

# Role of the Decision- Maker



# IN THIS CHAPTER



OVERVIEW OF THE  
DECISION-MAKER ROLE



DUE PROCESS



AVOIDING BIAS AND  
CONFLICTS

# Overview of the Decision-Maker Role



# Title IX Stipulations

- May be employee(s) of the institution or may be external individual(s) hired by the institution.
- May be a single Decision-Maker or a panel of multiple Decision-Makers.



The Decision-Maker CANNOT be the Title IX Coordinator or the Title IX Investigator(s) from the same case.

If an informal resolution process has taken place and was unsuccessful, the Decision-Maker cannot be the same person as the Informal Resolution Facilitator.

# Responsibilities of the Decision-Maker



## Postsecondary Institutions

As required under §106.45 of the Title IX Regulations, postsecondary institutions' grievance processes must allow for a live hearing. The Decision-Makers in these cases will:

- Review the formal complaint, investigative report, and evidence
- Conduct pre-hearing meeting(s) (if offered)
- Oversee the Title IX hearing process
  - Supervise the conduct of the involved Parties and Advisors
  - Ask Parties and Witnesses clarifying questions, if necessary
  - Determine the relevance of questions posed by Advisors (cross-examination) and explain decisions to exclude as not relevant
- Apply the school's standard of evidence to the facts
- Draft and issue a written determination regarding responsibility

# Responsibilities of the Decision-Maker



## K-12 Institutions and Districts

K-12 Institutions/Districts do not have the requirement to hold live hearings. However, they may choose to utilize live hearings if they wish. Otherwise, the institution must present the opportunity for Parties to submit questions in writing. The Decision-Makers in these cases will:

- Review the formal complaint, investigative report, and evidence
- Facilitate pre-hearing meeting(s) (if offered)
- Oversee the Decision-Making process
  - Shuttle written questions between Parties and Advisors
  - Ask Parties and Witnesses clarifying questions, if necessary
  - Determine the relevance of questions posed by Advisors (cross-examination) and explain decisions to exclude as not relevant
- Apply the school's standard of evidence to the facts
- Draft and issue a written determination regarding responsibility

# Training Requirements

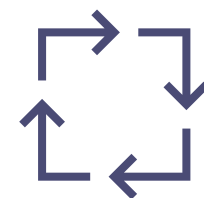
**"A recipient must ensure that Title IX Coordinators, Investigators, Decision-Makers, and any person who facilitates an informal resolution process, receive training on:**



The definition of sexual harassment in § 106.30;



The scope of the recipient's education program or activity;



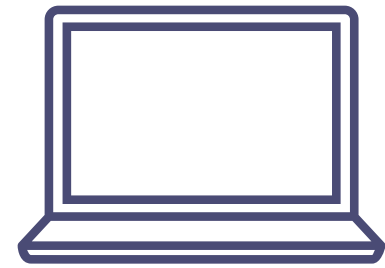
How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable;



And how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias." §(106.45(b)(1)(iii)

# Training Requirements

## Additional Title IX training requirements for Decision-Makers include:



"A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing; and



Issues of relevance of questions and evidence, including when questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b) (6) of this section." §(106.45(b)(1)(iii)

# Training Requirements

**In addition to the Title IX Regulations, Decision-Makers must also familiarize themselves with:**

- Institutional policies, including:
  - Key policy terms
  - Relevant timelines
  - Standard of evidence
- Other laws or policies applicable to your institution or district, such as:
  - State and local laws
  - Policies under which non-Title IX conduct may be adjudicated

# Additional Considerations for Decision-Makers



Under Title IX, there is a presumption that the Respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.



The burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school, not either of the Parties.

# Title IX Grievance Process

The Decision-Maker participates during this portion of the grievance process



INTAKE/  
REVIEW

NOTICE OF  
ALLEGATIONS  
SENT TO  
PARTIES

INVESTIGATION

HEARING

WRITTEN  
DETERMINATION

APPEAL  
PROCESS



INFORMAL RESOLUTION  
(OPTIONAL, BUT MAY BE INITIATED IN THIS WINDOW)

# Timeline of a Decision-Maker's Responsibilities

Engaged to serve as Decision-Maker in an active case

Receives investigation report and file from Title IX Investigator

Conducts thorough review of all information provided in the investigation report and file

Holds pre-hearing conference with Parties and Advisors

Facilitates live hearing or written decision-making process (K-12 institutions)

Drafts and issues the written determination regarding responsibility

# Attributes of the Decision-Maker

## It is important to have the ability to:

- Understand applicable policy and apply it to decision-making
- Evaluate evidence carefully
- Use critical thinking skills to determine relevance of evidence and questions
- Craft professional and thorough determinations
- Communicate effectively with Parties and Advisors
- Remain comfortable making tough but equitable decisions

# Guiding Principles

**The outcomes of Title IX cases can be deeply impactful for all Parties involved and even the greater community.**

**Therefore, Decision-Makers are to:**

Use school policy to guide decision-making

Uphold the integrity of the Title IX process

Remain objective (and recuse if not possible)



A Decision-Maker's goal is not to find someone responsible for violating Title IX or school policy. Their goal is to ensure the Parties have an equal opportunity to fully share their stories, then apply the standard of proof to the facts.

# Helpful Hints

BECOME  
COMFORTABLE  
WITH  
DISCOMFORT

Do not shy away from or fear using anatomically correct words and/or asking questions about private and emotional events.

BE  
INFORMED

Read EVERYTHING pertaining to the case, including applicable policies, investigative reports, and supplemental information.

BREATHE

Yes, the role carries a great deal of responsibility, but you are capable.

*You can do this!*

# Foundational Questions to Note

**The Decision-Maker is ultimately responsible for applying evidence to the standard of proof to objectively answer the following questions:**

- 1** Did the alleged incident(s) occur?
- 2** Does the alleged conduct violate the school's policy?



# Did the alleged incident(s) occur?

- Apply the appropriate standard of evidence to answer this question
- Considerations include:
  - Parties' statements about the alleged incident
  - Witness statements about the alleged incident
  - Inculpatory and exculpatory evidence about the alleged incident
  - If the Complainant and Respondent were present during the alleged incident
  - Nature of the relationship between the Parties at the time of the alleged incident
  - Communications and actions before and after the alleged incident

# 2

## Does the alleged conduct violate the school's policy?

- Apply the appropriate standard of evidence to answer this question
- Analyze the definitions of the relevant policy violations
  - Review every word of the definition
  - Example: 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 school's education program or activity;
- Review additional terms outlined in the school's policy, such as consent and incapacitation

# Due Process



# Due Process Afforded by Title IX

"Whether due process is conceived in terms of constitutional due process of law owed by State actors, or as principles of fundamental fairness owed by private actors, the final regulations prescribe a grievance process grounded in principles of due process for the benefit of both Complainants and Respondents, seeking justice in each sexual harassment situation that arises in a recipient's education program or activity."

p. 86, Preamble to the  
Title IX Regulations, 2020

# Importance of Due Process

**Procedural due process provides "at a minimum notice and the opportunity to be heard."** (p. 88, Preamble to the 2020 Title IX Regulations)

A grievance process created with due process as its central tenet creates outcomes that are:

Accurate

Legitimate

Replicable

Fair

# What does due process look like under Title IX?

- Creates equity for both Parties, such as the opportunity to present one's own view of the alleged conduct
- Delivers fact-based outcomes
- Provides adequate notice of allegations and opportunity to respond
- Allows for the cross-examination of Parties through relevant questions asked at a live hearing (or in writing for K-12 entities)



**Due process under Title IX is intentionally different from that in criminal proceedings.**

# What does due process look like under Title IX?

- Provides an equal opportunity for the Parties to present Witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence
- Provides both Parties an equal opportunity to inspect and review any evidence obtained as part of the investigation so that each Party can meaningfully respond to the evidence
- Provides each Party the right to an Advisor of their choice
- Does not restrict the ability of either Party to discuss the allegations under investigation or to gather and present relevant evidence

# What does due process look like under Title IX?

## **If a Respondent is found not responsible for violating Title IX:**

- Complainants are offered supportive measures designed to restore or preserve equal access to education programs and activities
- Respondents are not subject to sanctioning

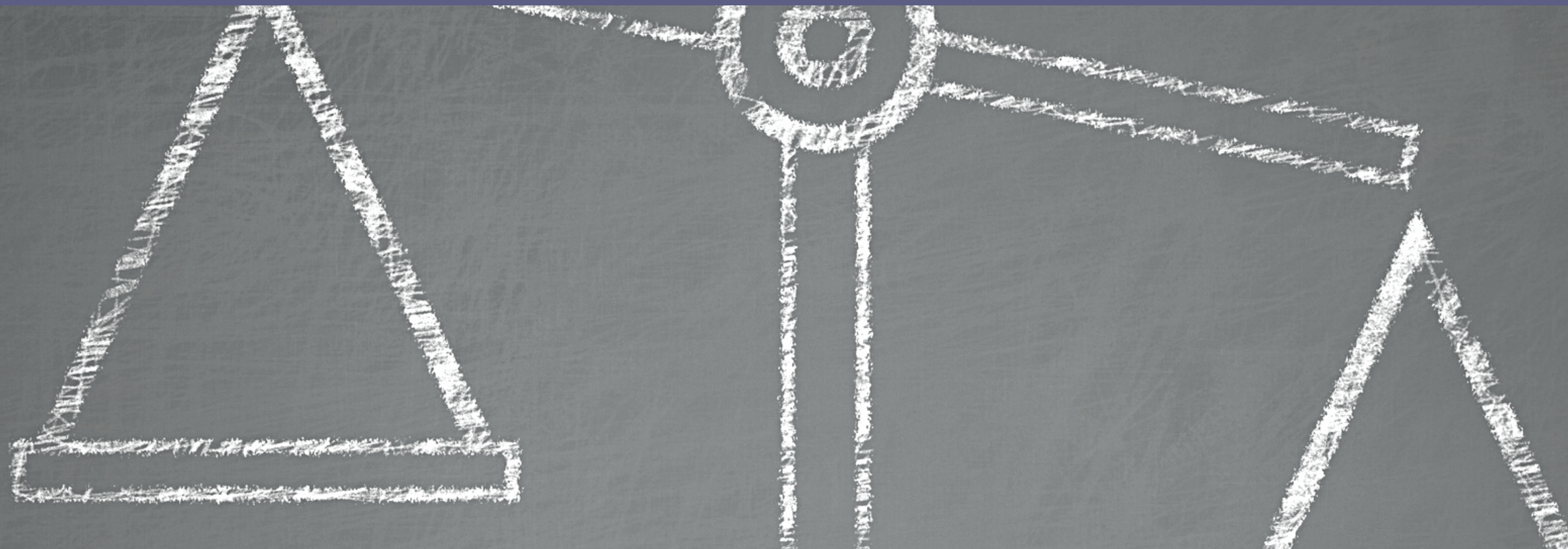
## **If a Respondent is found responsible for violating Title IX:**

- Complainants are offered remedies designed to restore or preserve equal access to education programs and activities
- Respondents are subject to sanctioning

# Decision-Maker's Provision of Due Process

- Ensure Parties have equal access to information and evidence
- Ensure Parties have equitable timelines and preparation, such as providing consistent timeframes for events such as the pre-hearing conference and live hearing
- Ensure Parties and Advisors have the opportunity to fully cross-examine all present at the live hearing
- Remain transparent and consistent when making relevancy determinations
  - Prioritize transparency and thoroughness when drafting the determination regarding responsibility

# Avoiding Bias and Conflicts



# Pillars of a Fair Title IX Process

## ✓ INDEPENDENT

- Remain free from any conflicts of interest or biases for or against Complainants or Respondents generally or an individual Complainant or Respondent
- Remain separate from the other stages of the Title IX grievance process
  - Has not served as the Coordinator, Investigator, Advisor, or Appellate Officer for the same case

## ✓ EQUITABLE

- Provide all Parties the same information, timelines, documentation, rights and benefits

# Pillars of a Fair Title IX Process

## ✓ **TRANSPARENT**

- Communicate procedures, options, timelines, and outcomes clearly to Parties
- Provide rationales for decisions regarding hearing procedures, scheduling, relevance, determinations regarding responsibility, etc.

## ✓ **CONFIDENTIAL**

- Share information only on a need-to-know basis, according to the Title IX Regulations and institutional policy

# Identifying Conflicts of Interest

**A legitimate claim of conflict of interest can be the basis of an appeal.**

Anticipate potential conflicts of interest when assigned as a Decision-Maker

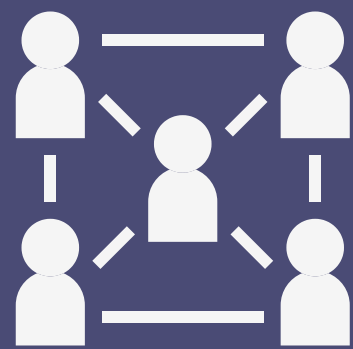
Allow a time prior to the hearing for Parties to disclose a potential conflict of interest

Evaluate and assign a new Decision-Maker if a conflict of interest arises

# What constitutes a conflict of interest?

- Conflicts of interest arise when there is a real or perceived personal or private interest that may prevent a Title IX Coordinator, Investigator, or Decision-Maker from carrying out their role impartially
- Conflicts of interest are not explicitly defined under the Title IX Regulations
- Conflicts of interest may be more difficult to navigate within smaller institutions or school districts

# Examples of Potential Conflicts



## Personal relationship with a Party or parent/guardian of a Party

*Example: A Decision-Maker is close family friend and has known the Party for years and outside of the academic program.*



## Position of power over a Party not related to the Title IX process

*Example: The assigned Title IX Decision-Maker is one of the Party's professors in a course in which they are currently enrolled.*



## Previous knowledge about a Party that could impact the ability to investigate or adjudicate the case

*Example: A Decision-Maker was a former conduct officer who adjudicated other code of conduct violations involving a Party.*



Simply knowing a Party or Advisor does not necessarily constitute a conflict of interest. The type of relationship and length of the relationship, and power dynamics should be considered. If any of these factors would prevent an individual from serving in their role objectively and without advantage or disadvantage to a Party, they will likely need to be removed from the grievance process for that case.

# Identifying Bias

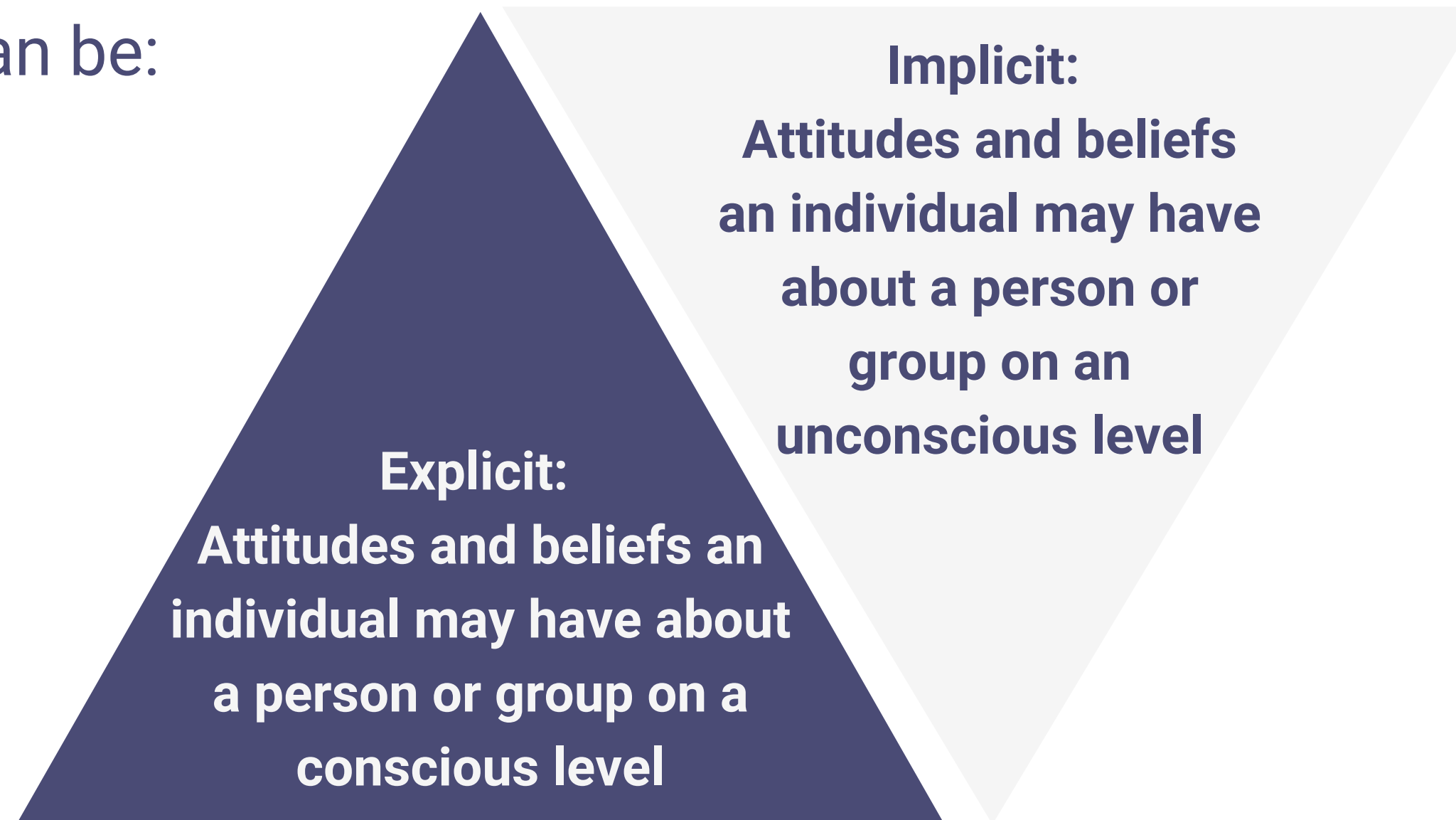
**A legitimate claim of bias can be the basis for an appeal.**

Consider personal biases and how they may affect your ability to serve objectively

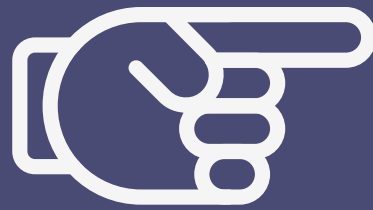
Recuse yourself from a case if biases may impact the process or determination

# What constitutes a bias?

- Title IX Regulations specifically references "bias for or against Complainants or Respondents generally, or for or against an individual Complainant or Respondent."
- Biases can be:



# Examples of Potential Bias



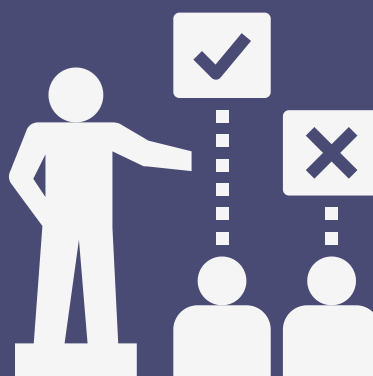
## **Prejudgment**

*Example: A Decision-Maker, upon hearing the summary of an upcoming case and before hearing all relevant facts, has formed an opinion believing the Respondent to be responsible for the alleged conduct.*



## **Bias for or against Complainants or Respondents generally**

*Example: A Decision-Maker also serves as a volunteer advocate at the local Rape Crisis Center and frequently and publicly makes posts on social media about "believing all survivors."*



## **Bias for or against a specific Complainant or Respondent**

*Example: An Investigator has a set of religious beliefs that create bias against a Complainant who identifies as queer.*



As with conflicts of interest, the Parties' perception of bias must be considered. It may be that an individual is unbiased in their role as a Decision-Maker but aspects of their identity and experiences may create concern for Parties.

For example, a sexual assault survivor may be perfectly capable of setting aside their experience to adjudicate a Title IX sexual assault case. However, if this individual is outspoken about their experience and has shared their story and experience in front of campus audiences, a Respondent may feel as though they will not receive a fair hearing.