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Example of immediate threat to physical health or safety

Student reports that another slapped and beat the reporter when they broke up with the other student. The reporter says the respondent has since threatened to kill the reporter and anyone the reporter might date. The breakup occurred two days ago. The reporter has visible injuries.



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Example of no immediate threat to physical health or safety

Engineering Student reports that Philosophy Student committed sexual assault by having sex with Engineer while Engineer was incapacitated after the two were drinking. The incident occurred two years ago. Philosopher has no disciplinary record. Engineer reports minimal but positive interactions with Philosopher since the incident.



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Can we utilize an already existing process for interim removals?

- Yes, if that process complies with the Title IX standard.
- Common institutional examples include:
 - Threat assessment policy
 - Critical Incident Response Team ("CIRT")
 - Interim suspension provisions of Student Handbook

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Can we place employees on administrative leave?

- Yes – employee respondents may be placed on administrative leave without requisite showing of threat to physical health or safety
- Whether an opportunity to challenge administrative leave must be given depends on employee status and other policies (e.g., Faculty Handbook)

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Example of administrative leave



Faculty member is accused of having sex in on-campus office with Undergraduate Student currently in the faculty member's class. Undergraduate alleges the encounter was non-consensual. Faculty member admits to sex but denies it was coerced or otherwise non-consensual. Institution temporarily suspends faculty member from teaching but continues pay and administrative duties.

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Example of administrative leave



Athletics department trainer is accused by multiple student athletes of unwelcome and unnecessary touching of genitals. Institution removes trainer from having any contact with student athletes pending investigation.

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Group Scenario



Future Oncologist and Future Psychiatrist are both in their third year of medical school. Oncologist reports that Psychiatrist sexually harassed Oncologist by repeatedly propositioning Oncologist at a school-sponsored happy hour. Oncologist has not decided whether to file a formal complaint. Oncologist requests several supportive measures, including free counseling; the ability to complete the semester remotely; never to be in the same class or clinical rotation with Psychiatrist; and for Psychiatrist to participate in supplemental sexual harassment training and a substance abuse prevention program. Oncologist submits a doctor's note indicating Oncologist suffers from anxiety and PTSD when in Psychiatrist's presence. Unbeknownst to Oncologist, another student accused Psychiatrist of similar sexual harassment a year prior but did not make a formal complaint. The Dean reports that the school has never allowed a student in their third year to study remotely and that required in-person experiences cannot be replicated remotely. The Dean also reports that, due to the small size of the class, it would be impossible to guaranty Oncologist and Psychiatrist would never be in the same class or clinical rotation.

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Questions



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The Investigation Process



What is the purpose of 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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What are the general principles of an investigation?

- Parties must have sufficient notice to prepare and meaningfully participate
- Investigator has an independent duty to collect relevant inculpatory and exculpatory evidence
- Parties have an equal opportunity to present their statements, evidence, and to identify witnesses
- Parties have equal opportunity to review and comment on evidence developed
- Investigation is evidence-gathering; not fact-finding

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What is a formal complaint?

- Signed 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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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



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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

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Example (incorrect)



Student accuses Employee of quid pro quo harassment. Prior to sending written notice, Title IX Coordinator appoints investigator who schedules interviews with Employee's co-workers. Only after these interviews are complete, does the investigator send a written notice to Employee.

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Can we gather any information prior to the written notice?

- Yes, but only to the extent necessary to determine how the case will proceed
- Typically, this “preliminary inquiry” would involve identifying the putative victim and understanding the scope of the allegations
- Information gathering that seeks to determine whether the allegations are *true* is investigatory and should await the written notice

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Example (preliminary inquiry)



Student submits formal complaint via email with a single sentence reading, "Named Student sexually assaulted me." Prior to sending a written notice, investigator meets with the complainant and asks for more specific information about what happened—the "who, what, when, where, and how."

Example (preliminary inquiry)



Campus visitor reports that Student was sexually assaulted by another student. Investigator sends email to Student seeking to meet with Student to understand what happened and how Student wishes to proceed.

May we take steps to preserve information before sending the written notice?



- Yes, if the work isn't investigatory and there is a legitimate concern information will be lost
 - Placing a "hold" on an email account
 - Asking IT to capture server-level data
 - Having campus security suspend auto-delete of security footage

How do we collect evidence in an investigation?






Interviews of parties and witnesses



Collection of non-testimonial evidence

How do you structure an interview?

-  Rapport building/information providing phase
-  Substantive testimony collection
-  Closure/information providing phase

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How do I ask questions in the substantive phase?

- Open-ended and non-suggestive invitations
- Use facilitator words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Delay use of specific questions ("recognition prompts") as long as possible
- Avoid suggestive or leading questions



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Examples of open invitations

-  "Please tell me what happened that night."
-  "Can you walk me through what happened?"
-  "In your own words, tell me what occurred."
-  "Can you tell me everything that happened after you got to the party?"

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Examples of facilitators



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Examples of cued invitations

"You mentioned that . . . Can you tell me more?"


"You said that . . . Can you elaborate?"


"You said they 'coerced' you. Can you tell me what they did?"


"If I understood you right, you said that after . . . Can you tell me what happened in between?"


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Examples of recognition prompts

 "What did she say?" (directive)

 "What day did that happen?" (directive)

 "Did it hurt?" (option choosing)

 "Was he slurring words?" (option choosing)

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How do we make a record of the interview?

- Note-taking and audio recording are both appropriate methods of making a record of the interview
- If the investigator takes notes, they should be used to create a coherent interview memorandum shortly after the interview while the interview is fresh in the investigator's mind
- If the investigator records the interview, the investigator must be sure to clearly state on the record the time, place, date, and persons involved in the interview



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Example sources of non-testimonial evidence



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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

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May an investigation collect and rely on privileged records?



- Only if a party waives the privilege
- An institution may not access information under a legally recognized privilege unless the holder of the privilege waives it
- Institution cannot unilaterally access its own counseling and health files for investigation purposes

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Example of permissible use

Student who makes report of sexual assault executes release allowing disclosure of counseling records demonstrating student sought an emergency counseling session the morning after the alleged sexual assault



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Example of impermissible use

Employee accuses Student of sexual assault and reports that Student transmitted an STD. Student denies sexual encounter occurred. Investigator unilaterally contacts student health center seeking records to determine whether Student has been treated for STD.



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Do the parties have access to the evidence?

- 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 finalized
- 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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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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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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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 the evidence and tells parties they can schedule a time to review it in a conference room without cell phones. They are not allowed to take the evidence outside the room.

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How is the investigation concluded?

- 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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Does the investigation report make findings?

- No – the investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the new Title IX regulations, factual findings and determinations of policy violations are made by a decision-maker at a subsequent hearing

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Do the parties get to comment on the investigation report?

- Yes
- Parties are permitted to “review” and provide “written response” to investigation report



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May parties have an advisor during the investigation?

- Yes – parties may be accompanied to any investigative interviews and meetings by an advisor of their choice
- Advisor may be an attorney, but does not have to be
- Institution may confine advisor to a passive role during the investigation phase
- Institution is not required to provide an advisor during the investigation phase



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Example

The institution sends a written notice of investigation to respondent requesting an interview. The advisor (an attorney) responds and indicates respondent will not submit to an interview. The advisor submits a legal brief seeking “dismissal” of the complaint and giving the respondent’s factual narrative. The document is on law firm letterhead and signed only by the advisor.



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Example

A complainant identifies a sexual assault victim advocate as advisor. The advocate indicates by email complainant will only respond to written questions that are pre-screened by the advocate and revised, as necessary, so as not to re-traumatize the complainant. Advocate tells investigator not to communicate with complainant directly.



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Group Scenario



Student athlete accuses teammate of sexual harassment after teammate kisses student athlete in a hotel room at an out-of-season summer tournament in which some team members are playing with coach's encouragement. Teammate does not respond to investigator's written request for interview. Eventually, attorney for teammate sends letter to investigator indicating teammate will not submit to interview and demanding complaint be dismissed because the incident occurred outside Title IX jurisdiction. After investigator completes other interviews and makes the evidence available, teammate's attorney sends a signed declaration from teammate disputing the allegations and accusing student athlete of falsifying the complaint. The teammate's attorney also identifies six student athletes who teammate wants interviewed, three of whom will purportedly testify to the complainant's general predisposition to be untruthful.

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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

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Who is the “decision-maker”?



- A single hearing officer; or
- A hearing panel led by a chair

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What standard of evidence can be used?

- Either
 - Preponderance of the evidence or
 - Clear and convincing evidence
- Institution must select a standard and apply it uniformly in all cases, regardless of the identity of the respondent

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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 assessment
- Hearing must be scheduled and logistics arranged
- Witnesses must be notified
- Pre-hearing conference should be held

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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

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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.



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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.



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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 letters excusing parties and witnesses from other obligations, as necessary

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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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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.



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What is a pre-hearing conference?

- A meeting with the parties, decision-maker, and other necessary officials to:
 - Address logistical issues and concerns
 - Discuss the sequence of the hearing and rules of decorum
 - Hear and resolve objections or concerns that can be addressed in advance
 - Take up other issues that will ensure hearing time is focused on testimony

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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; and
- Sufficient time exists to address issues raised in the pre-hearing conference before the hearing actually occurs

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Example

The investigation report issues, the institution identifies the hearing officer, and a hearing is scheduled to take place in 14 days. The institution schedules a pre-hearing conference 3 days before the hearing is set to occur.



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What are other considerations?

- The pre-hearing conference can be two separate meetings—one with each party and advisor; but follow up notification may be required
- The pre-hearing conference can 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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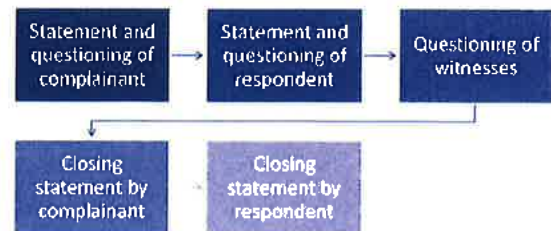
How does the hearing actually work?

- 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

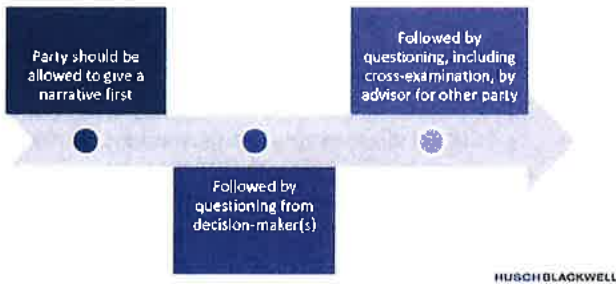
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What is a potential sequence?

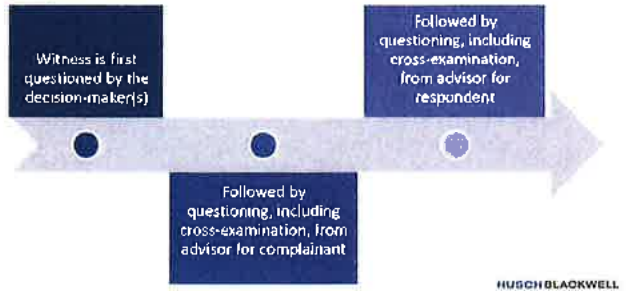


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How might questioning of parties take place?



How might questioning of witnesses take place?



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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Who determines relevance?

- Decision-maker(s) must screen questions for relevance and resolve relevance objections
- Decision-maker(s) 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

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Example (relevant)

Student has accused another student of dating violence by way of slapping Student. Advisor for respondent asks complainant how many dates complainant and respondent went on before the slapping incident.



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Example (relevant)



Faculty member is accused of engaging in quid pro quo harassment by rounding up a student's final grade in exchange for a sexual favor. Complainant's advisor asks faculty member whether he rounded up any other student's grade.

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Example (not relevant)

Employee accuses another employee of sexual harassment by telling sexual jokes in the workplace. Advisor for complainant asks respondent whether respondent had an affair with a co-worker three years prior.



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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.

Does any testimony get excluded?

- Yes – Decision-maker(s) must exclude the statements of any party or witness who refuses to submit to cross-examination from the other party’s advisor



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Example (excluded)

Witness gives testimony in support of complainant's account that respondent sexually assaulted complainant. When advisor for respondent seeks to cross-examine witness about a long-standing grudge witness holds against respondent, witness refuses to answer questions.



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Example (excluded)

During hearing, respondent seeks to "introduce into evidence" an email respondent obtained from witness stating that "respondent could not have committed sexual assault because they were with me at that time in a different town." Witness is not present at the hearing.



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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



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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.



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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.

Is an advisor required to ask questions a party wants asked?

- Advisors should consult with their party and consider their preferences for what questions to ask
- But an advisor must exercise their own reasonable judgment and is never required to ask questions that the advisor knows are improper (e.g., invade sexual history)
- An advisor may consult the decision-maker if a party demands the advisor ask a question that advisor is uncertain is appropriate

Can we have standards of decorum for hearings?

Yes, provided they are applied equally and do not violate explicit guarantees from the Title IX regulation.

Example (permissible)



Institution's hearing procedures require all participants to remain seated during the hearing and to remain silent when another party is testifying or engaging in cross-examination except to succinctly raise an objection.

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Example (impermissible; too broad)

Institution's policy prohibits a party or advisor from "doing anything that would make another party feel intimidated, re-traumatized, or attacked in any way."



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Are there "objections" at hearings?

- Minimally, the institution must allow a party to raise an objection that evidence is not relevant or should be specifically excluded (e.g., sexual history; confidential privilege)
- Institution may permit other objections to be raised
- Institution may limit the right of objection to a party

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How long does a hearing last?



- Decision-maker(s) have the ability to set reasonable time limits on the hearing and its constituent parts
- Parties must have a reasonable opportunity to conduct questioning/cross-examination, but do not have the right to question/cross-examine witnesses as long as they want

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Example

In a case involving two parties and four witnesses, hearing officer budgets four hours of time for the hearing—one hour for each party to testify and be cross-examined and two hours total for the four witnesses.



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Can we delay or “continue” a hearing once it starts?

- Yes, but only if a delay is not clearly unreasonable
- Consider pre-scheduling an alternative date
- Inconvenience alone should not be the determinative factor; every date will inconvenience someone



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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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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

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Who determines discipline and remediation?

- Some institutions will have the decision-maker(s) also impose discipline
- Others may refer a disciplinary authority with jurisdiction over the respondent (i.e., Dean of Students, Provost, Director of Human Resources, etc.)
- If referred to someone else, that must occur before the written determination is issued

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