

Title IX Investigation and Adjudicator Training

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University of Maine System

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Agenda: What We Will Cover

- Title IX: New Regulations and Guidance
- How to conduct an investigation and grievance process, including a live hearing with advisor-led cross-examination.
- How to serve impartially, including avoiding prejudgments of facts, conflicts of interest and bias.
- How to evaluate relevance and create an investigation report that fairly summarizes relevant evidence.
- How to make rulings on relevance, reliably assess credibility and weigh evidence, and write a final determination letter.
- How to conduct and review appeals.

Title IX- New Regulations and Guidance

- Final Title IX Regulations went into effect on August 14, 2020
 - Not retroactive
 - Prior OCR Guidance rescinded
- U.S. Department of Education Office of Civil Rights Blog
- U.S. Department of Education Title IX Website
- September 4, 2020 OPEN Center Q&A Regarding the Department's Final Title IX Rule
- Court Jurisprudence

Defining Sexual Harassment Under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

- An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (Quid Pro Quo);
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- Sexual assault, dating violence, domestic violence, stalking and retaliation:
 - Penetration without consent
 - Fondling (touching of genitals, breasts, buttocks) for sexual gratification purposes

Jurisdictional Scope Under Title IX

- Requirement to adopt a grievance procedure applies only to sex discrimination occurring against a person in the United States.
- **Education program or activity** includes locations, events, or circumstances over which the institution exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by an institution.

Mandatory/Discretionary Dismissal Under Title IX

- Under the Final Rule, if alleged conduct would not constitute “sexual harassment,” did not occur within the University’s program or activity or did not occur in the United States the school **must** terminate its Title IX grievance process but can still proceed under the SCC/EO process.
- Under the Final Rule, the University *may* dismiss the complaint if the Complainant withdraws their formal complaint, the Respondent is no longer enrolled or employed by the University, or the circumstances would prevent the school from gathering sufficient evidence to reach a determination on the merits.

Formal Complaints → Investigation

- Report v. “formal complaint.”
- Detailed written notice must be to provided to parties sufficiently in advance of interview.
- Cross complaints.
- Consolidation of complaints.
- Title IX Coordinator signed complaints.
- Amended complaints & amended notice of allegations.

Guiding Principles for Title IX Investigations and Grievance Processes

- If University has “actual knowledge” of sexual harassment, it must respond promptly in a manner that is not deliberately indifferent.
- Equitable treatment & process for parties.
- Burden of gathering evidence and burden of proof is on University, not parties.
- Equal opportunity to present witnesses, including experts, and provide inculpatory and exculpatory evidence.
- No “gag orders” on parties.

Guiding Principles for Title IX Investigations and Grievance Processes

- Presumption that Respondent is not responsible until final determination is reached following a hearing.
- Conduct objective evaluation of all relevant evidence.
- Coordinators, investigators and decisionmakers cannot have a conflict of interest or bias.
- Promptly conduct investigations and grievance processes and document reasons for delay.
- Comply with confidentiality and privacy laws in conducting investigations and grievance proceedings.

Guiding Principles for Title IX Investigations and Grievance Processes

- Parties and witnesses must receive timely notices sufficiently in advance of meetings and hearings.
- Parties have opportunity to review, respond to, and reference evidence that is “directly related” to the allegations even if not relied upon by investigator/decisionmaker.
- Parties may be accompanied to any meeting/hearing by advisor of choice and will be appointed an advisor for cross-examination if they do not have one.

Guiding Principles for Title IX Investigations and Grievance Processes

- Investigators will not seek information or records protected by a legally held privilege (attorney/client, medical, or psychological records) without express, written consent of the party holding the privilege.
- Complainant's prior sexual history will not be explored except under limited exceptions.
- Credibility assessments will not be based on a person's status as a Complainant, Respondent or Witness.

Advisor of Choice

- All parties have the right to an advisor of choice:
 - May be present at all meetings, interviews and proceedings, but cannot speak on behalf of the party except for at hearing.
 - Any restrictions on advisor participation must be applied equally to all parties.
 - Advisors receive copy of evidence and investigation report but are required to sign non-disclosure agreement.
 - During live hearing, advisor of choice or University-appointed advisor will conduct cross-examination of opposing parties.
 - Advisors will be required to follow rules of decorum.

Conflict of Interest or Bias

- Parties have opportunity to challenge assignment of investigators/decision-makers for conflict of interest and bias.
- Investigators/decision-makers should recuse themselves if they cannot be impartial in a given case.
- Whether there is a conflict of interest or bias will be judged on an objective standard of whether a reasonable person would believe that conflict/bias exists.
- Bias/conflict of interest is a grounds for appeal.

Conflict of Interest or Bias

- Investigators/decision-makers must not pre-judge the facts or hold a bias in favor/against complainants and respondents generally or in a particular case.
- Decisions must be based on evidence and the individual facts and circumstances presented in each particular case, not stereotypes, generalizations, or assumptions.
- Being a University employee, being a particular gender, past advocacy work in the field of sexual violence, statistical outcomes, filing a complaint in capacity as Title IX Coordinator does not necessarily establish bias or a conflict of interest.

Conflicts of Interest or Bias

- Conflict of interest may be shown by relationship to parties or knowledge of particular facts that would pose conflict.
- Bias may be shown by:
 - Engaging in sex stereotyping attitudes and judgments such as that all complainants should be presumptively believed, that respondents are generally guilty, that only women experience sexual harassment, and that only men commit sexual harassment.
 - Inequitable treatment of parties in procedural rights afforded.
 - Failure to seek and analyze both inculpatory and exculpatory evidence.
 - Recall that regulations require a presumption of non-responsibility on the part of a Respondent.
 - Recall that it is the University's burden to prove and collect sufficient evidence to establish a violation, not the parties.

How to Avoid Bias

- Recognize that anyone (regardless of sex, gender identity or expression, sexual orientation, race, color, religion, national origin, age, disability status) can be a Complainant or a Respondent.
- Do not make assumptions- seek clarification and try to understand the parties' perspectives.
- Use the parties' and the witnesses' words, not your own.
- Use inclusive language in your interviews and communications
- Be aware of your biases, known or implicit, and educate yourself to check against them and gain cultural competency.
- Beware of confirmation bias – rigorous search for evidence and open-minded exploration of motives and theories.
- Consider any plausible explanations of behaviors fairly and objectively with other evidence.

Understanding Relevance

- Investigator has discretion to determine the relevance of evidence received. Decisionmaker has the discretion to determine the credibility and weight of relevant evidence.
- Evidence is relevant if it tends to prove or disprove an issue in the complaint:
 - Makes a material fact more or less probable than it would be without the evidence.
- Relevant evidence includes both “inculpatory and exculpatory” evidence.
- Evidence may be relevant even if it is sensitive, embarrassing or “prejudicial.”

Understanding Relevance

Evidence that *may* be relevant:

- Past sexual history between parties to prove consent.
- Past sexual history of Complainant to prove that a person other than the Respondent committed the alleged conduct.
- SANE exams, medical records if express, written consent is provided.
- Prior bad acts/ evidence of similar misconduct.
- Evidence of motive/ bias.
- Evidence that explores the credibility of a party/witness.

Understanding Relevance

Evidence that *may not* be relevant:

- Complainant's past sexual history unless limited exceptions met.
- Medical, psychological records/information unless valid written consent obtained.
- Information protected by a legally recognized privilege (attorney/client; psychologist, rape counselor) unless valid written consent obtained.
- Duplicative cross-examination questions.
- Evidence that does not tend to prove or disprove a material fact at issue.

Privileged/ Health Records

- Ensure that the investigator does not access, consider, disclose, or otherwise use a party's records that are made or maintained by a health or mental health professional unless the investigator obtains voluntary, written consent to do so.
- Ensure that the investigator does not seek information that is protected by a legally recognized privilege unless the party waives the privilege.

“Rape Shield” Exclusion

- Evidence of Complainant’s prior sexual behavior is not relevant unless:
 - Offered to prove that someone other than the respondent committed the alleged misconduct or;
 - Offered to prove consent from prior sexual behavior between the complainant and respondent.
- For example, prior sexual behavior may be relevant to explain:
 - Presence of a physical injury.
 - Pattern of communication/behavior between parties regarding consent.
- Prior sexual behavior is not relevant to explain:
 - General predisposition toward engaging in sexual activity.

Consent

- Consider prior/post relationship history to understand total context and how consent communicated between parties.
- Consider both verbal and nonverbal means of communication in determining whether consent was given for particular sexual activity.
- Review sexual activity as a whole to understand total context.
- May be sufficient evidence of lack of consent to some acts, and not others.
- Consider objective circumstances of the sexual activity as well as the parties' subjective feelings about it.
- Consider circumstances of decision to disclose/report.
- Consent cannot be obtained by force, intimidation or coercion.



Key inquiry: What would reasonable person in Respondent's position have understood from other party's express words and actions as to whether valid consent was given?

Effect of Alcohol

- Alcohol can interfere with the creation of memory, but not necessarily render a person incapacitated.
 - **“Blackouts”**
- Differing perceptions about alcohol consumption.
- To determine intoxication v. incapacitation issues, investigators and adjudicators must seek/understand detailed information about:
 - Alcohol consumption
 - Food/water consumption
 - Tolerance levels
 - Observations by others, if possible
 - Other evidence of incapacity (texts, video, etc.)

Intoxication vs. Incapacitation

- Incapacitation is a state far beyond drunkenness or intoxication.
- Signs of intoxication include, but are not limited to:
 - Slurred speech
 - Weaving or stumbling while walking
 - Impaired fine/gross motor skills
 - Exaggerated emotions
- Signs of incapacitation include, but are not limited to:
 - Inability to speak coherently
 - Confusion of basic facts (day of week, birthdate, etc.)
 - Inability to walk unassisted
 - Unconsciousness

Incapacitation



Key Inquiry:

Whether Respondent knew/should have known that Complainant was incapacitated and *took advantage of Complainant's incapacity* to engage in sexual activity.

Scenario

Investigation Preparation & Information Gathering

- Obtain relevant policies.
- Consider known facts and identify potential sources of information:
 - Incident report/ disclosures, witnesses, electronic evidence (emails, texts, social media), phone records, documents, security video, card swipe records, physical site visit, forensic evidence (must be reviewed by trained forensic examiner).
 - Publicly available evidence (e.g. social media).
- Develop a working timeline of events and prepare outline of questions for parties/witnesses.
- Log of outreach, communications, investigation timeline.

Outreach to Parties/Witnesses

- Use parallel communications for parties (updates)
- Identify and address barriers to participation by:
 - Communicating care through tone and word choice
 - Using inclusive language
 - Addressing disability accommodations and interpreter services
 - Encouraging the use of available supports/resources
- Non-responsiveness:
 - Make at least 3 attempts at outreach using at least 2 different modes before concluding that someone is intentionally not responding.
 - Think about other avenues/people for outreach.

Interview Opening Statement

- Thank the person for coming.
- Brief explanation of matter.
- Explain recording.
- Explain process of the investigation/hearing, including expectations for participation and consequences for failure to submit to cross-examination.
- All information only disclosed on a “need to know” basis.
- Expectations of confidentiality (not parties), candor/prohibition on false statements, cooperation, no contact
- Discuss prohibition of retaliation.
- Explain amnesty policy.
- Explain guidelines regarding advisor’s participation.
- Ask: Questions?

Basic Interviewing Techniques

- Build a rapport—don't interrogate.
- Be sympathetic in neutral manner.
- Listen to understand and do not assume.
- Be comfortable with silence.
- Plan out questions, but let conversation evolve naturally.
- What are you able to tell me about your experience → Who, what, where, when, how?
- Avoid “leading” questions (*i.e.* questions that presume an answer)
- Establish a timeline.
- Make sure to ask the difficult questions!
- Get clarification.
- Ask: Anything else?
- Opportunity for follow-up.
- Avoid asking for opinions, speculation, or character evidence.

Interview Techniques

- Focus on sensory details.
- Pay attention to emotional cues and responses.
- Look for evidence of motive/bias/interest, even where not immediately apparent.
- Listen for “ring of truth” answers.
- Rely upon maps, photos, electronic evidence where available.
- Create running timeline.
- Be open minded, do not fill in gaps with assumptions, use language of witness, and **listen**.
- Reflexive questioning.
- Do not paraphrase or summarize.
- Considerations for Zoom interviewing.

Complainant Interview

- Reluctant complainants → what to do?
- Open-ended, non-judgmental questions.
- Do not ask about prior sexual history (except as relevant/permitted)
- Consider impact of parents, advisors, etc.
- Handling conflicting statements (reconciliation)
- Handling difficult disclosures (explain why you need to know)
- Interview for clarification – don't interrogate.

Complainant Interview

- What are you able to tell me about your experience?
- What are you able to tell me about . . .
 - What you saw?
 - What you heard?
 - What you tasted?
 - What you smelled?
 - What you touched/felt?
- What are you able to tell me about how that made you feel?
- What are you able to tell me about what you thought was going to happen?
- What are you able to tell me about what your thought process was when . . .
- Can you tell me more about . . . ?

Complainant Interview

- What are you able to tell me about any specific moments that stand out in your mind?
- What are you able to tell me about your physical reactions to this experience when it happened?
- What are you able to tell me about your emotional reactions to this experience when it happened?
- What are you able to tell me about impact on your life and behavior now compared to before? Eating? Drinking? Sleeping Other routines?
- Clarify the **Who, What, When, Where, How, Why** after giving open opportunity to share.
- Anything else you'd like to share that we haven't talked about?

Respondent Interview

- Acknowledge difficulty of conversation and affirm presumption of non-responsibility.
- Follow same structure and approach to questioning as Complainant interview.
- Allow Respondent to give statement in own words, uninterrupted.
- Seek exculpatory evidence, information and/or leads, other witnesses, etc.
- Ask Respondent to explain inconsistencies with known evidence & provide opportunity for Respondent to explain evidence disclosed by Complainant and witnesses.
- Explore sensory and peripheral details disclosed by Complainant.
- Explore motive, bias, interest.
- Identify where there is agreement/dispute about what occurred.

Explain Difficult Questions

What you say	What the interviewee hears
Are those the clothes you were wearing when this happened?	The investigator thinks it's my fault because of what I was wearing.
Were you drinking or doing any drugs?	I am in trouble/to blame for alcohol and drug consumption.
Did they physically hurt you or threaten you with a weapon?	I knew the person and they didn't hurt me or use a weapon. The investigator thinks I consented.
Why didn't you tell anyone about what happened?	The investigator thinks I am lying because I didn't immediately tell someone/report

Conclusion of Interviews with Parties

- Questions for other party/witnesses.
- Opportunity/need for follow-up.
- Safety planning/interim actions.
- Next steps, manage expectations.
- Exchange contact information, details.
- Work with advisor/ intake/ Title IX Office to ensure parties understand resources and how to obtain supportive measures.
- Explain parameters of no contact and retaliation.
- Questions?

Continued Investigation of Parties' Accounts

- Seek clarification of facts and information to help determine elements of the alleged violation or other additional evidence (who, what, where, when, how).
- Seek information about parties' behavior and communication.
- Exhaustive search for corroboration (even minor details).
- Explore motive, bias, interest.
- Explore circumstances of parties' disclosures about the incident.
- Identify witnesses, electronic evidence, other sources of evidence.

Witness Interviews

- Explore witness's relationship to the parties.
- Ascertain the source of the witness's knowledge.
- What to do about tampering with witness testimony.
- Follow the same open-ended approach with focused follow-up questions.
- Give enough detail to illicit relevant information but be circumspect about what is shared.
- Ask witnesses about parties' motives.

What if ?

Difficult Investigation Issues

- Interviewee volunteers highly sensitive information.
- Disappearing evidence (Snapchat).
- Prior complaints & pattern evidence.
- Cross complaints.
- Concurrent law enforcement investigations.
- Retractions.

Redactions

- Investigators may redact/withhold information that is not directly related to the allegations or that is otherwise barred from use, such as as because of a legally recognized and unwaived privilege.
- Department warns against overbroad exclusion of evidence and cautions institutions to be “judicious” and “not redact more information that necessary.”
- Keep log of any documents/information that is withheld or redacted.
- “Directly related” is broader than “relevant.”

Review of Evidence and Investigation Report

- Prior to finalizing the report, parties and advisors must have equal opportunity to inspect and review evidence that is “directly related” to the allegations, including any evidence that the investigator does not intend to rely on in the written investigation report.
- Parties and advisors have at least 10 days to inspect, review and respond to the evidence.
- Responses will be shared with other party/advisor.
- Investigator will consider responses prior to completing the investigation report and conduct any additional investigation, as necessary.
- Investigator will send report to Title IX Coordinator/designee for review.
- Parties/advisors have 10 days to review investigation report prior to hearing.

Before You Begin Writing the Report

- Know the University's policies and procedures.
- Decide whether to consolidate multiple complaints arising from same incident in a single investigative report.
- Have both parties had an opportunity to test/explain all information relied upon in report?
- Think about how you can make the report understandable to someone who is entirely unfamiliar with process/parties:
 - Spoon-feed factual information
 - Explain acronyms
- Document efforts to obtain information/interview witnesses that were unsuccessful.
- Document delays.
- Your report must stand on its own in the event of an internal/external review.

Report Contents

- Summary of Complaint.
- Jurisdiction.
- Procedural history– when the report was made, when the investigator was assigned, when the interviews were conducted, any delays, dates for review of evidence and responses.
- Applicable policies and procedures.
- Information considered during the investigation, including:
 - List of witnesses interviewed and when
 - List of documents and other information reviewed and who provided
 - List of witnesses proposed but not interviewed and why
 - Standard of proof (preponderance of the evidence)
 - Summary of Interviews and Evidence
 - Appendix

Summary of Relevant Evidence

- Chronological.
- Include timeline of parties' relationship up through complaint.
- Relevant and material facts only.
- Include both exculpatory and inculpatory evidence.
- Use verbatim quotes.
- Include source.
- Use headings and bullet points.
- Identify undisputed/disputed facts.
- Isolate areas of consistency/inconsistency among interviews/evidence.

Investigation Report

- Must fairly summarize the relevant evidence, including inculpatory and exculpatory information.
- May include direct observations and reasonable inferences drawn from the facts.
- May discuss consistencies/inconsistencies from various sources of information.
- Investigator does not make credibility assessments/determinations of responsibility under Title IX regulations – role of decisionmaker.

Attachments

- Decide what will be attached to the report (e.g., Facebook/text messages, Snapchats, photos, police report, etc.) keeping Department's guidance on relevance in mind.
- Redact as appropriate:
 - Keep in mind Department's guidance on relevance
 - Keep unredacted originals in your file
- If the material is attached, explain the attachment and refer to it in your report.

The Final Product

- Easy to read (e.g., use the active voice, good grammar, etc.).
- No typos.
- Use consistent terminology.
- Look professional (e.g., professional font, formatting, etc.).
- Follow consistent structure and format.

Conducting the Hearing

- Preparing for the hearing and pre-hearing meeting:
 - Review record
 - Identify witnesses to be called at hearing and “waived”
 - Review questions proposed by parties’ advisors
 - Go over hearing process and rules of decorum for hearing
- Zoom hearing – will receive training on technology used.
- Parties/advisors will have access to all information directly related to the allegations in complaint (evidentiary record and investigation report).
- Parties have an equal opportunity to present witnesses who have provided information to the investigator & have relevant information.
- Rules of evidence do not apply.

Advisor-Led Cross-Examination

- Cross-examination is designed to probe the credibility of the parties and witnesses and, according to OCR, is a critical element of due process.
- OCR states that no legal training is required to conduct cross-examination.
- According to OCR, the cross-examination function is fulfilled by advisors neutrally relaying the party's desired questions (and follow up questions) to the other parties and witnesses.
- All cross-examination questions must be posed to the hearing officer for a ruling on relevance before the party/witness answers.
- cross-examination must be conducted in accordance with the University's rules of decorum.

Chair's Responsibility to Make Relevance Rulings

- Use pre-hearing procedures to evaluate proposed questions and determine whether they are relevant/missible.
- Questions not submitted in advance may still be asked in hearing if relevant.
- Hearing officer may ask advisor to explain relevance of a question before ruling.
- Hearing officer may ask the advisor to re-frame question if it violates rules of decorum (abusive, hostile).
- Parties may choose not to attend the hearing or submit to cross-examination but are still entitled to University-appointed advisor in hearing to conduct cross-examination of other party and witnesses.
- Parties may waive cross-examination of the other party or witnesses.

Relevance Rulings

- If question is deemed by Hearing Officer to be irrelevant / subject to exclusionary rules (rape shield or privilege), Hearing Officer will state basis for disallowing the question:
 - Irrelevant because the question calls for prior sexual history of Complainant without meeting one of the two exceptions.
 - Irrelevant because the question calls for information protected by a legally held privilege or contained in a medical/psychological record.
 - Irrelevant because the question asks about an issue that does not tend to prove/disprove any material fact about the allegation(s).
 - The question is repetitive/has already been asked and answered.

Parties' or Witnesses' Failure to Submit to cross-examination

- If a party or witness does not submit to cross-examination at the live hearing, Decision-makers cannot rely on any statement of that party or witness in reaching a determination of responsibility:
 - May, however, rely on “non-statement” evidence
 - May admit evidence where statement itself constitutes alleged sexual harassment (e.g. verbal threat to sexually assault someone or “quid pro quo” communication)
- Decision-makers may not draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer questions.

Hearing Panel's Questioning of Parties/Witnesses

Before asking a question, consider:

- Will the answer to this particular question help me to understand if a violation of the policy occurred?
- How will the answer to this question illuminate whether or not a person's behavior meets the definition of a violation?
- Does the information I am attempting to elicit serve my curiosity about the person or the incident? Or, does it help the panel make a decision?
- Does the question probe the credibility of the person's narrative?

Body language, tone, and mannerisms are important in conducting the hearing and asking questions.

Questions Posed by Derrick's Advisor During Hearing Phase

Derrick's attorney advisor, Alice B. Payne, requests that you, the hearing officer, ask Carlos the following questions:

- Did you and Antwon have intercourse earlier in the week leading up to the incident and/or on the day of the incident?
- What is your mental health diagnosis?
- Could your mental health diagnosis have impacted your experience with Derrick?
- How many sexual partners have you had at the university?
- Did you experience childhood sexual abuse/trauma that may have been triggered by the encounter with Derrick?

Questions Posed by Carlos's Advisor During Hearing Phase

Carlos's advisor, a social worker from a local victims' advocacy organization, requests that you ask Derrick the following questions:

- Have you ever been accused of sexual assault before?
- How many relationships/sexual encounters have you had with men?
- Did you date men at your prep school? Who?
- Did you or Attorney Payne speak to any of the witnesses in this investigation? What did you say to them? What did they say to you?

Assessing Credibility

- Credibility assessments are necessary to resolve material issues in dispute between parties' accounts.
- Credibility is different than "honesty."
- Evaluation of source, content, and plausibility of evidence presented.
- Specificity v. vagueness in accounts.
- Corroboration through witness testimony and evidence.
- Evaluate motive and bias and apply common sense.
- Inconsistencies – major versus minor/ material versus immaterial.
- Demeanor.

Corroboration

= Sufficient independent evidence to support the facts at issue.

- Corroboration ≠ second witness who agrees with the first.
- Corroboration = evidentiary support for what a witness contends after evaluating source, content, and plausibility.
- Witnesses, electronic evidence, physical/medical evidence, police reports, video surveillance
- Timeline.
- Be aware of subtle bias of which witnesses may not even be aware (victim blaming attitudes, group defensiveness, fear of getting in trouble).
- Sensory details/micro-corroboration.

Inculpatory / Exculpatory Evidence

- Communications between parties (pre and post incident)
- Behavior of the parties (pre and post incident)
- Statements against interest/ admissions
- Disclosures about the incident

Consider any explanations and fairly weigh them.

Motive / Bias

- Understand parties' and witnesses' relationship(s) to one another.
- Understand Complainant's decision to disclose/report when they did.
- Be curious and explore theories of potential motive (those offered by the parties/witnesses and those revealed by the evidence).
- Understand the difference between a false report v. good faith report that is not supported by evidence.

Demeanor

- Consider person's reaction to certain lines of questioning, cooperativeness, candor, defensiveness, argumentativeness, etc.
- Consider potential trauma, shame, blame, fear, nervousness, heightened emotions.
- Consider cultural/background differences.
- Consider disabilities.

Preponderance of the Evidence Standard

- More likely than not.
- 50% plus a feather.
- Remember though, evidentiary burden is not on the parties.

Final Determination Letter

Must include:

- 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.
- Statement of the findings of fact supporting the determination.
- Statement of the rationale for the result as to each specific allegation.
- Sanctions imposed on Respondent and any remedies provided to the Complainant designed to restore or preserve access to the education program or activity.
- Procedures and bases for any appeal.

Rationale and Conclusion

- Clearly articulates the policy elements at issue.
- Clearly articulates how a determination of responsibility/ no responsibility was reached.
- Clearly identifies the evidence in support of the determination.
- Clearly outlines the credibility determinations made and the basis on which they were made:
 - Credibility of evidence not general credibility of persons.
- Explains how relevant evidence was weighed and assessed in reaching conclusion.

Appeal Process

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time of the decision that could affect the outcome of the matter; or
- The Title IX Coordinator, investigator or a decision maker 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.

Appeals

1. Deny the appeal and affirm the original decision;
2. Grant the appeal and order a previously dismissed Formal Complaint to be reinstated;
3. Grant the appeal and remand to the Hearing Officer/Panel for further consideration;
4. Grant the appeal and remand for a new live hearing before new Hearing Officer/Panel or;
5. Grant the appeal and revise the sanction.

The Appeal Officer will issue a written decision, which shall be provided to both parties simultaneously. The written decision will describe the result of the appeal and the rationale.

Questions?