

Session 4: Decisions and Appeals, Including Credibility Assessment

Making and Assessing Findings

OSPA Summer Retreat
July 28-29, 2025



Presented By

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About ECR Solutions

- Most educational administrators lack the time, specialized expertise, and staff to fully meet their institutions' civil rights obligations.
- ECR Solutions PLLC fills those gaps through holistic legal guidance, strategic consulting partnerships, and interim or external civil rights staffing.
- This support helps institutions manage legal risk, reduce the likelihood of public scrutiny, and uphold the rights of their communities.



WELCOME

Getting Education Civil Rights Right, The First Time

Expert services to help you
understand civil rights laws and
industry standards for K-12, higher
ed, and beyond



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Reminders!

- This is not legal advice; contact me for specific help
- Training materials must be posted online
- Keep it hypothetical
- Ask questions
- Have fun!



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Work Alike Groups

- You should be seated with others **who serve in similar roles to you**
 - ✓ Title IX Coordinators/Deputy Coordinators (Intake & Coordination)
 - ✓ Investigators
 - ✓ Decision-Maker (Initial Decision)
 - ✓ Appeals Decision-Maker
 - ✓ Informal Resolution Facilitator
 - ✓ Other
- Each breakout group will examine the requirements covered **through the lens of their specific responsibilities**, allowing every attendee to understand how their role connects to the broader Title IX framework

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Agenda

- Decision-Maker Training & Role in the Process
- Decision-Making Requirements & Best Practices
- The Written Determination & Relevant Evidence
- Recordkeeping



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Training & Role in the Process



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Required Training – Title IX

“Title IX Team” Members

Must be trained on:

- Definition of sexual harassment under the 2020 Title IX Rule
- Scope of the education program or activity under the 2020 Title IX Rule
- Investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable, under the 2020 Title IX Rule
- How to serve impartially, including by avoiding prejudgment, conflicts of interest, and bias

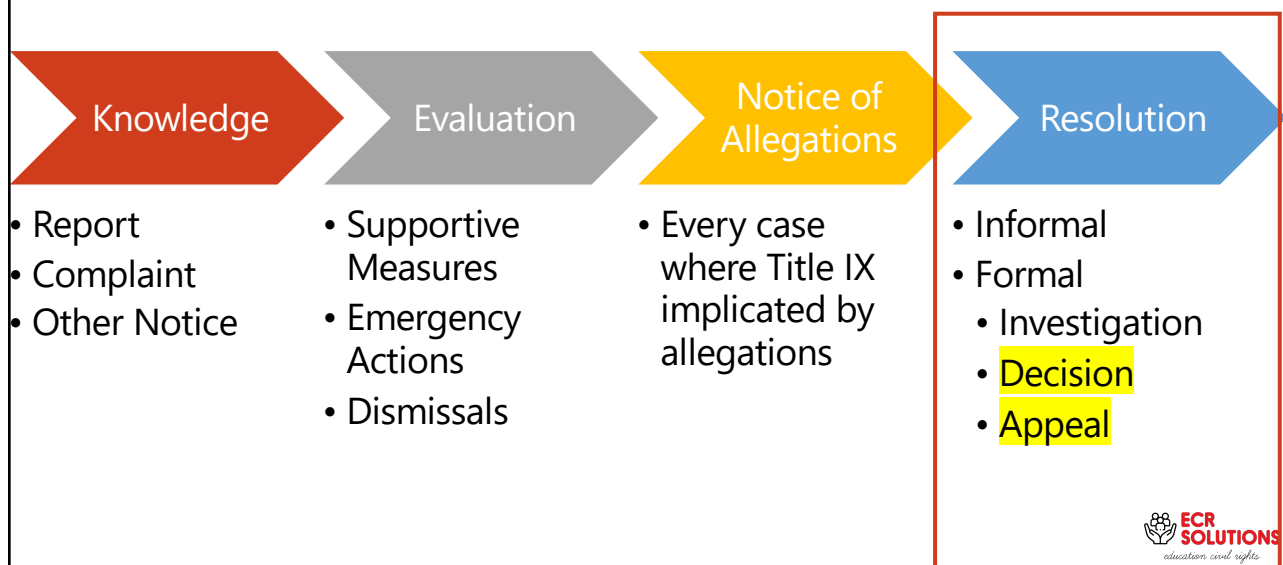
Additional Training For:

- For **decision-makers**: issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant



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Getting Into the Flow



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The Decisionmaker's Role

- The decisionmaker must do all of the following:
 - Review the evidence to determine what is relevant to and permissible to consider for each fact or issue in dispute
 - Analyze the relevant and not otherwise impermissible evidence to determine whether there is sufficient evidence to support each disputed fact
 - In completing that analysis, make decisions about the weight of the evidence based on credibility and other factors
 - Look at all facts for which there is sufficient evidence and determine if there is sufficient evidence of a policy violation, i.e., of sex discrimination

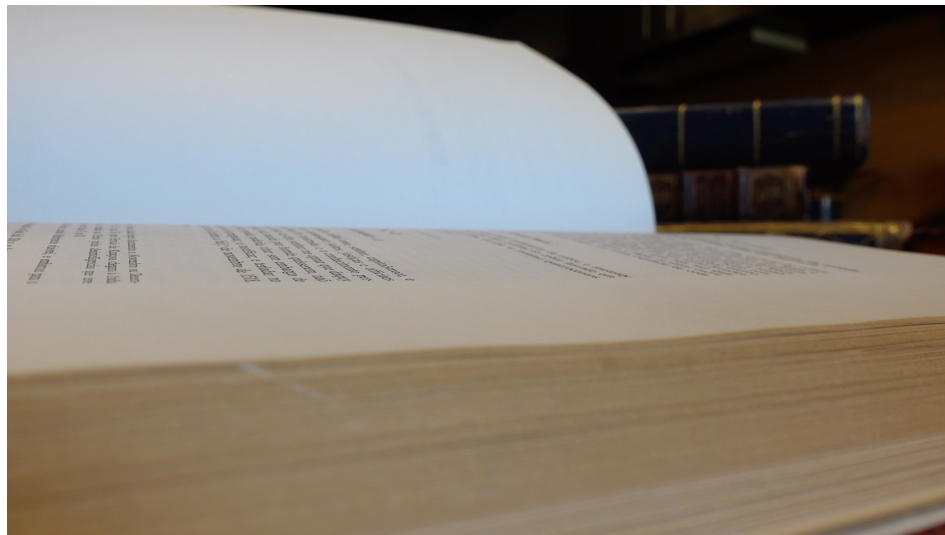
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Decisionmakers



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Requirements & Best Practices



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Title IX Decision-Making Process

- Each party must be allowed to submit **written, relevant questions** to any other party or witness through the decision-maker (the decision-maker can submit questions, too!)
- The parties and witnesses respond to the questions in writing to **the decision-maker**, who **shares the responses with all parties**
- Each party must be allowed to submit **written, relevant follow-up questions** to any other party or witness through the decision-maker
- Repeat questions and answers until no remaining relevant follow-up questions
- The decision-maker then writes a **lengthy written determination** with several specific, required elements
- The written determination is **shared with both parties** and their advisors simultaneously in writing



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Written Decision

- Written determination required for all Title IX sexual harassment cases
- Applies the standard of evidence (preponderance of the evidence)
- Must include:
 - Allegations
 - Procedural steps taken
 - Findings of fact
 - Conclusions regarding the application of the code of conduct to the facts
 - Statement and rationale for the result as to each allegation, including determination regarding responsibility
 - Any disciplinary sanctions imposed
 - Whether remedies will be provided
 - Appeal procedures



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Relevance in Decisions

- Objectively analyze **all relevant and permissible evidence**, including the credibility of the evidence
- Relevance in practice:
 - Does it relate to a fact or issue in dispute?
 - Does it make the fact or issue even a feather more or less likely to be true?
- Consider both **inculpatory and exculpatory evidence** (inculpatory → supports a fact or issue in dispute; exculpatory → refutes a fact or issue in dispute)
- The written determination must explain the **result and rationale** for the decision, which may include explanations about the analysis of relevance



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Credibility

What the Title IX rule says:

- Credibility determinations may not be based on a person's status as a complainant, respondent, or witness



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Credibility Factors

- **Inherent Plausibility** – Whether the account makes sense on its face and aligns with what typically occurs.
- **Demeanor and Manner** – The way the person presents themselves, including body language and tone during their report or testimony.
- **Motive to Falsify or Mislead** – Whether the person has any reason to lie, exaggerate, or misrepresent the facts.
- **Corroboration** – Support from other evidence or witnesses that aligns with the person's account.
- **Consistency and Specificity** – Whether the account is internally consistent and includes specific, verifiable details.
- **Past Record** – Relevant past behavior or conduct (not character evidence) that may impact credibility.
- **Opportunity and Perception** – Whether the witness had a clear opportunity to observe or experience the events in question.
- **Memory and Recall** – The reliability of the witness's memory regarding the details they shared.
- **Bias or Interest** – Any personal stake in the outcome or bias/prejudice toward a party or issue.
- **Contradictory or Conflicting Evidence** – Inconsistencies between this account and other known evidence.
- **Overall Reasonableness** – Whether the testimony fits within the broader factual context and what is reasonably expected.
- **Other Relevant Factors** – Any additional considerations that may help assess believability in the specific context.



**U.S. Equal Employment
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Excluded Evidence

- Privileged information
- Medical and psychological records and information
- The complainant's sexual predisposition or prior sexual behavior, unless
 - To show that someone other than the respondent engaged in the alleged conduct
 - Evidence of past behavior between the parties to show consent



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Remedies and Disciplinary Sanctions

- Must be included in the written determination
 - This may not always be possible under state law
- The grievance procedures must describe the range of or list the possible disciplinary sanctions and remedies that may be implemented following any determination of responsibility



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Work Alike: Night Shift

Review the "Night Shift Part 1"
document for Session 4

<https://tinyurl.com/OSPAT9Session1>

*See specific work alike group
questions in the document*



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Grievance Procedures – Appeals



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Appeals

The 2020 Title IX rule requires
appeals for:

All dismissals of sexual
harassment formal
complaints and

All written determinations
of formal complaints of
sexual harassment



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Specified Appeal Bases

Under the 2020 Rule, appeals must be offered on three bases:

- Procedural irregularity + affected the outcome
- New evidence not reasonably available at the time of the determination + could affect the outcome
- Bias or conflict of interest of Title IX team member + affected the outcome

Can offer appeals on other bases if do so equally between the parties

- The appeal decision-maker cannot be the Title IX Coordinator, the investigator(s), or the decision-maker(s)



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Appeal Steps



Step 1: Notify parties of the right to appeal in the dismissal or written determination



Step 2: Notify parties when an appeal is filed (required to be in writing)



Step 3: Provide parties a reasonable and equal opportunity to make a statement in support of, or challenging, the dismissal or decision (required to be in writing)



Step 4: Notify parties of the result and rationale for the result (required to be in writing)



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Evaluation of the Appeal for Validity



Evaluation just considers whether a valid appeal basis is being raised



It does not address the "weight" of the argument (how persuasive it is)



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Analyzing the Appeal



This is where you consider the “weight” of the arguments made in the appeal



Make sure to consider arguments raised by both sides



SHOW YOUR WORK!



Include policy definitions and procedural requirements



Assess whether there is sufficient evidence of impact on the outcome



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Dismissal Appeal Basis #1: Procedural Error

Did the appealing party identify a procedural irregularity?

- Failure to follow policy/procedure steps
- Failure to analyze all relevant evidence
- Inappropriate disqualification of evidence or questions

Did the appealing party identify how they believe the error affected the outcome/decision made?



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Dismissal Appeal Basis #2: New Evidence

Did the appealing party identify new evidence that wasn't reasonably available at the time the decision being appealed was made?

Did the appealing party identify how they believe the new evidence could outcome/decision made?



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Example

During intake, the complainant, when asked whether the respondent touched the complainant's private body part "for purposes of sexual gratification," the complainant said they did not know. The Title IX Coordinator dismissed because there was no allegation that the conduct was for a sexual purpose and the specific conduct alleged was neither severe nor pervasive. After the dismissal, a friend of the respondent's told the complainant that the respondent was laughing after the dismissal that they got away with "copping a feel."



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Dismissal Appeal Basis #3: Bias or Conflict



DID THE APPEALING PARTY IDENTIFY AN
ALLEGED BIAS OR CONFLICT OF INTEREST
BY A TITLE IX TEAM MEMBER?



DID THE APPEALING PARTY IDENTIFY
HOW THEY BELIEVE THE BIAS OR
CONFLICT AFFECTED THE OUTCOME?



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After the Appeal



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Reverse vs. Remand

Reversal: Where
the appeal makes
clear the decision
was incorrect



Remand: Where
more information
is needed



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Serving Impartially



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Impartiality Concerns

Having pre-formed opinions about the case or parties involved

Personal or professional conflicts (e.g., relationships)

Influences from board, supervisors, community members, etc.



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Bias in Title IX Decisions

- Reliance on evidence that is not relevant
- Reliance on evidence that is impermissible

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Avoiding Impartiality Concerns

Regularly participate
in training on
impartiality, conflict
of interest, and bias.



Follow documented
procedures and
guidelines strictly.



Documenting
reasons for all
decisions (SHOW
YOUR WORK!)



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Trauma Informed Decisions

- Science shows trauma can have a neurological effect, particularly on memory
- Trauma can impact either party
- There is a difference between being trauma-informed and trauma-lenient – do not use apparent existence of trauma as *evidence* of alleged conduct



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Don't Forget Your Records & Trainings



Under the 2020 Rules, educational institutions must maintain records related to Title IX cases for no less than 7 years



The 2020 Rule requires posting of all training for Title IX Team members (including these!) on your educational institution's website



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Documentation

- Even if documentation is not required, ask yourself, "How would I prove that I did this later if there is a dispute?"
- Ensure that you obtain documents from external decision-makers



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