

The background features a large, faint, light gray graphic of a lightbulb. Inside the lightbulb, there are several interlocking gears of various sizes, symbolizing industry, technology, and interconnected systems.

Title IX Decision Maker Training

August 4, 2020

Objectives



- Role of the Decision Maker
- Due Process
- Decision-Making Skills
- Hearing Logistics
- Deliberations
- Appeals

Role of the Decision Maker



- Formerly called Hearing Officer or Panel
- Panel of Decision Makers (3)
- Appellate Decision Maker(s)
- Determine Relevance
- Uphold Policy
- Remain Equitable

Decision-Maker Competencies

- The Legal Landscape
- The Conduct/Disciplinary Process
- Understanding Investigations
- Title IX & VAWA Requirements
- Pre-Hearing Investigation Report Review
- Critical Thinking Skills
- How to Prepare for a Hearing
- Hearing Decorum
- Questioning Skills, including Relevance
- Weighing Evidence, including Relevance
- Sexual Misconduct/Discrimination
- Technology Used at Hearing
- Controlling Evidence
- Managing Advisor
- SANE and Police Reports
- Presumption of Innocence

Decision-Maker Competencies

- Due Process and Fairness
- Domestic/Dating Violence
- Bias/Impartiality/Conflicts of Interest
- Stalking/Sexual Assault/Harassment
- Deliberation
- Sanctioning/Remedies
- Understanding the Appeal Process
- Cultural Humility
- Intersection with Mental Health Issues
- Concurrent Criminal Prosecutions
- Impact of Failing to Testify/Answer
- Drawing Inferences
- Manage Accommodations During Process
- Fixing Procedural Deviations
- Managing Impact Statements
- Writing Decisions/Rationales
- Role in Appeal Process

Challenges

- Understanding the standard used to identify what constitutes sexual harassment
- Not a question of right or wrong, but whether there has been a policy violation, proven by the standard of evidence.
- The role of impartially upholding the integrity of the process.
- You may not agree with the policy, but you must be willing to uphold it.
- Conflict of interest, objectivity, and bias.

Due Process

The background features a large, light gray gear with several smaller gears of varying sizes interlocking with it. A thick, light gray curved line sweeps across the lower portion of the image, partially overlapping the gears.

- Meant to mirror a legal proceeding
- Substantive
- Procedural
- Rights
- Timing

What is Due Process

- Legal protections ensuring no public entity deprives someone of education or employment without substantive and procedural fairness.
- Based on the 5th and 14th Amendments.
- Both sides have rights-based protections throughout the entire process.
- Perceptions of “due process” can be connected to the perception of legitimacy of the process’s outcome.

Substantive Due Process



A decision must:

- Be appropriately impartial and fair.
- Be neither arbitrary or impulsive.
- Be based on a fundamentally fair rule or policy.
- Be made in good faith.
- Have a rational relationship to (based upon and a reasonable conclusion from) the evidence.

Procedural Due Process

- Consistent, thorough, and procedurally sound review of all allegations.
- Substantial compliance with written policies and procedures.
- Policies and procedures afford sufficient rights and protections to satisfy all applicable laws.
 - Clear written notice of allegations
 - Opportunity to present witnesses and evidence and be heard by the DM.

Procedural Rights per Regulations

- Present witnesses, fact and expert.
- Gather and present inculpatory and exculpatory evidence.
- Discuss allegations without restriction.
- Have others present during any grievance proceeding/meeting.
- Have an advisor of their choice.
- Written notice of allegations, including the date, time, location, participants, purpose of investigation or meeting, with sufficient time to prepare.
- Inspect and review evidence and draft investigation report before finalized.
- Right to argue for inclusion of “directly related” evidence at the hearing.
- Ask relevant questions of the other party and witnesses through an advisor, in the presence of the DM.

Timing

Investigate



10 days to review and appeal to Investigator

Update by Investigator



10 days to review and appeal to chair

Hearing

Decision Making Skills

- Questioning:
 - Your goal is to ensure you understand the information contained in the report:
 - Relevant facts about what happened during the incident
 - Any related events
 - Any corroborating information
 - Use questions to elicit details, eliminate vagueness, fill in gaps where information seems missing
 - Your goal is NOT to satisfy your curiosity or chase a rabbit down a hole.
 - No not expect the “Gotcha” moment.

Decision Making Skills

- Ask yourself:
 - Is the answer to my questions already in the report or documentation I have been provided?
 - If not, why not? (Ask the Investigator)
 - You still will need to ask it again but keep the report in mind.
 - What do I need to know?
 - Why do I need to know it?
 - If the answer is not that it will help to determine whether or not the policy violation occurred and you can explain a rationale for; then it is not something you need to know!
 - What is the best way to ask the question?
 - Who is the best person to get this information from? (Investigator, a party, a witness)
 - Are you the best person to ask the question?

Decision Making Skills

- Asking good questions:
 - Generally use open-ended questions.
 - Try to avoid close-ended questions.
 - Do not ask compound questions (I have two questions...).
 - Do not ask multiple choice questions.
 - Avoid suggesting an answer in your question.
- Questions skills
 - Listen carefully and adapt follow-up questions.
 - Work from prepared outline, but be flexible.
 - Seek to clarify terms (hook-up, acted weird, sketchy, had a few drinks).
 - Be aware of your own body language, stay neutral.
 - Be cognizant of the difference between what was "heard", what can be assumed, and what was "witnessed"

Decision Making Skills

- Questioning Tips:
 - Restate/summarize what was said, helps ensure you understood what was said.
 - Consider using these phrases:
 - So it sounds like....
 - Tell me more....
 - Walk me through....
 - Help me understand....
 - Frame questions neutrally.
 - Be on the lookout for “cued” responses or rehearsed or memorized answers.
 - Handle emotions sensitively and tactfully.
 - Observe body language, but do not read too much into it.

Decision Making Skills

- Hearing Testimony:
 - Determine the relevance and appropriateness of questions. Pause after each questions to “rule” on relevance. State your rationale for the record.
 - Viewed VERY broadly and tie break would go to relevant.
 - When necessary, provide directives to disregard a questions or information deemed irrelevant, abusive, or unduly repetitive.
 - Manage advisors as necessary, including cross-examination.
 - Maintain professionalism.
 - Recognize your positional authority.
- Credibility analysis

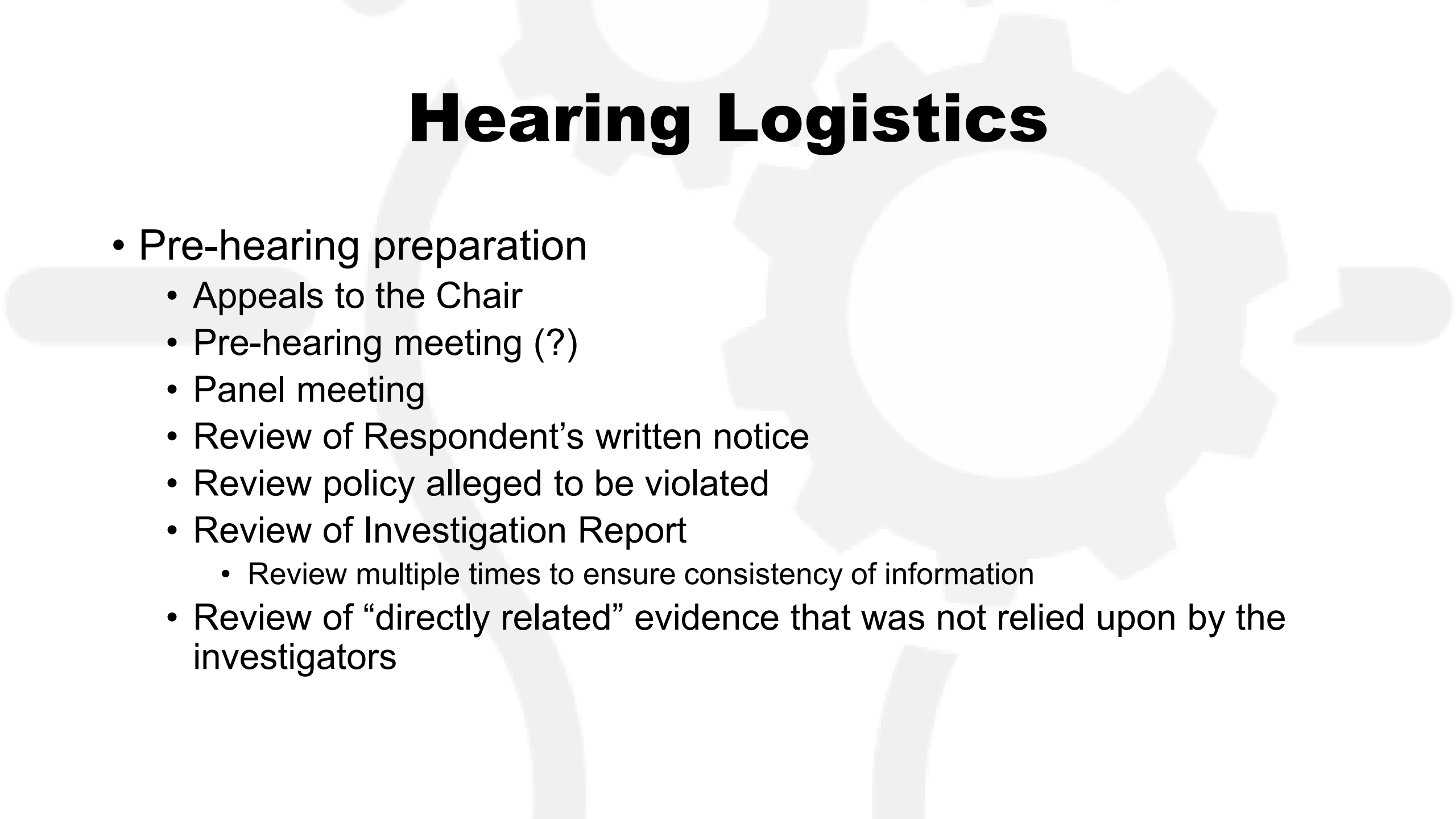
Decision Making Skills

- Credibility analysis
 - Accuracy and reliability of information
 - “Credible” is not synonymous with “truthful”
 - Memory errors, evasion, misleading may impact
 - Primary factors: corroboration and consistency (went to dinner, can provide receipts)
 - Avoid too much focus on irrelevant inconsistencies
 - Source + content + plausibility (Does what the party is saying make sense?)
 - Is the physical location or proximity reasonable?
 - Is the party’s statement consistent with the evidence?

Decision Making Skills

- "Separate" witness accounts
- Assessment may not be based on person's status as a Complainant, Respondent, or Witness
- Inherent plausibility: Does it make sense?
- Motive to falsify: Do they have reason to lie?
- Past record: Is there a history of similar behavior?
- Demeanor: Do they seem to be lying or telling the truth?***
- Allegiances (roommate, friend, group member)
- Does what the party said then line up with what they say now?

Hearing Logistics



- Pre-hearing preparation
 - Appeals to the Chair
 - Pre-hearing meeting (?)
 - Panel meeting
 - Review of Respondent's written notice
 - Review policy alleged to be violated
 - Review of Investigation Report
 - Review multiple times to ensure consistency of information
 - Review of "directly related" evidence that was not relied upon by the investigators

Hearing Logistics

- Preparation of questions
- "Live" hearing
- Cross-examination:
 - Must be conducted directly, orally, and in real time by the advisor
- Hearing will be recorded
- Note-taking: less is better, record what you need to make determination
- Be prepared for the hearing a deliberation to take time

Hearing Logistics

- Evidence

- Any kind of information presented with the intent to prove what took place.
- Formal Federal rules of evidence do not apply in Title IX hearings, but rules crafted by OCR for Title IX cases do.
- Could be used as relevant for credibility of witness, but not the alleged policy violation.
- In information helps to prove or disprove a fact at issue, it should be admitted.
- If credible, it should be considered.
- No limits on types/amount of evidence that may be offered except that it must be relevant. (Again, very broad)

Hearing Logistics

- DM may consider and assign weight to different types of evidence when relevant and credible:
 - Documentary evidence
 - Electronic evidence
 - Real evidence
 - Direct or testimonial evidence
 - Circumstantial evidence
 - Hearsay evidence
- DM should typically disregard:
 - Character evidence (generally of little value or relevance)
 - Impact statements (typically only relevant in sanctioning)

Hearing Logistics

- Complainant's prior sexual behavior is explicitly *not relevant* except in two limited exceptions:
 - Offered to prove that someone other than the Respondent committed the conduct alleged, OR
 - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted by the Complainant.
- Does not apply to Respondent's prior sexual behavior or predisposition.
- Other Restrictions:
 - Records maintained by physician, psychiatrist, psychologist
 - Questions or evidence that seek to disclose information protected under legal privilege without permission.

Deliberation

- If investigator indicates an opinion on credibility, outcome, whether policy was violated, how evidence should be weighed, etc, as a roadmap for the DM about where to look for information that is critical to a determination.
 - “DM will want to carefully review Mary’s testimony as to whether the conduct was welcome, in light of the testimony of Witness 1.”
- The DM may consider it, but has to be objective and independent, and is free to accept or reject any recommendation of the investigator (or can ask them not to make one).
- Panel have a conversation about their understanding of the narrative to ensure they are all on the same page about what happened.

Deliberation

- If a party or witness does not submit to cross-examination at the live hearing, DM must not rely on any statement of that party or witness in reaching a determination regarding responsibility.
 - This can be question-specific if witness declines to answer questions about a particular statement, topic, or evidence.
- DM cannot draw inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

Deliberation

- Must provide a written letter with rationale of determination.
 - This will be a form letter provided by TIX Coordinator
- Evidence that was persuasive or conversely discounted due to credibility or relevance should be listed and rationale given.
- Findings should be separate from Sanctions.
- Only DMs attend deliberations
 - TIX Coordinator or legal counsel can be available as a resource.
- Session is not recorded

Appeals

- Separate DM that has not previously involved in the process.
- Other party must be made aware of appeal and implementation of appeal procedure equally for all parties.
- They will have 10 days to submit an appeal after determination has been delivered
- Only three reasons for appeal:
 - New relevant evidence/information that was not available at time of hearing
 - Procedural irregularity
 - Conflict of interest that would affect the outcome of the matter.

Appeals

- Deference is given to original hearing authority.
- Not an opportunity for full review of evidence and new opinion given, not a second bite at the apple.
- Not an opportunity for Appeal DM to substitute their judgement because they did not like the original outcome.
- “I don’t think it’s fair.....” is not a reason for appeal
- Sanctions cannot go into place until **all** due process opportunities have been exhausted.

The background features a light gray graphic of a lightbulb. The bulb's outline is formed by several interlocking gears of different sizes, with the largest gear positioned in the center-right. A thick, curved line forms the base of the bulb. On the left side, a horizontal rounded rectangle is positioned as if it were a plug or a switch. On the right side, a small, pointed shape is positioned as if it were a lightbulb cap or a plug.

Questions?