

HUSCH BLACKWELL

Title IX Training for Hearing Panel Members

May 2024

Agenda

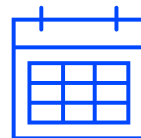
Background on Title IX and Hearings

Hearing Procedures

Questioning for Hearing Panel Members

Decision-making and Writing Considerations

Sanctioning



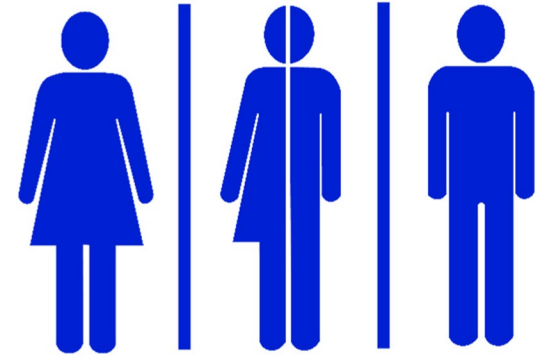
Background on Title IX & Hearings

Module 1

What is Title IX?

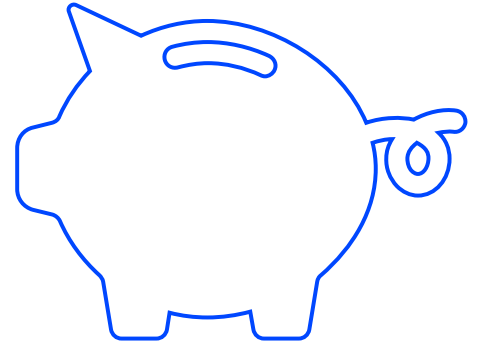
“[N]o person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

34 C.F.R. § 106.31



Who does Title IX apply to?

- Entities that receive federal financial assistance, including colleges and universities that participate in U.S. Dept. of Ed. Federal Student Aid funding
 - Not individual persons
 - But institutions are required to adopt policies and procedures to implement Title IX that *do* apply to individual persons



What is “sexual harassment” as addressed in ED’s 2024 Title IX regulations?

Conduct that is sexual or sex-based and that constitutes

Quid pro
quo
harassment

Hostile
environment
harassment

Sexual
assault

Relationship
violence

Stalking

What sexual harassment does Title IX apply to?

- Title IX applies to sexual harassment in the “education program or activity” of a federal funding recipient
 - Title IX defines “education program or activity” to include the “operations” of educational institutions
- Title IX does not apply to private conduct occurring in private location that is not part of education program/activity



What are examples of education programs and activities?

Admissions

Hiring

Workplace

Academic instruction

Residence life

Amenities on campus

Sports teams

Work-study

Games, concerts, and speeches on-campus

Off-campus trips or experiences organized by the institution

Sponsored organization activities

Anything else that happens on-campus

Does Title IX apply to off-campus sexual harassment?



Yes, if the conduct at issue occurs in the context of an education program or activity



Yes, if the conduct at issue occurs in a house owned or controlled by an officially-recognized Greek organization or other student organization



Yes, if the bad actor is an employee or other person exercising institutional authority



Yes, if the respondent is engaged in conduct under the institution's disciplinary authority

What about sexual harassment abroad?

- Title IX applies to sexual harassment “in the United States”
- But incidents occurring abroad must be investigated if they contributed to a hostile environment on campus



What is the grievance process?

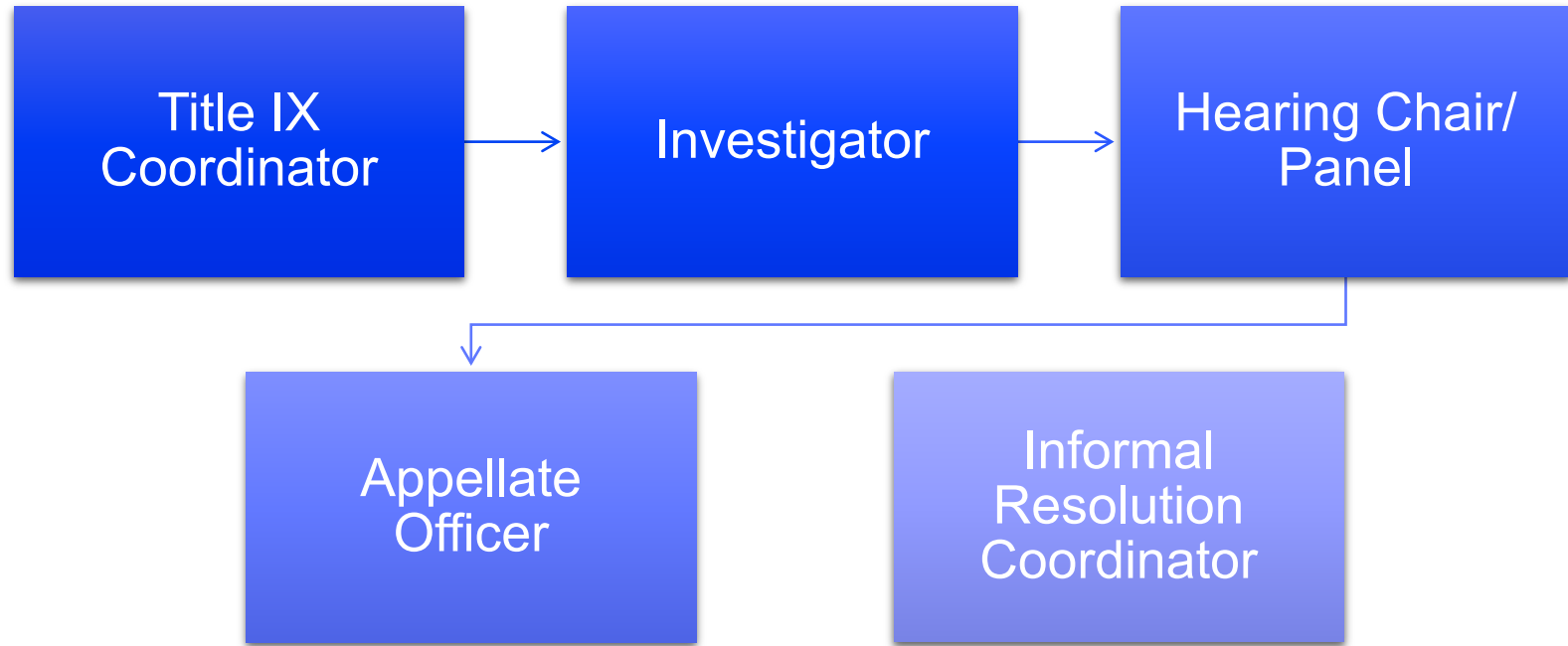
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graph LR; A[Investigation to collect relevant inculpatory and exculpatory evidence] --> B[Live hearing before a decision-maker who finds facts under an evidentiary standard and determines the existence (or not) of a policy violation and any resulting sanctions/remediation]; B --> C[Appeal];
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Investigation to collect relevant inculpatory and exculpatory evidence

Live hearing before a decision-maker who finds facts under an evidentiary standard and determines the existence (or not) of a policy violation and any resulting sanctions/remediation

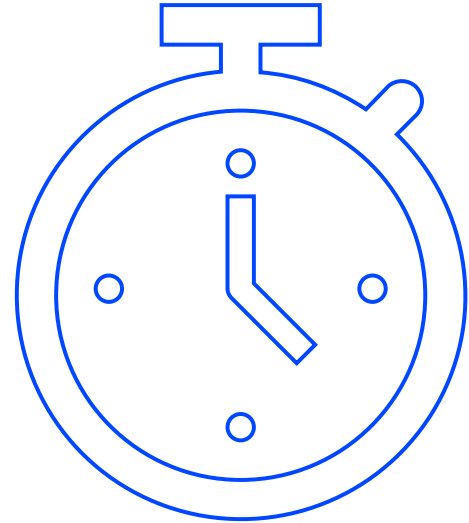
Appeal

Who are the key institutional actors in the grievance process?



How long does a grievance process take?

- There is no firm deadline, and the length of the grievance process varies depending on a variety of factors
- Institution must be reasonably prompt, advise parties of timelines for particular phases of the process, and notify parties of extensions of timelines and the reasons for the same



Standard of evidence

Preponderance of the evidence

=

“more likely than not”

General Grievance Process Principles

What general principles govern the grievance process?

- Equitable treatment of complainants and respondents
- Presumption respondent did not violate policy *unless and until* a determination is made after hearing
- No stereotypes based on a party's status as complainant or respondent
- Conflict and bias-free institutional participants
- Trauma-informed

Who is responsible for identifying conflicts of interest and bias?

- Title IX Coordinator or designee oversees grievance process and must address known or reported conflicts of interest/bias
- Institution must also permit parties to raise concerns of conflicts of interest and bias
- Individual institutional actors should self-police conflicts of interest and self-identify bias

What is a conflict of interest?

- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position

Example: Conflict of Interest

Student Math files a formal complaint of sexual harassment against Student Chemistry. One of the hearing panel members selected is Student Chemistry's faculty advisor who has previously written letters of recommendation for Student Chemistry's application to graduate school in which faculty advisor wrote that Student Chemistry is "honest to a fault."



Example: Conflict of Interest

An administrator accuses an employee of an office supply vendor of sexual harassment; matter is investigated. Institution assigns a hearing panel member whose spouse is employed as a manager for the office supply vendor and who directly supervises the accused employee.



Example: Bias

An employee in the gender studies department who is chosen to serve on a hearing panel also chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption of innocence is wrong in cases of sexual assault. I firmly believe a person accused of sexual assault must prove their innocence."



Example: Bias

**Investigator assigned to investigate a formal complaint of sexual assault has repeatedly told colleagues that the investigator believes most complainants just “regret that they got drunk.” Investigator tells a co-investigator:
“I just don’t think it’s ever fair to hold anyone responsible when both parties are drinking.”**



Examples of impermissible stereotypes

“Anyone who would go into another’s bedroom drunk must have wanted to have sex.”

“Greeks can’t be trusted because they will just lie for each other.”

“People who are dating can’t commit sexual assault against each other.”

“There are no false reports of rape. Therefore, every complainant must be believed.”

How do we approach trauma in a Title IX case?

- Balance
 - “Trauma-informed investigation techniques that bleed over into ... bias detract from the fundamental tenets of fairness and impartiality that are [key to] disciplinary proceedings.”
 - Candace Jackson, Acting Asst. Secretary of ED (2017)

What is the definition of trauma?



Merriam-Webster: A very difficult or unpleasant experience that causes someone to have mental or emotional problems usually for a long time



English Oxford: Deeply distressing or disturbing experience



Wikipedia: Is a type of damage to the psyche that occurs as a result of a severely distressing event. Trauma is often the result of an overwhelming amount of stress that exceeds one's ability to cope, or integrate the emotions involved with that experience

Possible trauma impact

People who have suffered trauma may, but may not, experience any or a mix of the following:

Flashbacks

Delayed recollection

Inability to concentrate

Non-linear recollection

Self-blame

Trauma & credibility

- Don't assume information is not credible due to the manner delivered
- Understand memory may be clarified in time
- Address inconsistencies

Pre-Hearing Grievance Process

What is a complaint?

Verbal or written indication

From the alleged victim (or person authorized to act on their behalf) or the Title IX Coordinator

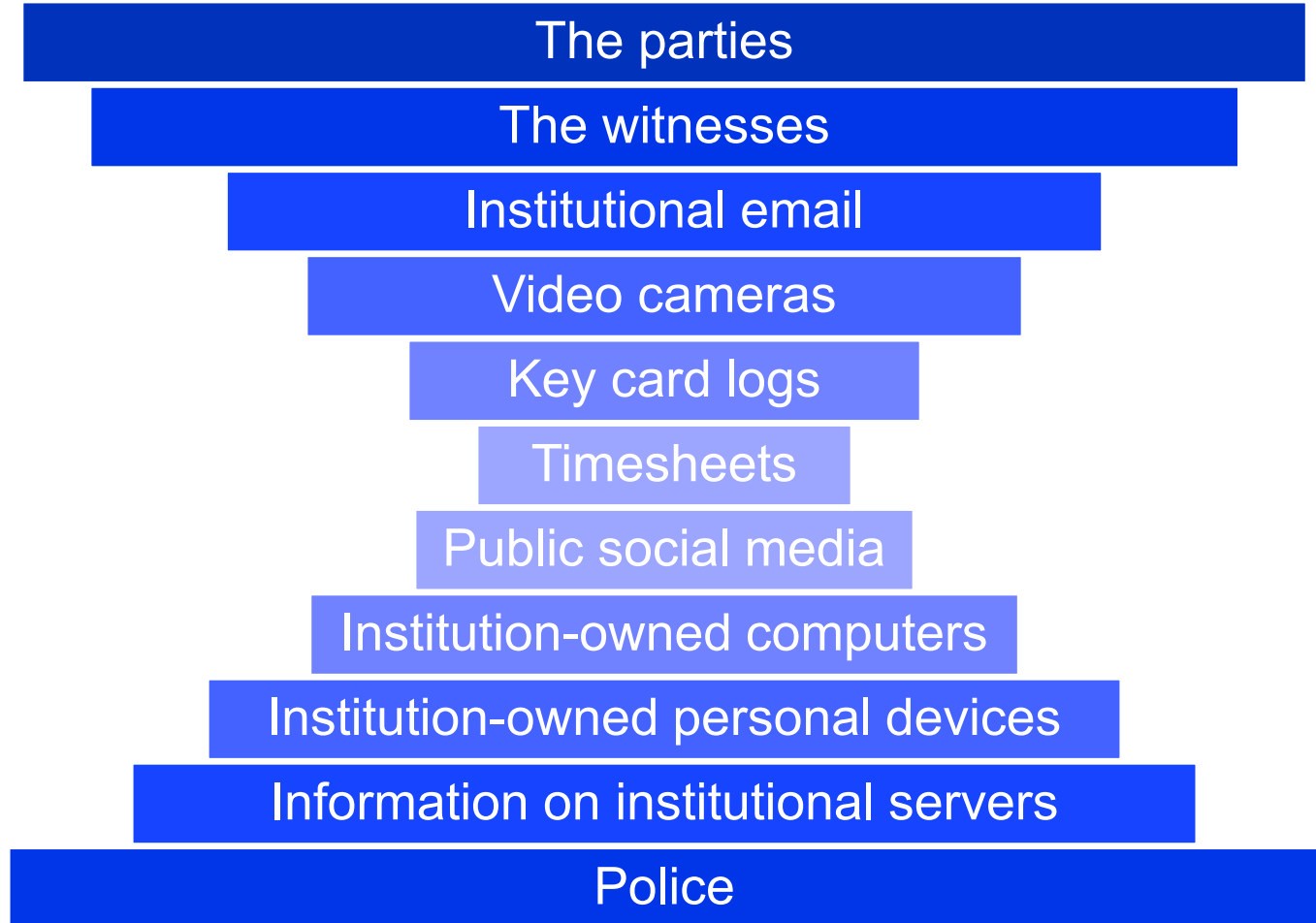
Alleging sexual harassment

Indicating desire to initiate the grievance process
(i.e., investigation and hearing)

What is the purpose of a Title IX investigation?

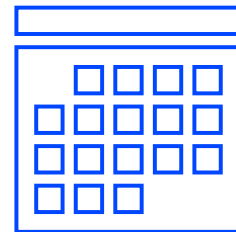
- For the institution
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision-maker to determine through a live hearing whether or not the reported sexual harassment occurred

Examples of Sources of Non- Testimonial Evidence



Do the parties have access to the evidence?

- At a minimum, parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations or a written report summarizing the same
- Evidence must be provided to a party and their advisor in physical copy or electronically
- Any earlier access to the evidence must be provided equally



What exactly has to be shared?

- Anything that has “evidentiary” value
- That is, the information is potentially inculpatory or exculpatory in light of the allegations at issue; or is otherwise potentially relevant
- E.g., witness statements; interview transcripts; text messages; social media posts; photographs; etc.
- Logistical communications; calendar invites; support measure communications generally are not shared

Example

Transcript of interview with complainant contains 10 minutes of initial discussion about complainant's supportive measures and access to counseling. Investigator redacts this portion of the transcript before sharing with the parties.



Example

Investigator had 12 emails with respondent and advisor attempting to negotiate a time and place for interview. Investigator excludes the 12 emails from the evidence made available to the parties.



Example: Permissible

After completing all interviews, investigator uploads interview transcripts and other evidence to a secure file sharing program and sends individual links and passwords to each party and their advisor.

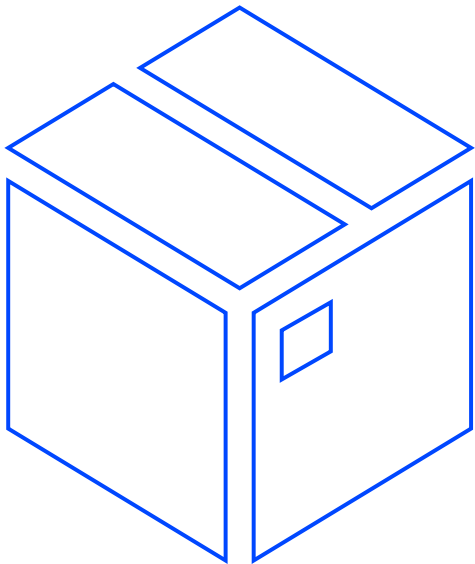


Example: Impermissible

After completing all interviews, investigator prints a copy of the evidence and tells parties they can schedule a time to review it in a conference room without cell phones.



How should we make the evidence available to parties?



- Evidence or summarizing report should be sent to each party and advisor in
 - Electronic format or
 - Hard copy
 - A reasonable amount of time before the hearing

Questions



Hearing Procedures

What is the purpose of the hearing?

To hear testimony and receive non-testimonial evidence so that:

- The hearing officer can determine facts under a standard of evidence
- Apply those facts to the policy, and
- Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary

Balancing the parties' interests

- The Department of Education believes that live hearings with cross-examination serve as a valuable truth-seeking tool in the grievance process
- But the Department recognizes that cross-examination in cases involving violent allegations could be traumatic for complainants
- To balance the two, the Department prohibits cross-examination from the other party directly, but allows it from an advisor or through questions posed via the hearing chair

Live hearing option

- Postsecondary institutions may use a live hearing to satisfy heightened due process requirements for certain cases
- Participation is contemporaneous (both parties and their advisors hear and see at the same time)
- A hearing officer or hearing panel chair supervises the hearing and screens evidence and questions for relevance
- There must be a mechanism for the parties to have their advisors ask questions of the other party and witnesses or to have them posed through hearing chair or hearing officer

What happens before the hearing?



Parties are provided the evidence or a written summary a reasonable time in advance



“Decision-maker” must be identified and clear conflicts of interest assessed



Hearing must be scheduled, and logistics arranged



Witnesses must be notified



Pre-hearing conference may be held

What is the pre-hearing conference?

- Discuss hearing procedures
- Discuss any stipulations that may be made to expedite the hearing
- Discuss what witnesses need to attend
- Resolve other matters raised in the party's written responses to the investigation report

What are other pre-hearing conference considerations?

- The pre-hearing conference may (under regulations) be two separate meetings—one with each party and advisor; but follow up notification may be required
- The pre-hearing conference may be conducted virtually
- Advisors should be allowed to attend although their role can still be passive if the institution desires
- The pre-hearing conference is not required but is a best practice that facilitates a smooth hearing

How do we schedule a hearing?



Set aside sufficient time considering the nature and complexity of the case



Consider class and work schedules of parties and key witnesses to avoid conflicts



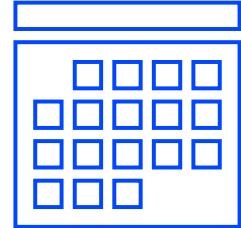
Consider pre-scheduling a backup or “spill over” date in the event the hearing runs long or must be continued



Provide documentation excusing parties and witnesses from other obligations, as necessary

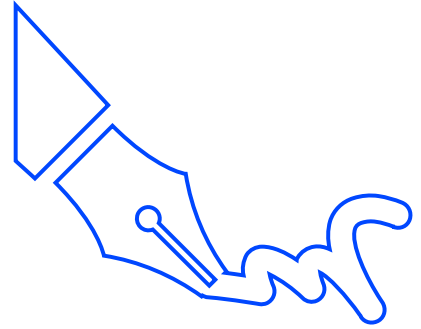
When should a pre-hearing conference be held?

- Any time after the investigation report or investigative evidence is shared
- The decision-maker is identified
- Sufficient time exists to address issues raised in the pre-hearing conference *before* the hearing occurs



How do we notify parties and witnesses?

- Institution must provide written notice to the parties of time and place of hearing
- Institution should provide written notice to witnesses requesting their presence
- Notice may be issued by the decision-maker or another institutional official in coordination with decision-maker



What does the hearing notice say?

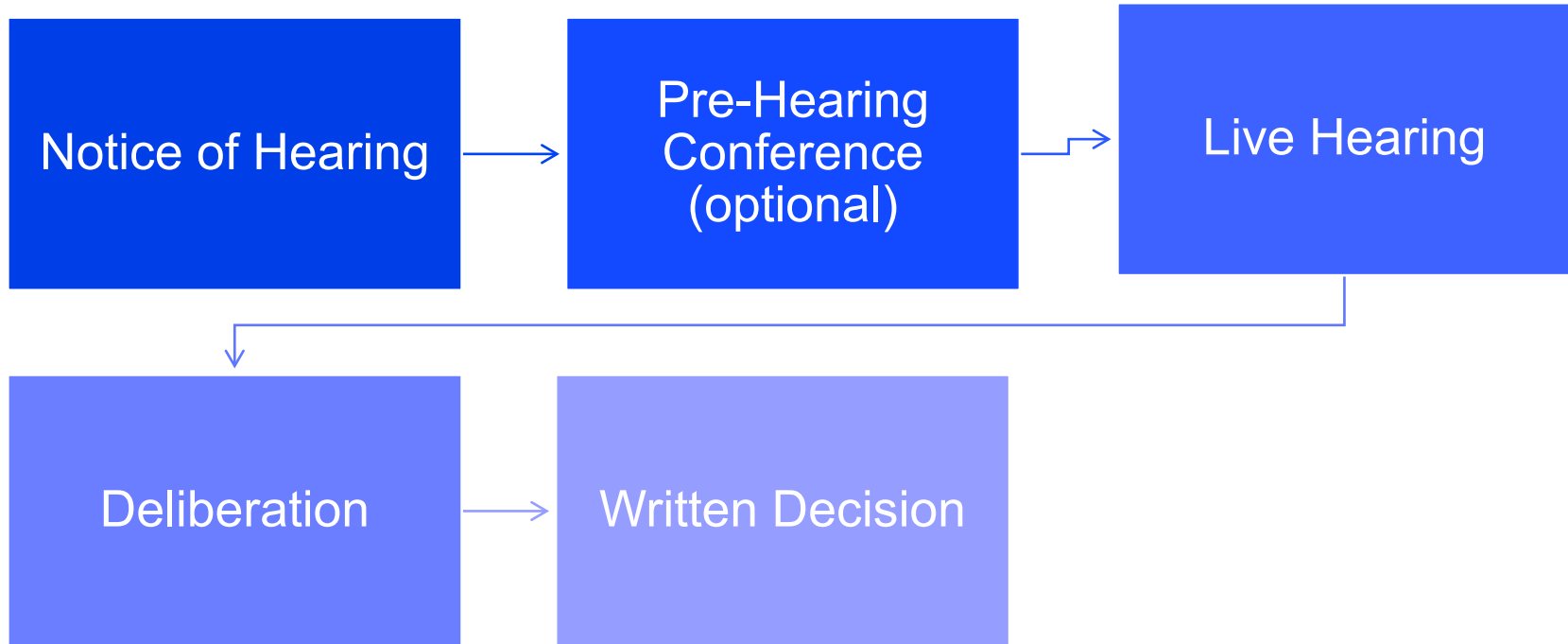
Identity of the hearing officers

Deadline for the parties to submit response to investigation report or evidence

Date for the pre-hearing conference

Date and time for the hearing (must be a reasonable period of time after investigative report and/or evidence is shared)

What are the phases of the hearing process?



How should we prepare for a hearing?

Know who's coming (parties, witnesses, advisors, others)

Consider potential conflicts of interest

Review relevant policies

Review investigative report/file

Review hearing procedures

Review rules of decorum

Review any responses to report by parties

Prepare “must ask” questions

Anticipate questions and issues



Lesson for Panel Members:

Doe v. Purdue University, et al. (2019)

- Court denied motion to dismiss on due process and Title IX claims
- Student suspended with conditions; later expelled
- Student claimed due process was inadequate, e.g.:
 - Not provided with investigative report
 - No opportunity for cross-examination
 - Complainant & witnesses found credible by committee, but not interviewed in person by fact-finder
- Court found material issues of fact and denied MTD, noting:
 - ***“... two of the three panel members candidly admitted that they had not read the investigative report ...”***



Consider other potential policies

- Examples
 - Student code of conduct
 - Staff handbook
 - Faculty handbook
 - Specific policies related to inappropriate use of computers, hazing, professionalism, etc.
- Ensure appropriate notice has been given if combining proceedings

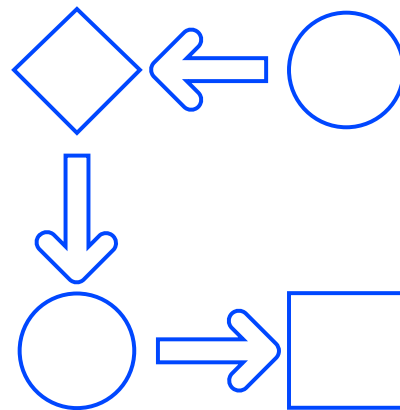


What is a “live” hearing?

- A proceeding held by the decision-maker, either in-person or virtually where:
 - Parties are present synchronously with their advisors
 - Parties and witnesses testify with contemporaneous participation (i.e., no “pre-recording”)
 - Parties’ advisors ask live questions of the other party and witnesses and/or questions are asked through the hearing chair

What are the logistics of a hearing?

- Hearing must be recorded (audio or video) or transcribed
- Hearing can be held in a single room or with the parties separated in different rooms
- Hearing can be held virtually using suitable software



Who attends a live hearing?

The decision-maker(s)

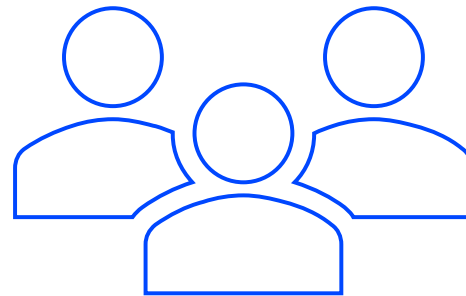
Other necessary institutional personnel or institutional advisors (e.g., attorneys)

The parties

Each party's advisor

Witnesses *as they are called to testify*

Other support persons for parties, if permitted by institution



What is the role of decision-maker(s)?

Conduct hearing (if applicable)

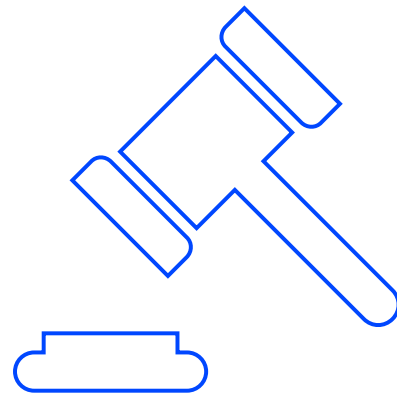
Make a finding

Determine/relay sanction*

Explain decision

Ensure clear record

** Note policy language*



What is the role of an advisor during the hearing process?

Support	Provide personal support to the party throughout
Preparation	Help the party prepare for pre-hearing conference and live hearing
Presence	Be present with the party during pre-hearing conference and live hearing
Questioning	Conduct live questioning of other party and witnesses at the live hearing

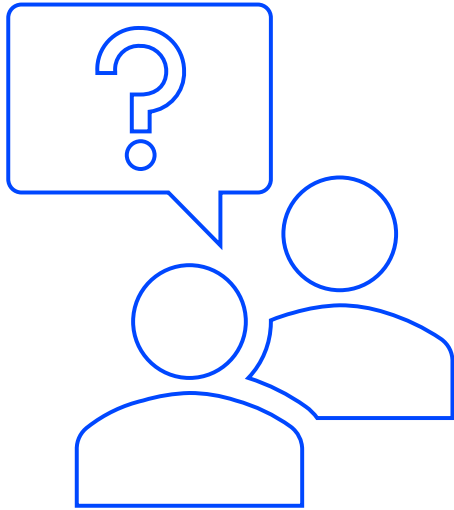
What must an advisor *not* do during the hearing?

Inhibit	Advisor cannot inhibit communication between panel and party
Disrupt	Advisor cannot disrupt meetings and interviews
Argue	Advisor is not permitted to argue with the panel
Evidence	Advisor does not present evidence or “make a case”

Does the institution provide a party's advisor?

- Default rule is that a party selects and brings an advisor of their choice to the hearing
- If a party does not have an advisor, the institution will supply one for the purpose of questioning the other party and witnesses on behalf of the student in question

Is an advisor allowed to question their own party?



- Not unless the institution chooses to allow it
- The Title IX regulation contemplates cross-examination, but not “direct” examination

Should advisors act like lawyers?

Unless an attorney is used, the role of an advisor is a *non-legal* role:

- Advisors are not providing legal advice
- Advisors are not a prosecutor or a defense attorney
- Advisors are not required to engage in “zealous advocacy” like an attorney
- Advisors are asking relevant and appropriate questions to reasonably support the case of the party they are supporting
- May fulfill role by asking party-directed questions

What if the advisor breaks the rules?



- An advisor who violates the rules may be excluded from further participation
- The institution should pause the relevant interaction to allow the party to select a new advisor

Example: Advisor breaking the rules

During the hearing, a party's advisor repeatedly interrupts the panel, objects to panel questions, argues that the panel members should ask different questions, and attempts to present legal arguments citing caselaw



How does the hearing actually work?

Required elements include:

Hearing officer or panel chair must independently evaluate questions for **relevance** and resolve relevancy challenges

A party's advisor must be allowed to conduct live questioning of other party and witnesses or a party must be allowed to pose questions through the hearing officer or panel chair

Hearing panel may give less weight, or no weight, to testimony of a person who does not submit to live questioning

Certain questions excluded (sexual history; health/privileged information unless waived; duplicative/repetitive)

Typical Hearing Elements

Procedural / housekeeping remarks

Overview / summary of investigation
report

Party statements

Questioning / cross-examination of
parties & witnesses

Deliberation

How might questioning of witnesses take place?

Witness is first
questioned,
including cross-
examination, by
advisor who called
the witness

Followed by
questioning of
hearing
officer/panel

Followed by
questioning, including
cross-examination,
from advisor for other
party

Hearing Curve Balls

Starting the hearing: Setting the tone

Affirm everyone received notice

Discuss purpose of hearing/goals: expectations of what hearing is for/not for

Discuss role of hearing panel/administrator

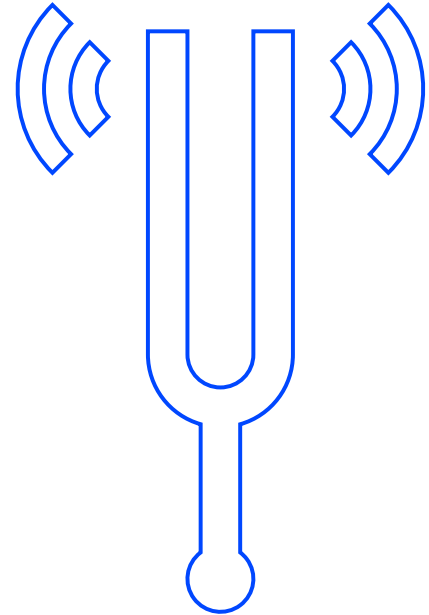
Explain ground rules

- May set rules of decorum

Address standard of evidence

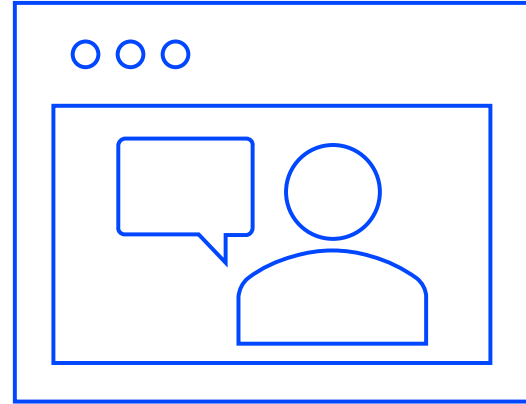
Welcome questions

Take breaks as needed



Separating the parties

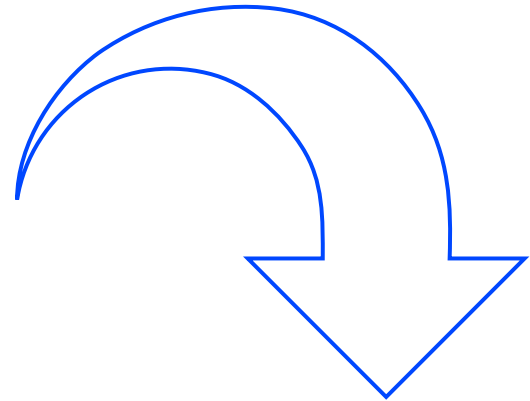
- Video/audio conferencing
- Separate rooms
- Screens



How should we field curveballs?

When curveballs arise during a hearing,
ADDRESS THEM:

- Late/new evidence
- Conflicts of interest
- Heightened emotions
- Potential trauma-impact



The art of fielding



Be ready to respond to curveballs with questions (or recess to regroup)



Late/new evidence → Why wasn't this presented during the investigation?



Conflicts of interest → Why are these being raised now? What changed?



Heightened emotions → Take a break so hearing can proceed productively



Potential trauma-impact → Take breaks, rely on support persons, and give opportunity to party potentially impacted to participate in the manner they are most comfortable

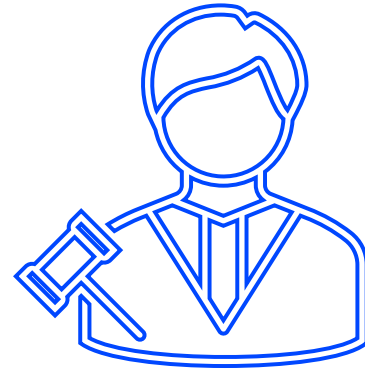
And fastballs!

- Character witnesses/statements:
 - Character evidence does not often hold much weight as to whether a policy violation occurred
 - May or may not be allowable, based on policy
 - If allowed, best practice is to impose reasonable limits, and
 - Explain that these are generally considered only as part of sanctioning



Litigating the process

- Purpose of the hearing is to determine whether the evidence (under a standard, like preponderance) supports the existence of a policy violation
- Hearing is not a forum to dispute or litigate earlier procedural failures or procedural complaints except to the extent they bear on the sufficiency of the evidence



More Curveballs: Advisors

Need to allow advisor to conduct cross-examination, but can enforce reasonable expectations of professionalism

Need to establish appropriate boundaries with advisors

Role should be set by policy

Hearing panel serves as umpire: “3 strikes, you are out” rule

If ejected from game, generally allow for party to find new support person/advisor

Example: Permissible

Institution's hearing procedures require all participants to maintain decorum, remain at their respective assigned table at all times, and direct all communications to the hearing officer with the exception of questions posed to the other party and witnesses by each party's respective advisor.



Example: Impermissible

Institution's policy prohibits a party or advisor from “doing anything that would make another party uncomfortable or suffer anxiety, including asking questions that may cause a party to relive an experience in a traumatizing way.”



Example: Impermissible

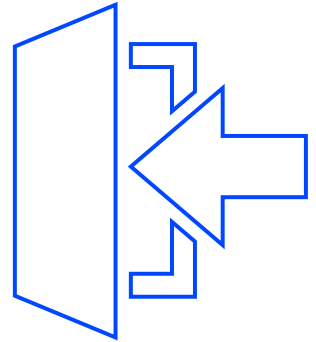
A respondent's advisor interrupts with “strenuous objections” to questions asked by complainant's advisor based on “hearsay,” “assumes facts not in evidence” and other bases other than relevance.



Evidentiary Considerations

Who determines relevance?

- Hearing officer/chair must screen questions for relevance and resolve relevance objections
- Hearing officer/chair must explain any decision to exclude a question as not relevant



What is relevance?

- Evidence is relevant if it may aid in showing whether the alleged sexual harassment occurred
- Relevance must be determined considering the **form** of sexual harassment alleged

Relevance: Practical considerations

- Not relevant
 - Sexual history (limited exceptions)
 - May exclude as not relevant duplicative/repetitive
- Pause to consider

Example: Relevant

Coach is accused of sexually propositioning Player in exchange for more playing time. Witness states that: “One of the trainers heard Coach say that Player is ‘extremely attractive.’”



Example: Relevant

One student has accused another of stalking. Respondent's advisor asks Complainant, "Did Respondent ever threaten to harm you physically?"



Example: Not Relevant

**Journalism student has accused Professor of sexual harassment.
Witness says: “Student was convicted for driving under the
influence when they were a sophomore in high school.”**



Example: Relevant

Assistant Provost has complained that Cabinet member created a sexually harassing hostile environment. Advisor for Assistant Provost asks Cabinet member, “Did you tell the Cabinet, in front of the Assistant Provost, that Assistant Provost was better suited to be a sexy stay-at-home parent than to be Assistant Provost?”



Example: Not Relevant

Complainant alleges Significant Other engaged in dating violence by kicking complainant during an argument. Witness asserts: “Complainant is only dating Significant Other because of the Other family’s money?”



Is sexual history considered?

- Generally, no – Evidence of a complainant's sexual interests or prior sexual conduct is permissible only if:
 - Offered to prove that someone other than the respondent committed the conduct, or
 - If evidence of specific incidents of the complainant's prior sexual behavior with the respondent are offered to prove consent

SH Example: Impermissible

**Law student has accused a faculty member of sexual harassment.
Witness asserts: “Law student slept with a number of individuals
in the month before the claim.”**



SH Example: Permissible

Engineering student has accused Fine Arts student of sexual assault. Engineer states that Artist had intercourse with Engineer without using a condom without Engineer's agreement--Engineer always requires protection. Artist provides "Engineer had unprotected sex with Artist a week prior."



Medical, psychological, similar & other protected records

- Questions seeking medical/psychological/similar information about a party are not permitted unless the party has given written consent to waive privilege
- Questions about other records protected by legally recognized privilege also not permitted unless the privilege is waived
- State/federal health care privacy laws must be followed

Example

Respondent's advisor asks Complainant, "When you were hospitalized in 2021 for bipolar disorder, didn't you accuse your doctor of sexual abuse?"



Case law & “live” hearing

- *Doe v. Baum* (6th Cir. 2018) (KY, MI, OH, TN): Due process in Title IX context at public University requires live cross-examination in cases where credibility is at issue
- *Haidak v. Univ. of Mass.-Amherst* (1st Cir. 2019) (ME, MA, NH, PR, RI): Due process requires only indirect questioning through hearing officials
- Courts unsettled on whether a private institution (vs. public institution required to meet “due process” requirements) must have live hearing
- U.S. Department of Education has opined that cases (including *Baum*) do not require live hearing, provided another method of testing credibility is provided



Can a decision-maker rely on statements of a party or witness who does not answer questions posed by the hearing panel or advisor?

- Yes
- *But*, the hearing panel may choose to place less weight, or no weight at all, on such statements, provided the questions they refused to answer were relevant and not impermissible

Example

Complainant told investigator that respondent sexually assaulted complainant through penetration and that no other sexual activity occurred or was even discussed. At hearing, advisor for respondent asks complainant whether, immediately before penetration, complainant asked respondent to perform oral sex. Complainant refuses to answer the question.



Example:

In a stalking case, respondent testifies to hearing panel that he was not even on campus the day the complainant claims he was leering in her dorm room window. On cross-examination, complainant's advisor asks respondent about a photograph that shows respondent entering an academic building, immediately adjacent to the complainant's dormitory, on the day in question. Respondent refuses to answer any more questions.



Effective Questioning for Hearing Panel Members

Module 3

How do I know what questions to ask?

Review the nature of the allegations



Review the definition of the particular type of sexual misconduct alleged



Consider facts that would help determine whether a particular element of the alleged violation is satisfied

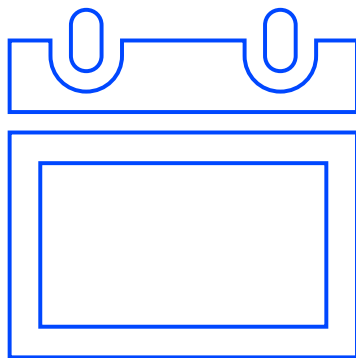


Focus on relevant evidence (tending to make a *disputed* fact more/less true) and (for investigators) other evidence directly related to allegations



Consider questions that will bear on credibility

Practical Considerations



- Prioritize
- Create list of must-ask questions in advance
- Focus on elements of alleged violation and disputed facts
- Consider appropriate ways to guide off-track witnesses

What are some hallmarks of effective questioning?

Questions should
be clear and
precise

Questions should
be asked in a
purposeful order

Questions should
address one or
more elements of
the sexual
harassment
alleged

Questions should
be prioritized and
edited for greatest
effect

General questioning guidelines

- Open-ended questions generate more information while closed-ended questions will clarify specifics.
- Closed-ended questions result in yes/no responses that often don't offer much additional information. Use closed-ended questions to obtain specifics and clarify information you have already received.
- Silence is ok: Give the witness time to answer.



General questioning guidelines (CONT.)

- **Credibility:** If you have concerns that a witness is not providing complete and accurate testimony, respectfully explain the reason for your concern and indicate that you are interested in hearing the individual's response to your concern (e.g., "Help me understand...") and address inconsistencies.
- **Be professional and respectful:** Keep in mind that questioning, while sometimes necessary, may put a party or witness on the defensive.
- **Ask the difficult but relevant questions:** Give both parties an opportunity to address your concerns.

When asking questions . . .

Non-verbal communication

- Convey care, concern, and interest to both sides
- Make eye contact

Verbal communication

- Avoid questions that imply the alleged conduct occurred or did not occur
- Avoid questions that blame or judge the complainant
- Avoid questions that blame or presume violation by respondent
- Use medical terms for clarification of physical contact

Incapacity: Sample Question Topics

Physical coordination

- Walking, dancing, running, maneuvering (e.g., stairs)
- Speech
- Dexterity (phone/computer usage, using keys/key cards)
- Dressing/undressing

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Ability to understand

- Topics of conversation
- What was said and tracking conversation
- Knowing the who/when/where of the situation
- Understanding what is happening generally and with regard to the conduct at issue

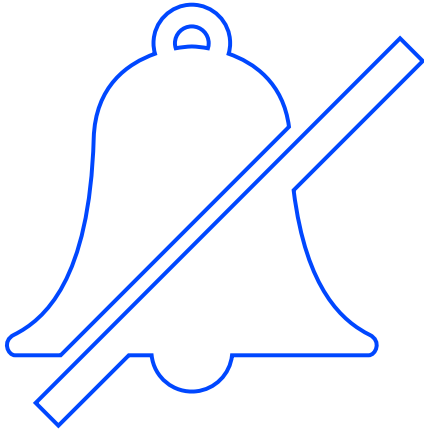
Other

- Quantity consumed (not determinative)
- Vomiting
- Passing out / blacking out
- Sleep
- Disability/age

Respondent's reasonable knowledge of capacity

- What was respondent able to observe with respect to the above
- What should respondent have known based on the above

What do we do with awkward silences?



- Give the witness time to answer
- Before answering, witnesses should pause to allow for relevance rulings

Questions



Decision-Making & Writing

How do(es) the decision-maker(s) decide a case?



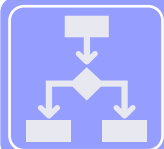
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



Evaluate evidence for weight and credibility



Resolve disputed issues of fact under the standard of evidence adopted by the institution



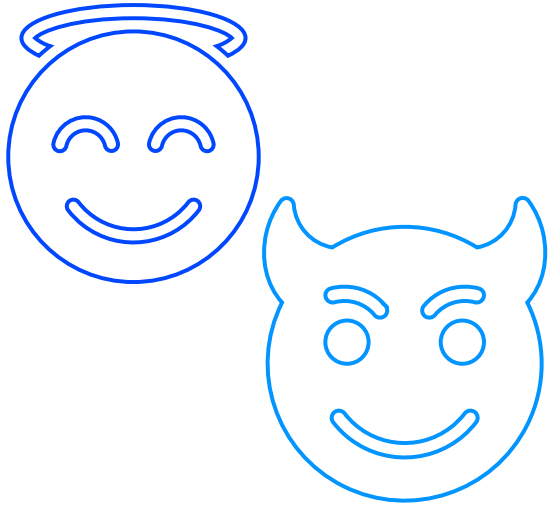
Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred

Preponderance... as to what?

Carefully consider elements of alleged violation

What needs to be shown to establish a violation?

Assessing Credibility



Plausibility—Believable?

Corroboration—Other evidence?

Consistency

Demeanor

Motive to falsify

Contemporaneous

First-hand knowledge

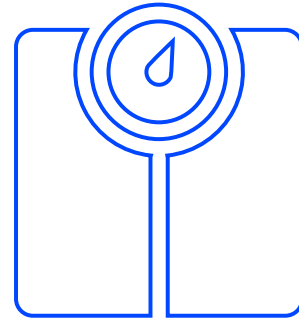
Influence of others

Bias (overt/unconscious)

Behavior after the report

What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative (tending to prove a proposition) than other evidence
- Weight may vary depending on a range of factors



Weight: Considerations

Believability/probability/plausibility

Apparently honest and sincere

Consistent

Unrefuted

Corroboration

Lacking motive/disinterested

Expertise

Level of detail

Unbiased

Direct vs. circumstantial

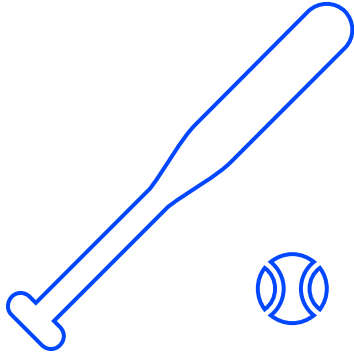
Personal observation vs. general knowledge or hearsay

Direct vs. circumstantial: Direct

Direct — Actual evidence of a fact, circumstance, or occurrence; proves a fact in question without presumption or inference

- E.g., testimony of a witness who actually observed and perceived event in question (see, hear, touch)

Direct vs. circumstantial: Circumstantial



- Circumstantial (indirect) — Information which, based on logic or reason, is so closely associated with the fact to be provided that proof may be inferred
- E.g., witness testimony saw student alleged to have hit someone with bat, with bloody bat an hour after the assault

“Hearsay”

- Hearsay — Statement (written or oral) made by a non-available witness offered to prove fact in question
 - Longstanding evidentiary principle of when courts can rely on hearsay
 - Court rules do not apply
 - Some hearsay is more reliable, e.g.,
 - Statement contemporaneous with the event in question
 - Excitable statement uttered in the moment being perceived
 - See other indicia of credibility

Example: Weight

Witness testified he saw complainant and respondent leave the bar at 11:05 pm as witness was arriving. Witness states he clearly saw their faces and remarked to a friend about a particular t-shirt the complainant was wearing and how respondent had a nose ring. Witness testified he knows the time was exactly 11:05 pm because witness remembers receiving a phone call right as witness entered the bar, and witness's call log indicates the call was received at 11:05 pm.



Example: Weight

Witness says he saw a couple leaving the bar “sometime after ten but before midnight” but witness is not “sure exactly” when. Witness testified they “sort of looked” like complainant and respondent and witness is “pretty sure” it was them. But witness also says witness had spent two hours at a different bar before that and was “pretty drunk at the time I saw them.”



Incapacitation & weight/credibility

- Incapacitation alone $\neq$ unreliable or lack of credibility as to facts



How do we assess “I don’t remember”?

- True loss of memory may occur due to, e.g.:
 - Trauma
 - Drug/alcohol consumption
 - Lack of attention
- Balance
 - Memory loss alone does not equate to a lack of credibility
 - Recollection/testimony need not be linear
 - Possible to remember some information and not other information
 - Memory loss = an absence of information

Expert witnesses

- New Title IX regulations permit the use of expert witnesses, as long as the institution permits them equally for both parties
- Role: Clarify, explain, and provide opinions on complex matters that an average person would not typically understand
- Not to opine on ultimate fact or policy issues

Example: Experts

Blood alcohol level for a typical person the size/weight of complainant after drinking four shots in four hours

Vs. whether complainant was incapacitated

Whether respondent could have traveled from class to complainant's apartment in order to be present at the time of a stalking incident alleged by complainant

Vs. whether respondent was stalking



Report Writing

Documenting the decision

Each decision should be explained in writing in as careful detail as a finding of responsibility. Why?

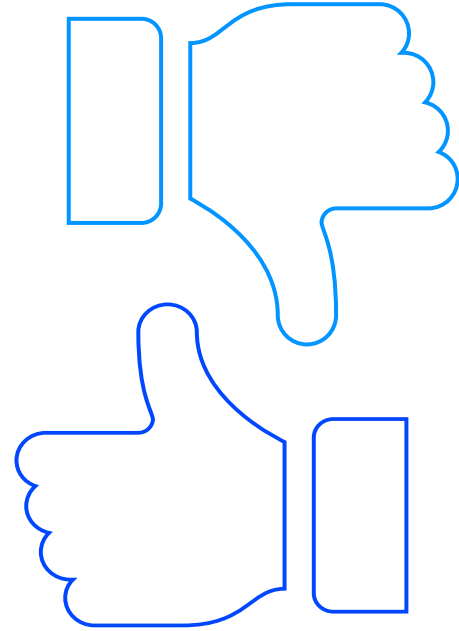
- The act of documenting helps a decision-maker consider all relevant issues
- Demonstrates that the decision was informed and not based on actual or perceived bias
- Demonstrates that the decision was not without thought, arbitrary, or capricious
- Demonstrates alignment with institution's disciplinary philosophy
- Provides appeals official and any reviewing court with a reason to grant the sanctioning official discretion in his/her decision

The decision need not be lengthy

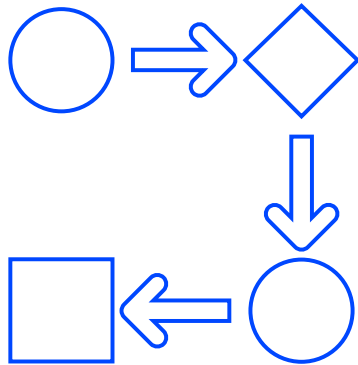
The decision clearly explains reasoning for accepting or rejecting investigator recommendation

What is a determination?

- The decision as to whether or not prohibited misconduct occurred
- Results in a finding of “violation” or a finding of “no violation” as determined under standard of proof



Purpose of a determination



- Moves matter to next procedural step
- Record of following process
- Documents fair process
- Provides parties and subsequent decision-makers with information

Critical elements

Preliminary case information and Case History

Allegations

Applicable policies/procedures

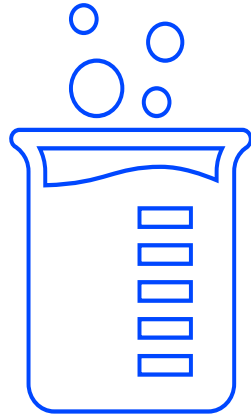
Standard of proof

Evidence gathered/considered

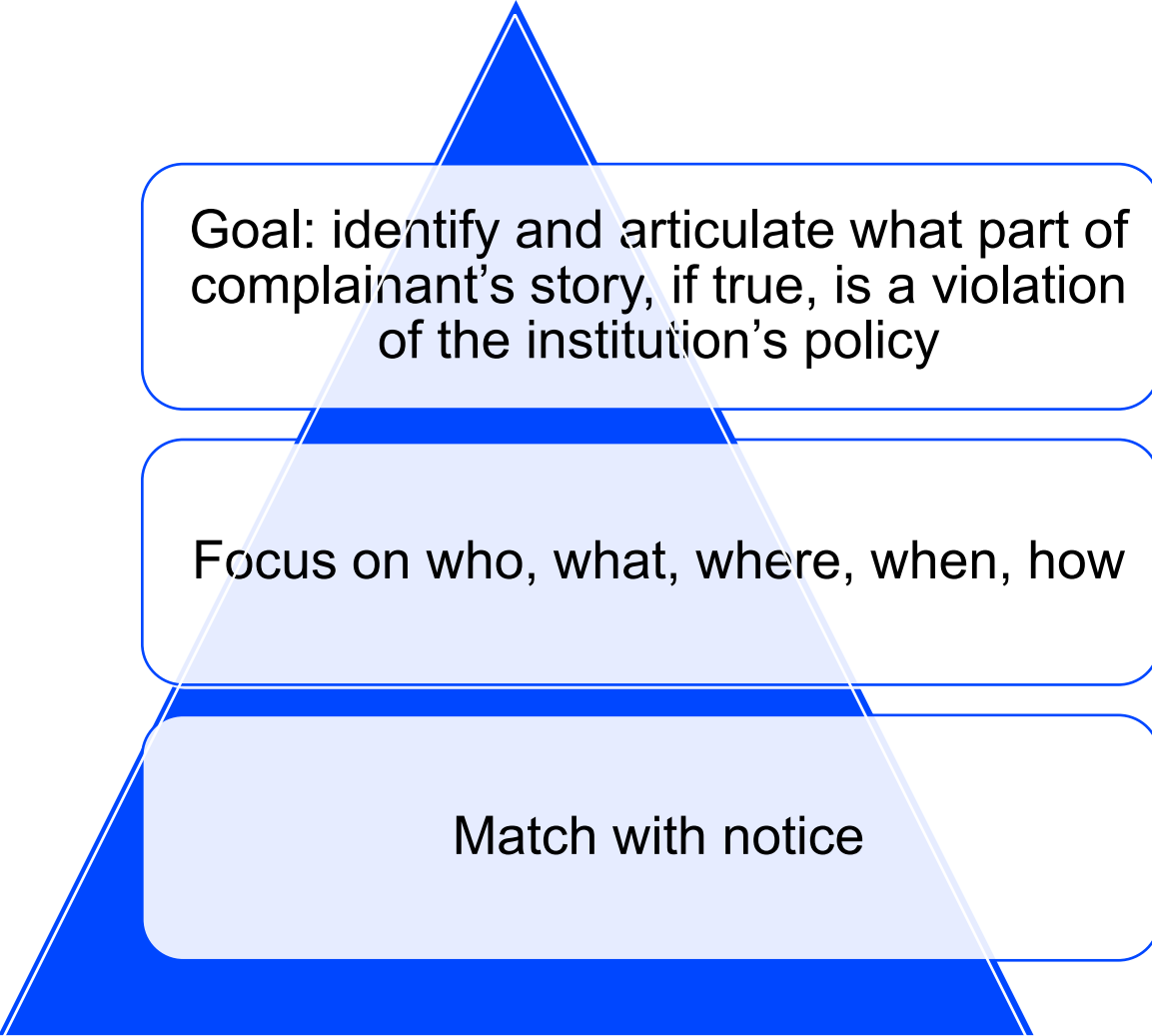
Evidence/Facts: Factual findings

Decision-maker:

- Analysis and conclusion regarding responsibility
- Sanctions
- Procedures/grounds for appeal



Summarizing allegations



Goal: identify and articulate what part of complainant's story, if true, is a violation of the institution's policy

Focus on who, what, where, when, how

Match with notice

Applicable policies & procedures

Reference Title IX sexual harassment policy and procedures, including specific language which is pertinent to the allegation

- E.g., include relevant definitions

Attach full copy of Title IX sexual misconduct policy and procedures to report

History of the case



How did the institution respond to the report?

- E.g., rights and options provided, notices provided



When, how, and where were parties and witnesses interviewed?



Provide status

- E.g., parties given access to evidence, opportunity to comment, report, applicable timeline dates



Explain any apparently unreasonable delays



Facts

Facts that matter

- Consider elements of alleged policy violation
- Which facts are relevant to each element?
- Which are disputed and undisputed?

Goals

- Investigators: identifying disputed / undisputed material facts
- Decision-makers: reaching resolution of disputed material facts

How to do this?

- Show your work
- Decision-makers: Explain your credibility assessments

Assessment of credibility

- Describe your reasoning: Line up *facts* relevant to credibility
- Factors (among others)
 - Plausibility—Is the testimony believable and does it make sense?
 - Specificity
 - Motive to falsify—Does the person have a reason to lie (other than mere status as party)?
 - Corroboration/consistency/contrary evidence—Is there testimony or evidence that corroborates the witness account? Are the witness accounts consistent? Are inconsistencies explained? Is there evidence disputing the witness account?
 - Past Record—Does the person have a history of similar behavior?

Example: Writing about credibility points – Investigative reports

“Respondent was not reliable when recounting what happened.”

VS.

“Though Respondent initially said that Respondent could not remember what happened in Complainant’s room, Respondent later reported recalling X.

Respondent told the Dean that Complainant actively pursued a relationship with Respondent after the night in question through text messages.

Complainant provided a text message string with Respondent in which Respondent asked Complainant to meet Respondent at the library, join Respondent at a restaurant, and come to Respondent’s room on three different occasions; in each instance, Complainant’s text messages to Respondent decline the invitations. (See Exhibit A.) Complainant denied deleting any portion of the text messages from the string, and the Investigator observed them on Complainant’s phone, showing Respondent’s phone number.”



Example: Writing about credibility points – Determinations

“The Hearing Officer finds that Witness is not credible.”

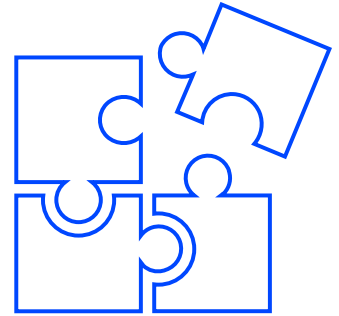
vs.

“Witness reported arriving at the office at 7 a.m. every morning and never observing Respondent speaking to Complainant before the 9 a.m. office meeting. However, key card records show that Witness did not arrive at the office until 9 a.m. on 23 occasions between March and June, and that, on 18 of those occasions, Complainant and Respondent had both entered the office. Complainant reported that Respondent often harassed Complainant early in the morning, when no one else was present. As such, there were multiple occasions on which Witness was not present to observe whether the parties were not interacting.”



Analysis & Conclusion

- Put everything together
- As to each allegation: Analyze whether a violation of *policy* occurred (not the law)
- Explain your reasoning
- Include the good/bad/ugly
 - E.g., explain decisions about conflicting information (E.g., “As discussed above, there is some evidence suggesting that [X], but the preponderance of the evidence supports a finding [of the opposite of X]”)
- Address sanctions/remediation



Example: Be specific

“Complainant alleges that Respondent had sex with Complainant without consent.”

VS.

“Complainant alleges that Respondent laid on top of Complainant, pulled Complainant’s underwear down with one hand, while pinning Complainant’s arms with Respondent’s other arm, penetrated Complainant’s vagina with a vibrator, while pushing Complainant against the wall next to the bed so Complainant could not move.”



Example: Be specific

“Evidence includes a recording of Pat and Dre in which Pat was drunk.”

vs.

“Pat provided a recording of a discussion between Pat and Dre that Pat reported recording at the Bar. In the recording, Pat states loudly, ‘I’m so wasted;’ in the remainder of the two-minute recording, though individual words can be heard, Pat’s speech is unintelligible. Pat stated this was slurring due to intoxication. Dre agreed the recording was of Pat and Dre.”



Example: Be specific

“Complainant is credible.”

vs.

“At the hearing, Respondent emphasized that Complainant sent a text saying, ‘Yeah, tonight was good,’ within an hour of the alleged sexual assault. On its face, the text could be construed as inconsistent with Complainant’s report that the sexual activity that occurred the hour before the text was not consensual.

However, Complainant said that, after Respondent drove Complainant home, Complainant was in shock and sent the text in response to Respondent so Respondent would not come searching for Complainant. Complainant explained engaging in the sexual activity despite it being unwelcome by saying Complainant feared for Complainant’s safety. Complainant reported that Respondent had slapped Complainant, creating a red mark, after Complainant refused to kiss Respondent; Complainant said this occurred about 30 minutes before the sexual activity Other than the text message, Complainant’s account is consistent with Complainant’s prior statements and the witness account about overhearing the early stages of the fight over the phone. It is also plausible that one who had just experienced sexual assault would send a text to appease one’s assailant.

In contrast, Respondent’s statements have changed repeatedly since the Complaint...

As such, the Hearing Officer finds Complainant’s account more credible than Respondent’s as to what occurred before the sexual activity.”



Words matter: Language considerations

- Use objective terms
 - “Complainant” and “respondent” rather than “victim” and “perpetrator”
 - “Violation of policy” not “guilty” or violation of “law”
 - Generally, credibility of *facts*, not *witnesses* as a whole, but-for specific circumstances
- Do not include speculation
 - Address unknown information as needed
 - Consider whether further investigation is needed
- Do not include irrelevant points and discussion
- Be thoughtful about pronouns
- Avoid vague phrasing like “had sex”

Common “mistakes” in report-writing

- Chronology of events is hard to follow
- Failing to spell out the allegations and relevant policies
- General lack of clarity/coherence
- Including too much information about irrelevant details
- Insufficient information on important issues
- Decision-making
 - Speculation
 - Conclusory determinations and credibility findings
 - Not clearly or adequately explaining basis for decision
 - Not clearly articulating whether/not the preponderance of the evidence establishes that it is more likely than not that the alleged misconduct occurred

Questions



Discipline & Remediation

What principles do we use to determine discipline?

- Discipline should vary depending on the nature of the violation found considering aggravating and mitigating factors
- All things being equal, like violations should have like punishments
- Discipline has educational, punitive, and protective elements

Disciplinary philosophy

- Varies by institution: Violations addressed in accordance with applicable policies and procedures, which may include disciplinary actions up to and including expulsion or termination
- When determining appropriate sanctions, institution may consider prior findings of misconduct
- Violations of law may be addressed by law enforcement and may result in criminal penalties

Sanctioning goals

Punitive

Safety

Reduce recidivism / recurrence

Advance educational and developmental growth of offender
(learning from one's mistake)

Appropriate fit for circumstances

What are common and mitigating factors?

Egregiousness of misconduct (e.g., act of violence, use of weapon or drug)

State of respondent's mind (bias-motivated, reckless/negligent, prior education)

Safety risk to the broader community

Impact statement

Conduct during investigation/adjudication (cooperative/less than cooperative)

Circumstances relating to lack of consent (force, threat, coercion, intentional incapacitation)

Position of trust/power differential

Documenting Sanctions: Rules of thumb



Should generally address the following factors, where applicable:

- Impact statement of complainant and respondent, if any
- Acknowledgment of wrongdoing or impact of conduct by respondent
- Alignment of sanction to institution's disciplinary philosophy
- Duration, exceptions, and how unforeseeable questions or circumstances will be resolved
- Potential ongoing safety risk to community (or not)
- Any continuation of no-contact directive, and duration and parameters of that directive

What common issues arise in sanctioning?

Ambiguity in sanction

Lack of clear explanation (and written record) of why sanctions should differ in similar circumstances

Failure to address expectations for returning students and/or employees following disciplinary action (e.g., participation in athletics/extra-curriculars)

Identity of decider if questions arise

Example: Sanction detail

Following an investigation, Student is suspended for stalking following a break-up with Partner, also a student. Sanctioning panel issues a no-contact directive to both students. Student returns to campus following a suspension to learn that the (now-ex) Partner is enrolled in the same lab course, which is offered only once a semester.



Example: Sanction detail

Student suspended for engaging in dating violence “will not be permitted to participate in band upon return to campus for two academic years.” The Title IX Coordinator will have discretion to identify the appropriate person(s) to resolve any ambiguities related to this sanction that may arise in the future.



Questions



The logo consists of a white stylized symbol on the left, resembling a cross with rounded ends, followed by the text "HUSCH BLACKWELL" in a bold, white, sans-serif typeface.

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