



ABERNATHY ROEDER
BOYD HULLETT

— EST. 1876 —

Title IX – Decision Makers

Chad Timmons

Angie Sander

Abernathy, Roeder, Boyd & Hullett, P.C.

1700 Redbud Blvd., Suite 300

McKinney, Texas 75069

TITLE IX

Abernathy, Roeder, Boyd & Hullett, P.C.

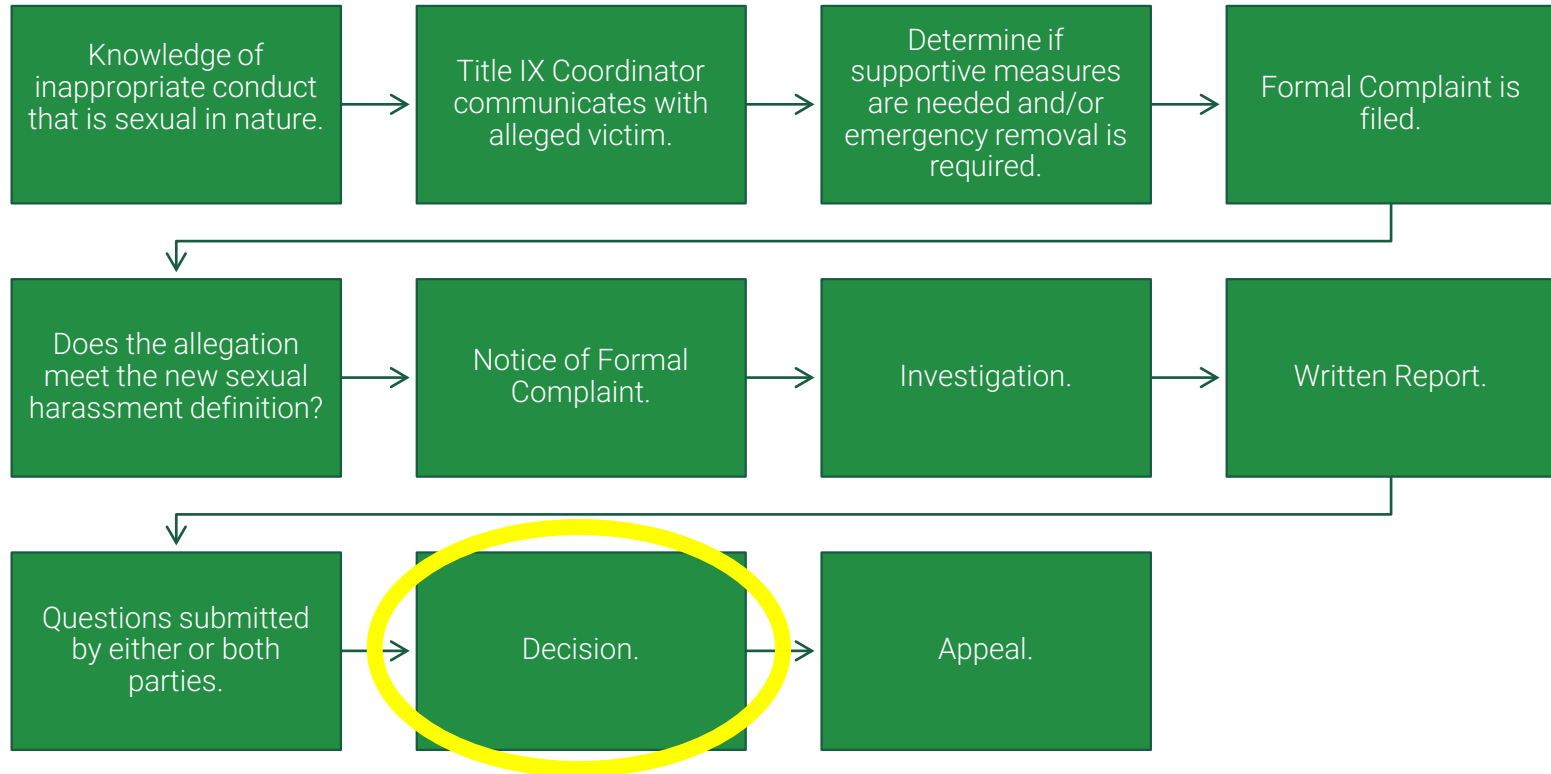


In a postsecondary institution, the decision-maker needs to objectively evaluate the evidence and reach a conclusion regarding the sexual harassment claims.

- The Decision Maker cannot be the same person who conducted the investigation and cannot be the same as the Title IX Coordinator.
- Decision Makers must be free from conflicts of interests or bias for or against either party.
- Decision Makers must receive special training on how to be impartial and how to determine what evidence is relevant.
- The Decision Maker must issue a written decision.

Title IX Flow Chart

Abernathy, Roeder, Boyd & Hullett, P.C.



Compliance Date

Abernathy, Roeder, Boyd & Hullett, P.C.

August 2020						
S	M	T	W	T	F	S
						1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31					

Friday, Aug 14th 2020

Presentation Agenda

Abernathy, Roeder, Boyd & Hullett, P.C.

Definitions

Role of a Decision Maker

Jurisdiction

Impartiality

Avoiding Bias

Conflict of Interest

Relevancy

Evaluating Evidence

Hearings

Written Decisions

Terminology	
<i>Complainant:</i> Person alleged to be the victim of sexual harassment.	<i>Respondent:</i> Person alleged to be the perpetrator of sexual harassment.

A parent may act on behalf of a minor student who is a complainant or respondent.



Definition – Sexual Harassment

Abernathy, Roeder, Boyd & Hullett, P.C.

The new Title IX regulation provides for a *narrower definition* of sexual harassment that constitutes sex discrimination. The new definition has (3) types of sex-based conduct which would constitute sexual harassment:

Sexual assault, dating violence, domestic violence, and stalking;

“Unwelcome conduct that is so severe, pervasive and objectively offensive that it effectively denies a person equal educational access;
AND

An employee conditioning the aid, benefit or service on participation of unwelcomed sexual conduct (Quid pro Quo).

- Decision Makers must adjudicate grievance proceedings involving sexual harassment. Their duties include:
 - Evaluate evidence;
 - Decide if evidence is relevant;
 - Reach conclusions regarding whether or not the respondent is responsible;
 - Determine if any remedies need to be offered;
 - Determine if any disciplinary actions are necessary; and
 - Write decisions.

- The Decision Makers have jurisdiction over Title IX claims that are within the “**Education program or activity**” of the College. This includes situations over which the College exercises substantial control.
- Substantial control over activities includes field trips, academic conferences, or other school-sponsored travel. Substantial control also applies to College-owned buildings.

Impartiality

Abernathy, Roeder, Boyd & Hullett, P.C.



What does it mean to be Impartial?

- Decisions should be based on **objective criteria**, rather than on the basis of bias, prejudice, or preferring the benefit to one person over another for improper reasons.
- Treat all parties equally.
- Keep an open mind until you have all the facts to make a decision.





Fact



Opinion



Bias



- As a Decision Maker you have no sides other than in the integrity of the process.
- Everyone has biases, but as a Decision Maker, you must learn to recognize what those biases are, and ensure they do not influence your decision making.
- Be aware of implicit bias.



- Does past advocacy for a survivor's rights group or respondent's right group show a bias?
- Does prior work as a victim advocate show a bias?
- Do past statements or social media statements show a bias?
 - Politics
 - Hot button issues: Women's rights, trans' rights, racial issues, etc.

Examples of Bias

- When the Decision Maker may have already heard from a witness in a prior case and made a credibility determination without knowing all the facts.
- When the Investigator shares his or her own views with the decision maker outside of the investigation report.

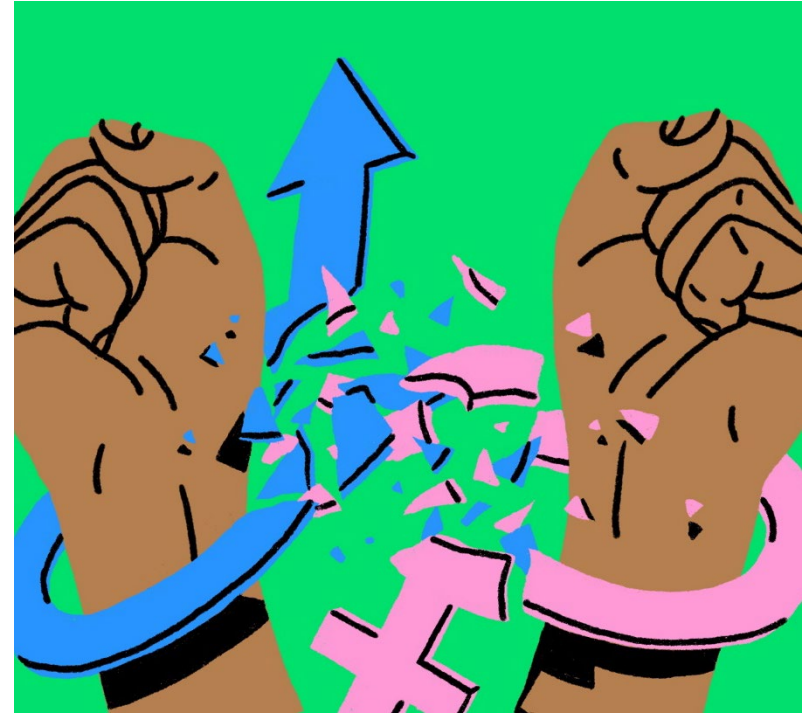


Ways to avoid bias:

- Keep an open mind as a Decision Maker;
- Objectively review the investigative reports;
- Remember that each case is unique.

A Decision Maker must not rely on sex stereotypes.

- Examples of sex stereotype in comments:
 - Women have regrets about sex and lie about sexual assault.
 - Men are more sexually aggressive and likely to have perpetrated a sexual assault.



Things to consider for conflict of interest:

- Does the Title IX Coordinator directly supervise the Decision-Maker?
 - Could that create a conflict?
 - Should the College look at the hierarchy of the roles?
- Does past advocacy for a survivor or respondent's right group create a conflict?





How to decide what is and is not relevant:

- If you are choosing to use the **preponderance of the evidence** standard:
 - Does this help me in deciding if a fact is more likely to be true or false?
 - Why or why not?
- If you are choosing to use the **clear & convincing** standard:
 - Does this help me in deciding if a fact is highly probable to be true?
 - Does this help me in deciding if a fact is more or less probable?
 - Why or why not?

The Decision Maker cannot consider any evidence of the complainant's sexual behavior or predisposition unless:

1. It is used to prove that someone other than the respondent committed the conduct; or
2. It concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent.

- Rape shield protections do not apply to the Respondent.
- Evidence of sexual behavior or predisposition may be a part of the investigative report. This may include evidence of a pattern of inappropriate behavior.
- This information should be judged for relevancy just like any other evidence.

- A Decision Maker cannot access, consider, disclose or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional without the party's voluntary consent.



The complainant texted the respondent about having sex the week before the alleged incident.

- Is this evidence relevant?
- Do you need any additional information to determine if this information is relevant?



The investigative report mentions psychological treatment the complainant sought. There are no actual medical records in the investigative report and no signed consent form. Additionally, the only mention of the treatment was information obtained by speaking to witnesses who overheard the complainant was receiving psychological treatment.

- What should the decision maker do with this information?

You are reviewing an investigative report for a case of unwelcomed touching. The investigative report states the respondent had previously tested positive for a sexually transmitted disease.

- What do you do with this information?
- Do you need any additional information?



HYPOTHETICAL





When evaluating the evidence, the decision maker should:

- Remember the standard of proof being used.
- Evaluate for consistency, accuracy and credibility.
- Keep presumption of innocence in mind.



- Keep an open mind until all reports and evidence have been reviewed.
- Fact based decisions.
 - Determine what evidence is credible and what conclusions you can draw from that evidence.
- Credibility.
 - Examine the credibility of all the witnesses and evidence.
 - Look for motives or bias.
 - Look for inconsistencies.
 - Consider the reasonableness or probability of the information a witness provided.
 - Credibility is determined fact by fact, not witness by witness.
- Do not consider impact.
 - Do not consider the potential impact of your decision.
 - Decisions should only be based on the evidence and investigative reports.
 - Focus on the standard of proof and the weight of the evidence.

- Colleges must provide for a live hearing.
- At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice

Format of Hearing:

- At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.
- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

Technology for Hearings:

- Live hearings may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.
- Determine format of hearing as soon as possible to ensure decisionmaker, parties and their advisors are properly informed on how to use it.

Written Decision

Abernathy, Roeder, Boyd & Hullett, P.C.



The written decision must include the following:

- ✓ The portion of the College's policy that was violated.
- ✓ A description of all the procedural steps taken by the College. This includes all the interviews that were conducted.
- ✓ A findings of facts section.
- ✓ A section that draws a conclusion after the finding of facts.
- ✓ A statement or rationale for the ultimate determination.

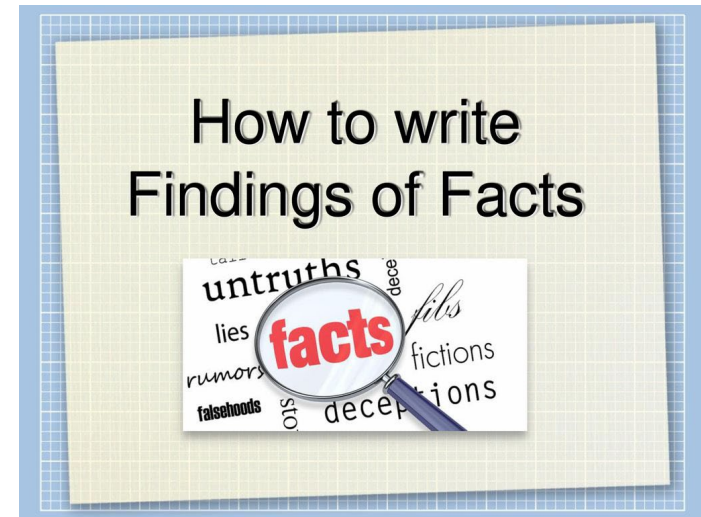
- ✓ Any disciplinary actions the College will impose on the respondent, and state if any remedies are provided to the complainant.
- ✓ A statement and rationale for any remedies provided to the complainant, and an explanation of how that remedy will restore or preserve equal access to education.
- ✓ A statement of the procedures, the right to appeal, and permissible basis for appeal.

- The procedural steps give the parties a thorough understanding of the investigative process and information considered by the decision maker in reaching his or her conclusions.



What are findings of facts?

- First, include all of the undisputed facts that the parties both agree on.
- List out the disputed facts and see what parts of it the parties agree on.
- Weigh the evidence for each relevant disputed fact.
 - The outcome of this should result in the disputed facts you would include in your findings of facts.



- The Decision Maker must describe in writing any conclusions reached and the reasons for those conclusion.



- The written decision must include a determination of responsibility.
- If a respondent is found to be responsible, the written determination must list any disciplinary actions taken.
- The written decision must include any remedies provided to the complainant to restore or preserve his or her equal access to education.



- Be mindful of the terminology used (i.e. using victim instead of complainant).
- Be clear as to the source of the information (i.e. Robert stated this happened.)
- Make no assumptions in your decision.
- Write so that someone who is unfamiliar with the facts can pick up the decision and understand what happened.
- Maintain a neutral, evidence driven tone.

How would you edit the following sentences:

- Respondent visibly winced when Complainant said “no.”

- On a scale of 1 to 10, Respondent was a “level 5 kind of drunk.”

- When the Respondent asked if the Complainant wanted to hook up, the Complainant said “That’s OK”. Clearly, that shows Complainant's consent.

Questions?

Abernathy, Roeder, Boyd & Hullett, P.C.



THANK YOU!

A | R | B | H

ABERNATHY ROEDER
BOYD HULLETT

EST. 1876