OVERVIEW

• Who’s Who
• Pre-Hearing
• Conflicts of Interest & Bias
• Rules & Procedures
• Questioning & Cross-Examination
• Deliberation & Determination
• Sanctions & Remedies
• Delivering the Written Determination
GRIEVANCE PROCESS HEARING ADMINISTRATOR TRAINING

WHO’S WHO
WHO’S WHO

- Hearing Board
- Complainant
- Respondent
- Advisors
- Witnesses (Fact and Expert)
- Title IX Coordinator (?)
- Investigator (?)
GRIEVANCE PROCESS HEARING ADMINISTRATOR TRAINING

PREHEARING
Title IX Coordinator (or designee) will:
- Appoint Hearing Board (no bias, conflict)
- Provide Notice of Hearing (10 days out)
- Provide Investigative Report
- Schedule with parties, witnesses
- Address disability accommodations
- Arrange Technology
- Organize Pre-Hearing Conference*
PREHEARING CONFERENCE

• Hearing Board Chair will:
  – Hear and rule on evidentiary challenges
  – Review pre-submitted questions (optional)
  – Review Hearing Rules & Procedures
  – Answer hearing process-related questions
  – Test tech
GRIEVANCE PROCESS HEARING ADMINISTRATOR TRAINING

CONFLICTS OF INTEREST & BIAS
CONFLICTS OF INTEREST & BIASES

• Hearing Board must not have conflict of interest or bias:
  – For or against complainants or respondents generally, or
  – An individual complainant or respondent

• Harmful/unlawful biases can be unconscious

  × Red flags:
  – Pre-judgment of the facts; pre-determined outcome
  – Partisan approach by Hearing Board in their questioning of the parties
  – Improper application of hearing procedures
  – Application of sex stereotypes
QUESTIONS?
GRIEVANCE PROCESS HEARING ADMINISTRATOR TRAINING

RULES & PROCEDURES
HEARING PROCESS

• Hearings must be “live” (may be fully or partially remote/virtual)
• Parties and Hearing Board must be able to simultaneously see and hear one another and any testifying participants.
• Must record the hearing and provide access to the recording or transcript to the parties for review upon request.
HEARING PROCESS

• Maintain order and decorum (Hearing Board responsibility)
  – De-escalate whenever possible; participation favored
  – 3 strikes: may remove on third offense
• Trauma-informed, person-centered
• Impartiality and equity
HEARING PROCESS FLOW/ORDER

1. Opening Remarks (Board Chair)
2. Call Complainant
3. Call Respondent
4. Call Witnesses
5. Closing Statements
6. Adjourn
HEARING PROCESS

The timeframe for the hearing will depend upon how much evidence is involved, how many witnesses there are, and schedules of participants. Hearings can take one day to multiple days.
HYPO

A virtual hearing is taking place for the adjudication of the Complainant’s formal complaint alleging that the Respondent raped the Complainant in the Complainant’s res hall room a year ago.

While the Respondent’s advisor is cross-examining the Complainant, half-way into the advisor’s questions, the Complainant bursts into tears and is unable to stop sobbing. The Complainant then declines to participate further and logs off. The Complainant’s advisor remains.

Respondent, seeing the reaction of the Complainant, also declines to participate further and logs off.

HOW SHOULD YOUR ADDRESS? WHAT OPTIONS ARE AVAILABLE?
QUESTIONING & CROSS-EXAMINATION

The objective for cross-examination under the Final Regulations (̈106.45(b)(6)):

• To allow parties to probe/challenge the credibility, plausibility, and reliability of statements asserted by parties/witnesses.

• To give the [Hearing Board] the opportunity to observe parties and witnesses answer questions, including those challenging credibility, to serve the truth-seeking purpose of an adjudication.

• To permit parties to pose questions intended to promote the asking party’s perspective with respect to the allegations at issue and bring out additional facts and details about the alleged incident.

Schools may adopt rules of decorum, prohibiting abusive or intimidating questioning, etc.
QUESTIONING & CROSS-EXAMINATION FLOW

1. Hearing Board begins by asking questions directly to party/witness.

2. For Parties
   a. Advisor of other party cross-examines.

3. For Witnesses
   a. Advisor of party who “presents” the witness questions next.
   b. Other Advisor cross-examines.

4. Hearing Board may question again (optional).
QUESTIONING & CROSS-EXAMINATION PROTOCOL

1. Advisor presents each question to Hearing Board Chair (or designee)

2. Chair determines whether each question is relevant and permissible.
   ✓ Relevant
     • Solicits information that would tend to prove or disprove the truth of a matter of consequence to the allegation
   ✗ Impermissible
     • Disallowed (rape-shield protections)
     • Privileged
QUESTIONING & CROSS-EXAMINATION PROTOCOL

• Rapeshield protections:
  ✗ Questions about prior sexual activity
  ✗ Questions about sexual predisposition
  ✓ UNLESS:
    ✓ prove someone other than Respondent engaged in the conduct, or
    ✓ specific instances of Complainant & Respondent’s prior experiences offered to prove consent

• Privileged
  ✗ May not seek disclosure of information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege
3. If question **relevant** and **permissible**, Chair invites response

4. If question disallowed, Chair explains rationale
   - Chair may ask advisor to rephrase the question to maintain decorum, clarify, or to avoid being disallowed

Remember, breaks, de-escalation tactics, etc. are your friends.
QUESTIONING & CROSS-EXAMINATION

Parties and witnesses must “submit to cross-examination” for their “statements” to be considered by the Hearing Board(s).

• “Statements” are intended assertions of fact.
  – Inclusive, broad definition

• “Submit to cross-examination” means answer all relevant questions.
ACTIVITY!
I am ok with being friends with Drew. But I thought I was clear. I said the word no. Several times.

You were. I didn’t know it was because you weren’t comfortable with it, we don’t have to do anything again, I really should have listened and I’m truly sorry about it.

I told you why too. I was clearly into you but I pointed out I wasn’t on birth control, and then I pointed out how badly it could go for both of us, and then I said no again. I’m a pretty clear communicator. No means no.

I did say no, right?

Yes you did.
I am ok with being friends with Drew. But I thought I was clear. I said the word no. Several times.

You were. I didn’t know it was because you weren’t comfortable with it, we don’t have to do anything again, I really should have listened and I’m truly sorry about it.

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DELIBERATION & DETERMINATION

• Set expectation that deliberation will take place in the days (not hours) following the hearing
• Determination will not be sent until at least 3 business days
• Hearing Board must objectively evaluate all relevant evidence (inculpatory and exculpatory) and arrive at finding of responsibility as to each allegation utilizing the preponderance of the evidence standard of proof
DELIBERATION & DETERMINATION

• Decision should be presented as a consensus (even if majority rule needed, still presented as the Board’s decision – no “dissenting opinions”)

• Written determination presented to Title IX Coordinator for compliance check

• Board Chair sends written determination once finalized
WRITTEN DETERMINATION (MUST INCLUDE)

• Allegations of sexual harassment
  – Include definitions verbatim from policy
• Description of procedural steps
• Findings of fact/analysis
• Conclusions from applying facts to policy
• Result (R or NR)
• Sanctions (if R) and rationale for sanctions
• Statement that remedies were provided (if R)
  – Need not name/list them
• Permissible appeal grounds
SANCTIONS

• Case-by-case, fact-specific
• May not be arbitrary, capricious, disproportionate, inconsistent with policy (out of range)
• Best to explain rationale

“In determining the appropriate sanction(s), the University must examine and consider a number of factors, including but not limited to: 1) level of risk or harm to the community; 2) the nature and seriousness of the offense; 3) use of drugs or alcohol in the perpetration of the violation; 4) motivation underlying the Respondent’s behavior; 5) the Respondent’s record of misconduct, including prior violations of the same or similar type.”
REMEDI EXAMPLES

• Counseling
• Extensions of deadlines or academic adjustments
• Modifications of work or class schedules (restrict R from enrolling in same course as C)
• Mutual (or not) NCD, extended
• LUAA
• Changes in housing or work
• Leaves of absence*
Thank you / Questions / Discussion