

# Disclaimers



---

- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
-

# Presentation Rules

---

- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

# Posting These Training Materials?

---

- Yes!
- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packP 4we3website

**Additional information available at:**

**Title IX Resource Center at  
[www.bricker.com/titleix](http://www.bricker.com/titleix)**

Find us on **Twitter** at  
**@BrickerHigherEd**

# Required Training for Appeals Officers

## 1 of 2

---

The new Title IX regulations require specific training for the Title IX Coordinator, investigator, decision-maker, and any other person designated to facilitate an informal resolution process.

- Section 106.45(b)(8)(iii)(C) clarifies that the - has to have some of the same training, as set forth 106.45(b)(1)(iii)

# Required Training for Appeals Officers

## 2 of 2

---

An appeals officer must be trained on:

- Jurisdiction: understanding “the scope of the recipient’s education program or activity” (Level 1)
- Definitions of “sexual harassment” under the new Title IX regulations (Level 1)

# Topics for Level 2 Training

---

- 

- •



# Aspirational Agenda

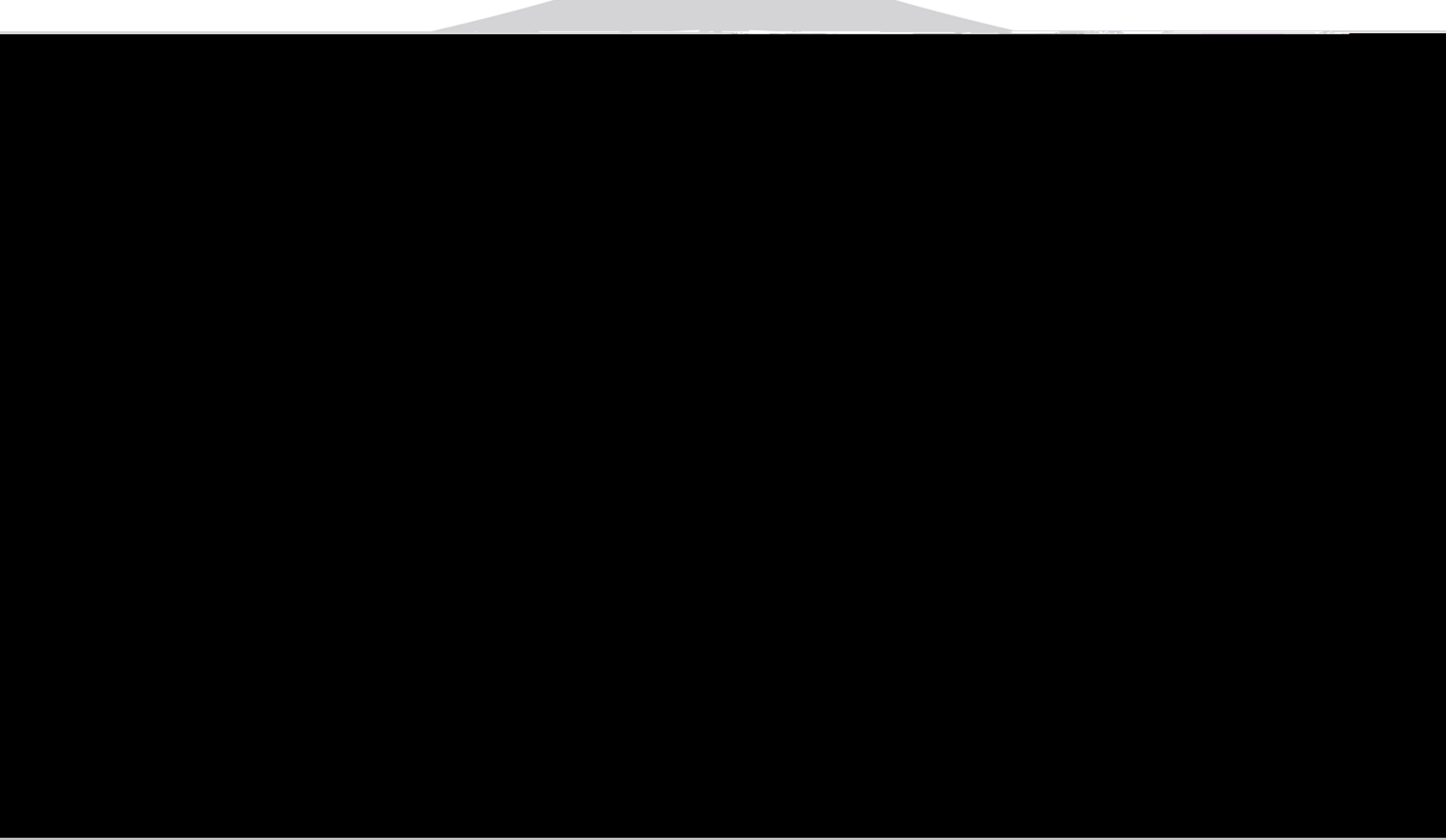
---

## Day 1

- |             |  |
|-------------|--|
| 9:00-10:30  | Introduction and Understanding Title IX<br>Process and Roles |
| 10:30-10:45 | Break  |
| 10:45-12:00 | Continue with Understanding Title IX<br>Process and Roles    |

## Day 2

- |             |  |
|-------------|--|
| 9:00-10:00  | Live Scenario                                |
| 10:00-10:30 | Impartiality, Bias, and Conflict of Interest |
| 10:30-10:45 | Break  |
| 10:45-12:00 | Handling Hypotheticals                       |



# The Appeals Officer's Role(s)

---

# Bases for appeal: Procedural Integrity

## 1 of 2

---

The three required base for appeals are (your institution can add to this):

- 1. Procedural integrity** that affected *the outcome of the matter*
- Does the process in policy align with process as applied?

# Bases for appeal: Procedural Integrity

## 2 of 2

---

What you need to know to answer this question:

- The process in your specific policy (to the extent it adds to the detailed process in the Regulations)
- The Title IX Coordinator's role
- The Investigator's role
- The Decision-Maker's role (relevancy determinations)
-

# Bases for appeal: New Evidence

---

2. **New evidence** that was *not reasonably available* at the time

# Bases for appeal: Conflict of Interest or Bias 1 of 2

---

- 3. Conflict of interest or bias** against a party by the Title IX Coordinator, investigator(s) or decision maker(s) that affected the outcome of the matter

This will require the appeals officer to be able to make determinations on bias and conflict of interest, usually on peers and understand the case to know if any bias or conflict of interest would impact the outcome of the matter

# Bases for appeal: Conflict of Interest or Bias 2 of 2

---

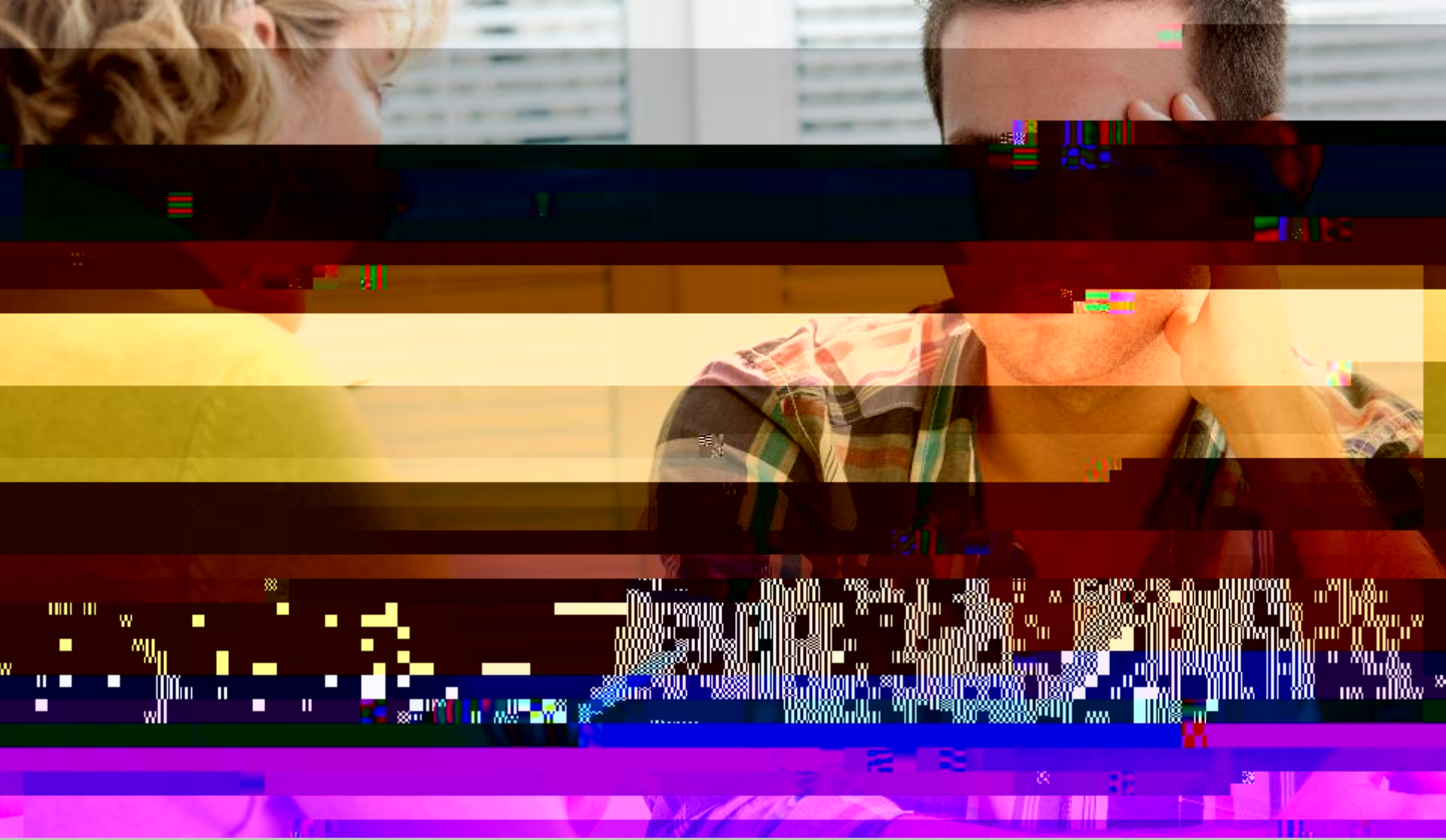
- How do you make these determinations of conflict of interest or bias, especially with coworkers or supervisors?
- How do you determine if this *actually affected* the outcome?



# Bases for appeal: Dealer's Choice

---

4. Any other bases the recipient establishes provided it is equally available or applies equally to both parties.
- You may or may not have additional appeal bases in your policy.
  - This will require the appeals officer to understand the institution's specific bases for appeals.
  - Many institutions provide a basis for appeal for arbitrary and capricious outcomes or sanctions not proportionate to the findings



## Understanding the Process: The Title IX

# The Title IX Coordinator

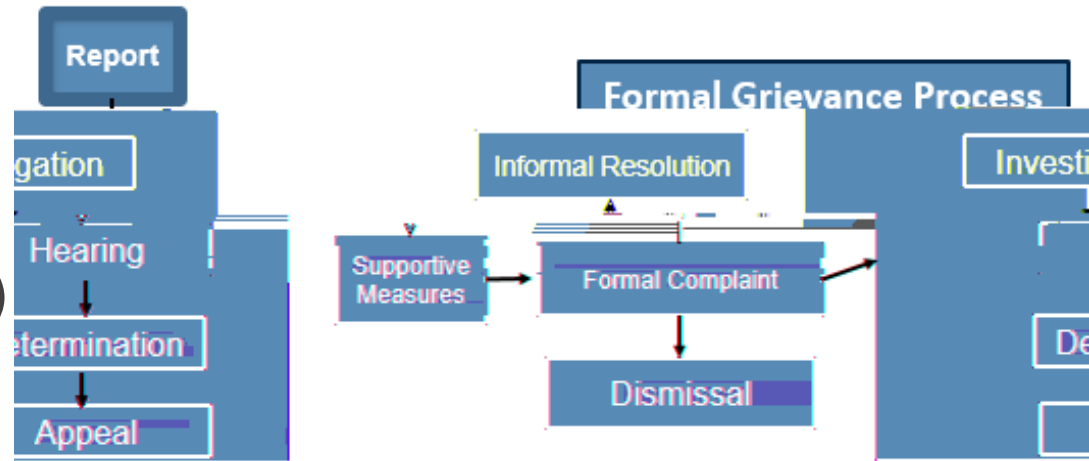
---

## Oversees procedural integrity

- Oversees the whole process and helps to ensure the written process and the as applied process are the same (and you, as the Appeals Officer, are a part of this).
- Often is the person who ensures the investigators, decision-makers, informal resolution officers and appeals officers are properly trained
- Often is the person who ensures advisors are available for hearings
- Makes decisions on new issues that arise to keep them in compliance with the policy

# Overview of the Process

Process starts with the Report. Then Supportive Measures leads to either 1) Informal Resolution; 2) Formal Complaint; or 3) Dismissal. A Formal Complaint goes to the Formal Grievance Process which includes Investigation, Hearing, Determination and Appeal.



# The Title IX Coordinator 1 of 4

---

For Appeals Officer purposes, must understand the intake process.

-



# The Title IX Coordinator 3 of 4

---

When a Title IX Coordinator may elect to sign and issue a formal complaint without a complainant:

- Complainant has not yet been identified or cannot be identified, but evidence indicates that sexual harassment

# The Title IX Coordinator 4 of 4

---

For Appeals Officer purposes, must understand the intake process.

- Often is the person who selects and assigns a specific investigator, decision-maker, and appeals officer to a matter
- May be the person who supervises the Title IX Office
- May be the investigator





# The Investigator 1 of 2

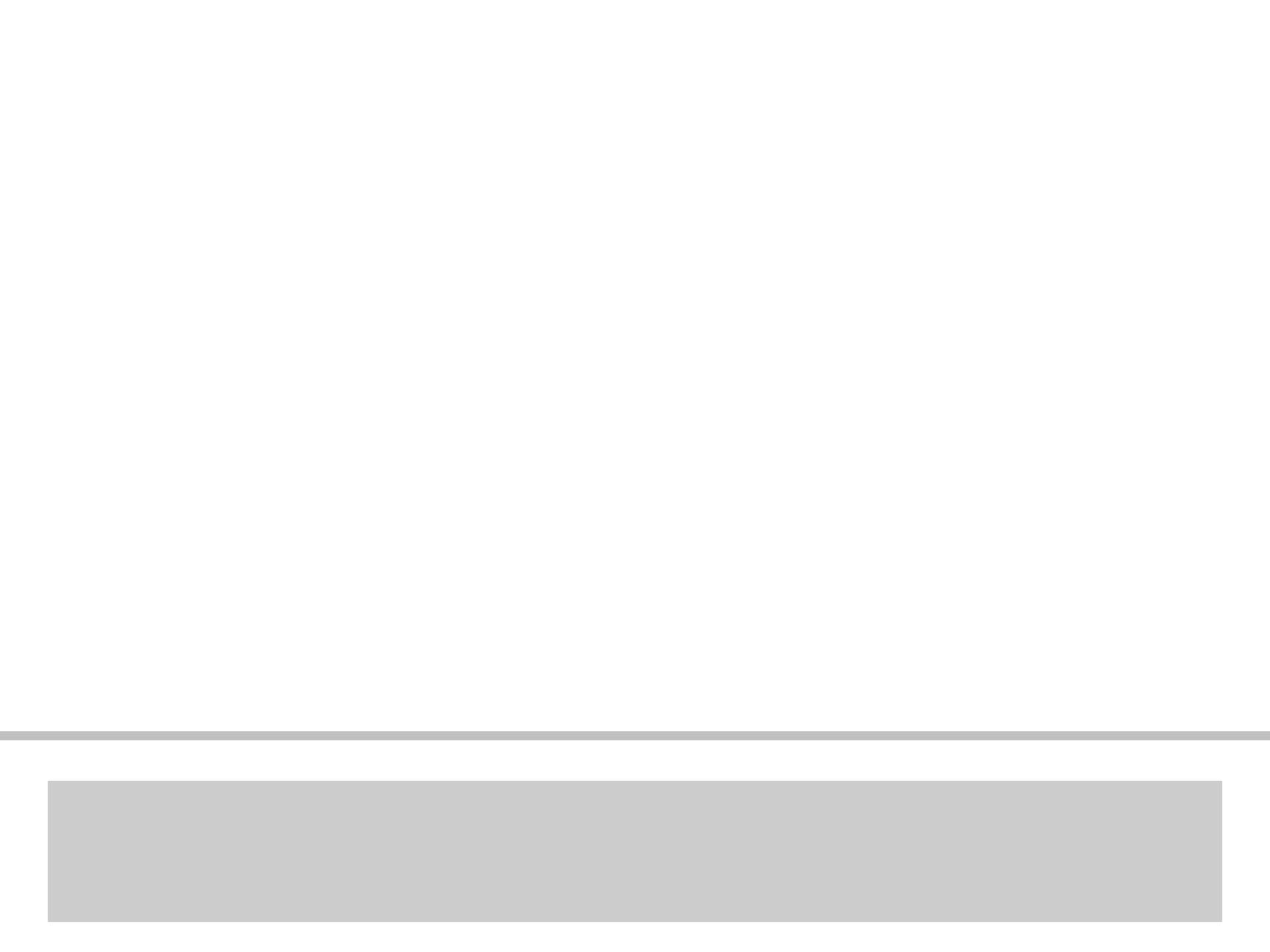
---

1. The gatherer of all relevant evidence.
2. The organizer of all relevant evidence

# The Investigator 2 of 2

---

- Does not make a determination on the facts
- Determines some level of whether evidence is relevant.



# What is Relevant? 1 of 3

---

The new regulations don't really tell us directly.

The preamble discussion indicates that it may include: evidence that is “probative of any material fact concerning the allegations.”

(30343)

# What is Relevant? 2 of 3

---

The preamble also tells us:

“evidence pertinent to proving whether **facts material to the allegations** under investigation are **more or less likely to be true** (*i.e.*, on what

# What is Relevant? 3 of 3

---

Does this question, topic, evidence help **move the dial** under the standard of evidence?

- **Preponderance of the evidence**: a fact is more likely than not to be true (30373 fn. 1409)
- **Clear and convincing**: a fact is highly probable to be true (30373 fn. 1409)

# Issues of Relevancy (NOT Rules of Evidence)

---

-



# This also means:

---

- Cannot exclude redundant evidence
- Cannot exclude character evidence
- Cannot exclude hearsay
- Cannot exclude evidence where the probative value is substantially outweighed by the danger of unfair prejudice (30294)

# This means:

---

- Cannot rely on a statement against a party interest (30345)
- Cannot rely on a statement of deceased party (30348)

# Issues of Relevancy (NOT Rules of Evidence).

---

“[A] **recipient** may **not** adopt rules **excluding** certain types of **relevant evidence** (e.g.,

# Issues of Relevancy: What isn't relevant?

---

1. **Privileged:** Information protected by a legally recognized privilege
2. **Treatment:** Party's medical, psychological, and similar records unless voluntary written consent
3. **Rape Shield:** Sexual history of complainant subject to two exceptions
4. **Cross-Examined:** Party or witness statements that have not been subjected to cross-examination at a live hearing



# Relevancy: Legally Privileged Information – What does this include?

---

- Preamble identifies medical and treatment records.
- Jurisdiction-dependent
  - Attorney-client communications
  - Implicating oneself in a crime
  - Confessions to a clergy member or other religious figures
  - Spousal testimony in criminal matters
  - Some confidentiality/trade secrets

# Relevancy: Medical treatment and Investigations

---

Section 106.45(b)(5)(i): when investigating a formal complaint, recipient:

- 

a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, **voluntary, written consent to do so for a grievance process under this section.**"

# Issues of Relevancy: What isn't relevant? – Rape Shield Provision

---

-



---

# Additional information for the Investigator regarding relevancy

---

- There are more considerations for decision-makers regarding relevancy that are not an issue for investigators.
-

# Retaliation

---

When parties elect not to participate, a recipient cannot retaliate against them (30322)

- It is the right of any party or witness not to participate in the investigation

# Relevancy and the Investigator

---

## The gatherer of all relevant evidence

- **Recipient** must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (30331)

# Relevancy and the Investigation and Report

---

“The requirement for **recipients** to **summarize** and evaluate

**Make No Assumptions**

# The Decision-Maker's Role

---

1. Make relevancy determinations...before any question at the live cross-examination hearing can be answered
2. Run an orderly and truth-seeking live cross-examination hearing
3. Write a decision: apply the policy, use standard of review, and evaluate relevant evidence still in the record after the hearing





# Everything the Investigator Had to Consider + More!

---

- The Decision-Maker has to consider all of the relevance issues the investigator did
- **Plus**

---

# Relevancy: No Reliance on Prior Statements

---

What if a party or witness gave a statement during the investigation but is not participating in cross-examination?

- “Must not rely on any statement of that party or witness in reaching a determination”

# Relevancy: No Reliance on Prior Statements – The Theory 1 of 2

---

If parties do not testify about their own statement and submit to cross-examination, **the decision-maker will not have the appropriate context for the statement**, which is why the decision-maker cannot consider that party's statement.

(30349)

# Relevancy: No Reliance on Prior Statements – The Theory 2 of 2

---

In a blog post on May 22, 2020, OCR clarified:

*not*

The p ueecm n

# Relevancy: No Reliance on Prior Statements 1 of 2

---

- No party, no problem: "[A] party's advisor may appear and conduct cross-examination . " (30346)
- Only one side appears? Recipient must provide an advisor to cross examine the party that shows up. (30346)

# Relevancy: No Reliance on Prior Statements 2 of 2

---

- Cross-examination of a third party of what a non-appearing party stated does not count as statements tested on cross-examination. (30347) (provides examples of family and friends showing up on behalf of the non-appearing party)
- “[A] rule of non-reliance on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements.” (30347)





# More Responsibilities of the Decision-Maker

---

- Must determine relevance after each individual question asked and provide an explanation if determine it is not relevant
- Has leverage to control decorum of the hearing and can ultimately remove individuals that do not respect decorum of the process

# Process: The Set up

---

## The setup

- Can have hearing in one room if a party doesn't request separate rooms and recipient chooses to do so.
- Separate rooms with technology allowing live cross examination at the request of either party
- Can be fully virtual.
- Must be recorded or transcribed

(30332, see also 30333, 30346) explaining 106.45(b)(6)(i)

# Process

---

Cross-examination must to be done by the party's “**advisor of choice** and **never by a party personally.**”

# Advisor of Choice

---

- May be an attorney or a parent (or witness) (30319)
- Can prohibit speaking other than when questioning. (30312)
- If party does not have an advisor present at the hearing, the **recipient** “**must provide** without fee or charge to that party, an advisor \_\_\_\_\_, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.”  
(106.45(b)(6)(i) and preamble 30339)

# Advisors

---

- Title IX Training not required (however a recipient may train its own employees whom the recipient chooses to appoint as party advisors) (30342)
- A party cannot “fire” an appointed advisor (30342)

“But, **if** the party correctly asserts that the **assigned**  
**-examination on**

# No Support People, Unless Required by Law

---

Not in the hearing, unless required by law (30339)

- ADA accommodations-required by law
- CBA require advisor and attorney?

# Questioning by the Decision-Maker and Neutrality

---

- The **neutrality** of the **decision-maker** role, and the role of the advisor to ask adversarial questions, protects the decision-maker from having to be neutral while also taking on an adversarial role (30330)

-

# Questioning by the Decision-Maker: Responsibility

---

**BUT “the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-makers own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party’s unique perspective about the evidence.” (30331)**





# More Responsibilities of the Decision-Maker – The Written Determination 1 of 6

---

The decision-maker's written determination **MUST** include:

- **Identification** of the **allegations** potentially constituting sex harassment



# More Responsibilities of the Decision-Maker – The Written Determination 3 of 6

---

The decision-maker's written determination **MUST** include:

- **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;

# More Responsibilities of the Decision-Maker – The Written Determination 4 of 6

---

The decision-maker's written determination **MUST** include:

- **Key elements of any potential policy violation** so parties have a complete understanding of the process and information considered by the recipient to

# More Responsibilities of the Decision-Maker – The Written Determination 5 of 6

---

The decision-maker's written determination **MUST** include:

- A statement of each allegation
- The result of each allegation
- The rationale for each allegation
- A determination regarding responsibility
- Any sanctions
- Bases for appeal

---

Make a Response Deliberate as a Form of Decision

**Make No Assumptions**



# Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts 1 of 3

---

Section 106.45 **requires** that investigators (and Title IXion 106.4

# Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts 2 of 3

---

For the Appeals Officer, this means that not only do **you** have to be free from **partiality, bias, conflict of interest, and avoid prejudgment of facts**, but **ALSO**:

You must be able to assess whether the Title IX Coordinator, investigator, and decision-maker on each case you review was free from ***bias*** and ***conflict of interest*** (as a basis for appeal).

# Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts 3 of 3

---

- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.

(30249-30257; 30496)



# Bias: Concerns raised in comments in preamble

---

- Neutrality of paid staff in Title IX positions
- Institutional history and “cover ups”
- Tweets and public comments
- Identifying as a feminist

# Perceived v. Actual Bias

---

- Both can lead to the same perception (30252)
- On appeal of decisions, the Department requires the bias “that affected the outcome of the matter”

# How the Department tried to prevent bias

---

No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

# Bias: Objective Rules and Discretion

1 of 2

---



# Bias: Objective Rules and Discretion

## 2 of 2

---

- **Discretionary**: Recipients have the discretion to have a process to raise bias during the investigation.
- **Mandatory**: Basis for appeal of decision-maker's determination per 34 C.F.R. 106.45(b)(8)(i)(C).

# Conflict of Interest: Concerns raised in comments in preamble

---

- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

# Preamble Discussion on Bias and Conflict of Interest 1 of 3

---

Final regulations “leave recipients **flexibility to use their own employees, or to outsource** Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.” (30251)

# Preamble Discussion on Bias and Conflict of Interest 2 of 3

---

- No *per se* prohibited conflicts of interest in using employees or administrative staff
  - including supervisory hierarchies (but see portion about decision-makers and Title IX Coordinator as supervisor)
- No *per se* violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process

(30352-30353)

# Preamble Discussion on Bias and Conflict of Interest 3 of 3

---

- Example: it is **not** a ***per se bias*** or **conflict of interest** to hire professionals with **histories of working in the field of sexual violence** (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead **recommends** using a **reasonable-person test** to determine whether bias exists.

# Example of Unreasonable Conclusion that Bias Exists

---

# Training, Bias, and Past Professional Experience

---

This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience

(30252)

# Department: Review of Outcomes Alone Does Not Show Bias

---

- Cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.”
- Explained: the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.” (30252)



# Examples of Bias

---

- 

-

# Avoiding Prejudgment of Facts at Issue

---

A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

## Appeals Officer's role in review 1 of 2

- Know what the process was supposed to look like
- Use that as a measure against what it actually looked like
- Did it make a difference?
- Be thoughtful and unbiased. You are the “fresh eyes” on the situation.

---

# Hypotheticals Disclaimer

---



*Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.*

# Hypotheticals on Bias and Conflict of Interest 1 of 2

---



You are the Appeals Officer for a matter in which you were not the investigator, decision-maker, or Title IX Coordinator. You have been handed the investigator report, the decision of the decision-maker, the bases for appeal, and the written responses of the parties on appeal. All of the appeals raise bias and conflict of interest.

# Hypotheticals on Bias and Conflict of Interest 2 of 2

---



For each hypothetical, there will be a

# Hypothetical 1



# Hypothetical 2

Complainant appeals alleging bias in the whole Title IX process. Specifically, Complainant alleges that the TIXC's prior work as the TIXC at another school, which did not properly investigate complaints, has

# Hypothetical 3

You have concerns about comments one of your investigators made to you about his belief that a woman cannot rape a man. You've shared this with your TIXC, but you don't know if anything came of it. You receive an appeal from a male Complainant in a sexual assault matter. The Complainant says the decision-maker was biased in that the decision did not find a violation of policy against a female Respondent. You know that the decision-maker and investigator are close friends outside of work. On the face of the file on appeal, everything appears to have otherwise followed the process.

# Hypothetical 4

You receive an appeal from a male Respondent with an attorney challenging the bias of the decision-maker for her prior work as a rape crisis counselor. The decision-maker is a good friend of yours and shared with you before you were assigned to the appeal that Respondent's case was one of the worst she had ever reviewed and wished the Complainant had pursued a criminal charge against Respondent because he shouldn't be on the streets. You believe her because she would know; she's seen a lot. You review the decision and decide that it is supported by the record.

# Hypothetical 5

You receive an appeal from a male Respondent with an attorney challenging the bias of the decision-maker for her prior work as a rape crisis counselor. The decision-maker handles Title IX decisions all the time and has been fully trained in compliance with the new regulations. The decision appears to be fully supported by the record, but it did find against Respondent in a sexual assault violation of policy. The decision-maker's record does indicate that, of the twenty cases she issued decisions on last year, eighteen of them found a violation by the Respondent and that all but one of those Respondents were male.

# Hypothetical 6

You receive an appeal from a Respondent alleging



# The Appeal Process 1 of 2

---

- Again, know your own policy—have your Title IX Coordinator train you—sign it in writing and have it on record.
- Regulations require an appeals process if formal complaint dismissed or after responsibility determined following a live cross-examination hearing and written determination from that decision-maker.

---



# Standard of Review of Appeal

## 1 of 3

---

- Not expressly stated in the Regulations, so discretion left to institutions
- But, with the required bases of appeal, none of them require the appeal decision-maker to reexamine all of the evidence to see if they would reach the same conclusion (known as a review)

# Standard of Review of Appeal

## 2 of 3

---

The bases the Regulations set are very limited and don't necessarily require a "standard of review":

- Was there a procedural issue? If yes, did it affect the outcome of the matter?
- Is there new evidence? If yes, was the evidence reasonably available at the time of the determination regarding responsibility or dismissal? If not, could its inclusion affect the outcome of the matter?

# Standard of Review of Appeal

## 3 of 3

---

- Did the Title IX Coordinator, investigator(s), decision-

# The Difficult Issue on Appeal: Relevancy Determinations 1 of 2

---

- There will be challenges on appeal to relevancy decisions made by the decision-maker at the live cross-examination hearing. The argument will be that, had that decision been different, the outcome would have been different.
- How do you handle these?

# The Difficult Issue on Appeal: Relevancy Determinations 2 of 2

---

- Ask, does this fit into one of the bases for appeal? Does this constitute a procedural issue if you would have made a different relevancy determination? What if it is just wrong and contrary to the Title IX regulations?
- Can a relevancy determination by a decision-maker at the live-

# Considerations for Additional Grounds for Appeal 1 of 2

---

- Do you want a control valve for an decision that has the record wrong?
- If so, you must make such grounds available evenly to parties.

# Considerations for Additional Grounds for Appeal 2 of 2

---

You agree with a ground for appeal.  
What do you do?

- Send it back to the decision-maker below?
- Overturn the decision below?
- Remand to the Investigator (or a new Investigator)?

# Written Appeal Decision 1 of 2

---

The Regulations do not detail what must be included in the written appeal decision in the same way that they detail what must be included in the decision-maker's determination after the live cross-examination hearing.



# Written Appeal Decision 2 of 2

---

Regulations are clear that the appeal decision must describe the result and rationale for the result

SHOW YOUR WORK.





\_\_\_\_\_

# Determinations from Written Decision for Hypotheticals 1 of 2

---

1. Respondent, Professor Ronan, violated the College's policy on sexual harassment. Specifically, the record supports by a preponderance of the evidence that Respondent stalked Complainant, Katie Kendall (a student) on campus by showing up to her organization's events, waiting for her in the dining hall, working out when her team was working out, and leaving notes on her car. Much of the stalking was documented in security footage, text messages, and the notes left by Professor Ronan.



# Appeal Hypothetical 1

---

## *Procedural Irregularity*

Prof. Ronan: This case was not filed until six months after the stalking had already stopped. Then, it took four months longer for the case to be finalized than what the policy promised. The delay made it more difficult for me to find witnesses that recalled these interactions.

# Appeal Hypothetical 2

---

## *Procedural Irregularity/Bias*

Katie alleges that the decision-maker, who is a tenured faculty member in another department, was biased towards faculty members. Specifically, the decision-maker refused to allow testimony about another student that Prof. Ronan began to stalk after Katie, or the student that Prof. Ronan stalked before Katie.



# Appeal Hypothetical 3

---

## *Procedural Irregularity/Bias*

Prof. Ronan states that the investigator exhibited bias because in the interview transcripts with Katie, the investigator offers to connect Katie with counseling and other supportive measures if needed. Because stalking requires consideration

# Appeal Hypothetical 4

---

Prof. Ronan is not friends with Katie on Facebook and cannot see her posts, but an anonymous person provided Prof. Ronan with a series of posts on Katie's page prior to the alleged stalking, noting that she was leaning heavily on Prof. Ronan for support during a break-up with her boyfriend, and indicating plans to meet up at the dining hall every day so she would not look for her ex-boyfriend.

# Appeal Hypothetical 5

---

Prof. Ronan asked for the investigator to gather Katie's counseling records, but the investigator did not do so. Prof. Ronan believes that these records will show that





**Thank you for attending!**

**Remember additional information  
available at:**

**Title IX Resource Center at  
[www.bricker.com/titleix](http://www.bricker.com/titleix)**

**Find us on [Twitter](#) at  
[@BrickerHigherEd](#)**