



MarymountManhattan

Title IX Training – Decision-Makers
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BIEDERMANN·HOENIG·SEMPREVIVO
A PROFESSIONAL CORPORATION

TOPICS COVERED

- Responsibilities of Decision Makers
- Evidence
- Issues of Relevance
- Live Hearings Logistics
- Cross-Examination at Live Hearings
- Reaching a Determination
- Written Determination

RESPONSIBILITIES OF DECISION MAKERS

DECISION MAKERS

What is your role as a Decision-Maker under the new Title IX Rules?

- Evaluate evidence
- Conduct Live Hearings
- Decide whether questions seek relevant evidence in a Title IX Hearing
- Reach conclusions about whether the Respondent is responsible for the alleged sexual harassment
- Determine whether remedies will be provided to the Complainant and/or the appropriate disciplinary consequences for Respondent
- Issue a written determination regarding responsibility, whether remedies will be offered and any disciplinary action

DECISION MAKERS

REQUIREMENTS UNDER THE NEW REGULATIONS

- Must not have bias for or against complainants or respondents generally, or with a specific complainant or respondent
- May not have a conflict of interest
- Must be trained on issues of relevance and admissibility of evidence
- Cannot be the same person that conducted the investigation
- Cannot sit on the Appeal Board

EVIDENCE

EVIDENCE

- The College carries the burden of collecting evidence
- Only **relevant** evidence may be considered by the Decision Maker
- Privileged evidence is not admissible without consent
- Medical Records and Mental Health Records are not admissible without consent
- There are no other restrictions on evidence (legal rules of evidence don't apply)
- Parties have the right to inspect the evidence
- Statements of a party or witness that does not submit to cross-examination may not be relied upon by Decision Maker
- Decision Maker evaluates credibility during the Live Hearing

PRIVILEGED EVIDENCE

Privileged Evidence is Inadmissible pursuant to Section 106.45(b)(1)(x) of the regulations

- The college may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege in writing.
- *Examples of Privilege:* patient-doctor; attorney-client; spousal privilege

OTHER INADMISSABLE EVIDENCE

Statements of non-cooperating party or witness

- The statements of a party or witness that does not submit to cross examination may not be considered by the Decision Maker in rendering a decision

ISSUES OF RELEVANCE

RELEVANCE

RELEVANCE: Information is relevant when the evidence directly relates to the issues being discussed or disputed.

- Keep in mind the difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence.

RELEVANCE

- Decision Makers are the gatekeepers of evidence
- They make the important decision of what is relevant and permitted to be considered during a hearing
- The parties use evidence to support or refute allegations

ISSUES OF RELEVANCE

• **Rape Shield Protections and Exceptions**

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are NOT RELEVANT, unless offered to prove:

1. “Mistaken Identity”

- that someone other than the respondent committed the conduct alleged by the complainant, or

2. Consent

- concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

LIVE HEARINGS

TITLE IX - HEARINGS

- After an Investigation Report has been completed by the Investigator, a live hearing will be held.
- Both parties have the right to submit, cross-examine, and challenge evidence at the live hearing, which will be recorded.

TITLE IX - HEARINGS

- Each party's respective Advisor will conduct cross examinations at the hearing.
- A Decision Maker will preside over the hearing and will determine whether a question is relevant before the party or witness is required to answer.
- The Live Hearings may take place in person or virtually.
- The Decision Maker will objectively review all relevant evidence set forth at the hearing, including evidence that is inculpatory and exculpatory.
 - *Inculpatory Evidence*: evidence that tends to present guilt
 - *Exculpatory Evidence*: evidence that exonerates or tends to exonerate guilt.

LIVE HEARINGS - LOGISTICS

- Live hearings may be conducted in person in the same room. An audio recording device will be provided by the Title IX Office for the Decision Maker to use to record all components of the live hearing.
- At any party's request, the live hearing may be conducted in separate rooms, using Zoom technology.
 - The Decision Maker will be the host of the Zoom session
- During remote learning, all live hearings will take place via Zoom.

LIVE HEARINGS - TECH

Technology considerations:

- Parties must be able to hear and see each other.
- Parties and Decision Maker must be able to view evidence being presented.
 - Consider screen-sharing and/or sending documents electronically in advance.
- Parties should have ability to communicate with their respective advisors in private.
 - Consider “breakout rooms.”

CROSS-EXAMINATION

HEARINGS – CROSS-EXAMINATION

- The US Department of Education has defined Cross Examination to mean the opportunity for a party's advisor to ask questions that might challenge the other party's statement or allegations
- The Department believes that this process makes it more likely that a Decision Maker will reach an accurate determination

HEARINGS – CROSS-EXAMINATION

- Cross-examination must be conducted by a party's Advisor **only**.
- Must be conducted directly, orally and in real time.
- If a party does not have an advisor, the College will provide an advisor who can convey the questions that a party would like to have asked.
 - No party should ever be allowed to personally questions any witness or any other party.
- Before an answer is given, the Decision Maker must first determine and indicate whether the question seeks relevant information.
- The Decision Maker must explain any decision to exclude something as not relevant.

HEARINGS – CROSS-EXAMINATION

- Examples of why a question may seek information that is irrelevant:
 - Outside the scope of the allegations
 - Inflammatory
 - Badgering the witness
 - Repetitive
- You may also choose to direct a witness not to answer when the advisor is demonstrating improper or inappropriate decorum

HEARINGS – CROSS-EXAMINATION

RIGHT TO NOT PARTICIPATE

- If a party chooses not to attend the live hearing, or opts not to answer cross examination questions, the Decision Maker merely excludes that party or witness's statements, and evaluates any evidence that doesn't involve those statements.
- The Decision Maker must never make inferences- positive or negative – about an individual's choice not to be cross-examined or to decline to answer certain cross examination questions.
- No individual should be intimidated, coerced, or threatened for choosing not to participate.
- **An individual's decision not to participate cannot factor into a Decision Maker's determination regarding responsibility.**

HEARINGS – CROSS-EXAMINATION

- Taylor, a theater student, alleges that he was sexually assaulted by his classmate, John, late one night in the theater after rehearsal for a play. Taylor alleges that he was backstage, gathering up his belongings when John approached him from behind and grabbed Taylor's butt. When Taylor turned around, John pushed him up against a wall and began kissing him. Taylor pushed John off of him and said, "stop!" John continued to hold Taylor against the wall, trying to kiss him until Taylor broke free. Taylor and John have known each other for about one year. He denies ever having a sexual relationship with John or any other male. Taylor has been seeking counseling as a result of this incident.
- John denies the claims as alleged by Taylor. He states that he and Taylor have had several sexual encounters over the past three months, one of which occurred in the theater after rehearsal. According to John, on the date of the subject incident, he grabbed Taylor's butt and Taylor turned around and began kissing John. After a few seconds, Taylor stopped and said, "I don't want anyone to find out about this - we can't do this here." John reassured Taylor that everyone was gone and they kissed again before leaving the theater and going their separate ways.

REACHING A DETERMINATION

REACHING A DETERMINATION

At the conclusion of the live hearing and evidence gathering, you will make a determination of responsibility.

Your determination must be based on an objective evaluation of the evidence gathered during a procedure that conforms to the presumption of innocence.

Remember that the Standard of Proof of the College is the Preponderance of the Evidence.

REACHING A DETERMINATION

Be sure to view and evaluate all evidence in an impartial manner.

- Maintain objectivity.
- Accept evidence at face value unless called into question by other evidence.
- Keep in mind that evaluating evidence may entail assessing the credibility of witnesses.
- Do not consider interactions with the Complainant or Respondent that are not relevant to the determination at hand.

REACHING A DETERMINATION

Relevant documents may include, but are not limited to:

- The formal complaint
- The initial written notice of the allegations
- Written statement(s) and responses by the parties and/or witnesses
- The investigation report
- Police reports, photographs and/or video footage (if any)
- Prior discipline records (only relevant to issue of appropriate sanction)

REACHING A DETERMINATION

Weighing evidence:

- Determine what evidence is probative (tends to prove a fact) by looking at the relevant **policy definitions**.
- If you have conflicting probative evidence, then you must determine the credibility of each individual's statement by considering factors such as:
 - Eyewitness accounts of third parties
 - Other pertinent evidence (*i.e.* photographs, texts)

REACHING A DETERMINATION

Policy Definition	Relevant Facts from Complainant Interview:	Relevant Facts from Respondent Interview:	Determination, Relevant Facts:
Sexual Misconduct			
Sexual Assault			
Sexual Harassment			
Stalking			
Dating or Domestic Violence			

WRITTEN DETERMINATION

- At the conclusion of the investigation and hearing, the Decision Maker must issue a single final written determination that includes:
 - a finding on issue of responsibility;
 - whether remedies must be offered to the Complainant; and
 - any disciplinary sanctions imposed by recipient
- The Written Determination must be contained in one document and cannot be issued piecemeal.
- The College must send the Written Determination to both parties simultaneously.

WRITTEN DETERMINATION

The Written Determination must include the following:

1. Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
2. 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 evidence, and hearings held;
3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the College's code of conduct to the facts;
5. A statement of and rationale for each result as to each allegation including the determination of responsibility, any disciplinary sanction imposed on the Respondent and whether remedies designed to restore or preserve equal access to the College's educational program or activity will be provided to the Complainant; and
6. Procedures and permissible bases for the complainant and respondent to appeal.



ANY QUESTIONS?