

AHLERS COONEY
ATTORNEYS

**New Title IX
Regulations: K-12
Decision Makers**

June 24, 2020 Webinar

1

©Ahlers & Cooney, P.C. - All Rights Reserved

1

Webinar Goals

- Decision Maker Roles and Responsibilities
- Sanctions and Remedies
- Appeal Process
- Impartiality, Bias, and Conflicts of Interest

2

©Ahlers & Cooney, P.C. - All Rights Reserved

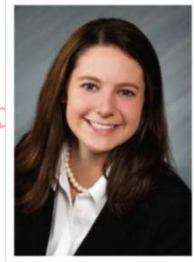
AHLERS COONEY
ATTORNEYS

2

Presentation Team



Carrie Weber



Kristy Latta

TOPIC #1

Decision Maker Roles and Responsibilities



Who Should the Decision Maker Be?

- Cannot be the same as the Title IX Coordinator or Investigator for that case
- Cannot be the same as the Appeal Decision Maker
- May be one person or a multi-member panel



5

©Ahlens & Cooney, P.C. - All Rights Reserved

 AHLERS COONEY
ATTORNEYS

5

What is the Decision Maker's Role?

- Act as a neutral
- Determine what questions are relevant to the case
- Objectively evaluate all relevant evidence both inculpatory and exculpatory
- Reach a determination regarding responsibility without giving deference to the investigative report

6

©Ahlens & Cooney, P.C. - All Rights Reserved

 AHLERS COONEY
ATTORNEYS

6

Decision Making Process

Written

Live
Hearing

7

©Ahlers & Cooney, P.C. - All Rights Reserved

 AHLERS COONEY
ATTORNEYS

7

Cross Examination



- Occurs in some form in both the written and live hearing options
- DOE determined it is necessary for due process
- DOE presumes Decision Maker will control advisors and advocates to ensure no party is abused by cross-examination process
- DOE has expressed concern about sex bias in the context of sexual harassment

8

©Ahlers & Cooney, P.C. - All Rights Reserved

 AHLERS COONEY
ATTORNEYS

8

Live Hearing Requirements

- Each party is permitted to have an “advisor,” who could be attorney or other representative
- Each party’s advisor is permitted to ask the other party and any witnesses all relevant questions, challenge credibility, and conduct cross-examination
- If a party does not have an advisor, the District must provide one free of charge to conduct cross-examination on behalf of that party

9

©Ahlers & Cooney, P.C. - All Rights Reserved



9

Live Hearing Requirements

- The District must provide technology to all the live hearing to take place with parties in separate rooms if requested
 - Technology training must be provided to decision maker
- The District must create an audio or video recording, or written transcript, of the live hearing and make it available to the parties



10

©Ahlers & Cooney, P.C. - All Rights Reserved



10

Written Option

- Instead of a live hearing, the decision maker may allow each party to submit written questions to any party or witness
- Decision maker provides each party with the answers, and allows for additional, limited follow-up questions from each party

11

©Ahlers & Cooney, P.C. - All Rights Reserved



11

Cross-Examination Procedure

- Each party's advisor will submit questions for cross-examination
- Your role: Decide if the questions are relevant and:
 - (1) Ask the question if relevant; or
 - (2) Decline to ask an irrelevant question, and explain why the question is irrelevant to the asking party in writing

12

©Ahlers & Cooney, P.C. - All Rights Reserved



12

Relevance

- Evidentiary definition: Evidence having any tendency to make the existence of any fact of consequence to the determination at issue more or less probable than it would be without the evidence
 - Determining relevance is different than determining how much weight to give the evidence
 - Irrelevant evidence: Excluded
 - Relevant, but not much weight: Included for consideration

13

©Ahlers & Cooney, P.C. - All Rights Reserved



13

Relevance

Example: Evidence is offered that the complainant took illegal drugs.

Relevant: Drug use the night of a contested sexual encounter. The drug use might make the issue of whether the complainant was incapacitated more or less probable

Irrelevant: Drug use two weeks prior to the incident in question. This evidence would make the complainant look bad, and does not make an issue in the case more or less probable



14

©Ahlers & Cooney, P.C. - All Rights Reserved



14

Relevance: Privileged Information

- Any party's medical, psychological, and similar records are not relevant unless voluntarily provided by that party
- Any information protected by a legally recognized privilege (like attorney-client privilege) is not relevant
 - Ex: Cannot ask: "What did your attorney tell you about whether these actions were consensual?"



15

©Ahlers & Cooney, P.C. - All Rights Reserved

 **AHLERS COONEY**
ATTORNEYS

15

Questions Prohibited

- In either a live hearing or using the written option, questions concerning the complainant's sexual predisposition or prior sexual behavior are not relevant unless:
 - Offered to provide someone other than respondent committed the conduct alleged; or
 - Incidences concern prior sexual behavior with the respondent and are offered to prove consent



16

©Ahlers & Cooney, P.C. - All Rights Reserved

 **AHLERS COONEY**
ATTORNEYS

16

Credibility Assessments

- DOE: Do not rely on “demeanor” alone – can be inaccurate, especially in traumatic situations
- Take trauma into account
- Other factors for credibility:
 - Consistency;
 - Plausibility; and
 - Reliability

17

©Ahlers & Cooney, P.C. - All Rights Reserved



17

Determining Responsibility

- Following live hearing or written exchange of questions, the decision maker must determine responsibility
- Independent assessment of the evidence
- No deference to investigation report

18

©Ahlers & Cooney, P.C. - All Rights Reserved



18

Evidence Standard

- Schools may utilize either a “preponderance of the evidence” OR “clear and convincing” evidence standard, HOWEVER
- School must apply this standard to.
 - *For formal complaints against students as for formal complaints against employees, including faculty, and*
 - *Apply the same standard of evidence to all formal complaints of sexual harassment*
- Major practical issue before 8/14/20: Revision to policies, collective bargaining agreements, contracts, and faculty handbooks/manuals

19

©AHLERS & COONEY, P.C. - All Rights Reserved

 AHLERS COONEY
ATTORNEYS

19

Evidence Standard

- Preponderance of the Evidence: More likely than not
 - What is more plausible?
 - What corroborating evidence is supportive?
 - Sometimes – who do you believe more and why?
- Clear and Convincing: Highly probable; highly and more substantially likely to be true

Neither are as high as the standard of evidence in criminal cases – “beyond a reasonable doubt”

20

©AHLERS & COONEY, P.C. - All Rights Reserved

 AHLERS COONEY
ATTORNEYS

20

Written Decision

- Identification of Allegations
- Procedural Steps
- Findings of Fact
- Application of Facts to Code of Conduct
- Statement of Results and Rationale for Each Allegation
- Sanctions and Remedies
- Appeal Procedures

21

©Ahlers & Cooney, P.C. - All Rights Reserved



21

Written Decision



- Ensure Title IX Coordinator receives a copy of decision and any other documents involved in process for required 7-year retention
- Decision must be provided to parties simultaneously
- Determination is not final until:
 - Date of written determination following appeal; or, if no appeal is taken
 - Date the appeal deadline expires

22

©Ahlers & Cooney, P.C. - All Rights Reserved



22

Poll Question 1:

Does your current policy provide for a decision maker that is a different person than your Title IX Coordinator?

1. Yes
2. No
3. Unsure

23

©Ahlers & Cooney, P.C. - All Rights Reserved



23

TOPIC #2

Sanctions and Remedies



24

©Ahlers & Cooney, P.C. - All Rights Reserved



24

Sanctions

- Range of possible sanctions must be described in policy
- Focus not just on discipline, but also on restorative remedies to prevent recurrence
- Don't forget about other legal obligations



25

©Ahlers & Cooney, P.C. - All Rights Reserved

 **AHLERS COONEY**
ATTORNEYS

25

Sanctions - Examples

- Written Warning
- Suspension
- Expulsion
- Demotion
- Termination



26

©Ahlers & Cooney, P.C. - All Rights Reserved

 **AHLERS COONEY**
ATTORNEYS

26

Other Legal Obligations

- Student Conduct Policies
- Suspension/Expulsion beyond 10 days
- IDEA/504 Students
- Employee Due Process Procedures



27

©Ahlers & Cooney, P.C. - All Rights Reserved

 **AHLERS COONEY**
ATTORNEYS

27

Remedies

- Title IX Coordinator responsible for implementing remedies
- May be the same or similar to interim supportive measures
- Must be designed to restore or preserve equal access to the District's education programs or activities
- Need not be non-disciplinary or non-punitive and need not avoid burdening the Respondent

28

©Ahlers & Cooney, P.C. - All Rights Reserved

 **AHLERS COONEY**
ATTORNEYS

28

Remedies

- Range of possible remedies must be included in policy
- Evaluated by DOE under a “deliberate indifference” standard
- Examples:

Counseling
modifications

Accommodations
to class schedules
or school work

Restrictions on
contact between
the parties

Increased
monitoring

29

©Ahlers & Cooney, P.C. - All Rights Reserved

AHLERS COONEY
ATTORNEYS

29

TOPIC #3

Appeal Process



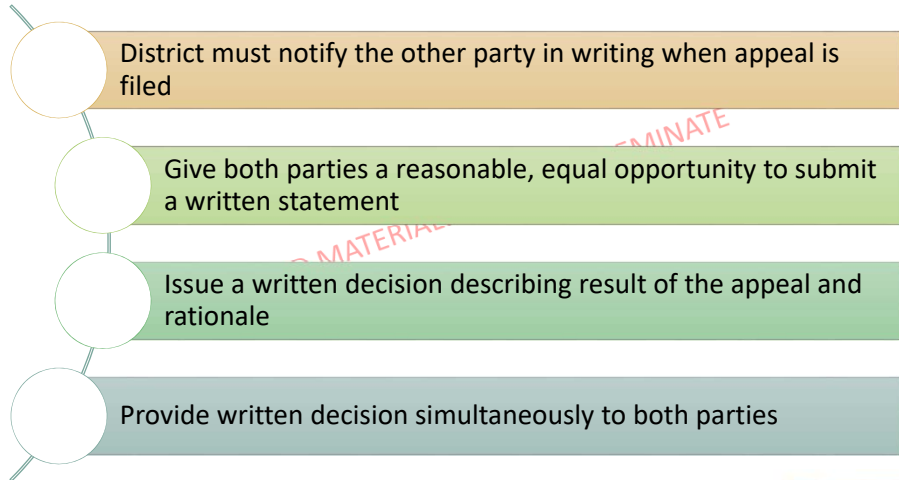
30

©Ahlers & Cooney, P.C. - All Rights Reserved

AHLERS COONEY
ATTORNEYS

30

Appeal Procedures



31

©Ahlers & Cooney, P.C. - All Rights Reserved

AHLERS COONEY
ATTORNEYS

31

Appeal Decision Maker

- Must not be Title IX Coordinator, Investigator, or Initial Decision Maker
- Can be individual or multi-member panel
- Not the full School Board
- Avoid conflict of interest and bias

32

©Ahlers & Cooney, P.C. - All Rights Reserved

AHLERS COONEY
ATTORNEYS

32

Mandatory Appeals

- Procedural irregularity that affected the outcome of the matter
- New evidence not reasonably available at the time of the determination regarding responsibility or dismissal was made
 - Evidence could affect outcome
- Title IX Coordinator, Investigator, or Decision Maker had conflict of interest or bias for or against either party that affected the outcome

33

©Ahlers & Cooney, P.C. - All Rights Reserved



33

Permissive Appeals

- May offer an appeal on any other basis, as long as the opportunity is offered to both parties equally
- Examples:
 - Whether the evidence met the identified standard of proof
 - Whether the sanction is proportional to the policy violation

34

©Ahlers & Cooney, P.C. - All Rights Reserved



34

TOPIC #4

Impartiality, Bias, and Conflicts of Interest



35

©AHLERS & COONEY, P.C. - All Rights Reserved

 AHLERS COONEY
ATTORNEYS

35

Impartiality

- Divorce yourself from stereotypes or generalizations about groups of people- e.g., “victim-blaming” or “believe all women”
- DOE: The Decision-Maker must endeavor not to “develop a personal relationship” with one party over another, including based on whether parties are remote for live hearing

36

©AHLERS & COONEY, P.C. - All Rights Reserved

 AHLERS COONEY
ATTORNEYS

36

Implicit/Unconscious Bias

- Undergo training or obtain resources on implicit or unconscious bias;
- Recognizing and acknowledging biases
 - Potential protected class bias
 - Group bias and assumptions – athletes, certain employment positions, etc.
- Gather input from diverse sources and viewpoints, to the extent possible
- Avoid focusing on early “gut reactions” and weigh all possible outcomes

37

©Ahlers & Cooney, P.C. - All Rights Reserved



37

Conflicts of Interest

- May have to recuse yourself from certain cases if a conflict of interest exists
- Disclose and recognize conflicts of interest:
 - Familiarity or connection to a party?
 - Stake in the outcome?

38

©Ahlers & Cooney, P.C. - All Rights Reserved



38

Confidentiality

- Must keep confidential the identity of any individual who has made a report or complaint, any respondent, and any witness confidential except as
 - May be permitted under FERPA,
 - as required by law, or
 - to carry out the investigation and hearing procedures

Keep identities and information confidential to the hearing and resolution process – only talk to school officials with a “need to know”

39

©Ahlers & Cooney, P.C. - All Rights Reserved

 **AHLERS COONEY**
ATTORNEYS

39

Poll Question 2:

My District has provided implicit bias training for administrators in the past:

1. Yes
2. No
3. Unsure

COPYRIGHTED MATERIAL: DO NOT DISSEMINATE

40

©Ahlers & Cooney, P.C. - All Rights Reserved

 **AHLERS COONEY**
ATTORNEYS

40



COPYRIGHTED MATERIAL: DO NOT DISSEMINATE

Thank You
for attending!