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Title IX Training for Hearing Panel Members

December 2023

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Housekeeping

- Not recording & recording is not permitted
- Slides will be provided by email after the training concludes
- Check Zoom name
- Let's discuss! Raise hand, use chat, or just jump in
 - In hypotheticals
- Breaks—Midpoint and take individually as needed
- Context



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Agenda

- Background on Title IX and Hearings
- Hearing Procedures
- Questioning for Hearing Panel Members
- Decision-making and Writing Considerations
- Sanctioning



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Background on Title IX & Hearings

Module 1

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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



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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



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What is “sexual harassment” as addressed in ED’s 2020 Title IX regulations?

Conduct on the basis of sex that is:

Quid pro quo harassment

Hostile environment harassment

Sexual assault

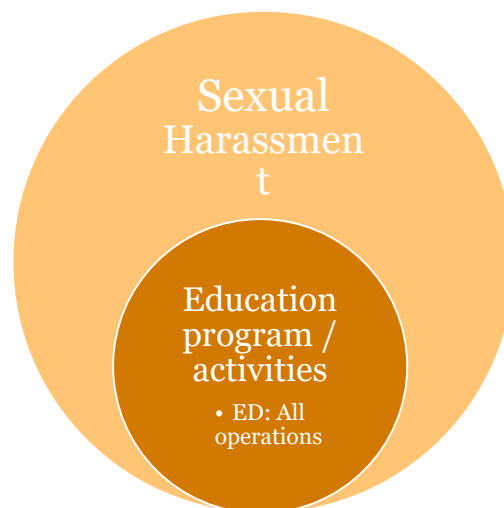
Relationship violence

Stalking

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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



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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

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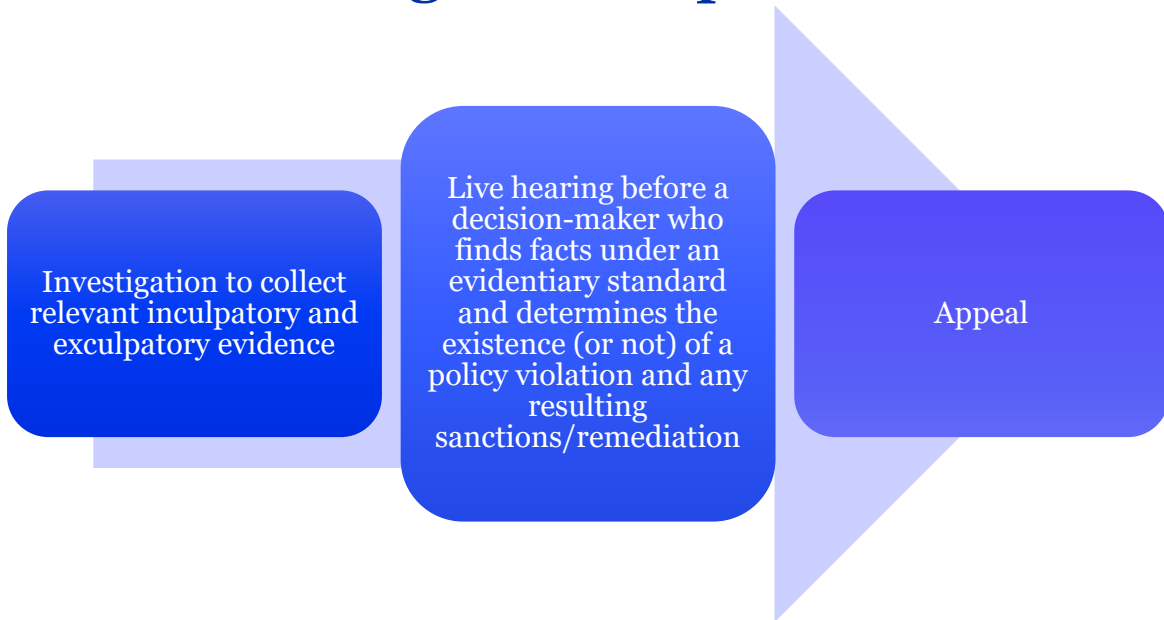
Does Title IX apply to off-campus sexual harassment?

 <p>Yes, <u>if</u> the conduct at issue occurs in the context of an education program or activity</p>	 <p>Yes, <u>if</u> the conduct at issue occurs in a house owned or controlled by an officially-recognized Greek organization or other student organization</p>	 <p>No, if it occurs in a private location and is not part of an institution's education program or activity</p>	 <p>No, if it occurs outside the United States</p>
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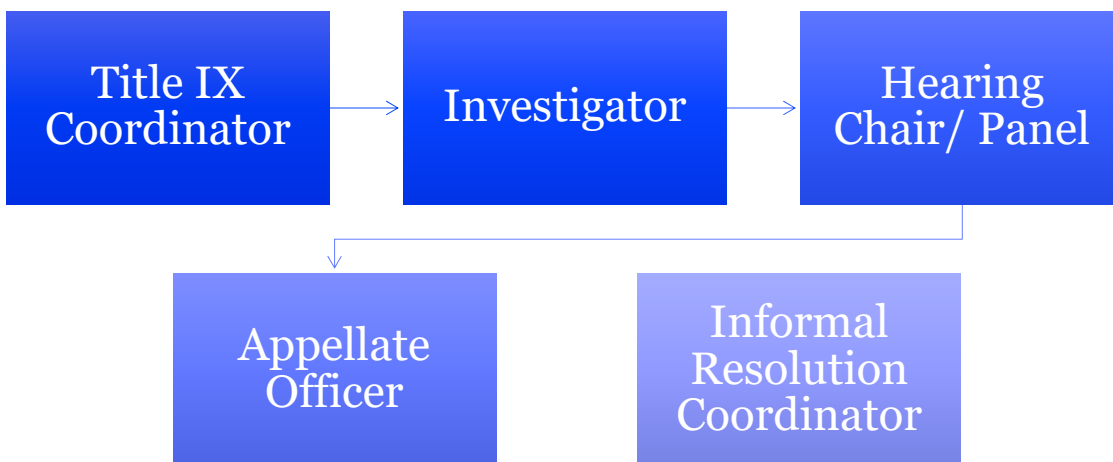
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What is the grievance process?



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Who are the key institutional actors in the grievance process?



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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



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Standard of evidence

Preponderance of the evidence

=

“more likely than not”

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General Grievance Process Principles

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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

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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

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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

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Example: Conflict of interest

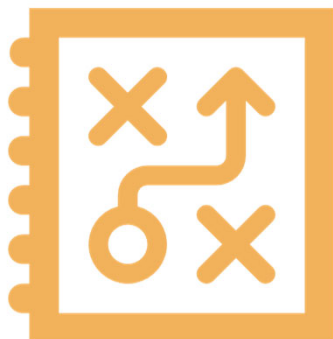
Student Math files a formal complaint of sexual harassment against Student Chemistry. One of the hearing panel members selected is Student Chemistry's faculty advisor who has previously written letters of recommendation for Student Chemistry's application to graduate school in which faculty advisor wrote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



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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.

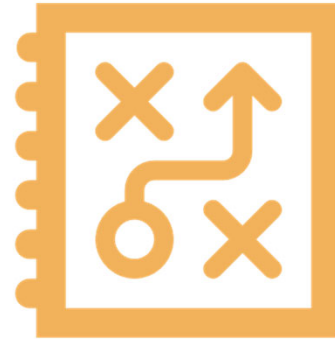


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For discussion

Do the following circumstances or relationships constitute conflicts of interest?

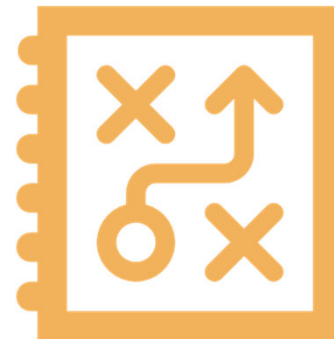
- Respondent faculty member and the hearing officer previously disagreed about a curriculum matter
- Complainant is currently a student in a hearing panel member's class
- Respondent is a staff member in the civil rights office



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Example: Bias

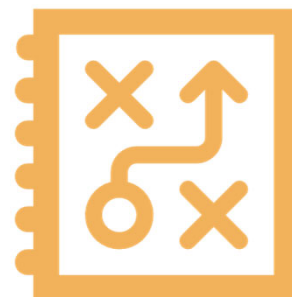
An employee in the gender studies department who is chosen to serve on a hearing panel also chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption of innocence is wrong in cases of sexual assault.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



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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.”



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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.”

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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)

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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

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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

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Trauma & credibility

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

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What is a formal complaint?

Signed in writing

From the alleged victim or the Title IX Coordinator

Alleging sexual harassment

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

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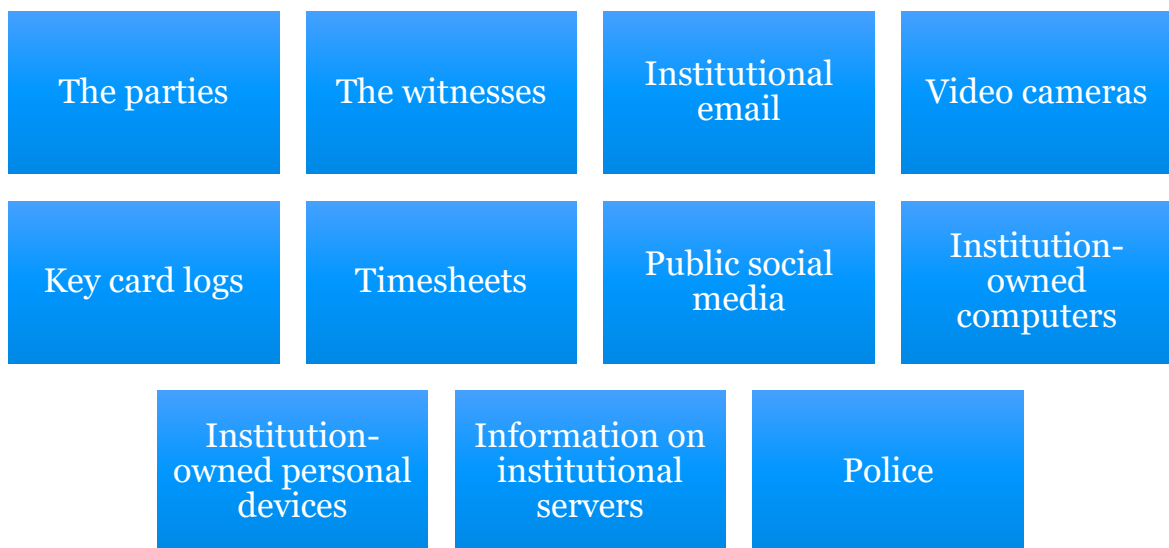
What is the purpose of a Title IX investigation?

- 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

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Example: Sources of Non-Testimonial Evidence



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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 (regardless of whether the institution intends to rely on it) at least 10 days before the investigation report is issued
- 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

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Do the parties get to respond to the evidence?

- Yes – after they review the evidence provided at least 10 days prior to issuance of the investigation report, parties can provide written responses
- Depending on written responses, additional investigation may be needed
- Investigator should consider the written responses in drafting final language of investigation report

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When is the investigation report finalized?

- After the 10-day period to review the evidence expires
- The investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the 2020 Title IX regulation, factual findings and determinations of policy violations are made at a subsequent hearing



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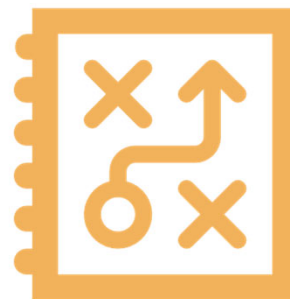
What exactly has to be shared?

- 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

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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.

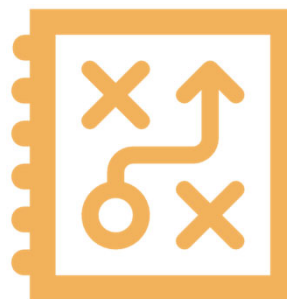


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Example

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.

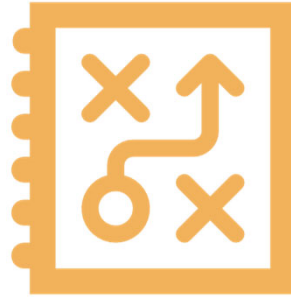


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Example: Permissible

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.

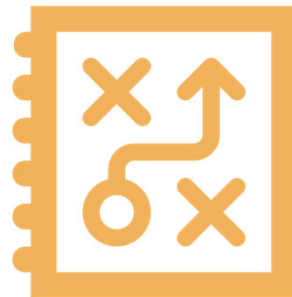


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Example: Impermissible

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.



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How should we make the evidence available to parties?

- Regulation requires the evidence be sent to each party and advisor in
 - Electronic format or
 - Hard copy



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Is an investigator required to address a party's response to the evidence?

- It depends on whether the party's comments merit a response
- If no response is merited, the party's submission can simply be appended to the final investigation report

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What is the last step in the investigation?

- Issuance of a written investigation report
- Must fairly summarize the evidence collected, including both inculpatory and exculpatory evidence
- Must be provided to each party and their advisor at least 10 days prior to any hearing



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Questions?



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Hearing Procedures

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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

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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 mandated both parties have the right to a third-party advisor

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Live hearing requirement

- Postsecondary institutions must provide for a live hearing
- At that hearing, the decision-maker must allow the advisors to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility
- Cross-examination may occur with the parties located in separate rooms at the request of either party

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What happens before the hearing?



Parties are provided the final investigation report at least 10 days prior to the hearing



“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

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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

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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

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How do we schedule a hearing?



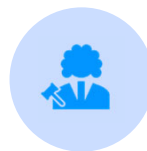
Set aside sufficient time considering the nature and complexity of the case



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

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When should a pre-hearing conference be held?

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



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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



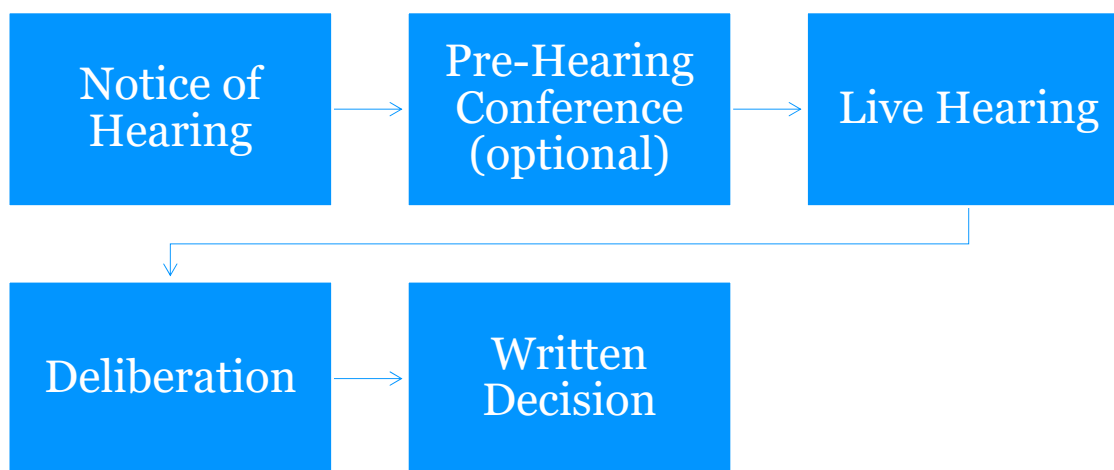
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What does the hearing notice say?

- Identity of the hearing officers
- Deadline for the parties to submit response to investigation report
- Date for the pre-hearing conference
- Date and time for the hearing (no earlier than 10 days after investigation report is issued)

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What are the phases of the hearing process?



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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



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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 ...”***



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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



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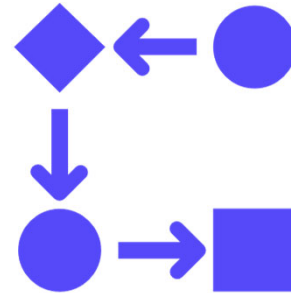
What is a “live” hearing?

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

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What are the logistics of a hearing?

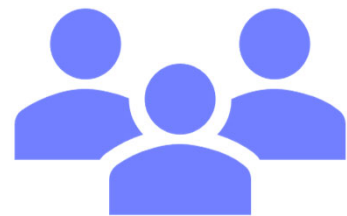
- Hearing must be recorded (audio or video) or transcribed
- Hearing can be held in a single room or with the parties separated in different rooms
- Hearing can be held virtually using suitable software



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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



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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*



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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

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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”

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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

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Is an advisor allowed to question their own party?



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

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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

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What if the advisor breaks the rules?

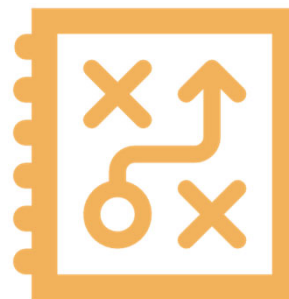


- An advisor who violates the rules may be excluded from further participation
- The institution should pause the relevant interaction to allow the party to select a new advisor

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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



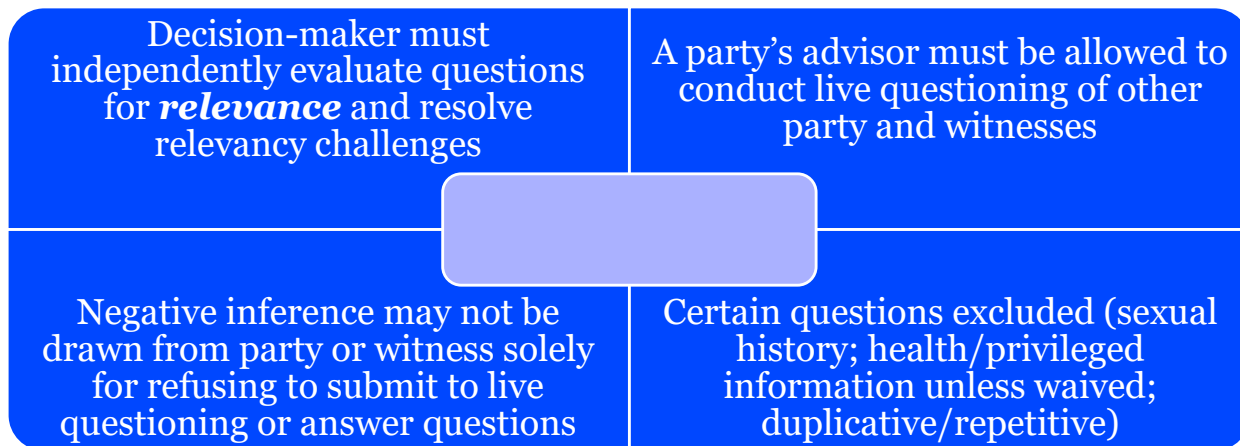
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How does the hearing actually work?

Required elements include:



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Typical Hearing Elements

Procedural / housekeeping remarks

Overview / summary of investigation report

Party statements

Questioning / cross-examination of parties & witnesses

Deliberation

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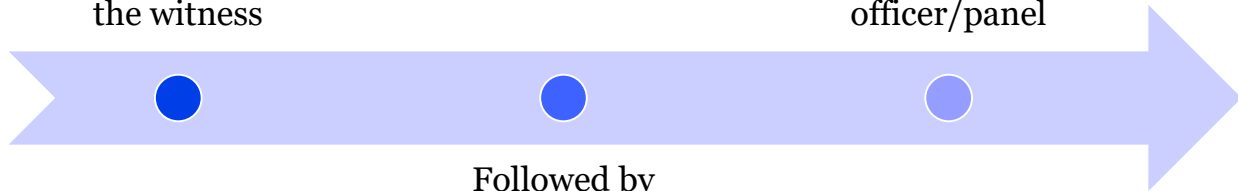
Slide 71

MSO Should it be "Parties' advisors" or "Party's advisor" ??
McGuire, Susie, 2023-12-11T16:30:31.204

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

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Hearing Curve Balls

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Starting the hearing: Setting the tone

- Affirm 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



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Separating the parties

- Video/audio conferencing
- Separate rooms
- Screens

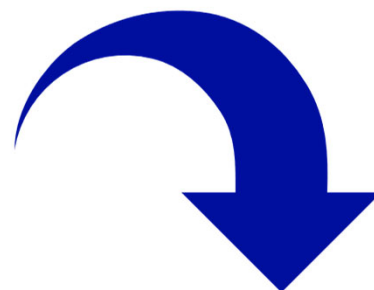


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How should we field curveballs?

When curveballs arise during a hearing,
ADDRESS THEM

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



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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

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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



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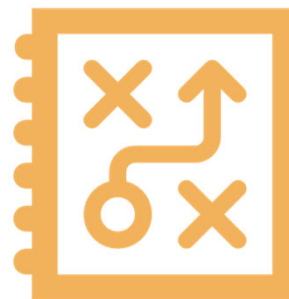
More Curveballs: Advisors

- 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

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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.

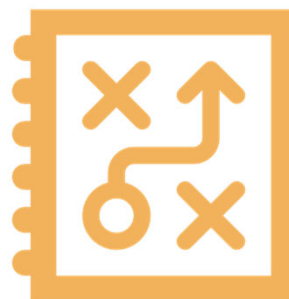


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Example: Impermissible

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."

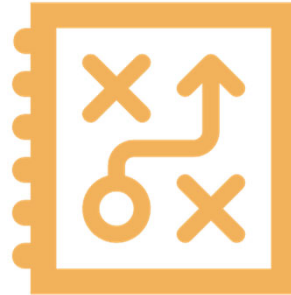


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Example: Impermissible

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.



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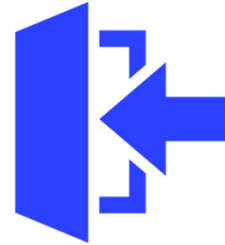
Evidentiary Considerations

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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



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What is relevance?

- Evidence is relevant if:
 - It has a tendency to make *a fact* more or less probable than it would be without the evidence; and
 - The *fact is of consequence* in determining the action
- Relevance must be determined considering the form of sexual harassment alleged

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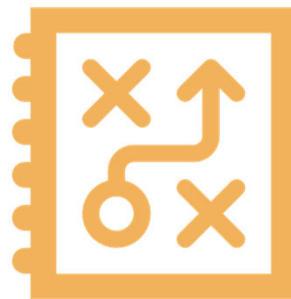
Relevance: Practical considerations

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

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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.’”

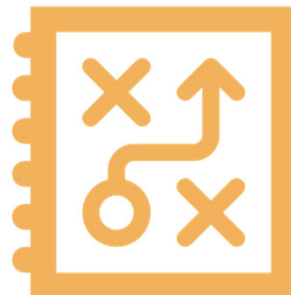


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Example: Relevant

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



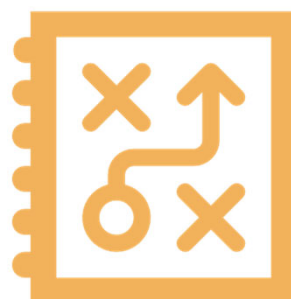
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Example (not relevant) (#2)

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."



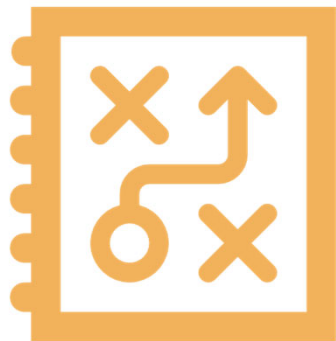
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Slide 90

MSO Where is "Example (not relevant) (#1) ??
McGuire, Susie, 2023-12-11T16:37:51.143

Example: Relevant



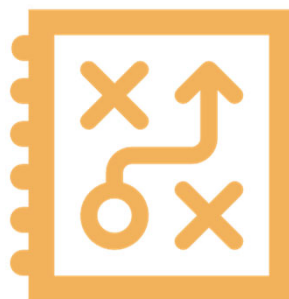
Assistant Provost has complained that Cabinet member created a sexually harassing hostile environment. Advisor for Assistant Provost asks Cabinet member, “Did you tell the Cabinet, in front of the Assistant Provost, that Assistant Provost was better suited to be a sexy stay-at-home parent than to be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

91

MSO

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?”



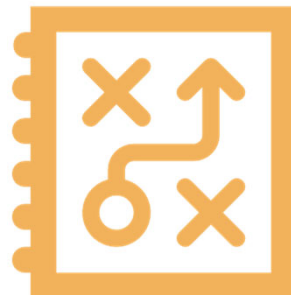
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92

MSO Why a question mark?
McGuire, Susie, 2023-12-11T16:39:16.265

For Discussion: Example

Faculty Member accused Senior of posting negative reviews on RateMyProfessors.com after Faculty Member declined Senior's attempts to instigate a romantic relationship. Advisor for Senior asks Faculty Member, "Haven't you had several negative reviews on RateMyProfessors.com?"



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93

For Discussion: Example



Student A alleges Student B committed sexual assault when groping Student A's buttocks. Student A's advisor asks Student B, "Haven't you been found responsible for groping two other students?"

94

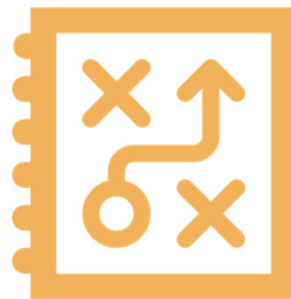
Is sexual history considered?

- Generally, no – Evidence of a complainant’s prior sexual behavior is relevant and appropriately considered 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

95

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.”

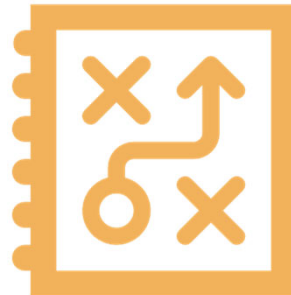


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SH Example (permissible)

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."



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97

Medical, psychological, similar & other protected records

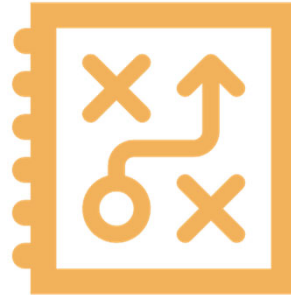
- Questions seeking medical/psychological/similar information about a party are not permitted unless the party has given written consent
- Questions about other records protected by legally recognized privilege also not permitted unless the privilege is waived
- State/federal health care privacy laws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

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Example

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



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Victim Rights Law Center et al. v. Cardona (D. Mass. July 28, 2021)

- Struck down part of the 2020 amendments to Title IX regulations
- Vacated regulatory language prohibiting decision-makers at postsecondary institutions from relying on statements by individuals who did not submit to cross-examination during a live hearing
- Department of Education guidance indicates that it will not enforce the vacated language.
- Decision-maker may not make an inference solely from the decision of a party or witness to not participate at the hearing



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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.

101

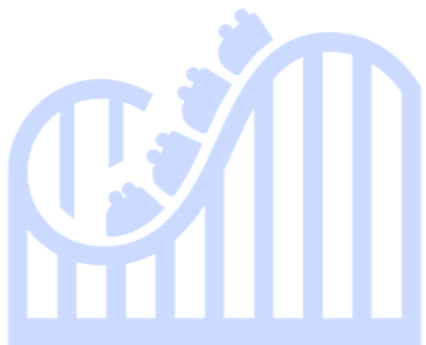
Can a postsecondary institution keep its exclusionary rule?

- No
- To the extent statements made by a party or witness who does not submit to cross-examination at a live hearing are relevant, they must be considered in any Title IX grievance process initiated after July 28, 2021

102

MSO

Updated OCR FAQ Guidance



Question: Despite the court’s decision, may a postsecondary school choose to maintain the prohibition on considering statements made by a party or witness who does not submit to cross-examination at a live hearing as part of its Title IX grievance process?

Answer: No. The 2020 amendments at 34 C.F.R. § 106.45(b)(1)(ii) require “an objective evaluation of all relevant evidence.” To the extent that statements made by a party or witness who does not submit to cross-examination at a live hearing satisfy the regulation’s relevance rules, they must be considered in any postsecondary school’s Title IX grievance process that is initiated after July 28, 2021.

103

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

- Yes
- If a party or witness submits to cross-examination but does not answer questions posed by the decision-maker, the decision-maker still may not draw any inference about the party’s credibility based on the party’s refusal to answer the questions

104

Slide 103

MSO Why a roller coaster image?
McGuire, Susie, 2023-12-11T16:50:36.620

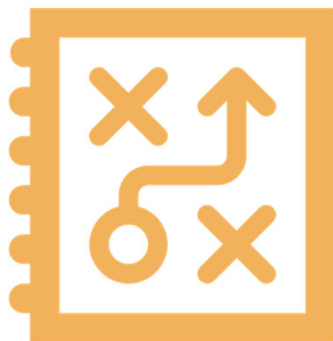
Example: Not-excluded

Respondent told investigator that Respondent could not have committed an alleged assault because Respondent was in a different city that day. Respondent does not appear at the hearing.



105

Example: Not-excluded



Complainant's advisor decides not to ask any questions of Respondent, who is present at the hearing and willing to submit to cross-examination, deciding to rest on Respondent's prior statements.

106

MSO

What if evidence is presented at a hearing but not in the investigation?

- ED, Q&A (updated June 2022):
 - Updates say: “34 C.F.R. § 106.45(b)(1)(ii) require ‘an objective evaluation of all relevant evidence.’”
 - But the following Q&A language remains: A school “may decide whether or how to place limits on evidence introduced at a hearing that was not gathered and presented prior to the hearing.”
 - Sample policy language still includes: granting lesser weight to last-minute information, discretion to exclude additional evidence not identified earlier



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Effective Questioning for Hearing Panel Members

Module 3

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Slide 107

MSO Again, why a roller coaster?
McGuire, Susie, 2023-12-11T16:54:41

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

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Practical Considerations

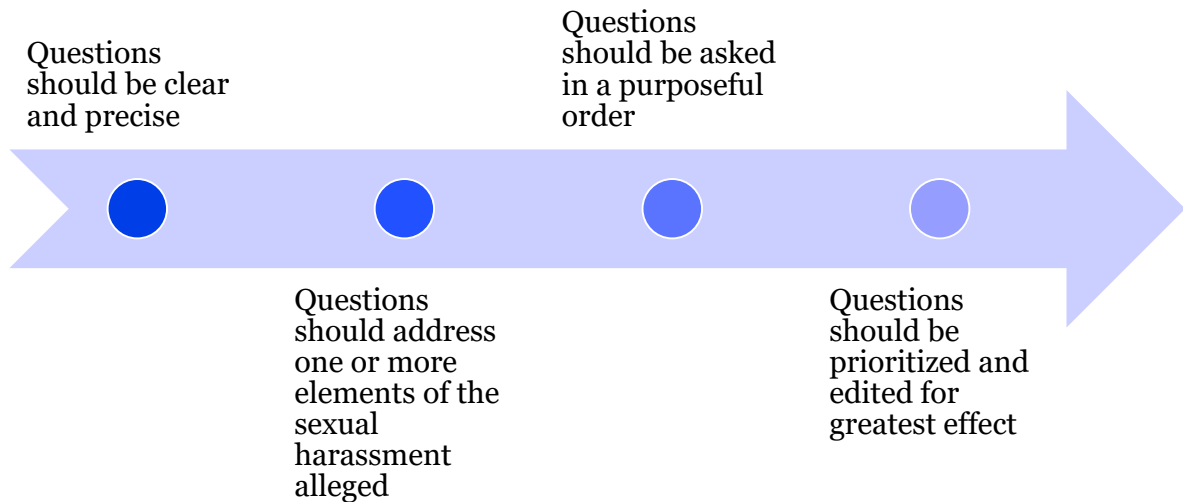


- Prioritize
- Create list of must-ask questions in advance
- Focus on elements of alleged violation and disputed facts
- Consider appropriate ways to guide off-track witnesses

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What are some hallmarks of effective questioning?



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General questioning guidelines

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



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General questioning guidelines (more)

- **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.

113

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 ^{MSO} that blame or presume violation by respondent
 - Use medical terms for clarification

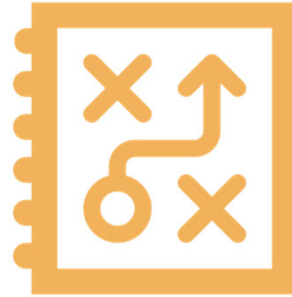
114

Slide 114

MSO "s" added for consistency
McGuire, Susie, 2023-12-11T17:03:49.528

Example – Discussion

Complainant has accused respondent of sexual misconduct. Respondent admits to the alleged conduct but asserts it “wasn’t that bad.” Complainant alleges being so affected by the conduct that complainant stopped attending class at the institution.



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Example questions (effective denial of access)

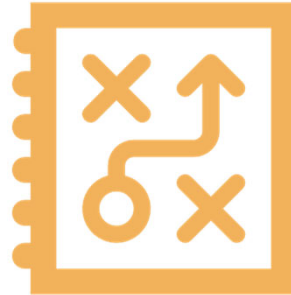
- For witnesses
 - What did complainant say about their class?
 - What did you observe about complainant’s attitude towards going to class?
 - Before the respondent’s conduct, did complainant go to class?
 - Did you notice any changes in complainant’s behavior after the respondent’s conduct?
 - After the respondent’s conduct, did complainant still go to class?
 - Are there any records that would show when complainant went to class before and after the conduct?

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Example -- Discussion

Respondent is accused of lurking around complainant's car following a breakup. Respondent denies the act. Complainant first reported clearly seeing the respondent's face at the car, but later said the person was not as clearly in sight.



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H-B

Example questions (complainant)

- *Single act*
 - Tell me more about what you saw at the car? Did you actually see the respondent's face? What else do you remember about the person's appearance or attire?
 - Could it have been someone else?
 - Do you actually *know* it was respondent at the car?
 - How do you explain your confidence in the sighting at first, but later saying you thought it was Respondent?
- *Directed at a specific person*
 - Why do you believe this conduct is directed at you?
 - Do you know why was respondent at the car? Was there anything suggesting respondent went there to see you? Could there have been **MSO** reasons for respondent's presence?
 - What did respondent do at the car? What did you do? Did either of you say anything?
- *Fear/distress*
 - What day/time did this happen?
 - Where did it happen?
 - How far was respondent from you?
 - Was there anyone else around?
 - What has the impact of this been on you? Did you tell anyone about it?

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Slide 118

MSO "...why respondent was at the car..." ??
McGuire, Susie, 2023-12-11T17:05:51.326

Incapacity – Sample Question Topics

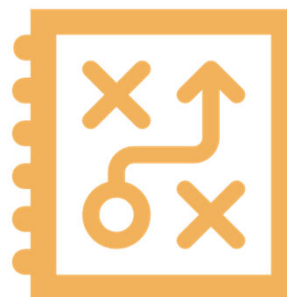
Physical coordination	Ability to understand	Other	Respondent's reasonable knowledge of capacity
<ul style="list-style-type: none"> • Walking, dancing, running, maneuvering (e.g., stairs) • Speech • Dexterity (phone/computer usage, using keys/key cards) • Dressing/undressing 	<ul style="list-style-type: none"> • 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 	<ul style="list-style-type: none"> • Quantity consumed (not determinative) • Vomiting • Passing out/blacking out • Sleep • Disability/age 	<ul style="list-style-type: none"> • What was respondent able to observe with respect to the above • What should respondent have known based on the above

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Example – Capacity

Respondent is accused of having sex with the complainant when complainant was incapacitated due to alcohol off campus at a private residence. Investigator asks questions that may demonstrate whether complainant was able to function and fully understand the nature of sexual activity.



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Example questions

How did you get upstairs to the respondent's apartment?

Before the sex started, did you discuss using a condom? Did you get a condom? Where was it in relation to you and the Respondent at that time?

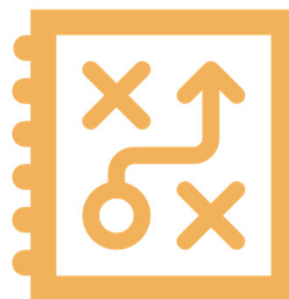
Did you send any text messages immediately before or after the sex concluded?

Did you speak with anyone on your phone immediately before or after the sex concluded?

121

Example – Discussion

Respondent is accused of retaliating against complainant for filing a Title IX complaint by excluding complainant from work-related social events. Complainant alleges this has limited complainant's opportunities for advancement and growth in the office because most office networking is done outside the office.



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Example questions (advancement)

- Events: About which events is complainant concerned? (Types, specific examples) How are events planned and invitations extended? Who has attended these events in the past and who attends now?
- Advancement Opportunities: What are some examples of advancement that arises out of these events? What advancement opportunities are there outside of events? Does everyone who advances attend events?
- Respondent: What is respondent's role with respect to events? Who plans the events? How did respondent exclude complainant? What was the result? Does respondent exclude anyone else?
- What is complainant's history of attending events? What events did complainant attend in the past? Did anything of note occur? What events did complainant not attend after the complaint? Why not? What happened at those events?

123

What do we do with awkward silences?



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

124

Group Scenario



Student accuses GTA of using a power differential to coerce the student into performing oral sex in exchange for a better grade. Student states that the oral sex occurred in the library at 9:30 pm on a Saturday in March. GTA claims oral sex occurred between student and GTA in late May at a party off campus, after grades had been assigned. GTA says it was a consensual “hook up.” GTA claims student has falsely accused GTA of misconduct because GTA refused to “date” the student after the hookup.

Video shows the student and GTA leaving the lab together at 9:15 pm on Saturday, March 7. GTA has a text message the student sent the GTA on May 26 stating: “I’m so happy we can finally be together. I want to spend my life with you!” Two student witnesses claim that the GTA repeatedly looked at student during class in a way that was “creepy.” Academic records show the student had a B- average on work performed before March 7 and an A+ average for work performed after March 7.

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Group Scenario Questions

- What type of sexual harassment is being alleged? Generally, what are the elements of the type of sexual harassment is being alleged (i.e., is this quid pro quo, hostile environment, sexual assault, dating/domestic violence, and/or stalking and what must be established to show a violation)?
- If you were the advisor for the complainant, what questions would you ask the respondent?
- If you were an advisor for the complainant, what questions would you ask the student witnesses?
- If you were the advisor for the respondent, what questions would you ask the complainant?
- If you were the advisor for the respondent, what questions would you ask the student witnesses?

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Questions?



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Decision-Making & Writing

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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

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Preponderance... as to what?

Carefully consider elements of alleged violation

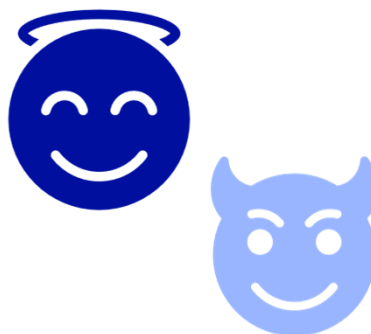
What needs to be shown to establish a violation?

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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



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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



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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

133

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)

134

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

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“Hearsay”

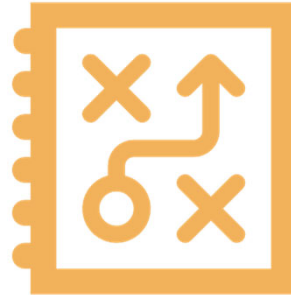
- Hearsay — Statement (written or oral) made by a non-available witness offered to prove fact in question
- Longstanding evidentiary principle of when courts can rely on hearsay
 - Court rules do not apply
- Some hearsay is more reliable, e.g.,
 - Statement contemporaneous with the event in question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

136

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.

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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.”

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Incapacitation & weight/credibility

- Incapacitation alone ≠ unreliable or lack of credibility as to facts



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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

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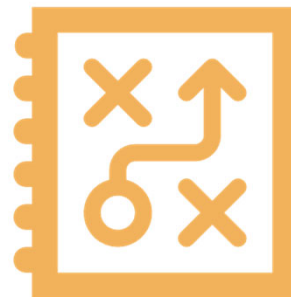
Expert witnesses

- 2022 proposed rule clarifies role of experts
- 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

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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



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Report Writing

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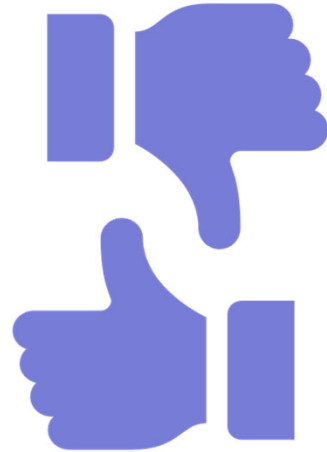
Documenting the decision

- 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

144

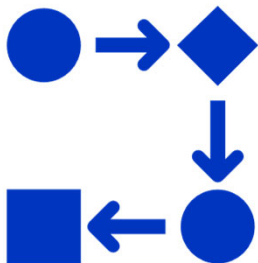
What is a determination?

- 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



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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

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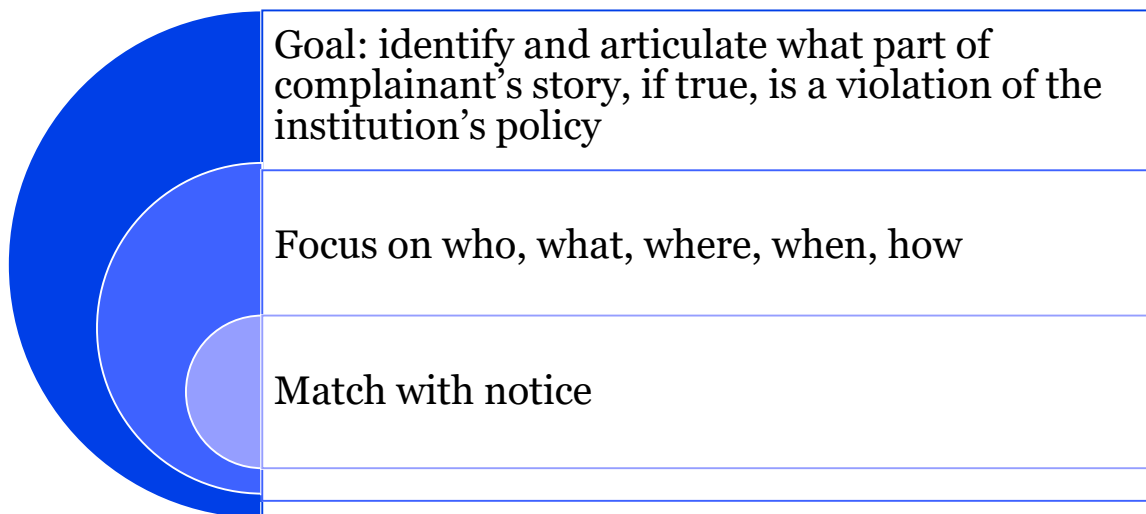
Critical elements

- Preliminary case information
- History of the case
- 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



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Summarizing allegations



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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

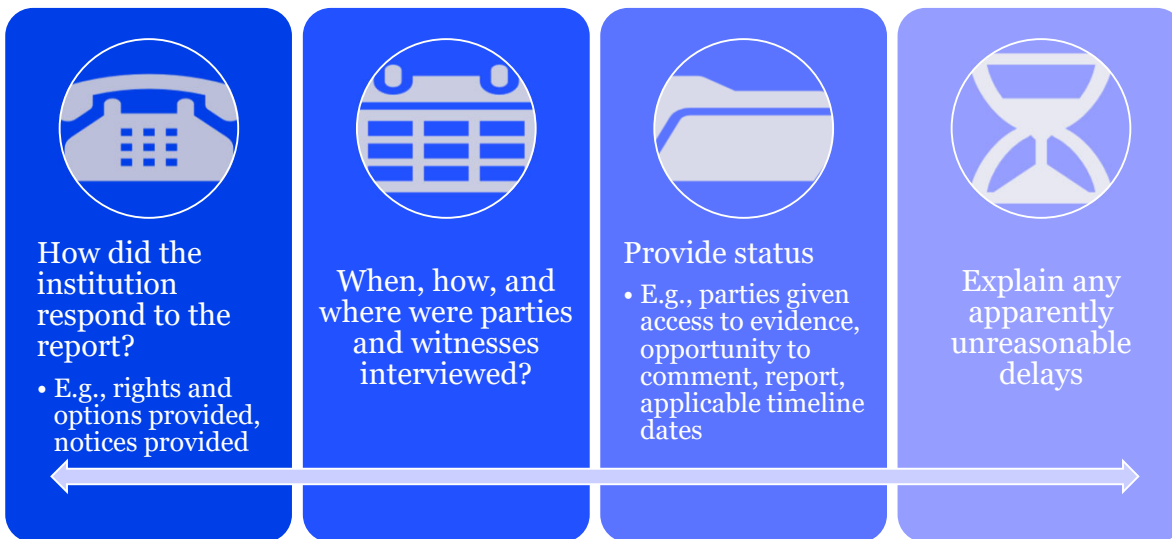
Attach full copy of Title IX sexual misconduct policy and procedures to report

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History of the case



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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

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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?

152

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.”

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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.”

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Analysis & Conclusion

Put everything together

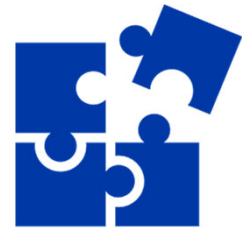
As to each allegation: Analyze whether a violation of *policy* occurred (not the law)

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



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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.”

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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.”

MSO

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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.”

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Slide 157

MSO Why capitalize?

McGuire, Susie, 2023-12-11T17:52:24.421

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”

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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

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Questions?



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Discipline & Remediation

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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

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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

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Sanctioning Goals

- Punitive
- Safety
- Reduce recidivism / recurrence
- Advance educational and developmental growth of offender (learning from one's mistake)
- Appropriate fit for circumstances

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What are common and mitigating factors?

- Egregiousness of misconduct (e.g., act of violence, use of a weapon, use of drug)
- State of mind of respondent (bias-motivated, reckless or negligent, prior education)
- Safety risk to the broader community
- Impact statement
- Conduct during the investigation and adjudication (cooperative or less than cooperative)
- Circumstances relating to a lack of consent (force, threat, coercion, intentional incapacitation)
- Position of trust / power differential

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Documenting Sanctions: Rules of Thumb



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- 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

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What common issues arise in sanctioning?

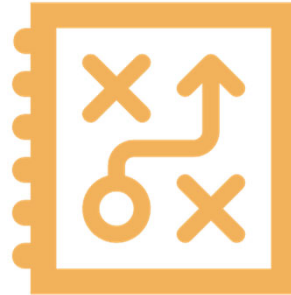
- Ambiguity in sanction
- Lack of clear explanation (and written record) of why sanctions should differ in similar circumstances
- Failure to address expectations for returning students and/or employees following disciplinary action (e.g., participation in athletics/extra-curriculars)
- Identity of decider if questions arise

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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.

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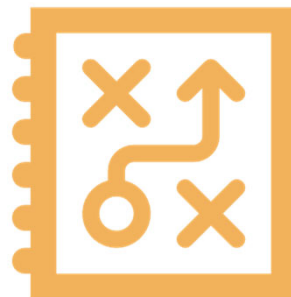


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Example: Sanction detail

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.

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Group Scenario



Athlete reports that Chemist stalked Athlete following their break-up. Athlete alleged that Chemist followed Athlete to the grocery store and pharmacy, tailgated Athlete's car back to Athlete's apartment, then stood outside for hours watching through the window while Athlete undressed. Athlete also alleges that Chemist changed work schedules at their job—the ice cream shop frequently visited by Athlete's teammates— to be near Athlete in attempt to rekindle the relationship.

In hearing, Chemist testifies that Athlete gave “friendly signals” that led Chemist to believe their conduct was welcome; Chemist realized in retrospect their conduct may have been unwelcome and professes a desire to leave Athlete alone. Athlete presents evidence that Chemist said to others that Chemist wanted to hurt Athlete for reporting.

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Group Scenario Questions

What mitigating factor may support lesser discipline?

What aggravating factor may support greater discipline?

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Questions?



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