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Webinar Goals

- Decision Maker Roles and Responsibilities
- Sanctions and Remedies
- Appeal Process
- Impartiality, Bias, and Conflicts of Interest

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Presentation Team

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Carrie Weber **Kristy Latta**

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TOPIC #1

Decision Maker Roles and Responsibilities

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Who Should the Decision Maker Be?

- Cannot be the same as the Title IX Coordinator or Investigator for that case
- Cannot be the same as the Appeal Decision Maker
- May be one person or a multi-member panel

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What is the Decision Maker's Role?

- Act as a neutral
- Determine what questions are relevant to the case
- Objectively evaluate all relevant evidence both inculpatory and exculpatory
- Reach a determination regarding responsibility without giving deference to the investigative report

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Decision Making Process

Written	Live Hearing

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Cross Examination

- Occurs in some form in both the written and live hearing options
- DOE determined it is necessary for due process
- DOE presumes Decision Maker will control advisors and advocates to ensure no party is abused by cross-examination process
- DOE has expressed concern about sex bias in the context of sexual harassment

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Live Hearing Requirements

- Each party is permitted to have an "advisor," who could be attorney or other representative
- Each party's advisor is permitted to ask the other party and any witnesses all relevant questions, challenge credibility, and conduct cross-examination
- If a party does not have an advisor, the District must provide one free of charge to conduct cross-examination on behalf of that party

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Live Hearing Requirements

- The District must provide technology to all the live hearing to take place with parties in separate rooms if requested
  - Technology training must be provided to decision maker
- The District must create an audio or video recording, or written transcript, of the live hearing and make it available to the parties

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Written Option

- Instead of a live hearing, the decision maker may allow each party to submit written questions to any party or witness
- Decision maker provides each party with the answers, and allows for additional, limited follow-up questions from each party

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Cross-Examination Procedure

- Each party's advisor will submit questions for cross-examination
- Your role: Decide if the questions are relevant and:
  - (1) Ask the question if relevant; or
  - (2) Decline to ask an irrelevant question, and explain why the question is irrelevant to the asking party in writing

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Relevance

- Evidentiary definition: Evidence having any tendency to make the existence of any fact of consequence to the determination at issue more or less probable than it would be without the evidence
  - Determining relevance is different that determining how much weight to give the evidence
    - Irrelevant evidence: Excluded
    - Relevant, but not much weight: Included for consideration

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Relevance

Example: Evidence is offered that the complainant took illegal drugs.

Relevant: Drug use the night of a contested sexual encounter. The drug use might make the issue of whether the complainant was incapacitated more or less probable

Irrelevant: Drug use two weeks prior to the incident in question. This evidence would make the complainant look bad, and does not make an issue in the case more or less probable

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Relevance: Privileged Information

- Any party's medical, psychological, and similar records are not relevant unless voluntarily provided by that party
- Any information protected by a legally recognized privilege (like attorney-client privilege) is not relevant
  - Ex. Cannot ask: "What did your attorney tell you about whether these actions were consensual?

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Questions Prohibited

- In either a live hearing or using the written option, questions concerning the complainant's sexual predisposition or prior sexual behavior are not relevant unless:
  - Offered to provide someone other than respondent committed the conduct alleged; or
  - Incidences concern prior sexual behavior with the respondent and are offered to prove consent

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Credibility Assessments

- DOE: Do not rely on "demeanor" alone – can be inaccurate, especially in traumatic situations
- Take trauma into account
- Other factors for credibility:
  - Consistency;
  - Plausibility; and
  - Reliability

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Determining Responsibility

- Following live hearing or written exchange of questions, the decision maker must determine responsibility
- Independent assessment of the evidence
- No deference to investigation report

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Evidence Standard

- Schools may utilize either a "preponderance of the evidence" OR "clear and convincing" evidence standard, HOWEVER
- School must apply this standard to:
  - *For formal complaints against students as for formal complaints against employees, including faculty, and*
  - *Apply the same standard of evidence to all formal complaints of sexual harassment*
- Major practical issue before 8/14/20: Revision to policies, collective bargaining agreements, contracts, and faculty handbooks/manuals

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Evidence Standard

- Preponderance of the Evidence: More likely than not
  - What is more plausible?
  - What corroborating evidence is supportive?
  - Sometimes – who do you believe more and why?
- Clear and Convincing: Highly probable; highly and more substantially likely to be true

Neither are as high as the standard of evidence in criminal cases – "beyond a reasonable doubt"

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Written Decision

- Identification of Allegations
- Procedural Steps
- Findings of Fact
- Application of Facts to Code of Conduct
- Statement of Results and Rationale for Each Allegation
- Sanctions and Remedies
- Appeal Procedures

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Written Decision

- Ensure Title IX Coordinator receives a copy of decision and any other documents involved in process for required 7-year retention
- Decision must be provided to parties simultaneously
- Determination is not final until:
  - Date of written determination following appeal; or, if no appeal is taken
  - Date the appeal deadline expires

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Poll Question 1:

Does your current policy provide for a decision maker that is a different person than your Title IX Coordinator?

1. Yes
2. No
3. Unsure

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TOPIC #2

Sanctions and Remedies

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Sanctions

- Range of possible sanctions must be described in policy
- Focus not just on discipline, but also on restorative remedies to prevent recurrence
- Don't forget about other legal obligations

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Sanctions - Examples

- Written Warning
- Suspension
- Expulsion
- Demotion
- Termination

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Other Legal Obligations

- Student Conduct Policies
- Suspension/Expulsion beyond 10 days
- IDEA/504 Students
- Employee Due Process Procedures

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Remedies

- Title IX Coordinator responsible for implementing remedies
- May be the same or similar to interim supportive measures
- Must be designed to restore or preserve equal access to the District's education programs or activities
- Need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent

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Remedies

- Range of possible remedies must be included in policy
- Evaluated by DOE under a "deliberate indifference" standard
- Examples:

Counseling modifications	Accommodations to class schedules or school work	Restrictions on contact between the parties	Increased monitoring

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TOPIC #3

Appeal Process

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Appeal Procedures

- District must notify the other party in writing when appeal is filed
- Give both parties a reasonable, equal opportunity to submit a written statement
- Issue a written decision describing result of the appeal and rationale
- Provide written decision simultaneously to both parties

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Appeal Decision Maker

- Must not be Title IX Coordinator, Investigator, or Initial Decision Maker
- Can be individual or multi-member panel
- Not the full School Board
- Avoid conflict of interest and bias

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Mandatory Appeals

- Procedural irregularity that affected the outcome of the matter
- New evidence not reasonably available at the time of the determination regarding responsibility or dismissal was made
  - Evidence could affect outcome
- Title IX Coordinator, Investigator, or Decision Maker had conflict of interest or bias for or against either party that affected the outcome

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Permissive Appeals

- May offer an appeal on any other basis, as long as the opportunity is offered to both parties equally
- Examples:
  - Whether the evidence met the identified standard of proof
  - Whether the sanction is proportional to the policy violation

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TOPIC #4

Impartiality, Bias, and Conflicts of Interest

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Impartiality

- Divorce yourself from stereotypes or generalizations about groups of people- e.g., "victim-blaming" or "believe all women"
- DOE: The Decision-Maker must endeavor not to "develop a personal relationship" with one party over another, including based on whether parties are remote for live hearing

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Implicit/Unconscious Bias

- Undergo training or obtain resources on implicit or unconscious bias;
- Recognizing and acknowledging biases
  - Potential protected class bias
  - Group bias and assumptions – athletes, certain employment positions, etc.
- Gather input from diverse sources and viewpoints, to the extent possible
- Avoid focusing on early "gut reactions" and weigh all possible outcomes

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Conflicts of Interest

- May have to recuse yourself from certain cases if a conflict of interest exists
- Disclose and recognize conflicts of interest:
  - Familiarity or connection to a party?
  - Stake in the outcome?

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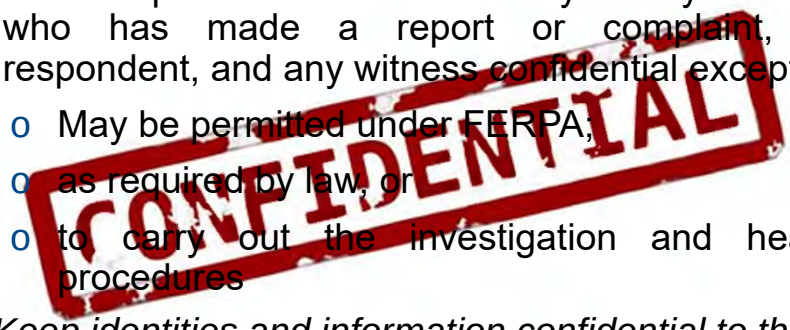
Confidentiality

- Must keep confidential the identity of any individual who has made a report or complaint, any respondent, and any witness confidential except as
  - May be permitted under FERPA;
  - as required by law; or
  - to carry out the investigation and hearing procedures



Keep identities and information confidential to the hearing and resolution process – only talk to school officials with a "need to know"

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Poll Question 2:

My District has provided implicit bias training for administrators in the past:

1. Yes
2. No
3. Unsure

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