OVERVIEW OF THE DELIBERATION PROCESS

• Only decision-makers attend the deliberations.
  – Parties, witnesses, advisors, and others excused.
  – If Title IX Coordinator is present, they do not participate and only serve as a resource to the decision-makers.
  – ATIXA recommends they not participate. Same with legal counsel.

• Do not record; recommend against taking notes.

• Parse the policy again; remind yourselves of the elements that compose each and every allegation.

• Assess credibility of evidence and assess statements as factual, opinion-based, or circumstantial.

• Determine whether it is more likely than not that policy has been violated or determine whether highly probable if C&C standard applies.
DELIBERATIONS

General Information

• Anticipate that the panel/decision-maker must concretely articulate the rationale for and evidence supporting its conclusions.
• With a panel, the Chair must be a voting member.
• Typically, there is no specific order in which allegations must be addressed. When in doubt, start with the most serious.
• Chair should ensure that all viewpoints are heard.
• Neutralize any power imbalances among panel members, particularly based upon their position at the institution.
• Ensure an impartial decision that is free of substantive bias.

Withhold judgment until all the evidence has been considered.
Foundation for Decisions

- Decisions must be based only upon the facts, opinions, and circumstances provided in the investigation report or presented at the hearing.
- Do not turn to any outside “evidence.”
- Assess each element in the policy (e.g. intent, sexual contact, voluntary, etc.), separate it out and determine if you have evidence that supports that a violation of that element is proven. Assess evidentiary weight. Measure with the following questions:
  - Is the question answered with fact(s)?
  - Is the question answered with opinion(s)?
  - Is the question answered with circumstantial evidence?
Findings, Impact Information, and Sanctions

• Separate the “Finding” from the “Sanction.”
  – Do not use impact-based rationales for findings (e.g.: intent; impact on the Complainant; impact on the Respondent, etc.)
  – Use impact-based rationales for sanctions only.

• Complainant and Respondent should share impact statement(s) only if and after the Respondent is found in violation.

• Understand that the question of whether someone violated the policy should be distinct from factors that aggravate or mitigate the severity of the violation.

• Be careful about not heightening the evidentiary standard for a finding because the sanctions may be more severe.
• Decision-maker issues a written determination regarding responsibility that includes the following:
  – Sections of the policy alleged to have been violated
  – A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
  – Statement of and rationale for the result as to each specific allegation
    ▪ Should include findings of fact supporting the determination and conclusions regarding the application of the policy to the facts
  – Sanctions imposed on Respondent
  – Any remedies provided to the Complainant designed to restore or preserve access to the education program or activity
  – Procedures and bases for any appeal
WRITTEN DETERMINATIONS: LOGISTICS

• The decision-maker should author the written determination.
  – May follow a template provided by the Title IX Coordinator.

• The written determination should be provided to the parties simultaneously.
  – Follows existing VAWA/Clery requirements for higher education institutions, but now extends both to reach sexual harassment cases as well as applying to all K-12 determinations.

• The determination becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

• FERPA cannot be construed to conflict with or prevent compliance with Title IX.

• Will this letter be reviewed by the Coordinator and/or legal counsel?
APPEALS

- Elements under the 2020 Regulations
- Grounds for Appeal
- Process Flowchart
- Other ATIXA Recommendations
• 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.
GROUNDS FOR AN APPEAL

• All parties may appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein, on the following bases:
  – Procedural irregularity that affected the outcome of the matter
  – New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  – The Title IX Coordinator, investigator(s), or decision-maker(s) had a 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
  – Other additional bases (sanction?), as long as applied to the parties, equitably.
APPEALS: THE PROCESS

Request for Appeal

- Accepted
  - Remand
  - Sanction Adjusted

- Denied
  - Decision Stands

Decision Stands

New Investigation

New Hearing

Sanctions-Only Hearing

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• One level of appeal.

• Short window to request an appeal.
  – May always grant an extension if necessary

• Document-based and recording review.
  – NOT de novo
  – In other words, not a “second-bite of the apple.”

• Deference to original hearing authority.
QUESTIONS?
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