



El Paso Community College

EPCC Title IX Training

Understanding Title IX and the Grievance Process

ScottHulse Legal Team

June 22, 2022

AGENDA



□ Title IX General Overview

□ Report & First Steps

□ Investigations & Informal Resolutions

□ Hearings, Determinations & Appeals





Title IX General Overview

Title IX of 1972



No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. 20 U.S.C. § 1681(a).



Title IX's Coverage (WHO)



Who is covered?

- Women
- Men
- Students
- Staff
- Faculty
- Applicants

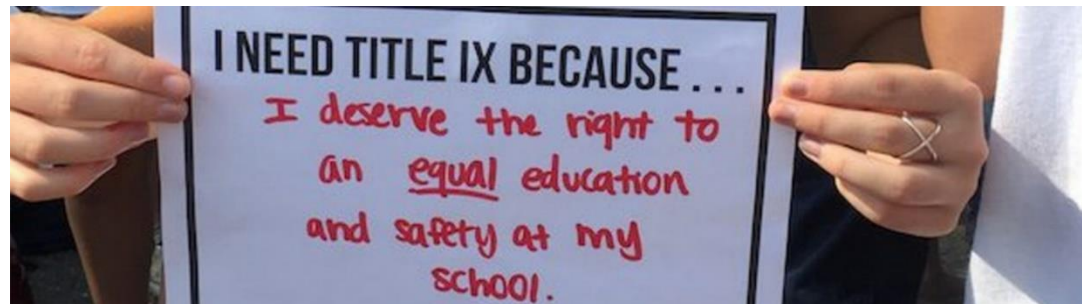


OCR
Office for Civil Rights

Sex Discrimination



- Institutions must, among other things:
 - Not treat individuals differently on the basis of sex in, for example, admissions, providing financial aid, academic instruction, and athletics
 - Not treat pregnant and parenting students differently
 - Adequately address *sexual harassment*



Obligations Under Title IX



- Respond to sexual harassment
- Engage in training
- Document response and maintain records



Title IX Compliance



- ❑ Failure to comply may result in loss of federal funds
- ❑ Title IX is enforced by the Department of Education's Office for Civil Rights (OCR)



Response Obligation



An educational institution with:

1. actual knowledge of
2. sexual harassment
3. in an education program or activity of the institution



must appropriately and timely *respond* to the sexual harassment

34 C.F.R. § 106.44.

Actual Knowledge



- Notice of sexual harassment or allegations thereof to the institution's Title IX Coordinator or any official of the institution with authority to institute corrective measures

- 34 C.F.R. § 106.30(a).

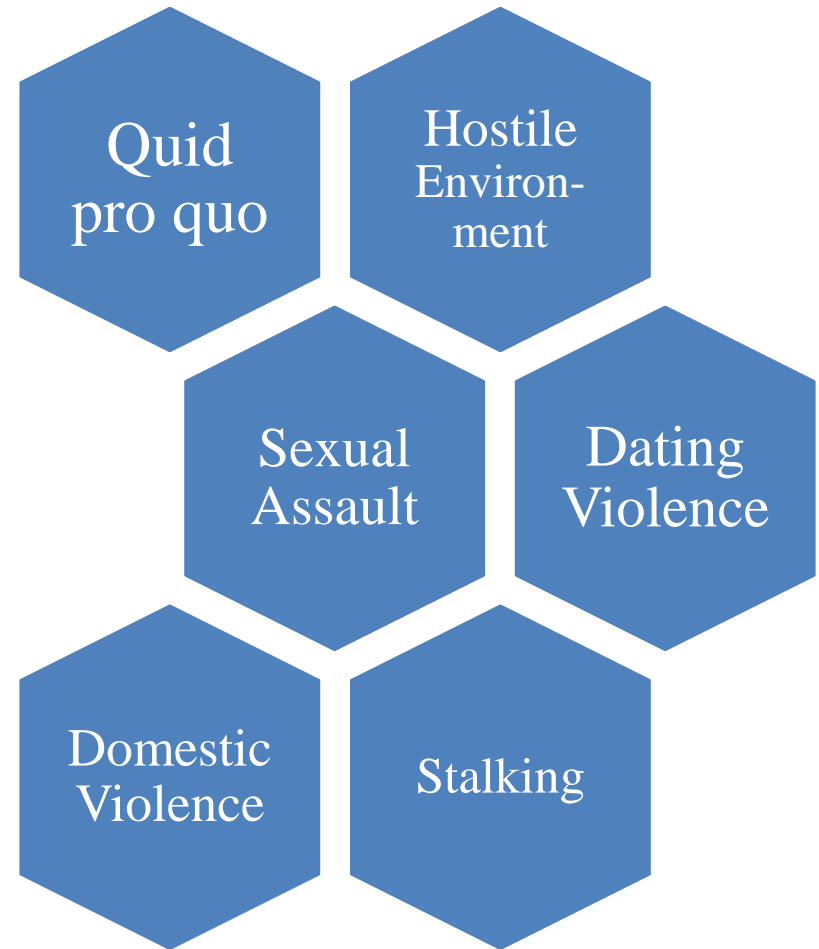


Actual Knowledge



<u><i>Who?</i></u>	<ul style="list-style-type: none"><input type="checkbox"/> Title IX Coordinator<input type="checkbox"/> Any official of the institution with authority to institute corrective measures
<u><i>How?</i></u>	<ul style="list-style-type: none"><input type="checkbox"/> Witness or hear about the sexual harassment<input type="checkbox"/> Receive a verbal or written report or complaint about the sexual harassment

Sexual Harassment



Quid Pro Quo Harassment



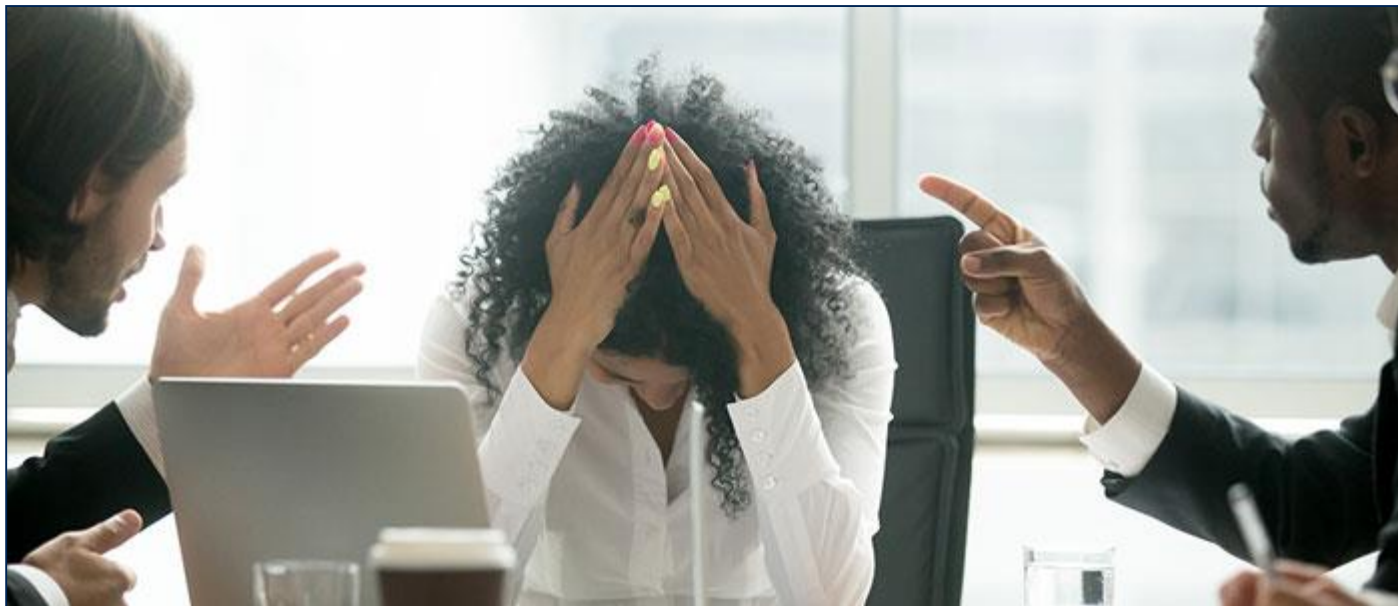
- This for That
- Any instance where an employee of the institution conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct. 34 C.F.R. § 106.30(a)(1).
- Common:
 - In employment context
 - Where an institutional employee holds a position of authority over a student (e.g., work study)



Hostile Environment Harassment



- ❑ Any unwelcome conduct that a reasonable person would find so *severe, pervasive, and objectively offensive* that it denies a person equal educational access. 34 C.F.R. § 106.30(a)(2).



Other Forms of Sexual Harassment



- ❑ Sexual assault as defined under the Clery Act
 - Includes: rape, attempted rape, sodomy, sexual assault with an object, fondling, and incest
- ❑ Dating violence, domestic violence, and stalking as defined under the Violence Against Women Act (VAWA)
- ❑ These automatically constitute sexual harassment



34 C.F.R. § 106.30(a)(3).

Scope of Education Program or Activity



- ❑ Any location, event, or circumstance over which the institution exercises substantial control over both **the person committing the sexual harassment *and* the context in which the sexual harassment occurs** 34 C.F.R. § 106.44(a).

- ❑ Includes buildings owned or controlled by a student organization that is officially recognized by the institution (e.g., a fraternity house)

Education Program or Activity

Included

Admissions

Academic instruction

Sports teams

Residence life

Sponsored organization activities

On-campus games, concerts, & speeches

Hiring

Work place

Work-study

Off-campus experiences organized by the institution

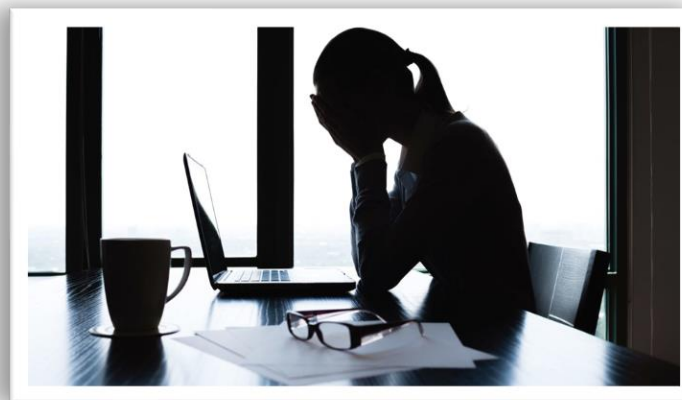
NOT

Private location & no intuitional education program or activity

Outside geographical boundary of the U.S.

□ Online Sexual Harassment

- ALL Operations
- Computer and internet networks, digital platforms, computer hardware or software owned or operated by the College—*Online Classes*
- Not contingent upon method by which the conduct is perpetrated



Response Obligation



If:

- ✓ actual knowledge
- ✓ sexual harassment
- ✓ education program or activity



Title IX response required



34 C.F.R. § 106.44(a).

Title IX Prohibits Retaliation



- ❑ No person or institution may intimidate, threaten, coerce, or discriminate against another for the purpose of interfering with rights secured under Title IX or because a person has participated in a Title IX proceeding (e.g., by filing a complaint, helping with an investigation, testifying).



34 C.F.R. § 106.71.

Documentation & Recordkeeping Obligation



- The institution must *create and maintain records* for any responsive actions taken
- The records must be maintained for a period of 7 years



34 C.F.R. § 106.45(b)(10).

Documentation & Recordkeeping Obligation



❑ The following records must be maintained:

- The investigation
- Any appeal
- Informal resolution
- Supportive measures
- All training materials



❑ Litigation and auditing is always a possibility

EPCCC's Sexual Harassment Policy



- Defines important terms (consent, sexual assault, etc.)
- Lists prohibited conduct (sexual harassment, retaliation, etc.)
- Describes possible sanctions
- Explains grievance process procedures
- Link:

<https://www.epcc.edu/Administration/InstitutionalEffectiveness/PoliciesandProcedures/FFDA-1.pdf>



EL PASO COMMUNITY COLLEGE PROCEDURE

For information, contact Institutional
Effectiveness: (915) 831-6740

FFDA-1 **Sexual Assault, Dating
Violence, Domestic
Violence, and Stalking**
(Working Draft: Considered
official)

APPROVED:
Year of last review: 2021
AUTHORIZING BOARD POLICY: FFDA (see also DIAA)

REVISED:

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Poll Instructions



Text: SCOTTHULSEPC444

To Phone Number: 22333

Or Scan the QR Code



When poll is active, respond at pollev.com/scotthulsepc444

Text **SCOTTHULSEPC444** to **22333** once to join

When does EPCC have a legal responsibility to respond to an allegation of sexual harassment?

When it has actual knowledge of an accusation

When the accusation concerns sexual harassment

When the alleged harassment occurs at a campus event or program

All of the above

AGENDA



- ✓ Title IX General Overview
- Report & First Steps**
- Investigations & Informal Resolutions
- Hearings, Determinations & Appeals



Report & First Steps

Grievance Process = Response



An institution must respond to sexual harassment promptly and in a manner that is not deliberately indifferent (i.e., clearly unreasonable under the known circumstances).



34 C.F.R. § 106.44(a).

The Grievance Process



Report

**Formal
Complaint**

Investigation

Hearing

Appeal

Who Can Report?



- ❑ Any person can make a report (e.g., an alleged victim, a witness, or a third party)

85 FR 30108.

- ❑ Anonymity

- Institutions may permit anonymous reporting.
- However, the institution's ability to respond down the line may be affected by this (e.g., offering supportive measures or filing a complaint)



Mandatory Reporting



- ❑ Under Title IX, institutions can choose which of their employees will be mandatory reporters, i.e., Responsible Employees

85 FR 30108.

- ❑ However, under **Texas law**, institutional employees ***must*** report incidents of sexual harassment which they witness or receive information about in the course and scope of employment.

TEX. EDUC. CODE § 51.252(A).



Mandatory Reporting



- Under Title IX, institutions can choose which of their employees will be mandatory reporters, i.e.,

Responsible Employees

85 FR 30108.

- You personally witness discrimination based on sex/gender
- You *receive* a first-hand or third-party *complaint* of discrimination based on sex/gender
- The pervasiveness of the discrimination is such that you should have known



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Mandatory Reporting



- Responsible Employee includes any employee who:
 - Has the authority to take action to address harassment
 - Has the duty to report harassment or other types of misconduct (designated Responsible Employees)
 - Someone a student reasonably believes has the authority or responsibility



Mandatory Reporting



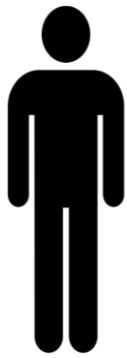
- ❑ Consequences of failing to report under Texas law:
 - Mandatory termination
 - Potential criminal penalties
 - If one *intends* to conceal the incident → Class A misdemeanor (punishable by up to 1 year in jail and/or a \$4,000 fine)
 - If one *knowingly* fails to report → Class B misdemeanor (punishable by up to 180 days in jail and/or a \$2,000 fine)



To Whom does One Report?



A report should be made to the institution's *Title IX Coordinator(s)*:



– **Audry Ortegon**, Executive Director of Employee Relations and Compliance (**FOR EMPLOYEES**)

– **Dr. Carlos Amaya**, Interim Vice President of Student & Enrollment Services (**FOR STUDENTS**)

Employees can also report to Human Resources

Contacts are listed in EPCC Legal and Local Policies

34 C.F.R. § 106.8.

Response to Report



- The Title IX Coordinator **must** contact the victim and discuss:
 - The availability of *supportive measures*,
 - The *victim's wishes* regarding supportive measures, and
 - The *grievance process* and how to file a formal complaint.



34 C.F.R. § 106.44(a).

Supportive Measures



- Non-disciplinary, non-punitive* individualized services
- Reasonably available* without fee or charge
- To the *complainant or respondent*
- Without *unreasonably burdening* the other party

Purpose of Supportive Measures



□ The supportive measures must be designed to:

- Preserve access to the institution’s educational programs or activities
- Protect the safety of the parties and the institution’s community
- Deter sexual harassment



Implementing Supportive Measures



- ❑ The institution, through its Title IX Coordinator(s), is responsible for arranging and enforcing supportive measures
- ❑ As long as the previously-mentioned parameters are met, the institution has flexibility in implementing the appropriate measures based on:
 - 1) the facts of the specific case
 - 2) the unique wishes of the parties

Supportive Measures: Complainant



- ❑ The institution must promptly offer every complainant supportive measures upon receipt of actual notice (e.g., a report)
- ❑ They must be offered regardless of whether the complainant files a formal complaint



34 C.F.R. § 106.44(a).

Supportive Measures: Complainant



- ❑ If supportive measures are not provided, the institution must document why that response was not clearly unreasonable in light of the known circumstances
- ❑ The institution has discretion to continue to provide measures after a finding of non-responsibility



34 C.F.R. § 106.45(b)(10)(ii).

Supportive Measures: Respondent



- ❑ An institution has discretion to provide supportive measures to respondents



85 FR 30266-67

Emergency Removal



- ❑ A student may be removed temporarily if the institution:
 - Conducts an individualized safety and risk analysis
 - Determines that the individual poses an immediate threat to the physical health or safety of the community arising from the sexual harassment
 - Provides immediate notice and an opportunity to challenge the removal



Employee Administrative Leave



- An institution has the right to place an employee on paid or unpaid administrative leave
- This can only be done once a formal complaint is filed
- Whether the institution must provide an opportunity to challenge this depends on the employee's status and other policies (e.g., the employee handbook)

34 C.F.R. § 106.44(d).

Formal Complaint



**What
is it?**

- A signed document



- Alleging sexual harassment

- Requesting an investigation into the allegations and resolution under grievance procedures

Formal Complaint



Who
files
it?

The *complainant*, or



The *Title IX Coordinator*, if it has decided on behalf of the institution that an investigation is needed

NOT anonymous persons or third parties

When should the Title IX Coordinator file a formal complaint?



- When there is an *important institutional interest* in adjudicating a report irrespective of the alleged victim's wishes
- When there is *serious misconduct*, repeated misconduct, risk of harm to others, use of violence or weapons, or misconduct by an employee

When the Title IX Coordinator should file a formal complaint (continued)



- ❑ If the alleged victim does not wish to file a formal complaint, the Title IX Coordinator's decision to do so must not be *clearly unreasonable*



Formal Complaint



How?

With the Title IX
Coordinator



In person, by mail,
online submission, or
email

Formal Complaint



When?

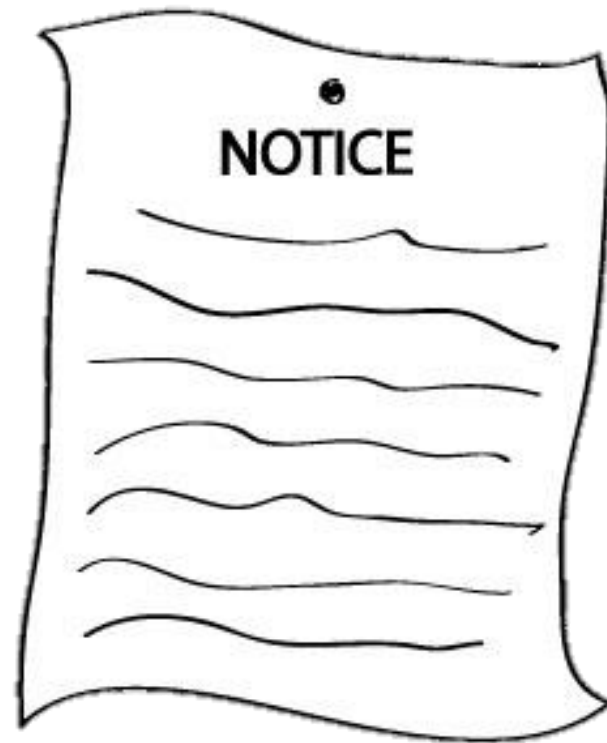


No set time limit from date of allegations to filing of complaint with EPCC (no statute of limitations) under Title IX, but other deadlines may apply (e.g., administrative deadlines within U.S. Department of Education, Office of Civil Rights has a 60-day deadline to preserve that external complaint)

Initial Notice



- ❑ An institution must provide initial written notice to both parties upon receipt of a formal complaint



34 C.F.R. § 106.45(b)(2)(i).

Initial Notice



- ❑ Must provide notice of allegations that provides sufficient detail for one to prepare a response before an initial interview, including:
 - The identity of the parties
 - The alleged conduct constituting sexual harassment
 - The date and location of the incident



34 C.F.R. § 106.45(b)(2)(i)(B).

Initial Notice



□ Notice must also include:



- The institution’s grievance and informal resolution processes
- That the respondent is presumed not responsible until a determination is made at the conclusion of the grievance process

Initial Notice



□ Notice must include (continued):

- Parties may have an advisor of their choice (need not be an attorney)
- Parties may inspect and review evidence
- Provisions in EPCC's Code of Conduct prohibiting knowingly making false statements



Other Required Notices



NOTICE

- Notice to all parties of hearings, interviews, or meetings
- Written notice by email is sufficient, but use “Read Receipt” option

34 C.F.R. § 106.45(b)(5)(v).

Mandatory Dismissal



- ❑ An institution **must** dismiss a formal complaint if:
 - conduct alleged, even if true, does not constitute Title IX sexual harassment
 - conduct did not occur in the institution’s education program or activity



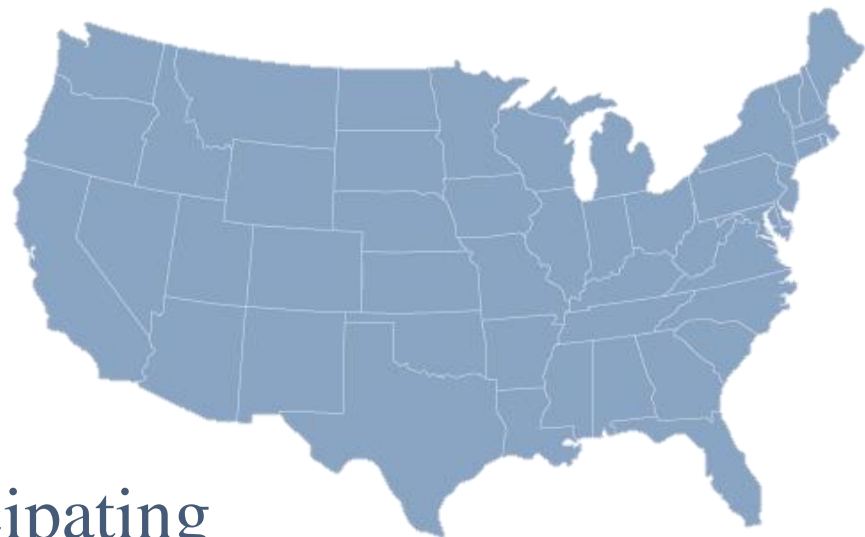
34 C.F.R. § 106.45(b)(3)(i).

Mandatory Dismissal



☐ An institution *must* dismiss if (continued):

- conduct did not occur against a person in the U.S.
- complainant is not participating in or attempting to participate in the institution's programs or activities at the time of filing



34 C.F.R. § 106.45(b)(3)(i).

Permissive Dismissal

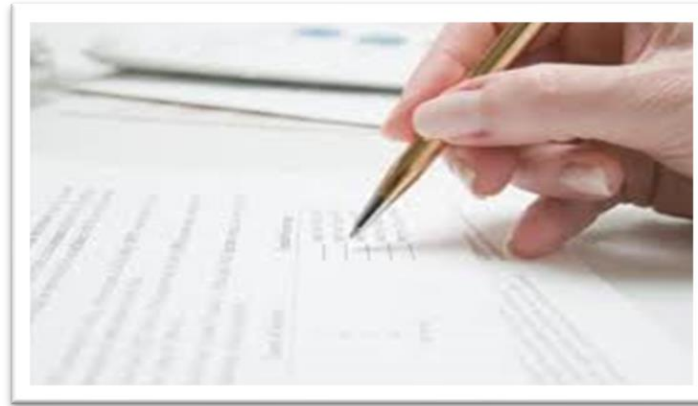


- ❑ An institution *may* dismiss a formal complaint if
 - Complainant withdraws formal complaint in writing
 - Respondent is no longer enrolled or employed by the institution
 - Circumstances exist that prevent the institution from gathering sufficient evidence to reach a determination



34 C.F.R. § 106.45(b)(3)(ii).

Notice and Appeal



- ❑ Upon dismissal (mandatory or permissive), the institution must
 - Promptly and simultaneously provide written notice of dismissal and reasons for the dismissal to all parties
 - Provide both parties with an opportunity to appeal

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📱 Text **SCOTTHULSEPC444** to **22333** once to join

Which of the following is EPCC required to do after receiving a report?

Contact the victim (answer)

Provide supportive measures

File a formal complaint

Dismiss the complaint if the complainant withdraws the complaint or leaves EPCC

AGENDA



- ✓ Title IX General Overview
- ✓ Report & First Steps
- ☐ Investigations & Informal Resolutions**
- ☐ Hearings, Determinations & Appeals



Investigations & Informal Resolutions

Investigations



- ❑ Are investigations required? YES.
 - EPCC must investigate ALL Title IX allegations detailed in a formal complaint.
 - Formal complaints request that EPCC, as a “recipient[,] investigate the allegations of sexual harassment”

INVESTIGATION



34 CFR § 106.30.

Investigations: Overview



□ Topics to be covered:

- Basic Requirements
- Access to the Evidence
- Serving Impartially
- Issue of Relevance
- Writing Investigation Reports
- Informal Investigations



Investigations: Basic Requirements



- Basic requirements for investigations:
 - Treat complainants and respondents equitably
 - Objectively evaluate all relevant evidence
 - Credibility determinations cannot be based on a person's status as a complainant, respondent, or witness
 - Investigators cannot have a conflict of interest or bias for or against participants

Investigations: Basic Requirements



□ Basic requirements for investigations:

- Respondent is not responsible for the alleged conduct until a final determination
- Understand burden of gathering evidence
- Do not use information protected under a legally recognized privilege, unless the privilege is voluntarily waived in writing

Investigations: Basic Requirements



- Basic requirements for investigations:
 - Provide parties equal opportunity to present fact and expert witnesses
 - Refrain from restricting parties to gather and present relevant evidence
 - Refrain from restricting the parties' ability to discuss the allegations
 - Provide sufficient time for parties to prepare a response before any initial interview

Investigations: Basic Requirements



Basic Evidentiary Requirements



Burdens



The burden of gathering evidence sufficient to reach a determination regarding responsibility rests on EPCC and not on the parties.

Investigations: ACCESS TO EVIDENCE



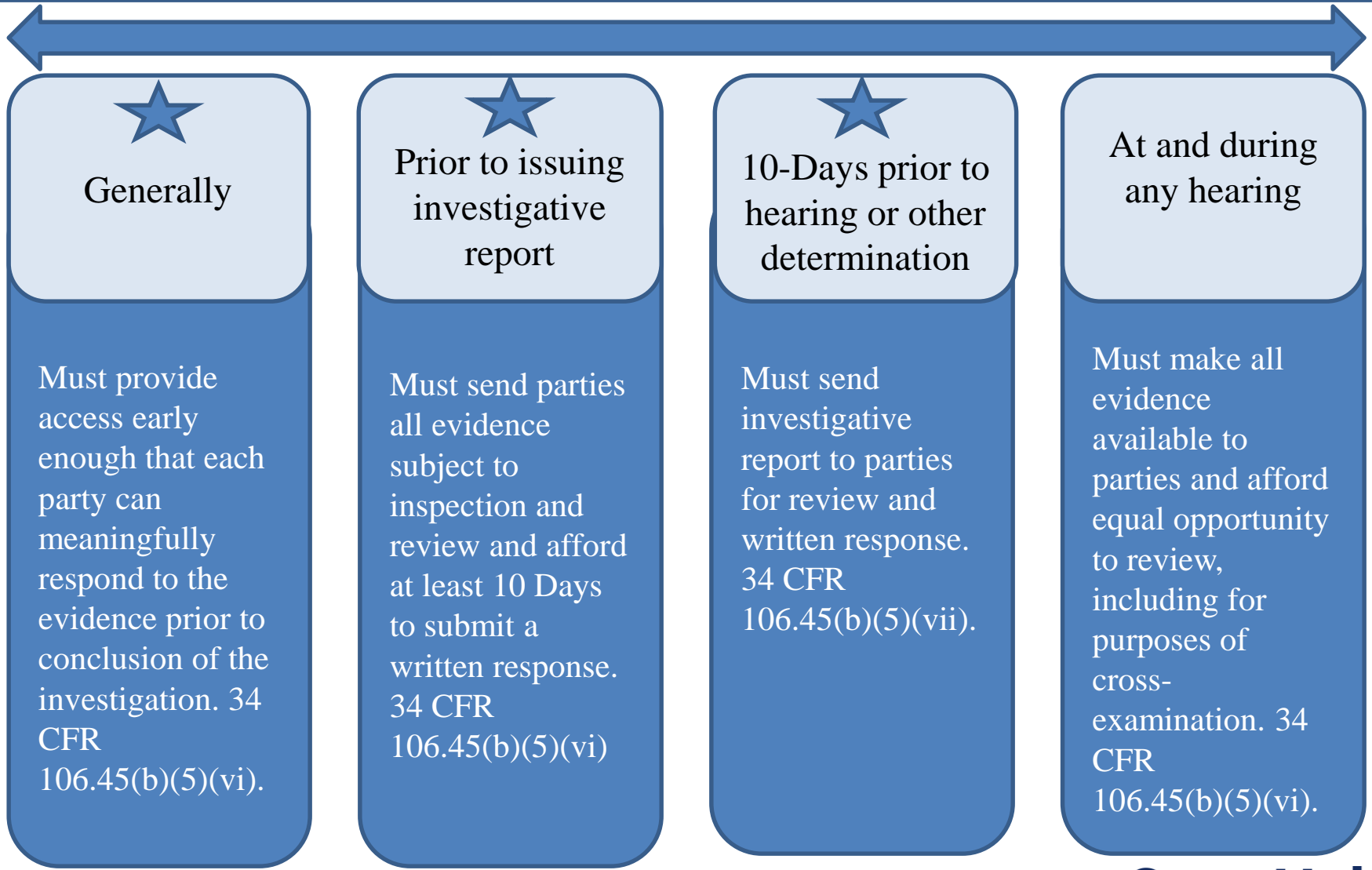
□ Access to the Evidence:

- Throughout the investigation, both parties must be afforded equal opportunity to review and inspect any evidence that:
 - was obtained as part of the investigation; and
 - is *directly related* to the allegations.
 - Includes *inculpatory* and *exculpatory* evidence.

EVIDENCE BASED



Access to Evidence: TIMELINE



★ Generally

Must provide access early enough that each party can meaningfully respond to the evidence prior to conclusion of the investigation. 34 CFR 106.45(b)(5)(vi).

★ Prior to issuing investigative report

Must send parties all evidence subject to inspection and review and afford at least 10 Days to submit a written response. 34 CFR 106.45(b)(5)(vi)

★ 10-Days prior to hearing or other determination

Must send investigative report to parties for review and written response. 34 CFR 106.45(b)(5)(vii).

At and during any hearing

Must make all evidence available to parties and afford equal opportunity to review, including for purposes of cross-examination. 34 CFR 106.45(b)(5)(vi).

□ Impartial and Unbiased Investigations:

- Investigators CANNOT have a conflict of interest or bias for or against complainants, respondents, or participants.
- Investigators must serve impartially, by avoiding bias conflicts of interest, and prejudgment of the facts at issue.

CONFLICT
OF INTEREST

A hand holding a blue marker, positioned as if writing the text above.



□ The U.S. Department of Education does not define “bias” or “conflict of interest.”

- “Whether bias exists requires examination of the particular facts of a situation and the Department encourages to apply an objective (*whether a reasonable person would believe bias exist*), common sense approach to evaluating whether a particular person serving in a Title IX role is biased[.]” 85 Fed. Reg. 30248.

Investigations: SERVING IMPARTIALLY



□ The following IS defined as bias in the preamble:

- Treating a party differently on the basis of:
 - the party's sex;
 - stereotypes about how men or women behave with respect to sexual violence; or
 - an individual's protected characteristic.



Investigations: SERVING IMPARTIALLY



- The preamble defines the following as NOT bias:
 - Outcomes of the grievance procedure.
 - Title IX Coordinator’s signature on a formal complaint does not make the Coordinator biased or pose a conflict of interest.



□ Is there a conflict of interest?

– It is **NOT** a conflict of interest for the Title IX Coordinator to be the same person as the investigator.

– **However:**

- It **IS** a conflict of interest for the investigator and/or the Title IX Coordinator to also serve as the decision-maker or appeal decision-maker.



Is there a conflict of interest?

- It is **NOT** a conflict of interest for EPCC employees to fill Title IX personnel positions “as long as these employees do not have a conflict of interest or bias and receive the requisite training[.]”
- Outsourcing unaffiliated Title IX personnel is not required.

IN-HOUSE
 OUTSOURCE



Investigations: SERVING IMPARTIALLY



□ How can an investigator serve impartially?

- Investigators and other personnel may **NOT** “believe” one party or the other.
 - Doing so violates the requirement to “serve impartially.”
- Title IX personnel are prohibited in making decisions based on sex stereotypes.



Investigations: SERVING IMPARTIALLY



- ❑ Serving impartially includes “avoiding prejudgment of the facts at issue”—investigators CANNOT:
- Pass judgment on the allegations presented by either party or witnesses.
 - Jump to any conclusions without fully investigating the allegations and gathering all of the relevant facts and evidence from all parties.

BANNED

Investigations: SERVING IMPARTIALLY



- ❑ To avoid the prejudgment of the facts at issue:
 - Any and all stereotypes about gender norms must be set aside;
 - Approach the allegations (of both parties) with neutrality at the outset;
 - Treat both parties equally; and
 - Provide an equal opportunity to present evidence, witnesses, and their versions of the story.

- Other considerations in serving impartially:
 - Application of trauma-informed practices is permissible, so long as it does not violate the requirement to serve impartially and without bias.



□ Overview:

- Investigators must receive training on **issues of relevance** to create an investigative report that “*fairly summarizes relevant evidence.*”



Investigations: ISSUES OF RELEVANCE



❑ Legal training on issues of relevance is not required.

– Determinations can be made impartially by applying logic and common sense.

❑ What is “relevant” evidence?

– Ordinary meaning of the word should be understood and applied.



Investigations: ISSUES OF RELEVANCE



- ❑ Evidence about the complainant's sexual predisposition or prior sexual behavior is NOT relevant.
- ❑ However, such evidence IS relevant if:
 - offered to prove that someone other than the respondent committed the conduct alleged by the complainant; or
 - evidence concerns specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Investigations: ISSUES OF RELEVANCE



□ The following evidence is considered NOT relevant *per se* for purposes of an investigation report:

- Any party’s medical, psychological, and similar treatment records without the party’s voluntary, written consent; and
- Any information protected by any other legally recognized privilege without voluntary, written consent.



❑ Can investigators make credibility determinations?

– Permissible; however, credibility determinations CANNOT:

- Be based on party status.
- Actually be a determination regarding responsibility (the ultimate finding of fact).



Investigations: COLLECTION OF DOCUMENTS



- ❑ Investigator's obligations with the Seven-Year record preservation requirement:
 - Close cooperation with Title IX personnel is critical to ensure that complete and accurate records are collected and preserved.
 - Litigation and auditing is a possibility in every Title IX investigation.



Investigations: INVESTIGATIVE REPORT



Is an investigative report required? YES.

- Investigators must create an investigative report that fairly summarizes relevant evidence.
- Provide a copy to the parties and their advisor(s) at least 10 days prior to a hearing (if a hearing is required) or other time of determination regarding responsibility to allow for their review and written response.
- Investigative report must be sent in an electronic format or a hard copy.

Investigations: INVESTIGATIVE REPORT



- **OVERVIEW**: In order to prepare an investigative report, investigators must:
 - **Step One**: Obtain evidence from the participants and other available sources;
 - **Step Two**: Provide both parties the opportunity to inspect and review all evidence directly related; send evidence to both parties and advisors for written responses; and
 - **Step Three**: Create an investigative report that fairly summarizes relevant evidence and have a 2nd set of eyes review it before sending the report to both parties and their advisors ten days before a hearing for review.

Investigations: INVESTIGATIVE REPORT



□ Are there any requirements as to the contents of an investigative report?

- “[T]hese final regulations do not prescribe the contents of the investigative report other than specifying its core purpose of summarizing relevant evidence.” 85 Fed. Reg. 30310.



Investigations: INVESTIGATIVE REPORT



- What are the main goals of an investigative report that fairly summarizes the evidence?
 - Do not reach any conclusions.
 - Put decision-maker(s) in the best position to understand relevant evidence.
 - Demonstrate to the parties that EPCC took the allegations seriously and responded appropriately.
 - Keep in mind that the investigative report may be “Exhibit 1” in a litigation/audit matter.
 - Investigator may have to testify.

Investigations: INFORMAL RESOLUTION



- Is informal resolution available prior to the filing of a formal complaint? NO.



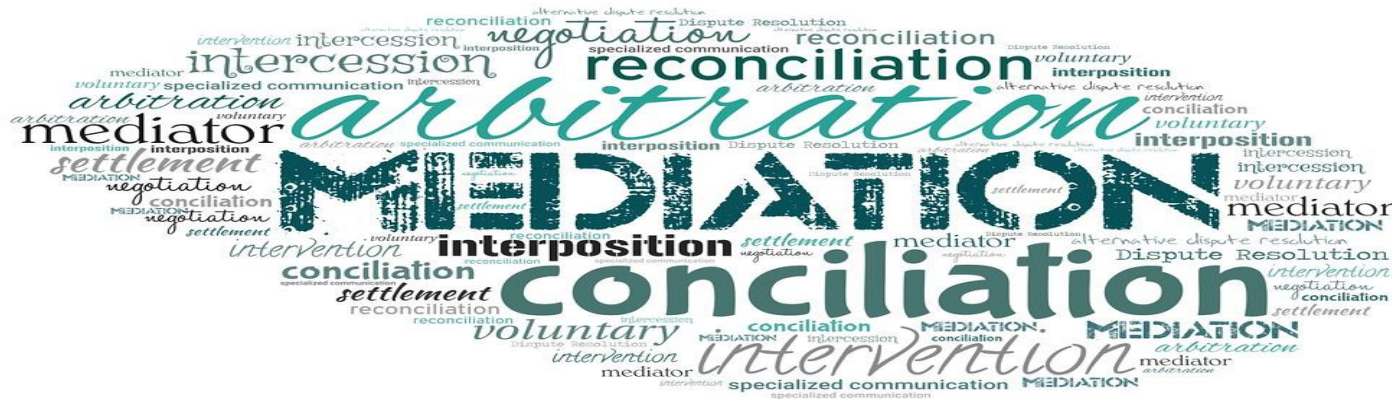
- Is informal resolution available to resolve allegations that an employee sexually harassed a student? NO.

Investigations: INFORMAL RESOLUTION



❑ Is informal resolution required? NO.

- Student or employee CANNOT be required to waive the right to an investigation and adjudication of formal complaints under Title IX (but they can agree to do so).



Investigations: INFORMAL RESOLUTION



□ When is informal resolution available?

- At any time prior to reaching a final determination, parties may voluntarily consent in writing to informal resolution. 34 CFR § 106.45(b)(9).



Investigations: INFORMAL RESOLUTION



- ❑ Is written consent the only requirement to an informal resolution? NO.
- ❑ Parties wishing to enter informal resolution must receive written notice disclosing:
 - (1) the allegations;
 - (2) the requirements of the informal resolution process;



Investigations: INFORMAL RESOLUTION



- Parties wishing to enter informal resolution must receive written notice disclosing:
 - (3) the circumstances under which it precludes the parties from resuming a formal complaint arising from the same facts;
 - (4) any other consequences of participating in the informal resolution process; and
 - (5) the records that will be maintained or could be shared.

Investigations: INFORMAL RESOLUTION



□ Other informal resolution considerations:

- Withdrawal *at any time prior to agreeing to a resolution*, resumes the formal complaint process.
- “The Department expects informal resolution agreements to be treated as contracts; the parties remain free to negotiate the terms of the agreement and, once entered into, it may become binding according to its terms.” 85 Fed. Reg. 30405.



Investigations: INFORMAL RESOLUTION



□ Other informal resolution considerations:

- Personnel involved must receive anti-conflict of interest and anti-bias training.
- Informal resolution may encompass a broad range of conflict resolution strategies:
 - Arbitration;
 - Mediation;
 - Restorative justice.



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Which of the following is a *per se* conflict of interest?

Prior work as a victim's advocate

Investigator or Title IX Coordinator
serves as a hearing officer

Supporting men's or women's
rights

Prior academic or employment
history

Agenda



- ✓ Title IX General Overview
- ✓ Report & First Steps
- ✓ Investigations & Informal Resolutions
- ☐ **Hearings, Determinations & Appeals**

An aerial photograph of a large, modern, multi-story building with a central courtyard. The building has a light-colored facade and a flat roof. The courtyard in the foreground features a central fountain and several benches. The scene is illuminated by streetlights and building lights, suggesting dusk or dawn.

Hearings, Determinations & Appeals

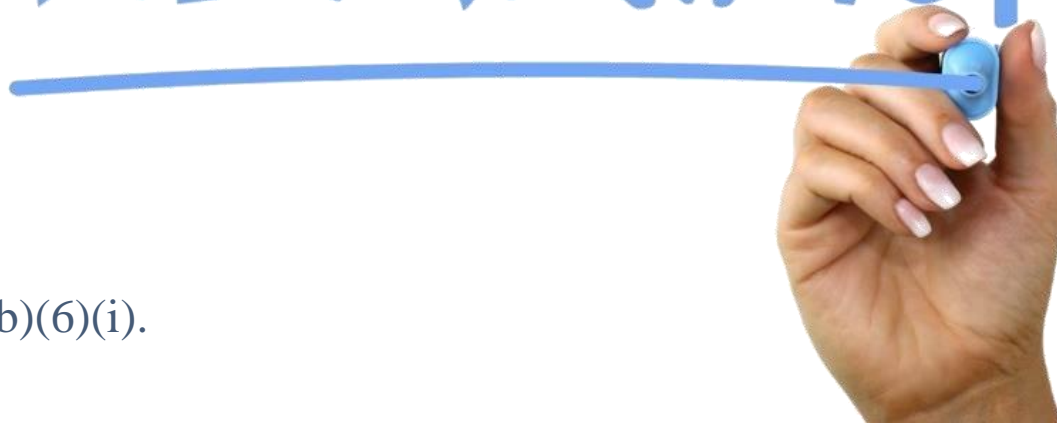
Hearings:



Are Hearings required? YES.

- EPCC is required to include a live hearing in their formal complaint process

HEARING



34 CFR 106.45(b)(6)(i).

Hearings: Overview

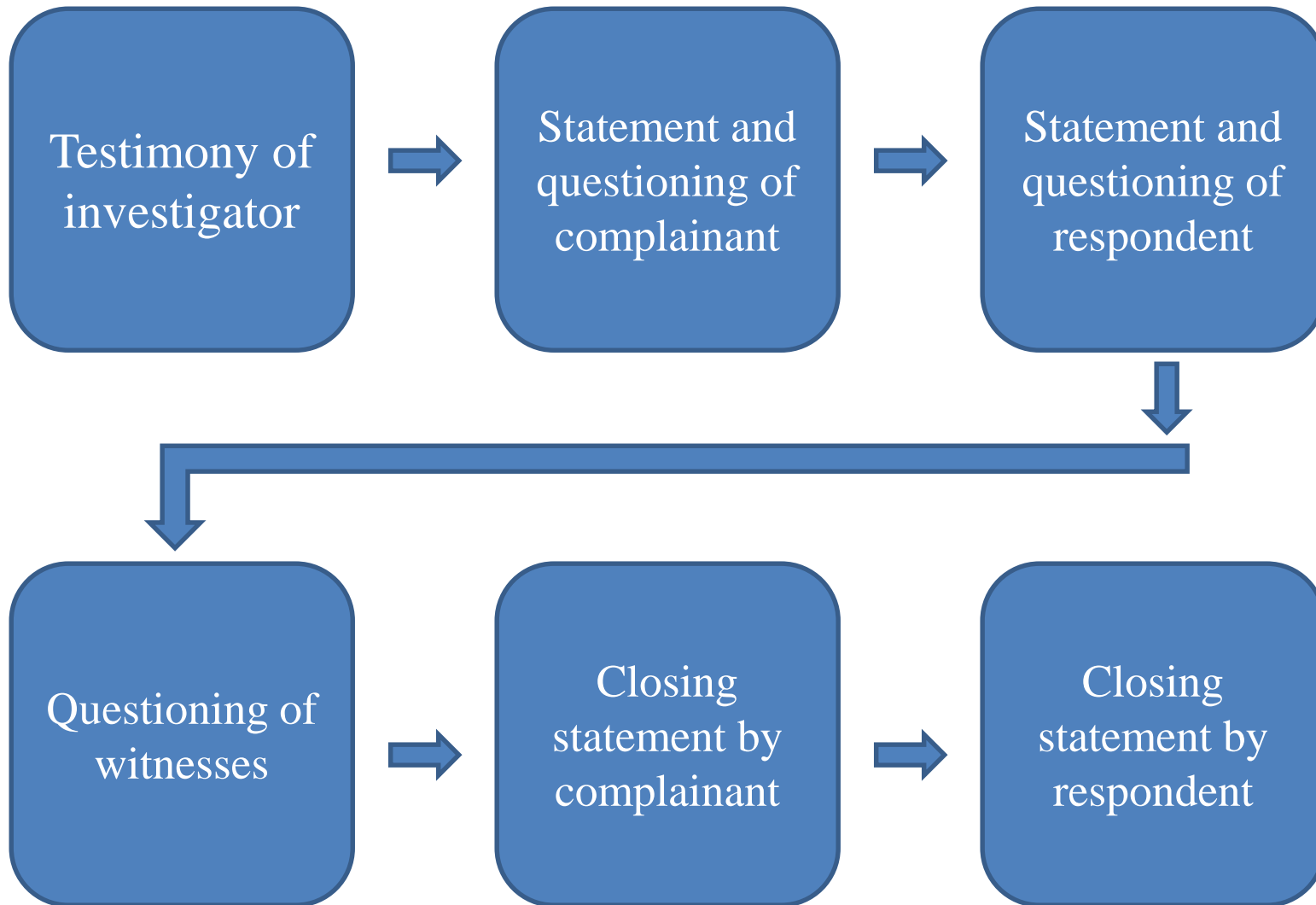


□ Topics to be covered:

- Potential Sequence of Hearings
- Live Hearings
- Advisors
- Cross-Examination
- Relevance
- Credibility
- Burden of Proof
- Evidence
- Legal Privileges



Hearings: Potential Sequence



Hearings: Live Hearings



□ Who runs the Hearing?

- Decision maker(s)
 - Single officer
 - Hearing panel

□ However:

- The decision maker(s)

CANNOT be the same

person as the Title IX Coordinator or the investigator



Hearings: Live Hearings



□ Hearing Scope & Requirements:

– *Absent any request from the parties*, live hearings may be conducted either:

- 1) With all parties physically present
- 2) With participants appearing virtually, with technology enabling them to see and hear each other

Hearings: Live Hearings



□ However, *at the request of either party*:

– Hearing must occur with parties located in separate rooms

- Each room must have technology enabling all parties to simultaneously see and hear any participant answering questions



Hearings: Live Hearings



□ Other Hearing requirements:

– In any live hearing:

- Audio or audiovisual recording, or transcripts must be created
- Whatever recording/transcript created must be available to the parties for inspection and review
- Best practice is to have a court reporter prepare a simultaneous transcript



Hearings: Live Hearings



□ Rules for Hearings:

- Equally applicable rules may be adopted concerning:
 - Decorum
 - Timing and length of breaks;
 - Prohibition on disturbing the hearings;
 - Prohibition on badgering witnesses.
- CANNOT forbid parties from conferring with their advisor.

RULES



Hearings: Advisors



Parties must have equal opportunity to an advisor present during any aspect of the formal complaint process.

Parties may not be restricted of their choice of advisor.

Advisor may be, but is not required to be, an attorney.

Participation of Parties' advisor in the proceedings may be restricted, as long as the restrictions apply equally.

If no advisor retained, EPCC **MUST** provide an advisor of *its* choice free of charge to conduct cross-examination.

Hearings: Cross-examination



□ Overall cross-examination requirements:

- Decision maker(s) must permit parties' advisor to cross examine opposing party and any witnesses
- Cross-examination must be conducted directly, orally, and in real time
- Only party's advisor can conduct cross-examinations
- Parties may never personally conduct cross-examinations

Hearings: Cross-examination



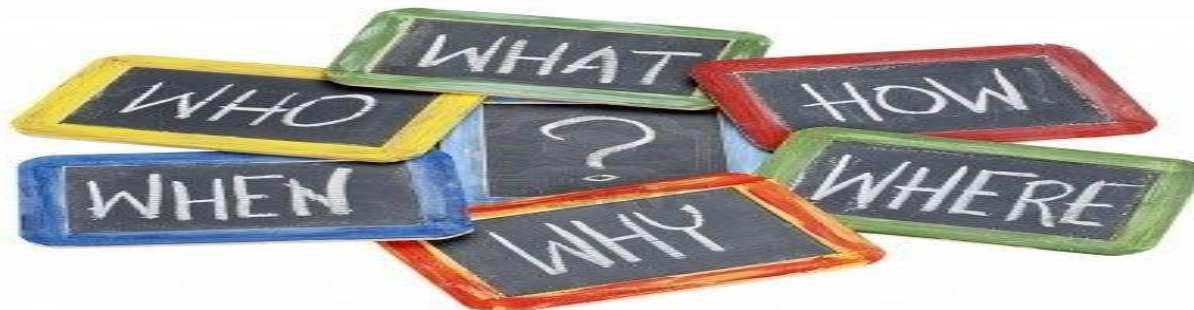
❑ Refusal of cross-examination:

- If a party refuses to submit to cross-examination, the hearing officer can rely on the party's statements

Hearings: Cross-examination



- When is an advisor’s cross-examination “*on behalf of that party*” satisfied?
 - When the advisor poses questions on a party’s behalf
 - Advisor may relay a party’s own questions to other participants
 - No particular skill or qualification is needed to perform cross-examination role



Hearings: Cross-examination



- Is the party's presence required for their advisor to conduct cross-examination? **NO.**
- If a party does not appear or submit to cross-examination, can the party's family members or friends recount the statement of the party? **NO.**
 - “. . . it would be unfair and potentially lead to an erroneous outcome to rely on statements untested via cross-examination”



85 Fed. Reg. 30347.

Hearings: Cross-examination



- What happens when a party does not appear but the party's advisor of choice does?
 - Advisor must still cross-examine the other appearing party on behalf of the non-appearing party
 - Appearing party's statements may be considered
 - Non-appearing party's statements may not be considered
 - Inferences cannot be drawn based on the non-appearance

Hearings: Relevance



- ❑ What questions may be asked on cross-examination?
 - Only relevant cross-examination and other questions, including those challenging credibility.



Hearings: Relevance



❑ What cross-examination questions are NOT relevant?

– Questions about the complainant’s sexual predisposition or prior sexual behavior

❑ Unless such questions:

– are offered to prove that someone other than the respondent committed the alleged conduct

– concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent

Hearings: Credibility



□ Consideration of relevant character evidence or evidence of prior bad acts

– “...where a cross-examination question or piece of evidence is relevant, but concerns a party’s character or prior bad acts the decision-maker *cannot exclude or refuse to consider the relevant evidence*”

85 Fed. Reg. 303337.



Hearings: Burden Of Proof



- Who carries the burden of proof and burden to gather evidence?—**EPCC**
 - **However**, it may not access, consider, disclose, or otherwise use a party's medical records without written consent



Hearings: Evidence



- ❑ What types of evidence may be potentially presented?
 - Direct
 - Circumstantial
 - Hearsay
 - Character Evidence
 - Prior Bad Acts

- ❑ **However**, the admissibility of evidence and its weight is governed by *relevance*



Hearings: Evidence

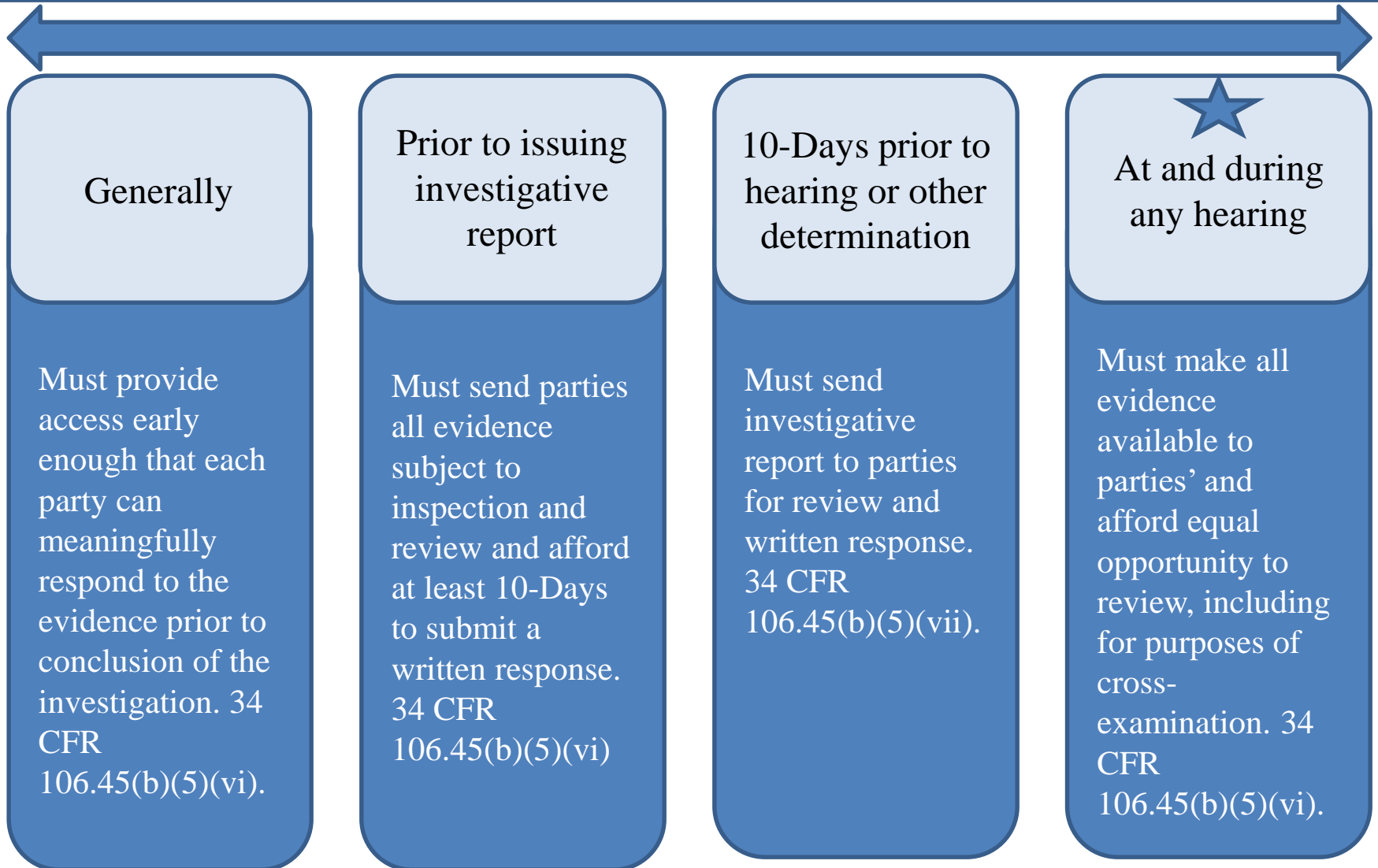


□ Access to the evidence:

- *Throughout the hearing*, both parties must be afforded equal opportunity to review and inspect any evidence that:
 - was obtained as part of the investigation; and
 - is *directly related* to the allegations.



Access to Evidence: Timeline



Hearings: Legal Privileges



- ❑ What are legal privileges and how may they arise at the hearing?
 - Attorney – Client
 - Priest – Penitent
 - Doctor – Patient
 - Spousal



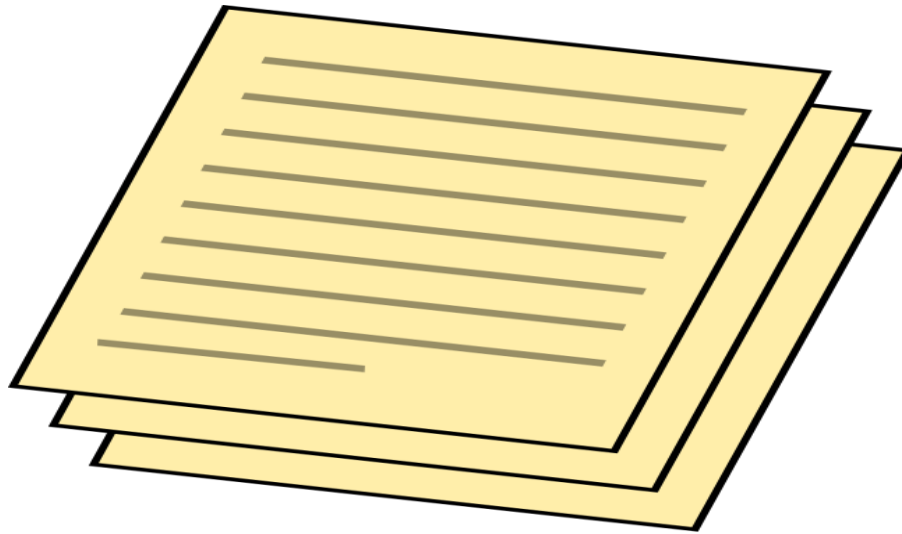
Determinations:



Are determinations regarding responsibility required?

YES.

- "The decision-maker(s), must issue a written determination regarding responsibility"



34 CFR 106.45(b)(7)(i).

Determinations: Overview



□ Topics to be covered:

- Format & Content
- Distribution of Determination
- Excluding Facts in Evidence
- Weighing facts
- Writing Defensible Determinations



Determinations: Format & Content



ALLEGATIONS

Identification of the allegations of sexual harassment.



PROCEDURAL RECITATION

A recitation 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 all hearings held.



Determinations: Format & Content



FINDINGS OF FACT

Findings of fact supporting the determination.

CONCLUSIONS

Conclusions regarding the application of EPCC's sexual misconduct policy to the facts, including a statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions EPCC imposes on the respondent, and whether remedies designed to restore or preserve equal access to EPCC's education program or activity will be provided by EPCC to the complainant.

Determinations: Format & Content



APPEAL

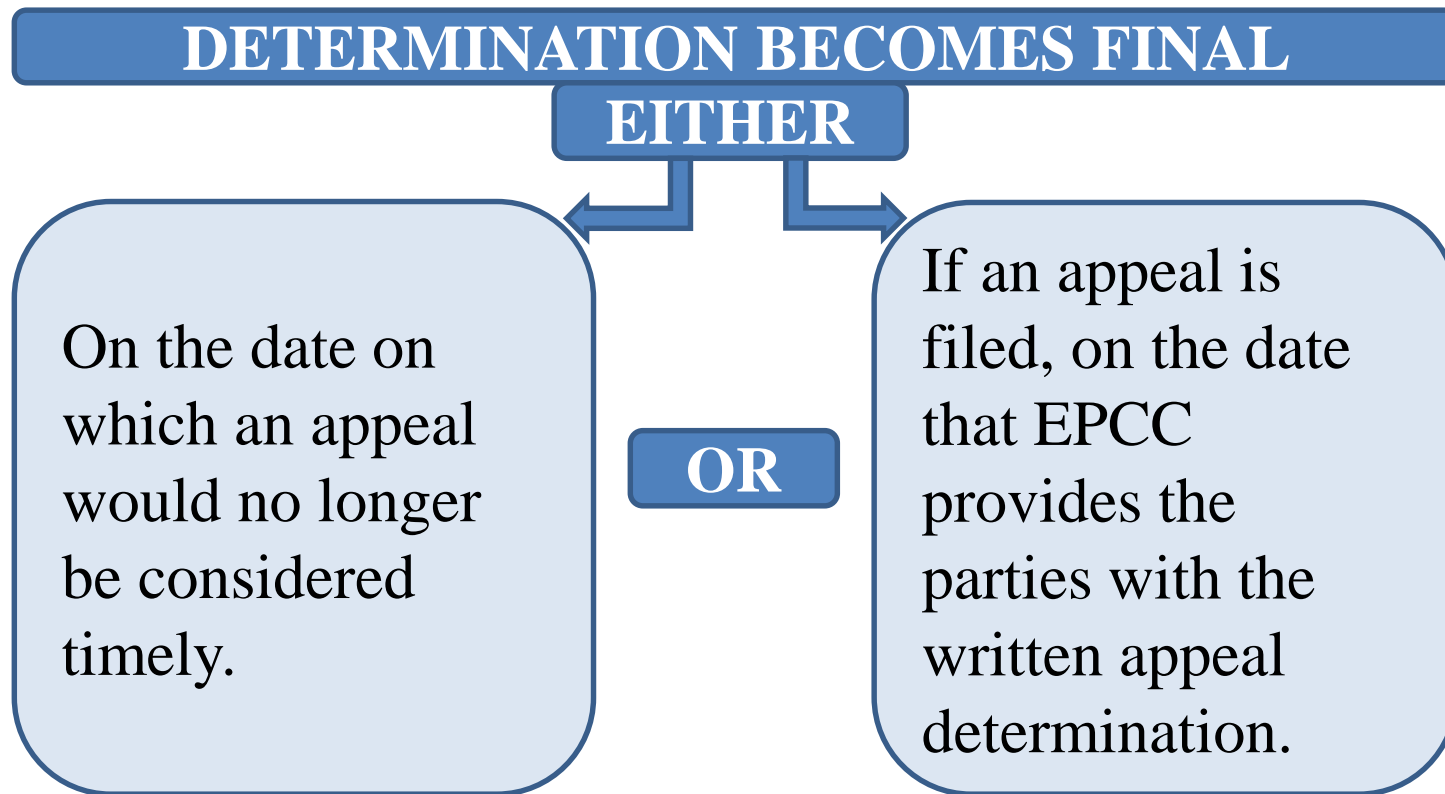
Procedures and permissible bases for appeal.

- Use format of a written determination as a checklist
- Answer each element before concluding the Hearing
- Written determination does NOT need to address “*all evidence*”

Determinations: Distribution



- ❑ Written determinations must be provided *simultaneously* to the parties



Determinations: Excluding Facts



- Inappropriate disclosure of privileged information, treatment records, or irrelevant information
 - Decision-maker(s) **CANNOT** consider such information
 - In a Hearing, state for the record that such information:
 - was inappropriately disclosed; and
 - will not be part of the evidence or considered.
 - If such information **CANNOT** be ignored, decision-maker(s) should recuse themselves

Determinations: Weighing Facts



Basic Evidentiary Requirements



Burdens



The burden of proof to reach a determination regarding responsibility rests on EPCC and not on the parties.

Determinations: Weighing Facts



- EPCC uses a “preponderance of the evidence” standard
 - Proof that a particular fact or event was more likely than not to have occurred
 - The fact finder believes that there is a greater than 50% chance that the allegation is true

Determinations: Writing Determinations



- Considerations when writing determinations:
 - Requirements under EPCC's policy
 - Severity of the outcome for the parties involved
 - Demonstrate that decision-maker(s) took the matter seriously and came to a thoughtful outcome



Determinations: Writing Determinations



- How may written determinations be as defensible as possible?
 - Assume the determination could be “Exhibit 1”
 - Include all elements necessary under policy and justify your conclusions with the record
 - Always ask for legal help when appropriate



Appeals:



Are Appeals required? YES.

- EPCC “must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein[.]”



34 CFR 106.45(b)(8).

Appeals: Key Concepts



- Appeal procedures must be equally implemented for both parties
- Written notification of an appeal to the other party required
- Decision-maker(s) for an appeal **CANNOT** be previous:
 - Title IX Coordinator
 - Investigator
 - Decision-maker(s) who initially determined responsibility or dismissal

Appeals: Key Concepts



- Appeal decision-maker(s) officer(s) must receive required training
- Both parties entitled to a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- Written decision describing the appeal outcome must be simultaneously provided to both parties



Appeals: Basis For Appeal



- Appeals must be granted on the following basis:
 - A procedural irregularity that affected the outcome
 - New evidence that was not reasonably available at the time the determination or dismissal was made and could affect the outcome
 - The Title IX Coordinator, investigator, or decision-maker(s) had a conflict of interest or bias that affected the outcome of the matter

Appeals: Basis For Appeal



- An appeal may be equally offered to both parties on additional bases
 - Appeal grounds on severity or proportionality of sanctions is discretionary
 - If such appeal basis is allowed, it must be offered equally to both parties



Appeals: Basis For Appeal



- ❑ Can you appeal an appeal? NO.
 - Determination regarding responsibility becomes final on the date the written appeal determination is provided simultaneously to the parties
- ❑ **However:**
 - A party can file a lawsuit and/or complaint with the U.S. Dept. of Education's Office of Civil Rights



Appeals: Drafting Decisions



- Considerations when reviewing appeals:
 - Understand applicable grounds for appeal
 - Keep an open mind
 - Be guided by applicable policies and facts
 - Address, in some fashion, all claims raised
 - Ensure no bias or conflict of interest
 - Keep an eye toward litigation

Appeals: Officer Requirements



□ Characteristics and qualities of the best appeal officer(s):

- Thoroughness and attention to detail
- Understanding of Title IX process
- Not afraid to find appeal has merit



Appeals: Officer Requirements



□ If there is a conflict of interest:

- An appeal officer should **NOT** hear the appeal.
- Policy should allow for the designation of a substitute appeal officer(s) in the case of a conflict or unavailability



🌐 When poll is active, respond at pollev.com/scotthulsepc444

📱 Text **SCOTTHULSEPC444** to **22333** once to join

Which of the following is not true about Title IX hearings?

An advocate need not be a lawyer

A decision-maker may not rely on statements if the party or witness does not submit to cross-examination

A complainant's sexual predisposition is never relevant

EPCC uses a preponderance of the evidence standard