

# Title IX Training Series Part 3: Hearings and Determination of Responsibility

Long Beach City College | January 26, 2022

Presented By: Pilar Morin & Monica M. Espejo

**LCW** LIEBERT CASSIDY WHITMORE

## Title IX Training Series Part 3: Hearings and Determination of Responsibility

Presented By:

Pilar Morin & Monica M. Espejo / January 26, 2022

### Agenda

- Hearing
  - Notice
  - Format and Procedures
  - Considering Evidence
  - Preparation
  - Testimony and Questioning
  - Consent

**LCW** LIEBERT CASSIDY WHITMORE

**LCW** LIEBERT CASSIDY WHITMORE

# Title IX Training Series Part 3: Hearings and Determination of Responsibility

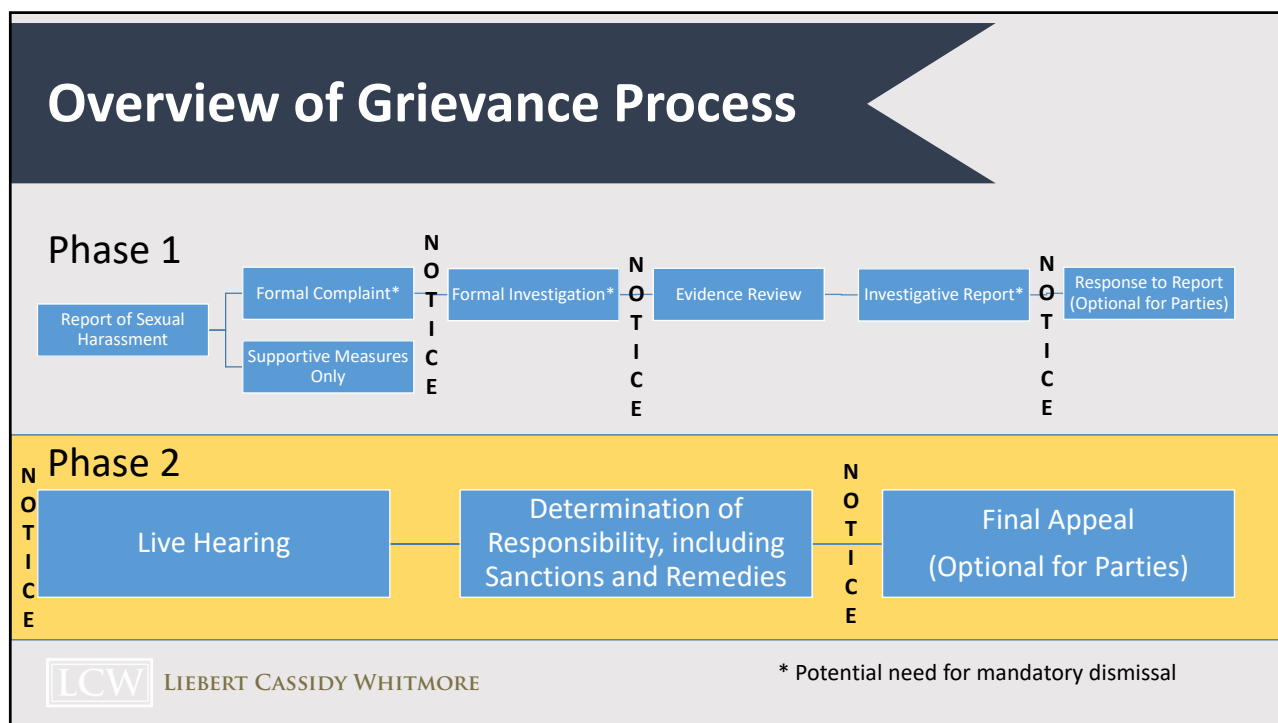
Long Beach City College | January 26, 2022

Presented By: Pilar Morin & Monica M. Espejo

## Agenda

- Determination Regarding Responsibility
  - Findings and Conclusions, including Credibility
  - Sanctions (Discipline) and Remedial Measures
- Appeals

**LCW** LIEBERT CASSIDY WHITMORE



# Title IX Training Series Part 3: Hearings and Determination of Responsibility

Long Beach City College | January 26, 2022

Presented By: Pilar Morin & Monica M. Espejo

## Required Training Components

- Definition of sexual harassment
- Scope of education program or activity
- How to conduct investigation and prepare investigative report
- **How to implement grievance process**
  - Hearings
  - Appeals
  - Informal resolution process
- How to serve impartially
- **Decision-makers: Hearing technology and issues of relevance**



LIEBERT CASSIDY WHITMORE

## The Grievance Process – The Hearing



# Title IX Training Series Part 3: Hearings and Determination of Responsibility

Long Beach City College | January 26, 2022

Presented By: Pilar Morin & Monica M. Espejo

## Hearing

- Opportunity for Parties to appear before a decision maker to respond to the evidence gathered during the investigation
- Neither Party may unilaterally waive the right to a live hearing
  - Can choose whether to participate in the hearing and whether to answer cross-examination questions
- Must presume Respondent is not responsible for alleged conduct

 LIEBERT CASSIDY WHITMORE

## Case Study – No, Yes, Maybe

The decision-maker is aware that the investigator is very experienced and highly respected. The investigator recommended findings in her report. Can the decision maker give the investigator and the findings deference in reaching a decision?

 LIEBERT CASSIDY WHITMORE

# Title IX Training Series Part 3: Hearings and Determination of Responsibility

Long Beach City College | January 26, 2022

Presented By: Pilar Morin & Monica M. Espejo

## Notice of Hearing

- Must provide Parties written notice of date, time, location, participants, and purpose of hearing
  - With sufficient time for Party to prepare

 LIEBERT CASSIDY WHITMORE

## Case Study – Right to Hearing No, Yes, Maybe

After the District provided the Parties notice of the hearing, the employee Respondent contacted the Decision-Maker and stated he accepts responsibility and wants to bypass the hearing in order to expedite the disciplinary decision. Because the Respondent admitted responsibility, can the Decision-Maker issue the determination regarding responsibility without the hearing?

 LIEBERT CASSIDY WHITMORE

# Title IX Training Series Part 3: Hearings and Determination of Responsibility

Long Beach City College | January 26, 2022

Presented By: Pilar Morin & Monica M. Espejo

## Advisor

- Only the advisor can conduct cross examine, directly, orally and in real time
- Must assign an advisor even if the party is absent at the hearing
  - *Conflict with California law procedure: Party or advisor cannot conduct cross exam (Ed. Code § 66281.8)*
  - *Follow title IX for title IX hearing*

LCW LIEBERT CASSIDY WHITMORE

## Q&A on the Title IX Regulations on Sexual Harassment (July 2021)

- Only required to provide for cross exam, but party has a right to advisor of choice at all times
- District can limit role of advisor:
  - Can attend meetings but may not be proxy for party
  - No role outside of cross examination
  - Party must author questions
- District can allow advisor role to be active:
  - Can conduct opening statement/closing argument
  - Provide guidance through hearing
  - May author questions, may make objections

LCW LIEBERT CASSIDY WHITMORE

# Title IX Training Series Part 3: Hearings and Determination of Responsibility

Long Beach City College | January 26, 2022

Presented By: Pilar Morin & Monica M. Espejo

## Role of Decision-Maker

- Conduct hearing
  - May ask Parties and witnesses questions
- Must objectively evaluate all relevant evidence
  - Including inculpatory and exculpatory evidence
  - No credibility determinations based on status as Complainant, Respondent, or witness
- Must independently reach a determination regarding responsibility
  - Without giving deference to the investigative report

 LIEBERT CASSIDY WHITMORE

## Responsibilities of Decision-Maker

- Must ensure hearing process is impartial, objective, unbiased, neutral, and independent
  - Cannot have conflict of interest or bias
  - Must be independent from Title IX Coordinator and Investigator
- Can be one person or panel, internal or external

 LIEBERT CASSIDY WHITMORE



# Title IX Training Series Part 3: Hearings and Determination of Responsibility

Long Beach City College | January 26, 2022

Presented By: Pilar Morin & Monica M. Espejo

## LBCCD's AP 3434

- **Decision-Maker:** person(s) who will oversee the live hearing and make a determination of responsibility. The District may have one Decision-Maker determine whether the Respondent is responsible, and another Decision-Maker determine the appropriate level of penalty for the conduct. The Decision-Maker cannot be the Title IX Coordinator or the investigator.

 LIEBERT CASSIDY WHITMORE

## Case Study – No, Yes, Maybe

The Title IX Coordinator attends the hearing to serve as a hearing facilitator. She will assist in bringing witnesses into the room, running the hearing technology, and enforcing decorum rules. Is this a violation of the Title IX regulations?

 LIEBERT CASSIDY WHITMORE



## Case Study – Responsibilities of Decision-Maker

If a Decision-Maker has questions about the grievance process and needs clarification about an issue raised by a Party during the Evidence Review, the Decision-Maker can consult all of the following resources, EXCEPT:

- A. Board Policies and Administrative Procedures
- B. Training Materials
- C. Title IX Coordinator
- D. Investigative Report
- E. Panel attorney

## Format of Hearing

- Live hearing with all Parties physically present in the same geographic location or virtual live hearing
  - Must be able to see and hear each other in real time
- Must create audio or audiovisual recording, or transcript, of any live hearing
  - Must make it available to Parties for inspection and review

## Hearing Procedure

- May adopt rules of procedure, such as:
  - Whether Parties may offer opening or closing statements
  - Process for making relevance objections to questions and evidence
  - Whether Party/Advisor may discuss relevance determination with Decision-Maker during hearing
  - Reasonable time limitations on a hearing

## Sample Hearing Procedures

1. Introduction and Overview of Hearing Procedure
2. Opening Statements
3. Testimony and Questioning
  - a. Direct questioning by Decision-Maker
  - b. Direct examination
  - c. Cross examination
4. Closing Statements

# Title IX Training Series Part 3: Hearings and Determination of Responsibility

Long Beach City College | January 26, 2022

Presented By: Pilar Morin & Monica M. Espejo

## Hearing Decorum

- May adopt rules of order or decorum, for example:
  - Only participants to the hearing may speak, and then only when recognized by the Decision-Maker
  - All individuals must address remarks, arguments, or objections to the Decision-Maker, and not to the opposing Advisor or the opposing Party
  - Individuals are to avoid making disparaging or acrimonious personal remarks toward any other participant at the hearing.
  - When a question is pending, Advisors will not, through objections or otherwise, coach the person testifying, or suggest answers

 LIEBERT CASSIDY WHITMORE

## Hearing Decorum

- May adopt rules of order or decorum, for example:
  - Individuals must refer to all persons, including witnesses, other Advisors, and the Parties by their surnames and not by their first or given names unless directed otherwise by the Decision-Maker
  - Advisors and parties shall be punctual and shall timely notify the Decision-Maker when they or their witnesses will be late

 LIEBERT CASSIDY WHITMORE

## Evidence at Hearing

- The District must make the information reviewed during Evidence Review available at hearing
- Only relevant evidence is admissible
  - Evidence that tends to prove or disprove any disputed fact material to the allegations
  - Includes evidence relevant to credibility of Party or witness

## Relevance

- Not defined in regulations
- Evidence having any tendency in reason to prove or disprove any allegation at issue (Cal. Evid. Code CFR § 210)
- Can rely on logic, common sense, experience or science
- Includes both inculpatory and exculpatory evidence

## Relevance Considerations

### Does the evidence:

- Indicate bias on the part of a witness
- Corroborate an allegation
- Provide evidence that might exonerate accused
- Provide motive or opportunity

### Direct v. Circumstantial Evidence

*How do you know it was raining outside?*

- Direct evidence: *I saw the respondent running in the rain*
- Circumstantial evidence: *I saw the respondent run inside with wet clothes, leaving a trail of puddles on the floor*



LIEBERT CASSIDY WHITMORE

## Evidence at Hearing

- Cannot exclude relevant evidence because the evidence may be unduly prejudicial, concern prior or subsequent bad acts, or constitute character evidence
  - Instead: objectively evaluate relevant evidence by analyzing whether evidence warrants a high or low level of weight or credibility
  - Exclude repetitive, irrelevant, or harassing evidence. (Cal. Ed. Code § 66281.8)



LIEBERT CASSIDY WHITMORE

## Evidence at Hearing – Privileged Information

- Cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally-recognized privilege
  - Unless person holding privilege provides voluntary, written consent to waive the privilege



LIEBERT CASSIDY WHITMORE

## Evidence at Hearing – Privileged Information

- California privileges:
- Attorney-client privilege
  - Privilege not to testify against spouse
  - Privilege for confidential marital communications
  - Physician-patient privilege
  - Psychotherapist-patient privilege
  - Clergy penitent privileges
  - Sexual assault counselor-victim privilege
  - Domestic violence counselor-victim privilege
  - Human trafficking caseworker-victim privilege
  - School counselor



LIEBERT CASSIDY WHITMORE

# Title IX Training Series Part 3: Hearings and Determination of Responsibility

Long Beach City College | January 26, 2022

Presented By: Pilar Morin & Monica M. Espejo

## Case Study

In the hallway on the way to the hearing, the respondent admits to his wife that he sexually assaulted the complainant. Several people are in the hallway, including the Complainant's advisor, and hear the comments. The Complainant's advisor asks the Respondent about the comments to his wife during cross examination.



LIEBERT CASSIDY WHITMORE

## Case Study (Con't) True, False, or Maybe

The comments the Respondent made to his wife in the hall are not admissible because they are privileged confidential marital communications?



LIEBERT CASSIDY WHITMORE



## Witnesses

- Must provide Parties equal opportunity to present witnesses
  - Includes fact and expert witnesses
  - Includes inculpatory and exculpatory evidence
- Witnesses not required to participate in hearing

## Case Study – Problems with Advisor

The District sent the required notice of the hearing to the Parties and their Advisors. The Complainant's advisor is an attorney he hired independently. On the day of the scheduled hearing, the Complainant's Attorney Advisor failed to appear. Neither the Complainant nor the Decision-Maker can get in contact with the Advisor. What should the Decision-Maker do?

## Case Study – Problems with Advisor

The Decision-Maker should:

- A. Postpone the hearing
- B. Appoint a new Advisor so the hearing can proceed as scheduled
- C. Allow the Party to represent himself
- D. A or B
- E. None of the above

## Advisor Hearing Preparation

1. Review
  - Notice of allegations
  - Title IX Policy and Procedure
  - Investigative materials (report and attached documents and other evidence)
2. Prepare list of information that needs to be established:
  - What question leads to the information?
  - Which witness has this information?

## Pre-Hearing Meeting

- Decision-Maker pre-hearing meeting with Parties and their Advisors
  - Clarify purpose and logistics of hearing
  - Establish allegations and evidence that will be considered
  - Review rights and responsibilities of Parties & Advisors
  - Confirm attendance and whether accommodations are needed
- No Ex Parte Communications: Decision-Makers should not meet or communicate with parties separately

## Conducting the Hearing – Cross Examination

- Cannot *require* prior submission of written questions
- Decision-Maker must explain and should document why an answer to question was excluded as irrelevant
- If a Party or witness disagrees on relevance ruling they have a choice to:
  - Abide by Decision-Maker's determination and answer question;
  - or
  - Refuse to answer question deemed relevant

## Refusal to Participate or Answer

- Decision-Maker cannot draw inference based solely on Party's or witness's absence or refusal to answer question
- Can rely on his/her/their previously provided statement
  - But consider the weight provided to a statement where a witness does not testify
  - If it is a party, is it an admission

## Group Exercise

The Respondent will be present at the hearing, but will not testify as he is asserting his right against self incrimination. However, the complainant will testify about text messages he sent her saying "sorry" for forcing her to do something she did not want to do, and stating he had been drunk when it happened. The Complainant was also drinking. She requested to testify via zoom. When she was testifying, she laughed as she testified, and looked down at her hands.

## Group Exercise

- Should the Decision-Maker exclude the statements in the text if the Respondent does submit to cross examination?
- Should the Decision-Maker find that the Respondent is not credible because he avoids testifying?
- Should the Decision-Maker find the Complainant is not credible because of her demeanor?

## Decision-Maker Questioning

- Eliminate missing information
- Use open-ended questions
- Don't ask compound questions
- Don't suggest an answer in question
- Listen carefully
- Clarify unclear terms or slang
- Remember, you are a neutral

## Decision Maker Questioning – Open Ended Questions

Examples of open ended questions:

- Who else was at the party?

Cross exam by Advisor:

- Isn't it true that Jake Smith was there? And so was Martina Lopez, right?



LIEBERT CASSIDY WHITMORE

## Decision Maker Questioning: Open Ended Questions

Examples of open ended questions:

- How would you characterize your relationship to them?

Cross Exam by Advisor:

- Isn't it true that they are your best friends?



LIEBERT CASSIDY WHITMORE

## Group Exercise

*A Respondent secretly video taped a sexual encounter he had with Complainant while she was passed out and intoxicated. Complainant was unaware of the taping. Respondent shared the video via text with his friends. Complainant learned of the video and filed a formal complaint. The District conducted a Title IX investigation and held a hearing.*



LIEBERT CASSIDY WHITMORE

## Group Exercise

*Depending on your role at LBCCD:*

- Decision-maker: Prepare 3 direct (open ended) examination questions, can be to either party.*
- Advisor: Prepare 3 cross-examination questions, for either party.*



LIEBERT CASSIDY WHITMORE



## Group Exercise Example of Decision Maker Questions:

How did you learn the video existed?  
When did you learn about it?  
Who showed it to you? When? Where?  
What did you do after you saw it?  
Do you know if other people had copies?  
How do you know that?



LIEBERT CASSIDY WHITMORE

## Group Exercise Example of Cross Examination of Respondent

Isn't it true you gave the complainant with more than 6 shots of tequila? And this was after she told you she didn't drink?  
Isn't it true the complainant could not speak after the 6 shots of tequila?  
Isn't it true that your best friend Jake told you to leave her alone as you carried the complainant up the stairs?



LIEBERT CASSIDY WHITMORE

## Evidence at Hearing – Relevance

- In a case involving stalking, should the decision maker allow or exclude the following offered during the hearing: *Testimony from Complainant's classmate, Vishal, that the Complainant once ask him to walk her to her car because she had spotted Respondent in the parking lot and was afraid.*

## Group Practice – Considering Evidence at Hearing

- Should the decision-maker allow or exclude the following offered during the hearing?  
*Pictures of Complainant's physical injuries after alleged sexual assault. The Respondent, who has a lawyer as an advisor, objects that they are prejudicial.*

## Group Practice – Considering Evidence at Hearing

- Should the decision-maker allow or exclude the following offered during the hearing?

*Complainant's attendance records showing Complainant was not in class on some of the days she claims Respondent was stalking her.*

## Group Practice – Considering Evidence at Hearing

- Should the decision-maker allow or exclude the following offered during the hearing?

*Complainant's medical records submitted by Respondent's advisor over Complainant's objection.*

## Group Practice – Considering Evidence at Hearing

- Should the decision-maker allow or exclude the following offered during the hearing?

*Complainant's medical records submitted by Complainant's advisor, who happens to be her mother, over Complainant's objection. Complainant is 16 years old.*

## Group Practice – Considering Evidence at Hearing

- Should the decision-maker allow or exclude the following offered during the hearing?

*Security footage from College academic building where Complainant had class.*

## Group Practice – Considering Evidence at Hearing

- Respondent is an employee. Should the decision-maker allow or exclude the following offered during the hearing?

*Respondent's certificate of completion of Title IX and Anti-Harassment Training records from the personnel file stored in the District's HR office.*

## Group Practice – Considering Evidence at Hearing

- Should the decision-maker allow or exclude the following offered during the hearing?

*Written witness statements from District students who claim the Complainant is jealous of Respondent and wants Respondent to face consequences for breaking up with him.*

## Group Practice – Considering Evidence at Hearing

- Should the decision-maker allow or exclude the following offered during the hearing?

*Question from Respondent's advisor to Complainant asking whether Complainant has been in a sexual relationship with another District employee since the alleged assault by Respondent.*

## The Grievance Process – The Determination Regarding Responsibility

# Title IX Training Series Part 3: Hearings and Determination of Responsibility

Long Beach City College | January 26, 2022

Presented By: Pilar Morin & Monica M. Espejo

## Timing and Standard of Evidence

- Must issue written determination after the hearing within timeline identified by District
- LBCCD AP 3433 Prohibition of Sexual Harassment Under Title IX:
  - Decision-maker will issue decision twenty (20) business days after the hearing ends
  - Using Preponderance of the Evidence Standard: whether the alleged conduct more likely than not occurred

 LIEBERT CASSIDY WHITMORE

## Content of Determination Regarding Responsibility

### To both parties simultaneously:

- Identify allegations;
- Procedural steps;
- Findings of fact;
- Conclusions;
- Statement and rationale for each determination regarding responsibility;
- Statement regarding whether district will provide remedies for Complainant;
- Appeal procedures for Complainants and Respondents.

34 CFR § 106.45 (b)(7)(ii)

 LIEBERT CASSIDY WHITMORE



## Reminder: Definition of Sexual Harassment

- Quid pro quo: An *employee* conditioning an aid, benefit, or service on complainant's participation in unwelcome sexual conduct
- Unwelcome conduct so severe, pervasive, ***and*** objectively offensive that it effectively denies a person equal access to education program or activity; or
- Sexual assault, dating violence, domestic violence, or stalking

34 CFR § 106.30

## Consent

- Affirmative consent standard (Ed. Code § 67386)
  - Affirmative, conscious, and voluntary agreement to engage in sexual activity

## Evaluating Consent

1. Did the Respondent use force before/during sexual interaction?
2. Was Complainant incapacitated?
  - a. Did Respondent know, or
  - b. Should Respondent have known that Complainant was incapacitated (e.g., by alcohol, other drugs, sleep, etc.)
3. What words or actions indicate consent or lack of consent for the specific sexual activity?

## Evaluation of Consent

- Consent must be on going
- Consent must be informed, voluntary, and mutual
- Can be withdrawn at any time
- No consent if there is force, coercion, intimidation, threats, or duress
- Silence or absence of resistance does not imply consent
- Consent to one type of sexual activity does not equal consent to other types of activity
- Prior consent or sexual relations do not mean consent for future relations
- Consent cannot be provided by an unconscious, intoxicated or sleeping person who cannot communicate or understand nature or extent of the sexual activity

# Title IX Training Series Part 3: Hearings and Determination of Responsibility

Long Beach City College | January 26, 2022

Presented By: Pilar Morin & Monica M. Espejo

## Evaluating Force

- Types of Force
  - Physical violence
  - Threats
  - Intimidation
  - Coercion

 LIEBERT CASSIDY WHITMORE

## Evaluating Incapacity

- Individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent
  - Alcohol or drugs
  - Mental/cognitive impairment
  - Injury
  - Asleep or unconscious
- Very fact-dependent

 LIEBERT CASSIDY WHITMORE

## Evaluating Incapacity

- Also consider
  - Did Respondent know Complainant previously?
    - Was Complainant acting differently from previous similar situations?
  - Review what the Respondent observed the Complainant consume
  - Whether Respondent provided any alcohol/drugs to Complainant
  - Other relevant behavioral cues

## Weighing Credibility

- Trauma Informed: Not based solely on observing demeanor
  - consider other factors
- Credibility cannot be based on complainant, respondent or witness status

## Determination Regarding Responsibility

- Becomes final either on:
  - Date district provides Parties with written determination of result of any appeal filed; or
  - Date on which appeal would not longer be timely



LIEBERT CASSIDY WHITMORE

## The Grievance Process – Sanctions and Remedial Measures



## Sanctions and Remedies

Where a determination of responsibility for sexual harassment has been made against the respondent, the District has discretion regarding disciplinary sanctions but must also provide remedies to the complainant designed to restore or preserve equal access to the District's education program or activity.

§ 106.45(b)(1)(i)

## Remedies

### **Non-exhaustive list of remedies for Complainants:**

- Providing escort
- Providing academic support services, such as tutoring
- Ensuring Complainant and Respondent do not attend the same classes or work in the same work area
- Providing counseling services or medical services or referrals
- Arranging for Complainant to re-take course or withdraw from class without penalty
- Reviewing any disciplinary actions taken against Complainant

# Title IX Training Series Part 3: Hearings and Determination of Responsibility

Long Beach City College | January 26, 2022

Presented By: Pilar Morin & Monica M. Espejo

## Sanctions

### Non-exhaustive list of sanctions for Respondents:

- Written or verbal reprimand
- Required training or counseling,
- Non-academic probation (students)
- Suspension
- Expulsion (student)
- Reduction in pay
- Demotion
- Termination of employment

 LIEBERT CASSIDY WHITMORE

## Employee Discipline

- Follow Title IX grievance policy to reach a determination regarding responsibility and suggested discipline
- Recommend a sanction and refer for discipline determination:
  - Per Collective Bargaining Agreement (classified)
  - Per Education Code
- Remember cannot retry the facts determined by grievance procedures

 LIEBERT CASSIDY WHITMORE



## The Grievance Process – The Appeal



### Appeals

- Must offer both parties an appeal from dismissal or determination regarding responsibility based on:
  - Procedural irregularity;
  - Newly discovered evidence; or
  - A conflict of interest or bias by Title IX personnel.
- May offer appeal to both parties on additional bases

34 CFR §106.45 (b)(8)(i) and (ii)



LIEBERT CASSIDY WHITMORE

## Appeal Procedure

- Party must state grounds for appeal and statement of facts supporting those grounds
- If either Party submits appeal, district must
  - Notify other Party in writing
  - Allow non-appealing Party opportunity to submit written statement in support of, or challenging, outcome

## Appeal Outcome

- Appeal Decision-Maker must issue written decision on whether to grant or deny appeal and rationale for decision
  - Must provide written decision simultaneously to Parties
- Appeal Decision-Maker may extend deadlines
  - Party may seek extension by submitting written request
  - Appeal Decision-Maker must inform Parties simultaneously whether extension granted

# Title IX Training Series Part 3: Hearings and Determination of Responsibility

Long Beach City College | January 26, 2022

Presented By: Pilar Morin & Monica M. Espejo

## Questions?



## Thank you!

### **Pilar Morin**

Partner | Los Angeles

310.981.2004 | [pmorin@lcwlegal.com](mailto:pmorin@lcwlegal.com)

[www.lcwlegal.com/our-people/pilar-morin](http://www.lcwlegal.com/our-people/pilar-morin)

### **Monica M. Espejo**

Associate | Sacramento

916.584.7000 | [mespejo@lcwlegal.com](mailto:mespejo@lcwlegal.com)

[www.lcwlegal.com/our-people/monica-espejo](http://www.lcwlegal.com/our-people/monica-espejo)



LIEBERT CASSIDY WHITMORE