

The logo consists of three white symbols on a blue background: a stylized 'H' at the top, a vertical bar in the middle, and a stylized 'B' at the bottom.

HUSCH BLACKWELL

Title IX & Sexual Harassment Response



Starting Principle: Presumption of Non-Responsibility

“From the time a report or Formal Complaint is made, a Respondent is **presumed not responsible** for the alleged misconduct until a determination regarding responsibility is made final.”



Key Components: Access to Evidence

- “Prior to the completion of the investigation report, the investigator will transmit to each Party and their advisor, in either electronic or hard copy form, all evidence obtained as part of the investigation that is directly related to the allegations raised in the Formal Complaint, including evidence the University may choose not to rely on at any hearing and inculpatory or exculpatory evidence whether obtained from a Party or some other source.”
- “The parties will have ten days in which to submit to the investigator a written response, which the investigator will consider prior to completing the investigation report.”



Key Components: Investigation Report

- “After the period for the parties to provide any written response has expired, the investigator will complete a written investigation report that fairly summarizes the various steps taken during the investigation, summarizes the relevant evidence collected, lists material facts on which the parties agree, and lists material facts on which the parties do not agree.”

Hypothetical

Police Report Template

POLICE REPORT

Case No: _____

Date: _____

Reporting Officer: _____

Prepared By: _____

Incident: _____



Police Report

- Jane Complainant stated that she had been in a dating relationship with John Respondent since February 14, 2021. In mid-March, she said that she travelled to Destin with friends. While there, she kissed another student. When she informed Respondent, he was upset but they worked it out and remained in a dating relationship.
- On April 1, 2021, while at a bar, Complainant and Respondent saw the other student which prompted the couple to argue. They left the bar and returned to Complainant's apartment to discuss.
- According to the police report, Complainant said that while she was sitting next to Respondent on his bed, Respondent "jumped on" her and "began to strike" her with his fists. According to the report, Respondent "punched Complainant 4 or 5 times in the rib area causing her pain." According to the report, Complainant "was able to push herself away from Respondent who grabbed at her throat but did not choke her"



Police Report

- Respondent's roommate purportedly heard Complainant screaming.
- Immediately following this incident, Complainant indicated that Respondent began texting her, apologizing for what he did.
- Complainant went to an emergency care facility the following day to make sure she had no internal injuries.



WE WANT YOU!

You Are The Investigator



Preparing for an Investigation

Four Critical Planning Questions:

1. What is the relevant policy language (*i.e.*, critical issues)?
2. Where is the evidence? (special emphasis: social media & video)
3. How long will the evidence be there?
4. Where is there agreement and disagreement?

Investigative Plan

Complainant Name:

Respondent Name:

Date Report Received:

Action	Planned Date	Actual Date and Reason for Delay
Complainant Interview		
Respondent Interview		
Primary Witness List/Dates of Interviews		



Questions

- If you were a student victim of dating violence, what would your concerns be prior to agreeing to an interview?
- As investigator, how do you allay those concerns?
- How might you exacerbate?

Four Questions I Ask Before Every Interview

1. Have I adequately prepared (and what does that entail)? *** I am gathering and reviewing “hard evidence” before any interviews (if possible)
2. Am I doing this in an appropriate location (and how can I make witness most comfortable)?
3. Have I given myself adequate time?
4. What is my process for memorializing witness statements?

Power of 1st Impressions – Thin Slicing

- People quickly reach “macro” conclusions (pleasant, kind, hostile, creepy, competent) based on “micro” traits (smiling, eye contact, open-handed gestures, fidgeting, stiff posture, facing another direction)
- What is macro impression we are trying to communicate and what are nonverbal micro cues that can get us there?

Acting on impulse

Ever felt that people are a bit quick to judge? That's because we are. Research shows we make up our minds about someone in a matter of seconds – and what's more, we're surprisingly good at it. Rosie Ifould explores the consequences of our snap decision-making



📷 Finding out you share the same name can create a sense of affection Photograph: Guardian

Preliminary Statements With C & R

1. Introduce myself and, more importantly, my role
2. Thank for reporting (for complainant) and acknowledge potential difficulty of conversation
3. Provide overview of investigation
4. Discuss available resources with both parties
5. Explain process and prohibition on retaliation (****)
6. Identify and address questions and concerns
7. Explain recording or other mechanism to keep record
8. Discuss process for supplementing
9. Identify any impediments to receiving accurate account of what happened
10. Stress importance of telling truth
11. Explain what to do if there is any confusion about questions

General Questioning Guidelines

Open-ended/close-ended questions:

- Open-ended questions will generate more information while closed-ended questions will clarify specifics.
- When possible, start with open-ended questions (What happened?) rather than close-ended (“Did you go to the bar?”).
- Open-ended questions will allow the person to answer as long as he or she desires, possibly yielding more information than requested. (Where would you like to begin?) (What are you able to tell me about your experience?)

General Questioning Guidelines

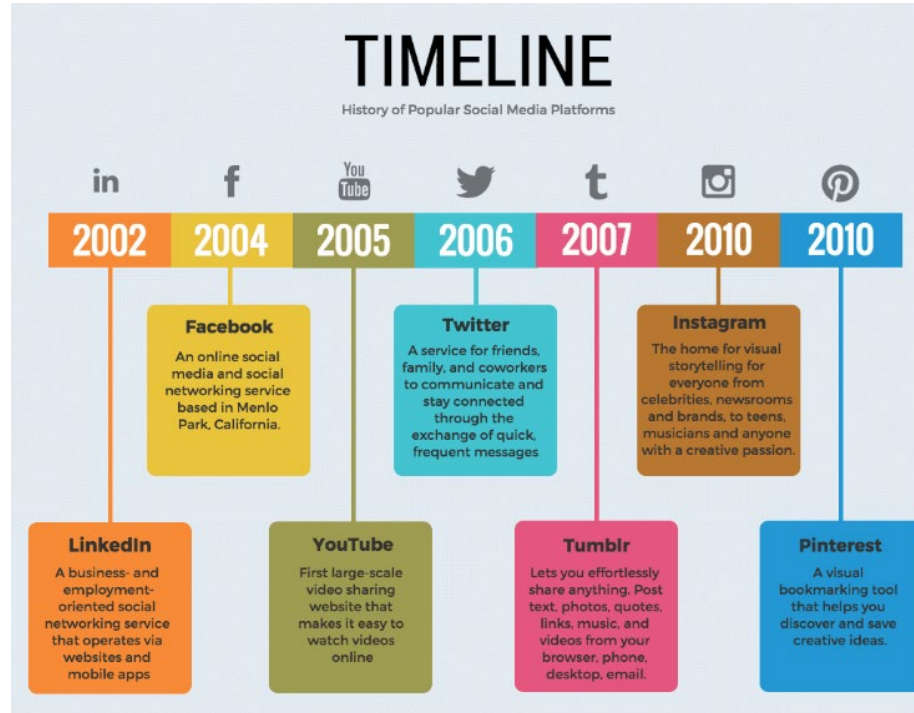
- Credibility: If you have concerns that a witness is not providing complete and accurate testimony, respectfully explain the reason for your concern and indicate that you are interested in hearing the student's response to your concern (E.g., "Help me understand . . . ")
- Ask the difficult but relevant questions: We want to give both parties an opportunity to address your concerns in the context of the interview and not after the fact

General Questioning Guidelines

- Seek other evidence: documents, physical evidence, videos, texts, Facebook posts, other witnesses, etc.
- Generally speaking, save close-ended questions for the end
- “Anything else?”

**** THERE ALMOST ALWAYS NEEDS TO BE****
FOLLOW-UP INTERVIEWS WITH COMPLAINANTS &
RESPONDENTS

Super Important Aspect of Interviews





Memorializing Witness Statements

- Recording – ensures accuracy, allows you to concentrate on conversation, logistically simpler, enhances quality (?), allows for meaningful feedback
- If being done in a statement format:
 - A. Convey all information relayed
 - B. Use quotes when appropriate (significant statements, jargon)
 - C. Allow parties opportunity to review but not make substantive revisions without notations
 - D. Consider “multiple witnesses” to statement

Physical Evidence Checklist

1. Text messages
2. Social media posts
3. Card swipes
4. On and off-campus video
5. Police reports
6. Medical reports
7. Teaching evaluations
8. Internal reports
9. Call logs
10. Other disciplinary records

Documenting Attempts To Obtain Relevant Information and Witnesses

Two challenges here:

(1) We don't have subpoena power

(2) "They ignored evidence" is a common complaint

- Identify relevant information and witnesses in our investigation plan
- Ask for it in interviews
- **Meticulously document efforts to obtain**
- What is enough?

Some Thoughts on Text Messages

1. Can be powerful evidence in these cases, but beware.
2. Be skeptical of print outs – **ask to see originals for full context**
3. Check contact information associated with contact
4. **Corroborate with opposing party**
5. Is there any process where complete messages can be provided via subpoena?

BREAKING NEWS

**Title IX Regs
FINAL**

Regs Rule 1 of Investigations

“When investigating a formal complaint and throughout the grievance process, a recipient must . . . Ensure that the **burden of proof** and the **burden of gathering evidence** sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.”

- What does “burden of proof” refer to here?
- Example of what not to do: “get your friends and witnesses to write statements and send them to me”
- What is still permissible?

Regs Rule 1 Practical

- Checklist for common sources of evidence
- Identify relevant information and witnesses in an investigation plan – to the extent it is within our control, get it
- Ask for it in interviews & in writing
- Meticulously document efforts to obtain (especially when you fail)

Regs Rule 1A of Investigations

“Provided that the recipient cannot **access, consider, disclose, or otherwise use** a party’s records that are made or maintained by a **physician, psychiatrist, psychologist, or other recognized professional or paraprofessional** acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that **party’s voluntary, written consent** to do so for a grievance process under this section.”



#News

#Students And Violence

Staying Confidential

Months after U of Oregon's actions exposed the ability of colleges to seek mental health records of alleged rape victims, the outrage hasn't led to action to prevent others from doing the same thing.

By **Jake New** // August 3, 2015

Regs Rule 2 of Investigations

“Provide an equal opportunity for the parties to present witnesses, including fact and **expert witnesses**, and other inculpatory and exculpatory evidence”

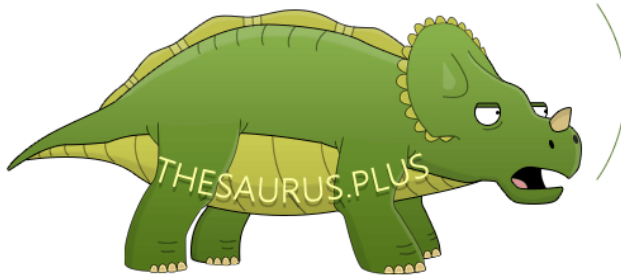
- “106.45 deems certain evidence and information not relevant or otherwise not subject to use in a grievance process: information protected by a legally recognized privilege; evidence about a complainant’s prior sexual history; any party’s medical, psychological, and similar records unless the party has given voluntary, written consent; and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross-examination at a live hearing.”
- Practical Point 1: err on side of allowing it & give it the weight its due
- Practical Question: how do we ensure that we have provided the parties this equal opportunity?

Regs Rule 3 of Investigations

“Not restrict the ability of either party to **discuss the allegations under investigation** or to gather and present relevant evidence”

synonyms for inartful:

inexpert, unskilful, unpractised, unartful, artless, inapt, scratchy, unaccomplished, unpracticed, unversed



- “This provision does not, therefore, apply to discussion of information that does not consist of ‘the allegations under investigation’ (**for example, evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation . . . or the investigative report summarizing relevant evidence sent to the parties and their advisors . . .**).”
- “Where ‘disparaging communications’ are unprotected under the Constitution and violate tort laws or constitute retaliation, such communications may be prohibited without violating this provision.”
- “This provision applies to discussion of “the allegations under investigation” and not to the evidence subject to the parties’ inspection and review under § 106.45(b)(5)(vi).”
- Remember: applies to employment

Regs Rule 4 of Investigations

“Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and **not limit the choice or presence** of advisor for either the complainant or respondent in any meeting or grievance proceeding; **however**, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.”



Regs Rule 5 of Investigations

“Provide, to a party whose participation is invited or expected, **written notice** of the **date, time, location, participants, and purpose** of all hearings, investigative interviews, or other meetings, with **sufficient time** for the party to prepare to participate.”

- Practical 1: How do we demonstrate we complied with this?
- Practical 2: What is “sufficient time”?

Regs Rule 6(a) & (b) of Investigations

“Provide both parties an equal opportunity to inspect and review **any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source**, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.”

“Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. **The recipient must make all such evidence subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.**”

Regs Rule 7 of Investigations

“Create an investigative report that **fairly summarizes relevant evidence** and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party’s advisor, if any, the investigative report in an electronic format or a hard copy, **for their review and written response.**”



How do we tell the parties about an investigation?

Institution must provide the parties written notice of a formal complaint that includes sufficient details about the “who, what, when, where, and how” before investigating





What else does the notice need to say?

Written notice must also include:

- Statement of presumption respondent is not responsible unless and until a determination is made at the end of the process
- That parties have the right to an advisor of their choice
- That parties have the right to inspect and review evidence
- Any prohibition on providing knowingly false statements or information



Question

- If you were a student accused of dating violence, what would your concerns be prior to agreeing to an interview?
- As we sit here now, what questions are you thinking you might ask Respondent?

Hypothetical

Police Report Template

POLICE REPORT

Case No: _____

Date: _____

Reporting Officer: _____

Prepared By: _____

Incident: _____



Respondent Information

- “I was super drunk. Complainant was on top of me trying to make sexual advances. I didn’t want that because she had an STI. I pushed her off of me to prevent her from assaulting me. I’m the victim here. I never punched her and she is only saying this because I broke up with her. Consider this my formal complaint of sex assault against Complainant!”





Potential Evidentiary Issues

1. Evidence of STI
2. Cheating
3. Character evidence
4. Previous assault
5. Retaliation



May an investigation collect evidence on sexual history?

- Generally, no – Evidence of a complainant's prior sexual behavior is relevant 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

Credibility: 7 Items to Develop

1. Compare verifiable facts to witness statements.
2. Are there major inconsistencies in testimony?
3. Do neutral witnesses corroborate or contradict?
4. Are there documents such as diaries, calendar entries, journals, notes or letters describing the incidents?
5. What have witnesses told others?
6. Have there been similar complaints against the respondent? ***
7. Do any of the witnesses have a motivation to lie, exaggerate or distort information?



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Report Writing

Scott's Common “Mistakes” With Report Writing

- General lack of clarity
- Chronology of events is hard to follow
- Failing to spell out the allegations and relevant policies
- Including insufficient information on important issues
- Including too much information about irrelevant details

Critical Elements

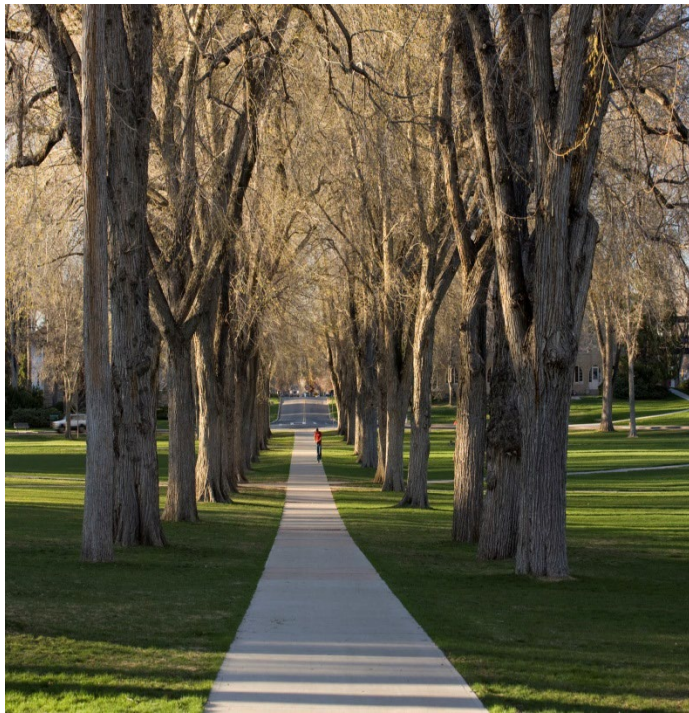
1. Summary of the Allegations
 - Preliminary case information
 - History of the Case, if any
2. Applicable policies/procedures
 - Misconduct Policy
 - Standard of Proof
3. Evidence considered
 - Undisputed facts
 - Disputed facts

The image displays a triangular section of the periodic table, starting from Boron (B) at the top and extending down to Francium (Fr) at the bottom. The elements are organized into groups and periods. The triangle is defined by a diagonal line that runs from the top-left corner (Boron) to the bottom-right corner (Francium). The elements are color-coded: blue for Group 13, green for Group 14, yellow for Groups 10-12, and pink for Groups 1-10. The elements shown include Boron (B), Carbon (C), Aluminum (Al), Gallium (Ga), Indium (In), Tin (Sn), Antimony (Sb), Tellurium (Te), Rhodium (Rh), Palladium (Pd), Silver (Ag), Cadmium (Cd), Mercury (Hg), Thallium (Tl), Lead (Pb), Bismuth (Bi), Polonium (Po), Astatine (At), and Francium (Fr). The atomic number and name of each element are provided.

History of the Case

- How did the institution respond to the report?
 - E.g., rights and options provided, notification of respondent
- When, how, and where were parties and witnesses interviewed?
- Explain any apparently unreasonable delays.

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 and Procedures

- Reference sexual misconduct policy and procedures, including specific language which is pertinent to the allegation
 - E.g., include relevant definitions
- Attach full copy of sexual misconduct policy and procedures to report



Evidence Considered

- Include a summary of evidence collected and reviewed during investigation
 - Parties' correspondence with institution
 - Summary of party and witness interviews (by person)
 - Text messages, emails, tweets, posts, letters, etc.
 - Police/medical reports
 - Video from surveillance cameras
 - Card key data
 - Phone logs

Language Considerations

- Use objective terms (i.e., “complainant” and “respondent” rather than “victim” and “perpetrator”)
- Avoid vague phrasing like “had sex”
- Do not include speculation
- Do not include irrelevant points and discussion

Example

- “Jane alleges that John had sex with her without her consent.”

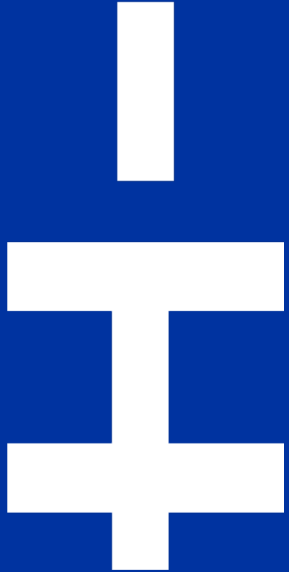
VS.

- “Jane alleges that John laid on top of her, penetrated her vagina with his penis, and held her down so she could not move.”

Check your Work

- The report must be able to stand on its own
- Spelling and punctuation matter—have the report proofread
- Double check that your allegations match your notice
- Include the good, the bad and the ugly





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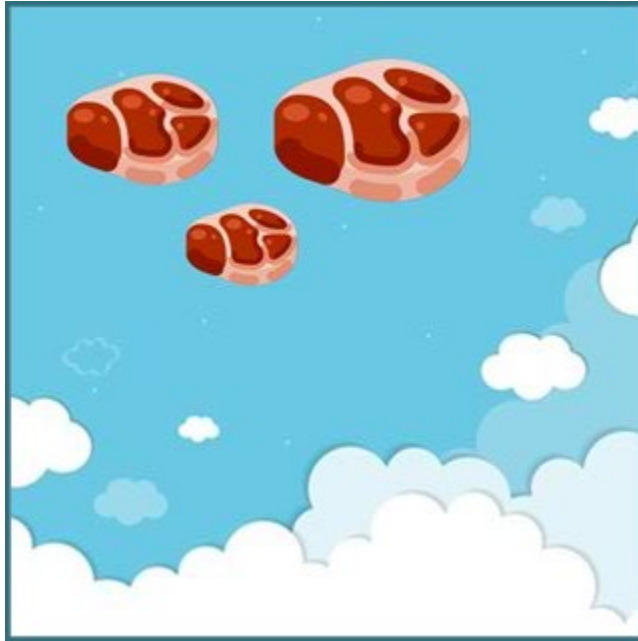
The Hearing Process



What is the purpose of the hearing?

- To hear testimony and receive non-testimonial evidence so that
- The decision-maker 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

Hearing Officer(s) Preparation: *Doe v. Purdue University, et al. (2019)*



- Denied MTD on due process and Title IX claims
- Student suspended with conditions; later expelled
- 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:
 - ***“... two of the three panel members candidly admitted that they had not read the investigative report...”***

Q1: Pre-Hearing Initial Issues

- A. Conflicts?
- B. Framing the material issues. What are the issues which should be the focus of the hearing? Stipulations?
- C. Framing the logistical challenges. What are the practical problems the hearing officer will need to navigate through?

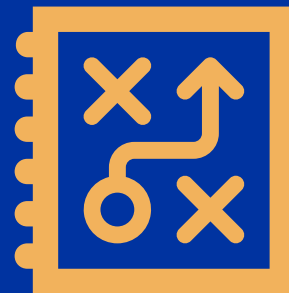


What is a conflict of interest?

- A material connection to a dispute, the parties involved, or a witness, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior relationship; professional interest; financial interest; prior involvement in a matter; or nature of position

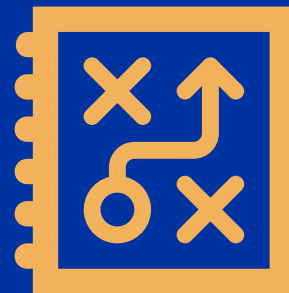
Example

The University hires an outside attorney to serve as a hearing officer. The outside attorney currently represents the respondent's father in a personal injury lawsuit.



Example

The College assigns a faculty member to serve on a hearing panel. The faculty member previously wrote a glowing letter of recommendation for the complainant and has recently advised the complainant on graduate school applications.





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

Example

Based on investigation report and in consultation with the parties, hearing officer issued letters to 8 witnesses advising them of the hearing date and time and requesting their presence at the identified location.



Typical Hearing Structure

- Hearing officer/chair provides opening remarks
 - Affirm notice
 - Discuss purpose of hearing/goals / explain ground rules
 - Discuss role of hearing officer(s)
 - Address standard of evidence
 - Welcome questions
- Consider investigation report/summary
 - Invite parties to make opening statement about report
- Questioning of parties & witnesses
 - Hearing Officer(s) should go first
 - Manage Cross-examination questions
- Deliberation
- Written determination



During the Hearing

- In an in-person hearing, plan for parties to enter and exit the room separately (with their advisor, etc.). Give them enough time to vacate hallways, etc.
- Discuss how the parties can request breaks and expectations during breaks.
 - Put into the script at the beginning.
 - Plan for a break every 60-90 minutes, if the parties do not ask for one.
- Know when to stop.
- New/additional evidence may be presented during the hearing, even if it is technically not permitted.
 - Discuss in advance how to address this should it occur.
 - Label anything submitted during the hearing with the date and who supplied it.

Managing Cross-Examination

Evaluating questions

- Hearing officer/panel must evaluate each question prior to the participant answering for relevancy and/or appropriateness (e.g. sexual history)
- If a question is deemed irrelevant, hearing officer/panel must state the rationale for that decision.
 - Consider making a written notation of the question, denial, and rationale for the record.
 - Discuss your philosophy on this in advance.
 - A poorly worded question, in and of itself, is not a reason to not ask it.

Q2: The Hearing

- A. Respondent refuses to answer a cross examination question regarding the inconsistency between his statements to investigator and police. What happens next?
- B. Respondent objects to introduction of the SANE exam because the nurse did not testify at hearing. How do you resolve?
- C. Respondent's advisor would like to question Complainant on her childhood sex assault. Should you allow? What is basis for denial?
- D. Halfway through hearing, Complainant informs you that she just received a forensic expert report demonstrating that semen from SANE exam shares Respondent's DNA. Complainant indicates expert is prepared to testify now. How do you handle?

How does the hearing actually work?

- Title IX regulation is largely silent on specific elements
- Required elements include:

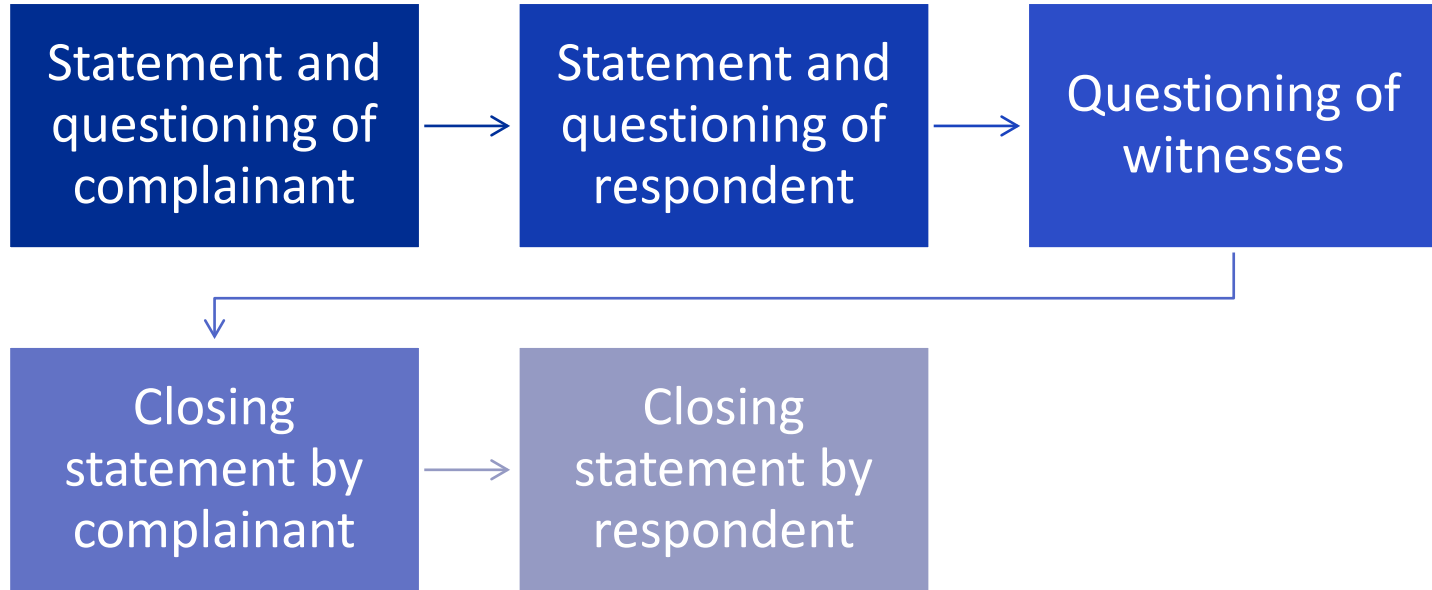
Decision-maker(s) must independently evaluate questions for relevance and resolve relevancy objections

Party's advisors must be allowed to conduct live questioning of other party and witnesses

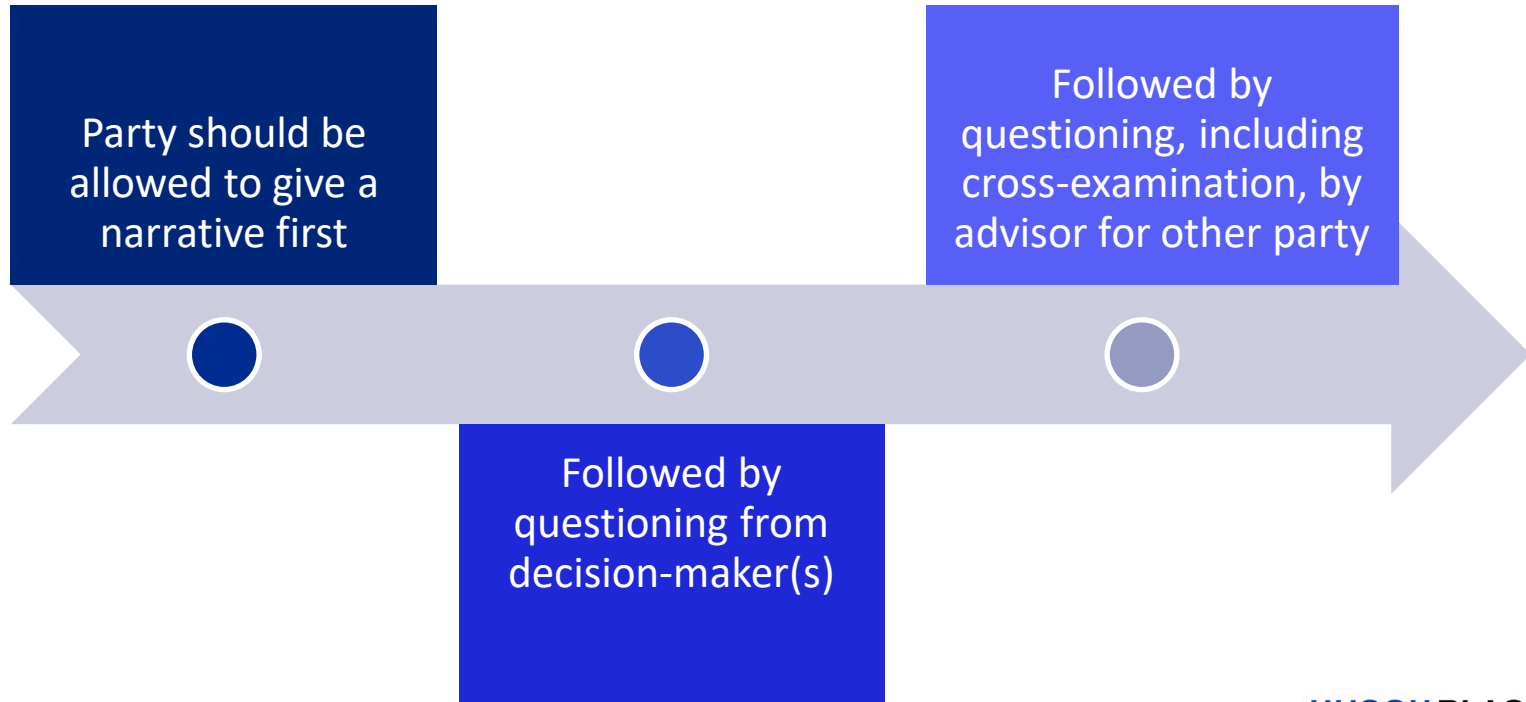
Party or witness who refuses to submit to live questioning from other party's advisor must have their testimony excluded

Questioning of sexual history generally not permitted

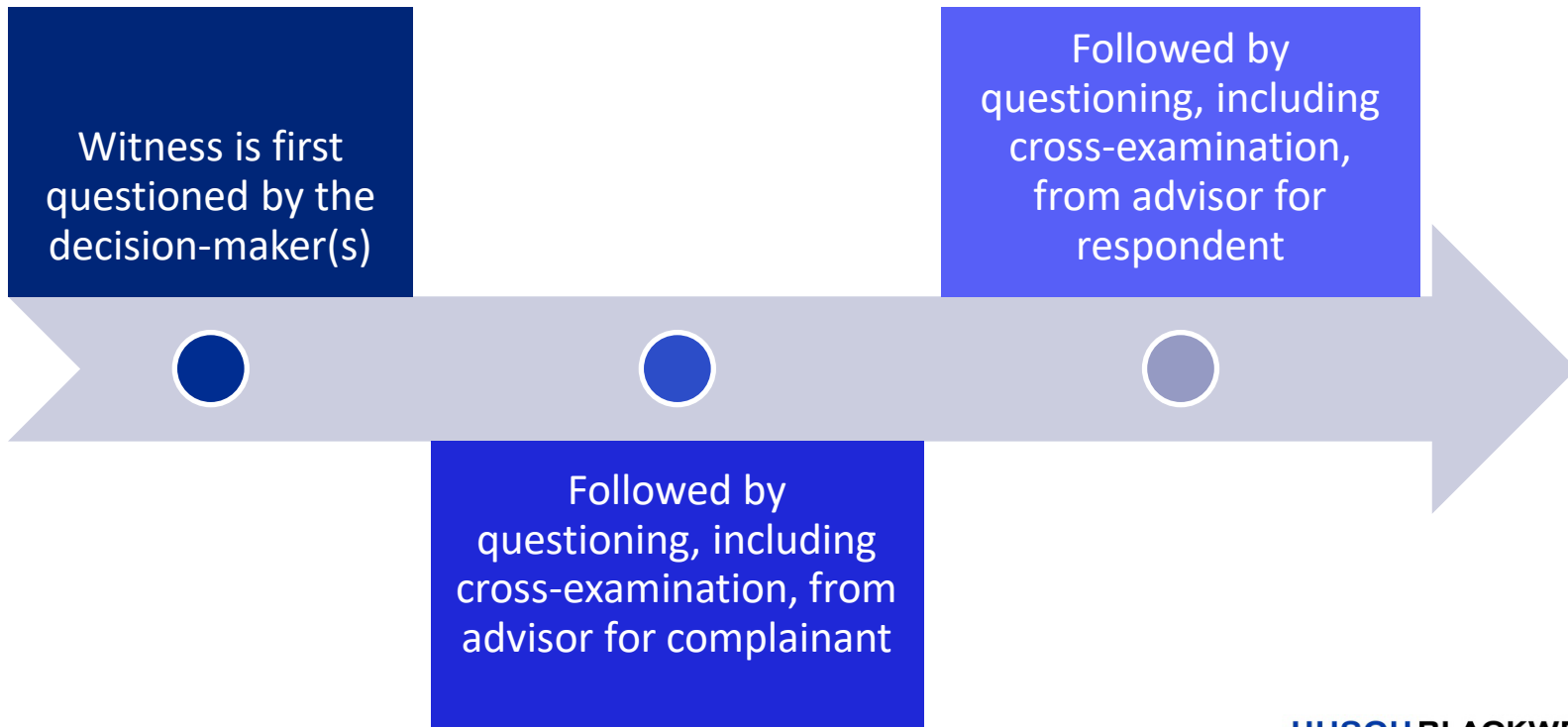
What is a potential sequence?



How might questioning of parties take place?



How might questioning of witnesses take place?





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
- When in doubt, err on allowing it



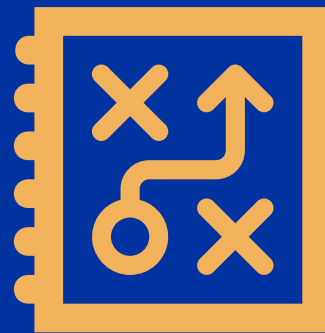
Is sexual history considered?

- Generally, no – Evidence of a complainant's prior sexual behavior is relevant 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



Example (impermissible)

—
Student has accused another student of sexual assault by incapacitation. Advisor for respondent asks complainant how many times complainant has had “drunk sex” with other persons.



Example (permissible)

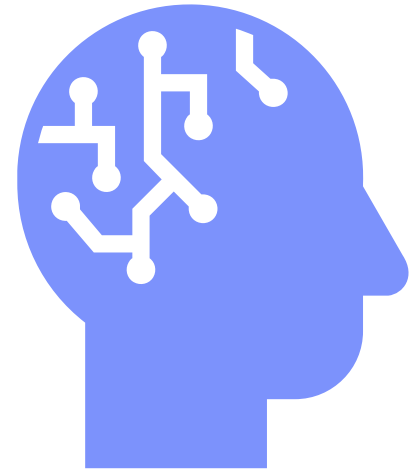


Student has accused another student of sexual assault by way of incapacitation. Advisor for respondent asks complainant whether complainant had any other sexual encounters with respondent when they were drunk.



Are there any exceptions to the exclusionary rule?

- Generally, “no.”
- Various hearsay exceptions set forth in civil rules of evidence do not apply
- If the alleged harassment itself is a verbal or written statement, it may be considered





Example (not excluded)



During hearing, complainant identifies a text message from the respondent, sent to the complainant, calling the complainant a sexual epithet. The respondent refuses to submit to cross-examination. The respondent's text message is still considered.

Example (excluded)



During hearing, respondent identifies text message sent to respondent by complainant's friend indicating "complainant admitted to me they made it up." Friend refuses to attend hearing. Text message is excluded.

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



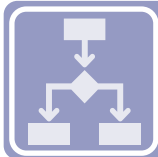
After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence



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



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

- In a written document, provided contemporaneously to the parties that:
 - Identifies the allegations of sexual harassment
 - Describes the various procedural steps taken from the time the formal complaint was made
 - States findings of facts supporting the determination
 - Reaches conclusions regarding application of relevant policy definitions to the facts
 - Includes a rationale for each finding for each allegation
 - States the disciplinary sanctions and remedies, if implicated by the determination made, and
 - Explains the procedures and grounds for appeal



What are trends in caselaw?

- Steady number of “deliberate indifferent” cases
- Continued growth in number of respondent-initiated lawsuits alleging:
 - Title IX sex discrimination based on status as male
 - Breach of contract for failure to follow policies and procedures in handbooks

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