Even if found “not responsible,” may evidence pattern or proclivity.
- Written/verbal statements, pre-existing relationship.

Demeanor

- Is the party uncomfortable, uncooperative, resistant?
- Certain lines of questioning agitated, argumentative.
- BE VERY CAREFUL
  - Humans are excellent at picking up non-verbal cues.
  - Human are terrible at spotting liars (roughly equivalent to polygraph).
-

- Under the 2020regs,investigators may or may not asst240.8 ()-17-4 crvejii t23.6 (y 1-2.5 wS)-0.6

- Distinguish performance/presentation skills from believability.
  - Make sure key witnesses will be present.
  - Make sure eviden18 733ye en r.84953yrevDie.–

- Deliberations
- Analyzing Information and Making Findings
- Sanctioning
- Written Determination

Findings, Impact Information, and Sanctions

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- Title IX and case law require:
  - Decision-maker should also decide sanction if credibility will influence the sanction
  - Not act unreasonably to bring an end to the discriminatory conduct (Stop)
  - Not act unreasonably to prevent the future 6.7 (t)2 (ur)22.8 (e)7P66.7 (tn)7P6urt(cid)0.9 Nsnaturr6-28.5 (y)1.

- The appeal decision-maker may be an individual or a panel.
  - Cannot be the Title IX Coordinator.
  - Cannot be the investigator or decision-maker in the original grievance process.
  - Recipient may run a pool of decision-makers who sometimes serve as hearing or appeal decision makers
  - Recipient may have dedicated appeal decision-makers.
- When an appeal is filed, must notify the other party and implement appeal procedures equally for all parties.
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
- The Chair may be called on by the appeal decision-maker to inform the appeals process. Likely a paper exchange. Not in-person.

- Certain records must be created, retained, and available to the parties for at least seven years:
  - Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
  - Any appeal and related result(s)
  - Any informal resolution implemented
  - Any supportive measures implemented
  - For each formal complaint, must document the basis for why the institutional response was not deliberately indifferent
- For each conclusion, must document the rationale for its determination
- Must document measures taken to preserve/restore access to education programs/activity

QUESTIONS?

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