

Title IX Coordinator
Training Online Course

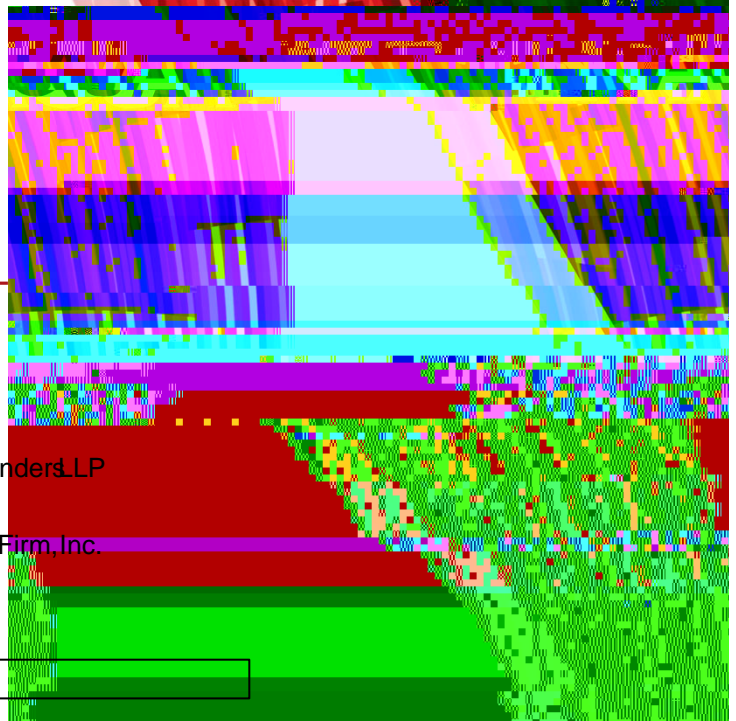
Class Three:
The Grievance Process –
Hearings & Appeals

Amy C. Foerster
Partner, Troutman Pepper Hamilton Sanders LLP

Melinda Grier
Melinda Grier Consulting & Novus Law Firm, Inc.

Janet P. Judge
Partner, Holland & Knight LLP

PLEASE NOTE:



Due Process (Fundamental Fairness)

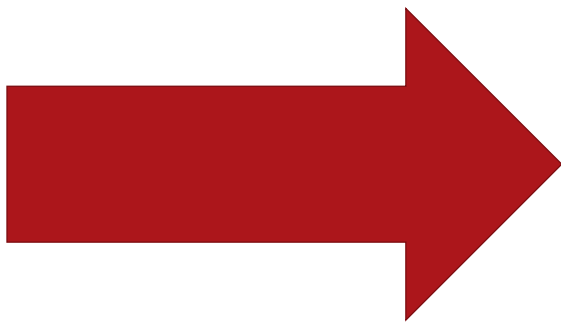
A Fair Process

% that follows the law,

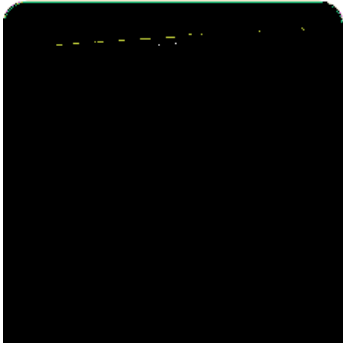
% is implemented without bias, stereotypes or pre judgment, and

% provides an equal opportunity for parties to be heard and present evidence,

% so as to allow the decision maker(s) to make the decision.



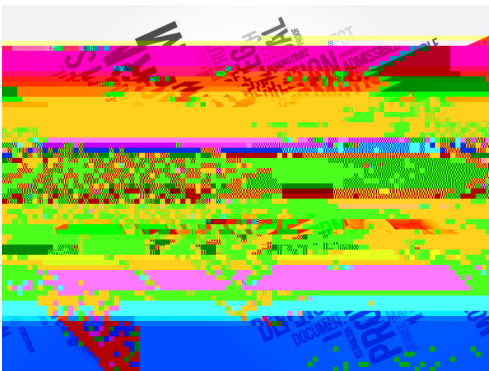
Title IX Sexual Harassment Grievance Process: Elements of “Due Process”



- Notice to the Respondent of the allegations
 - Opportunity to respond
 - Adequate opportunity to prepare before responding
- Notice to the Parties of the process that will be used, including appeals
- Opportunity to present evidence and witnesses
- Cross-examination, including questioning of witnesses
- Live hearing (in separate spaces upon request and as appropriate)
- Opportunity to have advisors of choice

5

State the Standard of Evidence



Same standard of evidence for all.

Either:

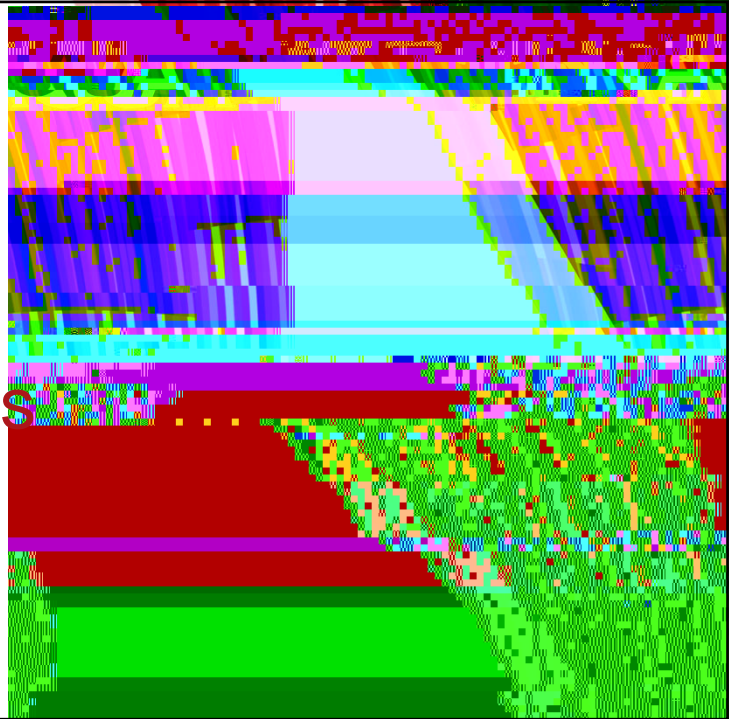
- *Preponderance of the evidence, i.e., more likely than not; OR*
- *Clear and convincing evidence, i.e., substantially more likely to be true than not.*

And Not:

- *Beyond a reasonable doubt (no other reasonable explanation possible— criminal cases).*

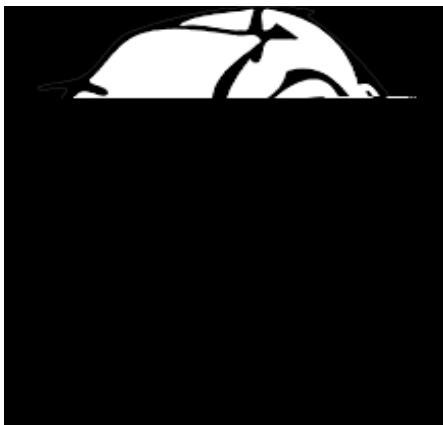
6

Credibility Determinations



7

Considerations



- What evidence is most believable?
- Corroborating evidence
 - Other testimony
 - Physical evidence
- Consider faulty memories
- Explore reasons for inconsistencies
- There are no “perfect” witnesses, complainants or respondents

8

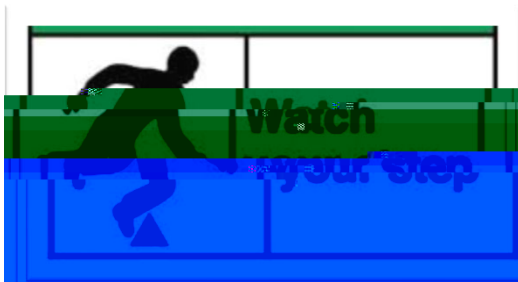


Factors to Weigh

- Consider each material fact separately.
- Credibility as to the facts:
 - Credibility on one fact doesn't make all of that person's testimony credible, and
 - Lack of credibility on one point doesn't make all of that person's testimony non credible.
- Does the testimony feel rehearsed or memorized?
- Is the testimony exactly the same as another witness?
- Does the testimony make sense?
- Is the testimony detailed, specific & convincing? If not, is there a reason?
- Is it a statement against interest?
- Less credible witness isn't necessarily being dishonest.

9

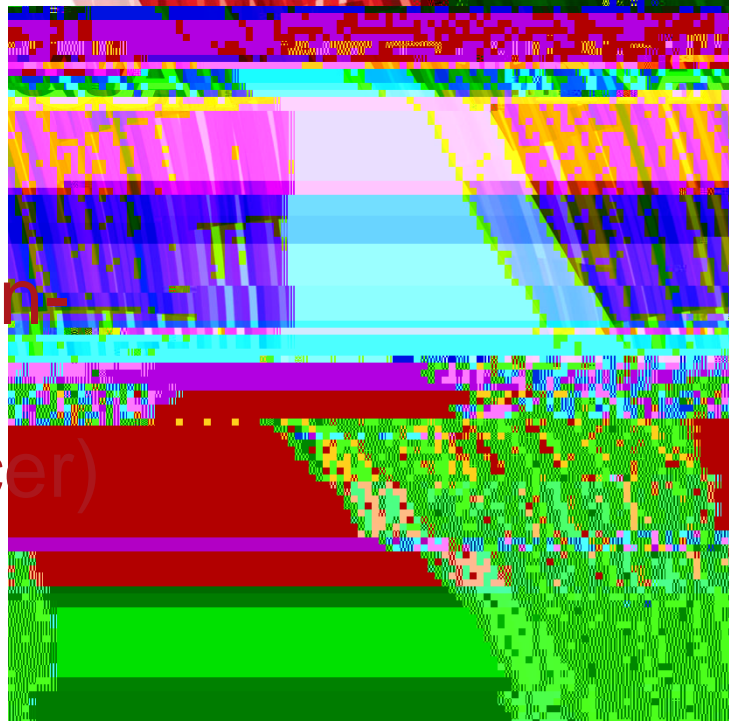
Caution




- Eyewitness accounts
- Bias/Assumption about witness credibility that may not take account of cultural norms or may stereotype.
- Assumptions about memory that may not reflect witness experiences.
- Failure of decision maker to explain credibility determinations.

10

The Decision Maker (Hearing Officer)



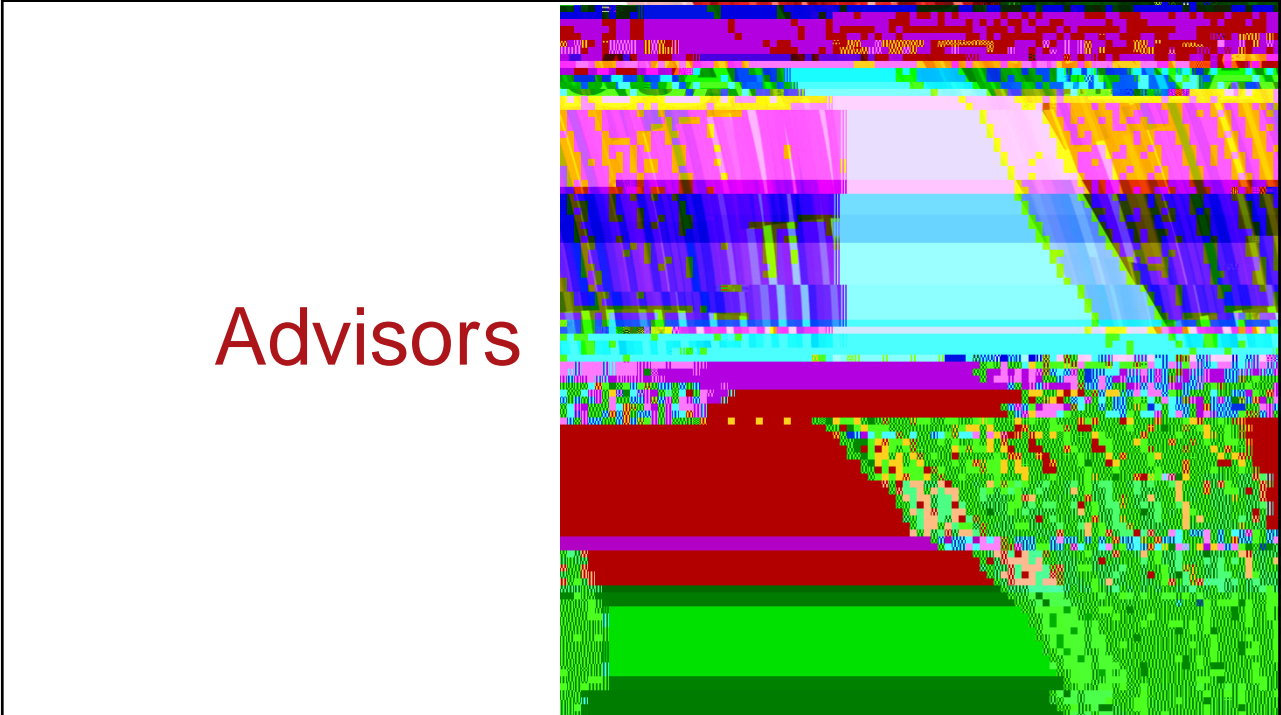


Hearing Decorum

Points to Consider: May have rules that:

- Require advisors be respectful and prohibit abusive/intimidating questioning.
 - Deem repetition of the same question irrelevant.
 - Allow for removal of advisors.
- Specify any objection process.
- Govern the timing and length of breaks to confer, and prohibit disruption.
- Require that *parties* make any openings and closings.
- Who will enforce the rules of decorum?
 - How will you train decisionmakers?

13



Advisors

14

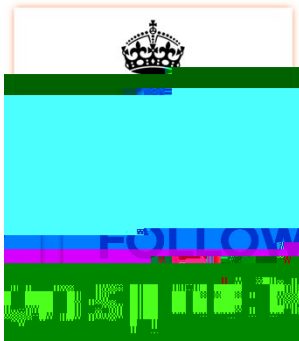
Advisors



- Parties must have the opportunity to have an advisor present during any grievance proceeding (hearing or related meeting).
- A party may choose not to have an advisor.
 - However, the institution must provide an advisor to question and cross-examine witnesses if the party isn't accompanied by one.
 - Institutions may require parties to provide advance notice of their advisor's attendance.
 - What if they are a no show?
- Advisor provided by institution need not be an attorney.
 - Need not be of "equal competency."
- May establish guidelines for advisors.
 - Role of advisors in hearings and meetings.
 - Use of non-disclosure Agreements.

15

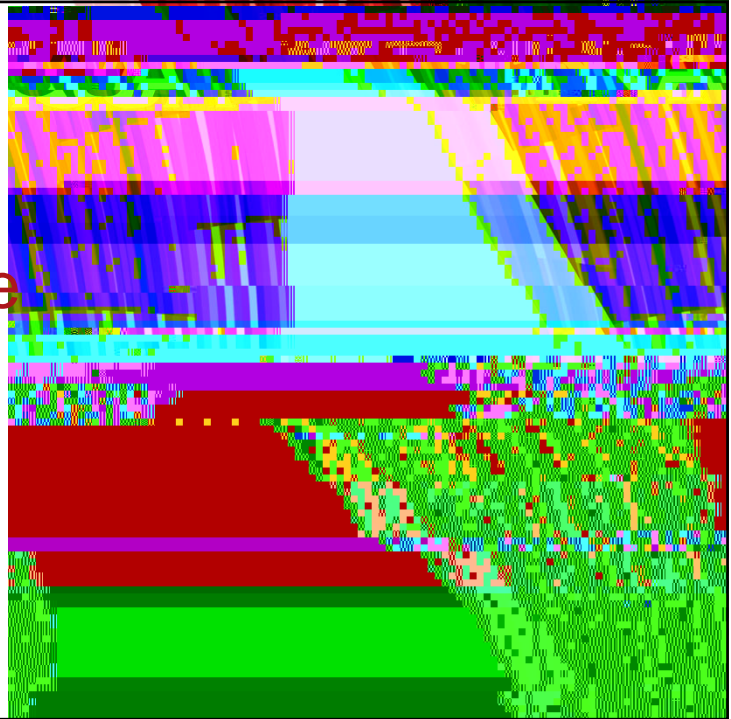
More on the Advisor's Role



- Provides support and advice to the party.
- Understand the allegations and the process.
- Understand the purpose and scope of questioning and cross-examination.
- Ask questions that elicit relevant information.
- Wait for relevancy determinations after asking a question.
- Adhere to rules of decorum and encourage the party to do the same.
- NOTE: Institutions may remove disruptive advisors... *carefully*.

16

Working with the Parties' Attorneys

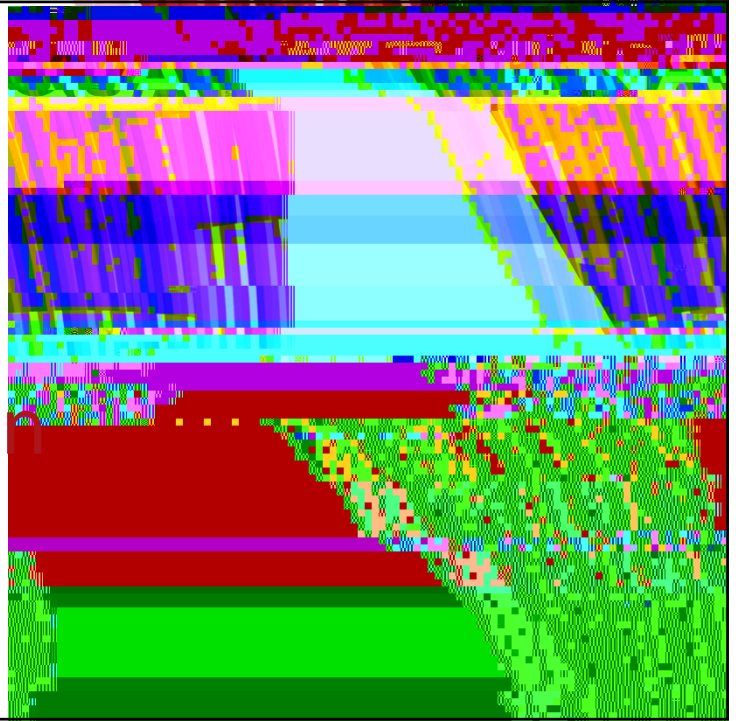


Advisor or Legal Representative

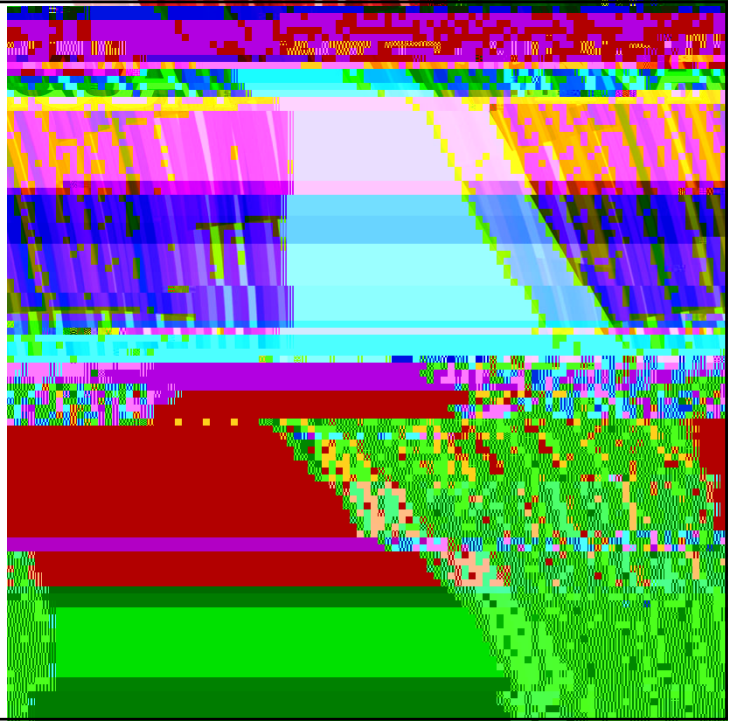
-



Written Determination

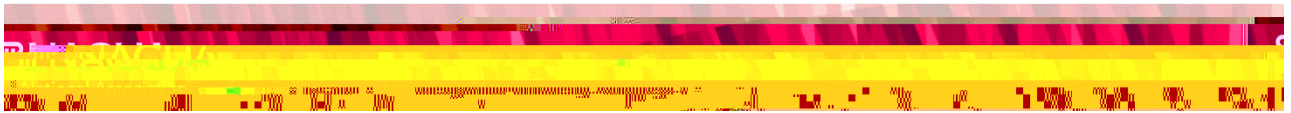


Appeals



Appeal Process

- Notify other party upon receipt of appeal.
-



Note

Thecontent

