

The Final Product

- Easy to read (e.g., use the active voice, good grammar, etc.).
- No typos.
- Use consistent terminology.
- Look professional (e.g., professional font, formatting, etc.).
- Follow consistent structure and format.

Conducting the Hearing

- Preparing for the hearing and pre-hearing meeting:
 - Review record
 - Identify witnesses to be called at hearing and “waived”
 - Review questions proposed by parties’ advisors
 - Go over hearing process and rules of decorum for hearing
- Zoom hearing – will receive training on technology used.
- Parties/advisors will have access to all information directly related to the allegations in complaint (evidentiary record and investigation report).
- Parties have an equal opportunity to present witnesses who have provided information to the investigator & have relevant information.
- Rules of evidence do not apply.

Advisor-Led Cross-Examination

- Cross-examination is designed to probe the credibility of the parties and witnesses and, according to OCR, is a critical element of due process.
- OCR states that no legal training is required to conduct cross-examination.
- According to OCR, the cross-examination function is fulfilled by advisors neutrally relaying the party's desired questions (and follow up questions) to the other parties and witnesses.
- All cross-examination questions must be posed to the hearing officer for a ruling on relevance before the party/witness answers.
- cross-examination must be conducted in accordance with the University's rules of decorum.

Chair's Responsibility to Make Relevance Rulings

- Use pre-hearing procedures to evaluate proposed questions and determine whether they are relevant/missible.
- Questions not submitted in advance may still be asked in hearing if relevant.
- Hearing officer may ask advisor to explain relevance of a question before ruling.
- Hearing officer may ask the advisor to re-frame question if it violates rules of decorum (abusive, hostile).
- Parties may choose not to attend the hearing or submit to cross-examination but are still entitled to University-appointed advisor in hearing to conduct cross-examination of other party and witnesses.
- Parties may waive cross-examination of the other party or witnesses.

Relevance Rulings

- If question is deemed by Hearing Officer to be irrelevant / subject to exclusionary rules (rape shield or privilege), Hearing Officer will state basis for disallowing the question:
 - Irrelevant because the question calls for prior sexual history of Complainant without meeting one of the two exceptions.
 - Irrelevant because the question calls for information protected by a legally held privilege or contained in a medical/psychological record.
 - Irrelevant because the question asks about an issue that does not tend to prove/disprove any material fact about the allegation(s).
 - The question is repetitive/has already been asked and answered.

Parties' or Witnesses' Failure to Submit to cross-examination

- If a party or witness does not submit to cross-examination at the live hearing, Decision-makers cannot rely on any statement of that party or witness in reaching a determination of responsibility:
 - May, however, rely on “non-statement” evidence
 - May admit evidence where statement itself constitutes alleged sexual harassment (e.g. verbal threat to sexually assault someone or “quid pro quo” communication)
- Decision-makers may not draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer questions.

Hearing Panel's Questioning of Parties/Witnesses

Before asking a question, consider:

- Will the answer to this particular question help me to understand if a violation of the policy occurred?
- How will the answer to this question illuminate whether or not a person's behavior meets the definition of a violation?
- Does the information I am attempting to elicit serve my curiosity about the person or the incident? Or, does it help the panel make a decision?
- Does the question probe the credibility of the person's narrative?

Body language, tone, and mannerisms are important in conducting the hearing and asking questions.

Questions Posed by Derrick's Advisor During Hearing Phase

Derrick's attorney advisor, Alice B. Payne, requests that you, the hearing officer, ask Carlos the following questions:

- Did you and Antwon have intercourse earlier in the week leading up to the incident and/or on the day of the incident?
- What is your mental health diagnosis?
- Could your mental health diagnosis have impacted your experience with Derrick?
- How many sexual partners have you had at the university?
- Did you experience childhood sexual abuse/trauma that may have been triggered by the encounter with Derrick?

Questions Posed by Carlos's Advisor During Hearing Phase

Carlos's advisor, a social worker from a local victims' advocacy organization, requests that you ask Derrick the following questions:

- Have you ever been accused of sexual assault before?
- How many relationships/sexual encounters have you had with men?
- Did you date men at your prep school? Who?
- Did you or Attorney Payne speak to any of the witnesses in this investigation? What did you say to them? What did they say to you?

Assessing Credibility

- Credibility assessments are necessary to resolve material issues in dispute between parties' accounts.
- Credibility is different than "honesty."
- Evaluation of source, content, and plausibility of evidence presented.
- Specificity v. vagueness in accounts.
- Corroboration through witness testimony and evidence.
- Evaluate motive and bias and apply common sense.
- Inconsistencies – major versus minor/ material versus immaterial.
- Demeanor.

Corroboration

= Sufficient independent evidence to support the facts at issue.

- Corroboration ≠ second witness who agrees with the first.
- Corroboration = evidentiary support for what a witness contends after evaluating source, content, and plausibility.
- Witnesses, electronic evidence, physical/medical evidence, police reports, video surveillance
- Timeline.
- Be aware of subtle bias of which witnesses may not even be aware (victim blaming attitudes, group defensiveness, fear of getting in trouble).
- Sensory details/micro-corroboration.

Inculpatory / Exculpatory Evidence

- Communications between parties (pre and post incident)
- Behavior of the parties (pre and post incident)
- Statements against interest/ admissions
- Disclosures about the incident

Consider any explanations and fairly weigh them.

Motive / Bias

- Understand parties' and witnesses' relationship(s) to one another.
- Understand Complainant's decision to disclose/report when they did.
- Be curious and explore theories of potential motive (those offered by the parties/witnesses and those revealed by the evidence).
- Understand the difference between a false report v. good faith report that is not supported by evidence.

Demeanor

- Consider person's reaction to certain lines of questioning, cooperativeness, candor, defensiveness, argumentativeness, etc.
- Consider potential trauma, shame, blame, fear, nervousness, heightened emotions.
- Consider cultural/background differences.
- Consider disabilities.

Preponderance of the Evidence Standard

- More likely than not.
- 50% plus a feather.
- Remember though, evidentiary burden is not on the parties.

Final Determination Letter

Must include:

- Sections of the policy alleged to have been violated.
- A description of the procedural steps taken from the receipt of the formal complaint through the determination.
- Statement of the findings of fact supporting the determination.
- Statement of the rationale for the result as to each specific allegation.
- Sanctions imposed on Respondent and any remedies provided to the Complainant designed to restore or preserve access to the education program or activity.
- Procedures and bases for any appeal.

Rationale and Conclusion

- Clearly articulates the policy elements at issue.
- Clearly articulates how a determination of responsibility/ no responsibility was reached.
- Clearly identifies the evidence in support of the determination.
- Clearly outlines the credibility determinations made and the basis on which they were made:
 - Credibility of evidence not general credibility of persons.
- Explains how relevant evidence was weighed and assessed in reaching conclusion.

Appeal Process

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time of the decision that could affect the outcome of the matter; or
- The Title IX Coordinator, investigator or a decision maker had a conflict of interest or bias for or against Complainants or Respondents generally, or the individual Complainant or Respondent that affected the outcome of the matter.

Appeals

1. Deny the appeal and affirm the original decision;
2. Grant the appeal and order a previously dismissed Formal Complaint to be reinstated;
3. Grant the appeal and remand to the Hearing Officer/Panel for further consideration;
4. Grant the appeal and remand for a new live hearing before new Hearing Officer/Panel or;
5. Grant the appeal and revise the sanction.

The Appeal Officer will issue a written decision, which shall be provided to both parties simultaneously. The written decision will describe the result of the appeal and the rationale.

Questions?