

TITLE IX



C O N S U L T
LLC

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Overview of Decision-Maker Training

- Introduction to Title IX law and regulations
- Title IX Coordinator role
- Education institution legal obligations, including employees
- Title IX jurisdiction and dismissal of complaints
- Types of Title IX claims and consent
- Title IX parties and administrators
- Overview of Title IX grievance process
- Burden of proof
- Investigation report and information-sharing with the parties
- Decision-maker role
- Types of evidence
- Avoiding decision-making pitfalls
- Evaluating evidence and reaching a conclusion
- Appeal
- Retaliation



Title IX Law

- No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.
- Enforced through the Department of Education, Office for Civil Rights (OCR)



Rescinded Guidance from OCR
under Obama administration

2015

Title IX Coordinator

2011, 2014, 2016

2017

Q&A on Campus Sexual
Misconduct

GUIDANCE ON TITLE IX

2001

Regulations on Title IX

2020

Final Rules on Title IX
(effective 8/14/20)

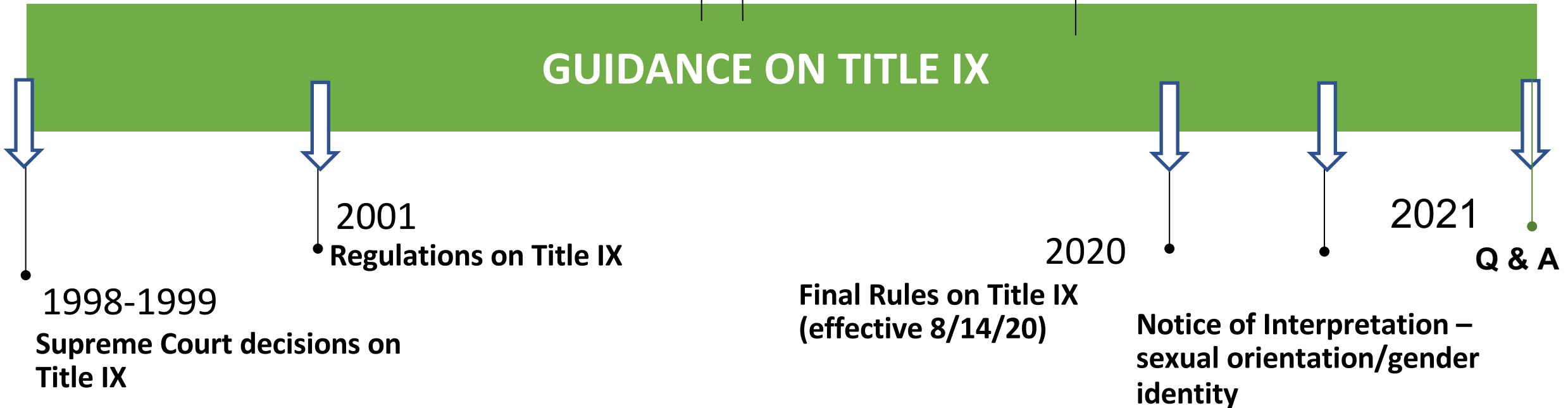
2021

Q & A

1998-1999

Supreme Court decisions on
Title IX

Notice of Interpretation –
sexual orientation/gender
identity



Title IX – Parties and Administrators

Administration of Claims

Parties

- Complainant – alleged victim/survivor
 - Respondent – respond the allegation
- Title IX Coordinator
 - Title IX Investigator
 - Title IX Decision-maker
 - Title IX Appeal Officer
 - Title IX Advisor
 - Title IX Informal Resolution Officer



Title IX Coordinator's Role

- Name, office address, email address, phone number of “Title IX Coordinator” available
- Distributed to students, employees, applicants for admission and employment, parents and legal guardians, and unions
- Reports by telephone, email, and verbal reports to Title IX Coordinator



Decision-Maker Role

- Review all evidence
- Issues decision relying on relevant, credible evidence
 - Policy violation
 - Sanction/Discipline, if violation found
- Advises of appeal rights
- Can be more than one decision-maker
- Can never be Title IX Coordinator, Investigator, Appeal Officer



Selecting Decision-Maker

- Attorney required – NO
- Training required – YES
- Understanding policy – YES
- Considerations in selection:
 - Willingness to serve
 - Objective and unbiased
 - Ability to connect with employees/students
 - Confidentiality
 - Reflective of campus
 - Diversity



Review Flow Chart



LEGAL OBLIGATION

Educational institution must respond in a manner that isn't deliberately indifferent when it has actual knowledge of sexual harassment occurring in the institution's education program or activity against a person in the United States.

In K-12 institutions, **ALL EMPLOYEES** have obligation to report



Actual Knowledge

When sexual harassment or allegations of sexual harassment
come to the attention of
ANY EMPLOYEE
of a K-12 district

All employees **MUST** report



Title IX Covers and Includes

- Prohibition of Sex Discrimination
 - Sexual Harassment
 - Athletics
 - Employment
 - Pregnant Students
 - Recruitment, Admission and Programs



Jurisdiction Issues

- Occurring in the institution's education program or activity
includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs
- Against a person in the United States



Dismissal - Mandatory and Permissive

Mandatory dismissal

- Would not constitute sexual harassment as defined in regulations
- Did not occur in education program or activity
- Did not occur against a person in the U.S.

Permissive dismissal

- Complainant notifies Title IX Coordinator in writing that Complainant would like to withdraw formal complaint or allegations
- Respondent is no longer enrolled or employed by school district
- Specific circumstances prevent the school district from gathering evidence sufficient to reach a determination



Types of Sexual Harassment

Under new regulations



Definition of Sexual Harassment

Conduct on the basis of sex:

- **Quid pro quo** - An employee who conditions the receipt of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.
- **Hostile environment** sexual harassment, defined as unwelcome conduct determined by a reasonable person to be so severe, pervasive **and** objectionably offensive that it effectively denies a person equal access to the school's education program or activity (emphasis added).



2021 Questions and Answers – Loss of Equal Access

- Skipping class to avoid a harasser
- Declining GPA
- Having difficulty concentrating in class
- Crying at night due to sexual harassment
- Quitting a team due to harassment



Definition of Sexual Harassment, continued

Sexual Assault

- Rape
- Fondling
- Incest
- Statutory Rape

Dating/Domestic Violence

Stalking



Question of Consent

- Age of consent
- Affirmative consent laws
- Important elements of consent
 - Freely given
 - Ongoing
 - Manifested



Rape Shield Protections

- Questions and evidence about a complainant's prior sexual behavior are prohibited unless:
 - offered to prove that someone other than the respondent committed the alleged misconduct, or
 - offered to prove consent.



Overview of Grievance Process

OBLIGATION: Respond promptly in a manner that is not deliberately indifferent

Initial complaint

- Notice
- Formal complaint
- Supportive measures
- Notice of allegations
- Presumption of innocence

Investigation

- Interviews
- Document review
- Sharing information and reviewing feedback
- Investigative report

Decision-maker

- Evaluate the evidence
- Determine if follow-up questions required
- Issue decision on policy violation and discipline



Formal Complaint

- Schools are required to investigate formal complaints - filed by a complainant alleging sexual harassment against a respondent and requesting that the school investigate the allegation
 - a complainant must be participating in or attempting to participate in the education program or activity of the school to file formal complaint
- If the complainant does not file a formal complaint, the wishes of the complainant should be respected.
 - Unless the Title IX Coordinator decides to initiate the complaint and it is “is clearly not unreasonable in light of the known circumstances”
 - Title IX Coordinator may file and sign a formal complaint
 - Title IX Coordinator does NOT become complainant



Supportive Measures

- Mandatory obligations include offering “**supportive measures**” to complainant that must be non-punitive, non-disciplinary, and not unreasonably burdensome on the other party
 - GOAL - provide both parties with equal access to their education, protect safety, and deter sexual harassment.
- No action can be considered “disciplinary” against a respondent at this stage.
- Appropriate supportive measures counter allegations of deliberate indifference
- Supportive measures must be revisited frequently and properly documented



Notice of Allegations

- Notice of the allegations of sexual harassment including sufficient details known at the time including the identities of parties, the conduct alleged, and date and location of the incident
- Provided before Respondent's interview
- Allow for sufficient time to prepare a response before any initial interview
- Includes policies alleged to have been violated and must be supplemented if additional allegations arise
- Notice of informal resolution process
- Must include:
 - Respondent is presumed not responsible for the allegation
 - Parties may have an advisor of their choice



Presumptions

- Not responsible until proven to be responsible
- Stereotypes and bias



Information Gathering

- Types of information
- Background
- Request information from parties
- Proactively seek information
- Requests and refusals
- Information sharing



Investigation Report

- Convey relevant information about the allegations to the parties and their advisors
- The Department of Education takes no position on the elements required in the report beyond what is required by final regulations
- The investigative report must fairly summarize relevant evidence



Title IX Report and Information Sharing

Before report, all evidence shared



Opportunity to question and provide feedback



Report issued and shared



Opportunity to question and provide feedback



Report and party feedback shared with decision-maker(s)



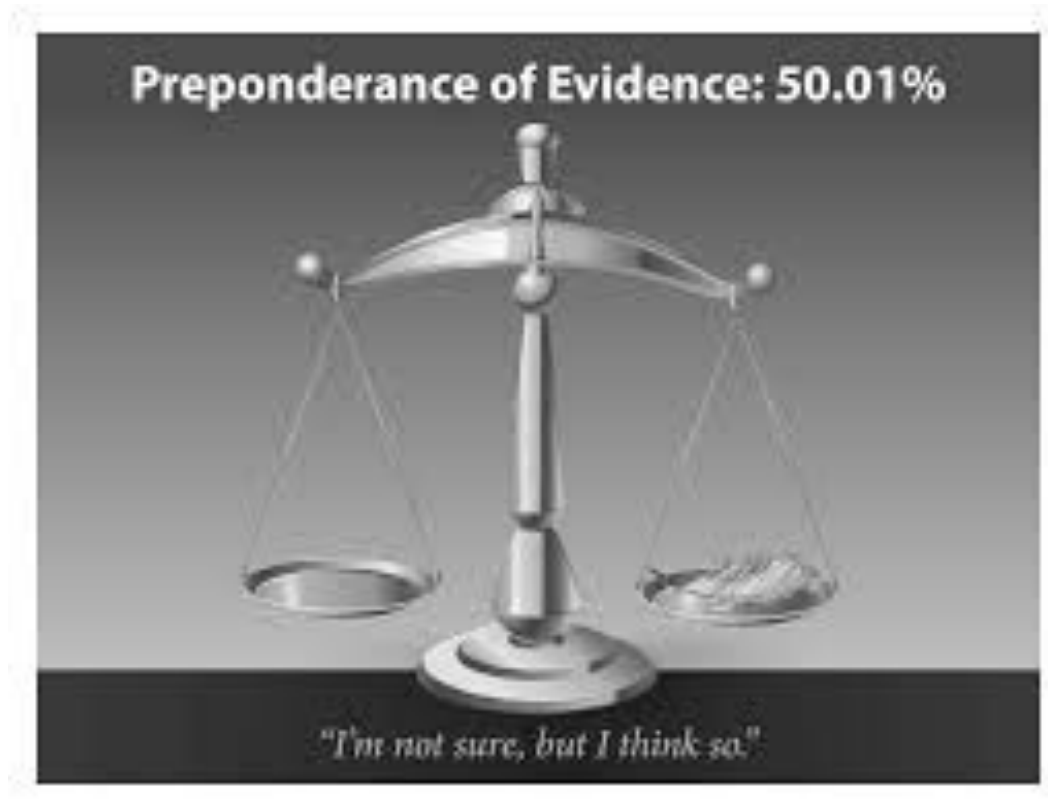
Initial Review

- Formal complaint
- Notice to both parties
- Supportive measures
- Timelines
- Parties (and parents) understand the process
- Other complaints?
 - Criminal matters
 - Similar complaints – consolidation
- Concurrent or parallel investigations
- Record-keeping requirements
- **Documentation at every step!!**



Burden of Proof

- Preponderance of the evidence
- Clear and convincing



Weighing and Challenging Evidence

- Authentication
- Relevance
- Credibility



Evidentiary Review

- RELEVANCE – Applying to the matter in question; affording something to the purpose (Black's Law Dictionary)
- NOT permitted:
 - Sexual history of Complainant (see Rape Shield exception)
 - Privileged communications
 - Medical documentation
- Not repetitive



Credibility

- Corroboration
- Feasibility
- Motivation for truthfulness/untruthfulness
- Consistent
- Reviewed/coached



Final Decision Requirements

Decision-maker must issue a written determination regarding responsibility that has to include

- Findings of fact
- Conclusions as to all allegations
- Rationale for reaching the decision
- Sanctions if the respondent is found responsible for policy violations must be included in the written determination.



Applying the Definitions



Allegation of Sexual Harassment – VT State Law Example

Title IX hostile environment sexual harassment - unwelcome conduct determined by a reasonable person to be so severe, pervasive **and** objectionably offensive that it effectively denies a person equal access to the school's education program or activity (emphasis added).

VT State Law - Hostile Environment

Sexual harassment may also include student-on-student conduct of a non-employee third party that creates a hostile environment. A hostile environment exists where the harassing conduct is severe, persistent or pervasive so as to deny or limit the student's ability to participate in or benefit from the educational program on the basis of sex.



Other Considerations

Impartiality, Conflict of Interest, Bias, Stereotypes, Trauma



Impartiality

- Be neutral – neither pro-Complainant nor pro-Respondent
- Consider the evidence as presented
- Confront and understand bias and not allow it to impact decision
- Maintain open mind as to the potential conclusions



Conflicts of Interest

- Relationship to parties or witnesses
- Professional conflicts
- Personal conflicts
- Actual and perceived

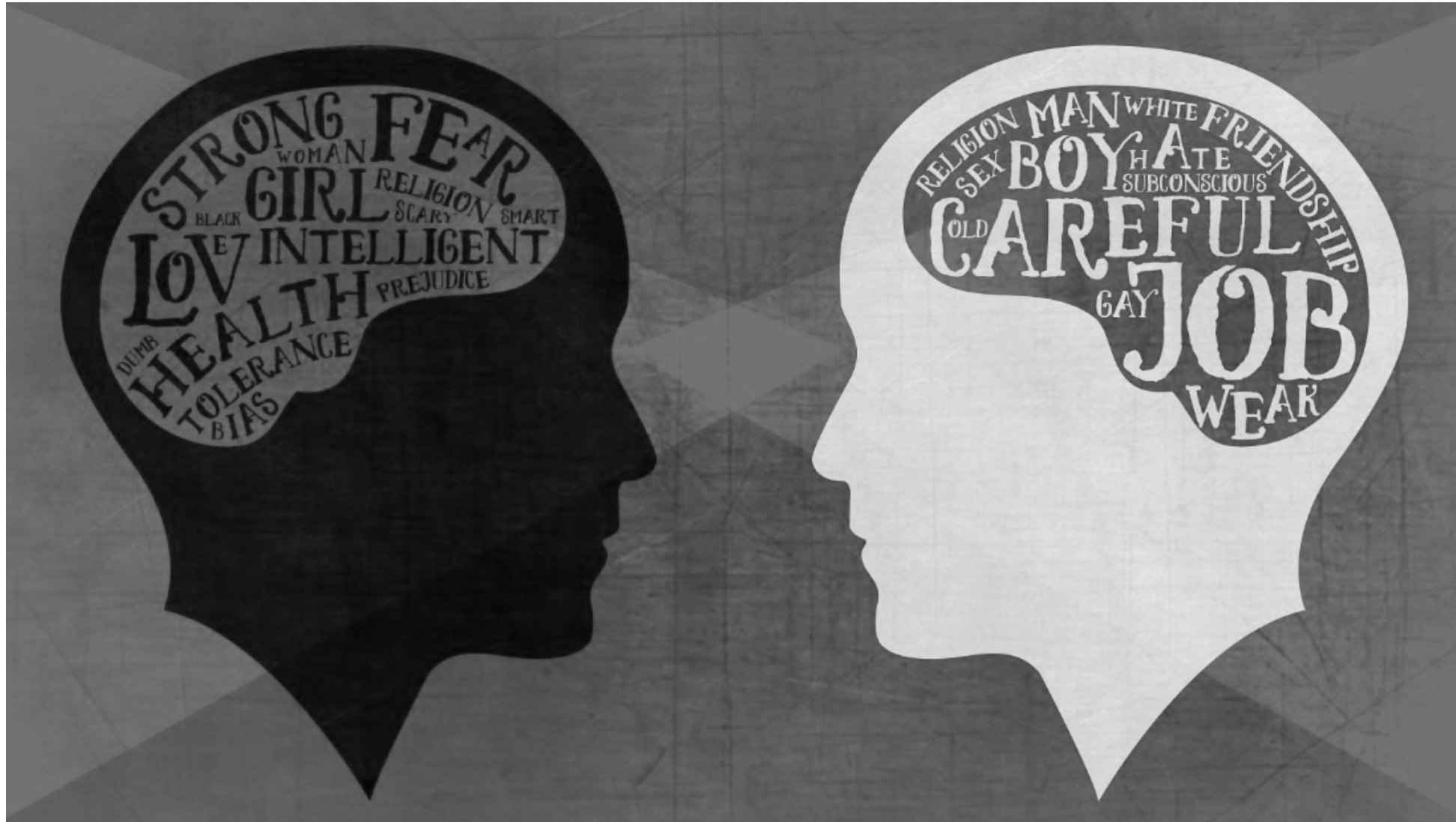


Bias

- Conscious/Explicit
 - Discriminatory intent
 - Stated preferences
- Unconscious/Implicit
 - For the most part, most people are unaware of these drivers
 - Developed over a period time and can influence many factors in hearing
 - Short cuts developed by the brain and often play a role in:
 - Immediate response to conflict
 - Often mimics fear responses



Displaying Bias



Stereotypes

- “A fixed, over generalized belief about a particular group or class of people.” (Cardwell, 1996)
- Stereotypes around sexual assault
- Stereotypes around sexual harassment
- Complainant and Respondent



Impact of Trauma

- Many Title IX causes of action involve trauma
- Investigators and decision-makers must understand the impact of trauma on:
 - Reaction to trauma
 - Ability to capture memories
 - Recollection of memories
- Expectations around trauma victim



Decision-Maker Responsibility

- Final outcome decision
- Explains reasoning and rationale
- Applies allegations to policy language
- Determines policy violation
- Gives sanctioning decision
- Other related responsibilities (not decision-makers)
 - Detailed review of investigation process
 - Information on supportive measures



Final Decision

- Identification of the allegations
- A description of all procedural steps taken from the receipt of the formal complaint through the determination,
- The findings of fact supporting the determination;
- The conclusions regarding the application of the school's code of conduct to the facts;
- Rationale for the result as to each allegation, including a responsibility and any disciplinary sanctions the school imposes on the respondent
- Other remedies designed to restore or preserve equal access; and
- The school's procedures and permissible bases for the complainant and respondent to appeal.



Grounds for Appeal

- Procedural irregularity in the Title IX grievance process affected the outcome
- Newly discovered evidence that was not reasonably available at the time of the determination of responsibility or dismissal that could affect the outcome
- Due to a bias or conflict of interest by the Title IX Coordinator, investigator, or decision-maker that affected the outcome



Q&A - Optional Bases for Appeal

- The determination regarding the policy violation was unreasonable based on the evidence before the decision-maker.
- The sanctions were disproportionate to the hearing officer's findings.



Other Important Provisions

- Non-retaliation
- Record-keeping



SJA

Policies and Process



SJA Policies to Review

Employees

Students

Complaint Form



QUESTIONS?

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