

TITLE IX

Serving on the Live Hearing Panel
What do you need to know?

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Introductions

- 42-year educator: 36 years active, 7 years in consulting
- ATIXA fully certified in Title IX, Title VI, and Title VII to serve as interim coordinator, investigator, decision-maker, advisor, and informal resolution facilitator
- Has conducted, participated in, or advised in over 50 Title VI, Title VII, and Title IX investigations and decision-making
- Served as IU Executive Director, interim superintendent, and consultant to charter schools and school districts



Title IX

The Basics

What is Title IX?

Title IX of the Education Amendments of 1972 is a **federal civil rights law** which prohibits discrimination on the basis of sex in all federally-funded educational institutions.

Title IX applies to **all K-12 schools and postsecondary educational institutions** which receive any kind of federal financial assistance

Text of Title IX

Title IX states

- *No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. (28 U.S.C.A. §1681)*

Applies to an entire school, not just programs receiving funding.

❖ Exceptions – Military and private religious schools



Title IX Enforcement

- Governed by Title IX statute and the 2020 Title IX regulations
 - Department of Education's Office of Civil Rights (OCR)
 - Case Law
- Guidance* from
 - Dear colleague letters
 - Executive orders
 - OCR resolutions

*Tolerance for risk

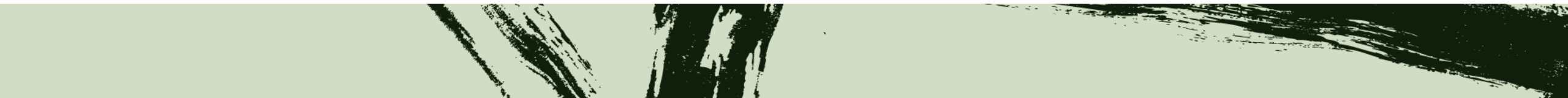


Title IX is a Gender Equity Law

Seeks to remedy the inequities sex-based harassment and discrimination create.

STOP PREVENT REMEDY

Live hearings must be equitable for all parties within a complaint and across complaints.



Two Paths of Enforcing Title IX



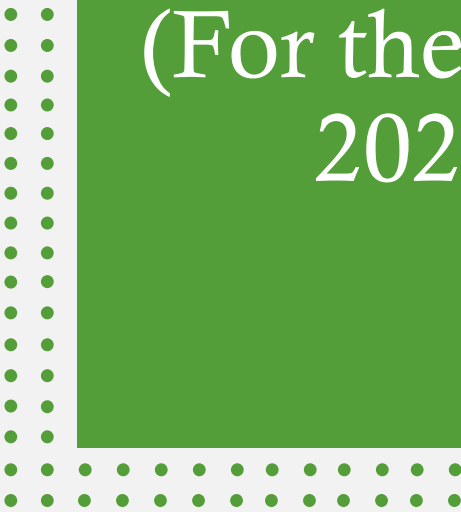
Judicially – In Court*

- Lawsuit in federal court against educational institution
- Plaintiff(s) must show that a school official had actual knowledge and was deliberately indifferent

Administratively - Agency

- By reporting to the school's Title IX Coordinator and following its Title IX grievance procedures
- By reporting to the Office for Civil Rights (OCR), subsidiary of DOE

*Some courts will require plaintiffs to exhaust administrative agency remedies first.



THE STANDARD OF LIABILITY (For the institution: 2020 Regs)

A School Entity with actual knowledge of sexual harassment in an education program or activity of the School Entity against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

Definition of Title IX Sexual Discrimination/Harassment

Discrimination: adverse treatment/impact of a group/individual on the basis of sex

Sexual Harassment (a form of discrimination):

1. Conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education program or activity
3. "Sexual assault," "dating violence," "domestic violence," or "stalking"

Title IX

Grievance Process Overview

Title IX Grievance Process

Step 1 – Intake and Formal Complaint – Is this Title IX?

- Decision to dismiss complaint or move forward under Title IX
- Either party can appeal a dismissal

Step 2 – Investigation and Investigation Report/Alternate Resolution

- Informal Resolution may be attempted to resolve Complaint – voluntary

Step 3 – **Live Hearing and Determination – Written Notice of Outcome**

- Sanctions and remedies will be determined by identified College departments

Step 4 - Appeal of Determination

- Appeal decision is final at the agency level

Roles During A Title IX Grievance Process

- Title IX Coordinator
 - Responsible for the institution's compliance with Title IX and its regulations
 - NOT the decision-maker!
 - Receives and processes the Complaint
 - Responsible for overseeing and adhering to process
 - Responsible for overseeing implementation of sanctions and remedies

Roles During A Title IX Grievance Process

- The Investigator(s)
 - Gathers relevant evidence, including interviewing witnesses
 - Writes investigation report
- **Hearing Officer/Panel** (3 people-one will be the Chair)
 - Hears evidence at the hearing, determines relevancy of evidence, coordinates questioning of parties and witnesses, reviews the investigation report, asks questions
 - Makes the determination/finding, writes determination report, may determine sanctions and remedies (Not at NCC)



Roles During A Title IX Grievance Process

- Appeal Decision-Maker(s)(ADM)
 - Decides the appeal of the determination made after the hearing or of any dismissals
 - Determines any additional actions required in relation to the appeal decision





Roles During A Title IX Grievance Process

- Informal Resolution Facilitator
 - Facilitates a written agreement between the parties to resolve the Complaint
 - Voluntary
 - Can run simultaneously with the investigation and live hearing or investigation and hearing can be postponed
 - Not final until it is signed by all parties, including the institution





Roles During A Title IX Grievance Process

- **Advisors of Choice/Institution Appointed Advisors**
 - Advise their advisee on their rights – request dismissal, for example
 - **Assist in preparing for the hearing**
 - **Question their advisee/cross examine the other party at the live hearing**
 - **Question witnesses at the live hearing**
 - Assist their advisee with any appeals



Serving Impartially

Title IX Team members (internal or external third-party members) must not have a conflict of interest or bias against:

- Complainants, generally
- Respondents, generally
- The parties involved in the current complaint
- The subject matter or details of the Complaint

***Includes members of the hearing panel**

***Conflict of interest or bias on the part of those involved in the Complaint is one basis for appeal.**

***Must be provable/substantiated conflict of interest/bias**

Serving Impartially

Conflict of Interest – What is it?

- An actual (or perceived) clash
- Between the role the person is playing in the process and a current or previous relationship with one of the parties
- That prevents neutrality or objectivity on the part of the team member

Must be substantiated and provable for after determination appeals

Serving Impartially

Bias – What is it?

- Prejudice for or against a person or group, or an unwillingness/inability to be influenced by factual evidence

Must be substantiated and provable for after determination appeals



Serving Impartially

If you believe you have a conflict of interest or bias, discuss it with the TIXC.

Recuse yourself if there is any question of your ability to serve impartially.



Title IX

Important Concepts

Standard of Evidence

Preponderance of the evidence is the industry standard

- whether it is more probable than not that the alleged conduct occurred and constituted a violation of policy. Under Pennsylvania law, a preponderance of the evidence standard is defined as “the greater weight of the evidence” with the criteria that such evidence **“tip a scale”** slightly. *Raker v. Raker*, 2004 PA Super 107, 87 A.2d 720, 724 (2004).

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Know your Title IX definitions – Unwelcome Conduct

- Severe
 - the impact or nature of the conduct, suggesting it is extreme or egregious. A single, intensely abusive incident can be considered severe
- Pervasive
 - the frequency and persistence of the conduct. It means the behavior is not an isolated event but is repeated or ongoing
- Objectively Offensive
 - a reasonable person, in the same or similar circumstances, would find the conduct offensive, regardless of their personal opinions

Important definition

Hostile Environment

- Unwelcome conduct
 - Determined by a reasonable person
 - To be so severe, pervasive and objectively offensive (SPOO)
 - That it effectively denies a person equal access to the school's education program or activity

May be identified as an additional allegation.

Important definition

Consent – not defined in the regulations

It is the responsibility of the person who wants to engage in sexual activity to ensure they have consent from their partner.

Important definition

Consent

- **Affirmative and active:** Consent must be a *clear "yes" through words or actions*, not a "maybe" or "no." It can never be assumed and *must be ongoing throughout sexual activity*.
- **Freely and voluntarily given:** Consent must be a choice made *without coercion, pressure, or manipulation*.
- **Knowing and informed:** A person *must be aware* of what they are agreeing to and *be able to make a rational decision*.
- **Mutual and ongoing:** Both parties must give consent, *and it can be withdrawn at any time before or during the activity*.
- **Specific:** *Consent to one act does not imply consent to another*. Previous relationships do not grant consent to future sexual acts.

Important definition

Consent is not possible when:

Incapacitation: A person cannot give consent if they *are incapacitated due to alcohol or drugs, asleep, or unconscious*.

Coercion or manipulation: Consent given under pressure is not valid

Lack of capacity: A person who is mentally disabled or a minor (depending on state laws and specific Title IX definitions) *may not be able* to give consent.

Important definition

Retaliation

- when an educational institution takes adverse action
- against an individual
- for exercising their rights under Title IX, such as reporting a sex discrimination complaint or participating in an investigation.

To prove retaliation, an individual must show they

- engaged in protected activity,
- suffered an adverse action, and
- that the two are causally connected



Critical for the Hearing Chair - “Relevant” Evidence

- Tends to prove or disprove a fact
- Is pertinent to the allegations
- Can be inculpatory or exculpatory

IMPACT on a party is NOT relevant to a determination or an appeal of the determination – it affect sanctions and remedies only

“Relevant” Evidence

Evidence about a complainant's prior sexual history is generally irrelevant and not permissible UNLESS

1. it's offered to show another person committed the act **OR**
2. to prove lack of consent in a specific instance with the respondent

Parse the Policy

Did the alleged conduct occur? (Quid pro quo, unwelcome conduct, and /or sexual assault, stalking, dating violence, domestic violence)

If the alleged conduct occurred, was it sex-based?

If it was sex-based, does it meet the other definition requirements?

Example: was there an adverse impact for saying no? (QPQ)
was it severe, pervasive, and objectively offensive?
(unwelcome conduct)

Parse the Policy

Definition:

Stalking means to engage in a course of conduct on the basis of sex directed at a specific person that would cause a reasonable person to either: (1) fear for their safety or the safety of others (2) suffer substantial emotional distress.

1. Did the respondent(s) engage in a specific “course of conduct?” If so, what was it?
2. Was the course of conduct carried out on the basis of sex?
3. Was the conduct directed at a specific person(s)?
4. Would the conduct cause a reasonable person to either (1) fear for their safety or the safety of others OR (2) suffer substantial emotional distress?

Title IX

Pre-Hearing

Important!

- **Refer to your institution's Live Hearing Procedures!!!!**
- If a party has not had an advisor up to this point, the institution **MUST** appoint one for the party

Pre-Hearing

- The TIXC will send a Notice of Hearing to the parties 37 business days prior to the hearing:
 - the date, time, and location of the hearing
 - the names of the hearing panel members
 - the charges to be reviewed by the Hearing Panel
 - the allegations concerning the potential violation(s)
 - the provisions of the Policy(ies) alleged to have been violated
 - the requirement that the parties have an advisor

Pre-Hearing

- Parties and their advisors will have 10 days to submit a written response to the TIXC to the Notice of Hearing
- They must submit in writing:
 - Who will serve as the advisor at the hearing?
 - **Witnesses** they would like to attend the hearing for questioning (can be new witnesses)
 - Questions or topics they would like to discuss at the hearing
 - Whether they prefer to **participate via technology or in-person**
 - Any **objections to any of the hearing panel members** and the reasons for the objections
 - Any **new evidence** they plan to present at the hearing that was not reasonably available at the time of the investigation
 - Other (Refer to the procedures)
- This will be shared with the Hearing Panel Chair

Pre-Hearing

- The Hearing Panel Chair will hold a pre-Hearing meeting (in-person, phone, video) with each party and their advisor:
 - Will review how the hearing will be conducted
 - Will review witnesses – not all may be necessary
 - Will make determinations regarding any questions of relevancy of evidence raised prior to the hearing – they may want to discuss but they have been told to save any strong objections for the appeal process
- Opportunity for the party and their advisor to ask clarifying questions
 - To review witnesses
 - To challenge rulings of relevancy – should not be a huge debate!

Title IX

The Live Hearing



The Live Hearing

The Hearing Panel Chair is in charge

Not a court hearing but has similarities

The TIXC will serve as the facilitator of the hearing

Complainant and Respondent may be in separate rooms, if requested

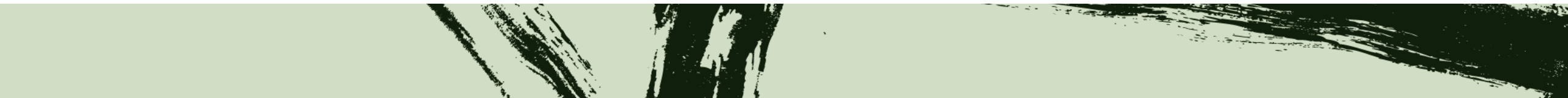
- or participate via technology if agreed to during the pre-hearing meeting

Advisors are to be present with their advisee

Witnesses will be kept separate until they are called for questioning

A written transcript or audio or video record will be kept of the hearing

Hearing is NOT a redo of the investigation



The Live Hearing – Sequence

1. Hearing Chair will review the process and ask people to state their names for the record
2. Hearing Chair will announce that recording other than the official recording is not permitted
3. The Hearing Panel will ask their questions first starting with the Chair (but also may interrupt later if party or witness testimony prompts follow-up questions for the panel)
4. The Hearing chair will ask each advisor (starting with the Complainant) if they would like to make an opening statement
5. After opening statements and starting with the Complainant's Advisor, the Chair will ask the Complainant's Advisor to first ask direct questions of their advisee and then cross-examine the Respondent to the complaint
6. The Complainant's Advisor will then call any witnesses for questioning
7. After the Complainant's Advisor is finished, the same will proceed from the Respondent's Advisor

The Live Hearing – NOTES

1. After each question, the Advisor will pause to allow the Chair to determine if the question is “relevant” or not and whether the person should proceed to answer
2. After the Complainant’s Advisor questions Complainant’s witnesses, the Respondent’s Advisor is to be given the opportunity to question those witnesses and vice versa
3. Advisors may use exhibits or visuals if they want, which should then be gathered to be included as part of the record
4. If parties are asking questions that have been asked or people are taking too long to answer or providing answers that don’t address the question, the Chair can interrupt and move the hearing along
5. If an advisor wants to speak to their advisee, they will ask for a break to do so

The Live Hearing – Advisors

- Advisors play THE major role at the live hearing after the Hearing Chair
- Most of the Chair's interactions will be with the advisor of each party
- Advisors will make the opening statements if they choose to make one
- Advisors will do the questioning both of their advisee, their witnesses, and of the opposite party and their witnesses

The Live Hearing – Advisors (and their advisee/witnesses)

- Are to respect rules of decorum
- Are to respect the Hearing Chair and his/her decisions
- Are to be prepared with their opening statements and questions
- Are to Pause after each question to allow the Chair to rule on relevancy
- ***If the ruling doesn't go their way, they should leave it for an appeal**
- Are to make sure their advisee and their witnesses show up!

The Live Hearing – The Parties

- The party could choose to appear, not to appear (**NOT GOOD**)
- The party could choose to appear and answer all questions or only some questions (**NOT GOOD**)
 - The Panel cannot draw an inference based solely on a party or witness's absence from the live hearing or refusal to answer questions
- If the party doesn't show up, the Advisor should be prepared to move forward (especially Institution-Appointed Advisors)
- If the Advisor doesn't show up, Hearing is postponed and rescheduled – college can then appoint another Advisor

The Live Hearing - Other

- Advisors may ask for a break if they need to talk to their Advisee or a witness – grant the break (make it short!)
- If someone doesn't understand a question, they may ask for it to be clarified or repeated
- Sometimes a party will not cooperate with their advisee or you may sense some tension....remember the Advisor plays the major role and should be up to date and ready to cross-examine the other party and witnesses
- If anyone acts inappropriately, the Chair can have them removed

Title IX

Post-Hearing

After the Live Hearing

- The Hearing Panel is the Decision-Maker (not just the Chair)
- The panel needs to meet to determine if the evidence and hearing information supports a determination as to if a violation did or did not occur under Title IX.
- A “Written Determination of Outcome” will be written by the panel (likely the Chair)
- Multiple allegations may have different findings

After the Live Hearing

If there is a finding of responsibility on the part of the Respondent, the Written Notice of Outcome will go to the appropriate disciplinary authority to determine what sanctions and/or remedies will be administered

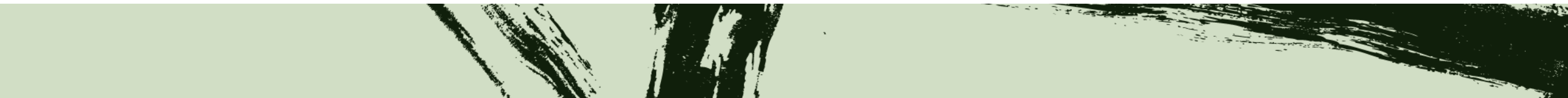
- Nature of the conduct
- Impact of the conduct on the complainant
- Previous disciplinary record
- Expression of remorse
- Other (See Procedures)



After the Live Hearing

- In the case of a determination that the Respondent violated Title IX, and after the sanctions/remedies have been filled into the report, the panel Chair will get the report back and has one more opportunity with the panel to review and finalize the document and send it to the TIXC.

At this point the role of the Chair and the Hearing Panel is ended!



Next Steps

- No later than 23 days after the TIXC receives the final report from the Hearing Chair, both parties and their advisors will receive the final Written Notice of Outcome.
- The Written Notice of Outcome will include information **on filing an appeal to the determination.**
- The other party is notified of an appeal and given a reasonable time to respond to it.

Standard of Evidence

Preponderance of the evidence is the industry standard

whether it is more probable than not that the alleged conduct occurred and constituted a violation of policy. Under Pennsylvania law, a preponderance of the evidence standard is defined as “the greater weight of the evidence” with the criteria that such evidence “tip a scale” slightly. Raker v. Raker, 2004 PA Super 107, 87 A.2d 720, 724 (2004).

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After the Live Hearing

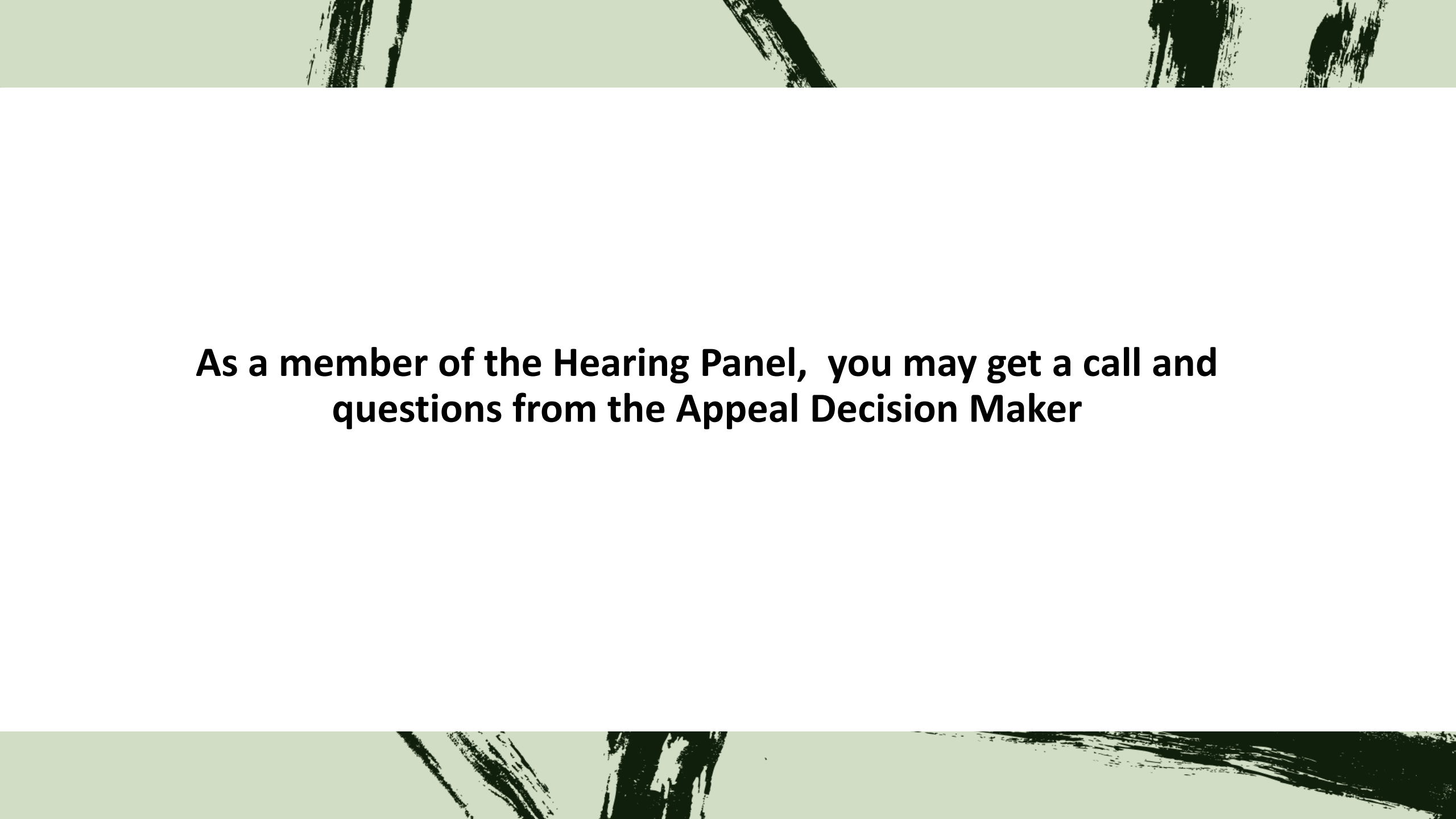
Appeals are limited to the following bases

- Procedural irregularity ***that could have affected the outcome of the matter***
- New evidence that was not reasonably available and ***that could have affected the outcome of the matter***
- A member of the hearing panel had a substantiated conflict of interest or bias ***that could have affected the outcome of the matter***
- A witness and/or evidence was ruled by the Panel Chair as relevant or not relevant, when the Panel Chair should have ruled the opposite and either included or excluded the witness and/or evidence inappropriately ***AND it could have affected the outcome of the matter***

Appeal Outcomes

- Deny appeal; original determination upheld
- Remand to original or new investigator for new or further investigation
- Remand to original or new decision-maker for additional consideration or new determination/hearing

Not recommended for appeal decision-maker to modify the original determination



As a member of the Hearing Panel, you may get a call and questions from the Appeal Decision Maker

Title IX Coordinator is responsible for implementing the appeal determination!

QUESTIONS?

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