



TITLE IX AT HOLMES

BRETT HARVEY, MISSISSIPPI STATE UNIVERSITY

OCTOBER 2020

TRAINING REQUIREMENTS

106.45(b)(1)(iii): A recipient must ensure that *Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process*, receive training on:

- The definition of sexual harassment in § 106.30
- The scope of the recipient's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

A recipient must ensure that *decision-makers* receive training on:

- Any technology to be used at a live hearing
- Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.

A recipient also must ensure that *investigators* receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.

Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment;

TITLE IX COMPLIANCE PERSONNEL, PART 1

- **Title IX Coordinator:** “Coordinates [institution’s] efforts to comply with [...] responsibilities” under Title IX and regulations.
 - **Must** contact complainant, receive formal complaints, and authorize any investigations where the complainant does not participate.
 - **Must** ensure procedural requirements for investigation/adjudication (e.g., proper notice, sufficient time) are followed.
 - **Must** coordinate supportive measures.
 - **May or may not** serve as investigator, oversee investigation process, and/or prepare mandatory investigative report.
 - **May not** serve as adjudicator or fact-finder in hearing, or make ultimate decisions on responsibility/non-responsibility.
- **Officials With Authority To Institute Corrective Measures (OWA’s):** Any official, other than the Title IX Coordinator, who has authority under your institution’s policies to institute corrective measures (such as discipline, no-contact orders, or other interim measures) in response to harassment.
 - **Must** relay information suggesting sexual harassment to the Title IX coordinator, as the OWA’s knowledge is imputed to the institution.
- **Investigators:** Responsible for interviewing witnesses, collecting evidence, and preparing investigation report before hearing.
 - **May or may not** also function as Title IX Coordinator.
 - **May not** serve as an adjudicator.

TITLE IX COMPLIANCE PERSONNEL, PART 2

- **Advocates:** Institutions are required to make available to the complainant and respondent an advisor *at the live hearing*.
 - **Must** conduct cross-examination of the opposing party.
 - **May or may not** be an attorney.
- **“Decision-Makers”:** Responsible for deciding the ultimate question of responsibility or non-responsibility at a live, recorded hearing, and for determining disciplinary sanctions.
 - **Must** make determinations as to the permissibility of cross-examination questions, and explain rationale for excluding any question.
 - **Must** make final determination, with assistance from investigation memorandum, on admissibility of evidence.
 - **Must** prepare a written determination explaining result of hearing, including responsibility/non-responsibility, procedural steps in investigation, findings of fact, application of fact to institution policies, disciplinary sanctions, and appeal procedures.
 - **Must not** be the same person as Title IX Coordinator or investigator.
- **Appellate Decision-Makers**
 - **Must** review appeals by complainants or respondents for procedural errors or new evidence that could not have previously been presented.
 - **May not** be the same person as Title IX Coordinator, investigator, or original decision maker.

A person in a dark suit and tie is holding a white tablet in their left hand and a magnifying glass in their right hand, looking at the tablet. The background is a light blue gradient.

TITLE IX INVESTIGATIONS

BRETT HARVEY
MISSISSIPPI STATE UNIVERSITY
OCTOBER 2020

TRAINING REQUIREMENTS

It is essential that every participant in HCC's Title IX process carefully review the Colleges Sexual Harassment Policy, as that document provides the authoritative statement of standards, policy, and procedure.

If you have questions about the contents of the policy, please contact the Title IX Coordinator, Dr. Stephanie Diffey, at (662) 472-9429 or compliance@holmescc.edu.

TITLE IX SEXUAL HARASSMENT

TITLE IX SEXUAL HARASSMENT: Conduct on the basis of sex that falls within one or more of three categories:

- **Quid Pro Quo Harassment:** When an employee of HCC conditions the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct
- **Hostile Environment Harassment:** When conduct on the basis of sex is sufficiently severe, pervasive, and objectively offensive, as determined by a reasonable person, that it effectively denies a person equal access to HCC programs or activities.
 - **Objective and Subjective Requirements:** The complainant must actually be subjectively offended AND the conduct must be judged by an objective "reasonable person" standard to be offensive.
 - **Severe or Pervasive:** Another objective standard. Some actions, such as groping or direct insults or threats, may be harassment despite happening only one time, if a reasonable person could determine that one instance is "pervasive enough" to deny equal access. NOTE that this requirement only applies to Hostile Environment Harassment. Offenses like sexual assault and domestic violence need not meet the "severe and pervasive" requirement.
- **Sexual Violence:** Sexual assault, domestic violence, dating violence, or stalking, as defined by policy.

HCC's "Program or Activity": Sexual Harassment meets this definition if it "occurs at any campus or facility operated by the College, or in connection with any program or activity of the College." HCC Reserves the right to address sexual misconduct that does not meet this definition or is not connected to a college program or activity under other policies.

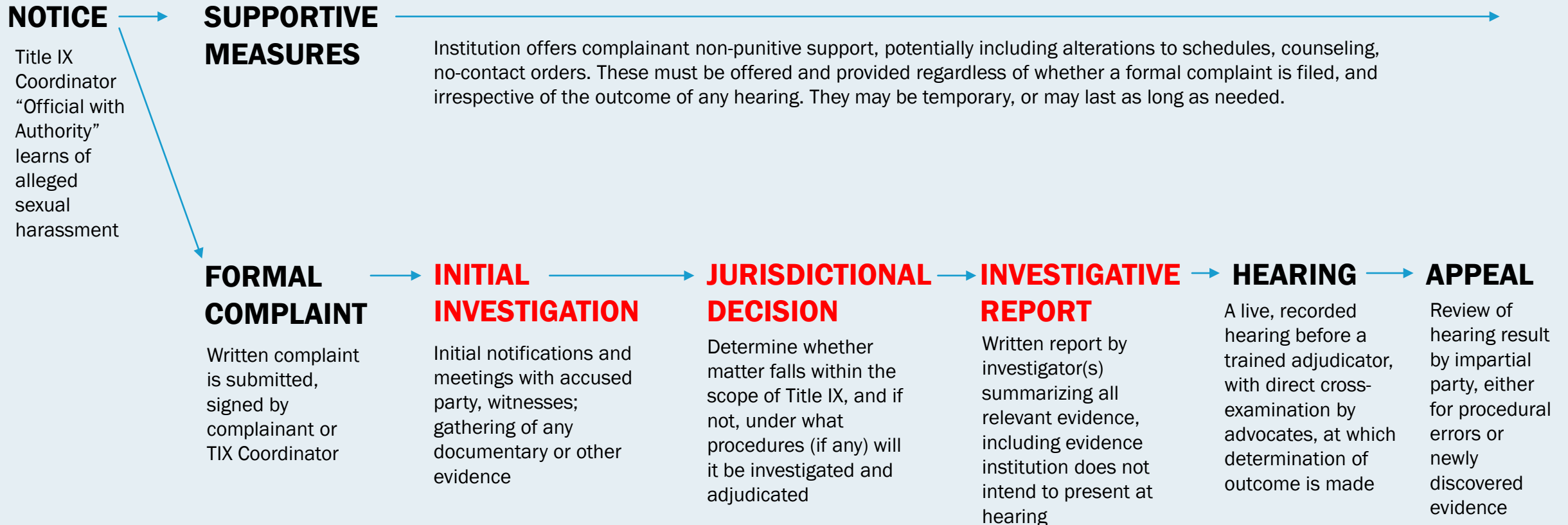
SEXUAL VIOLENCE

- **Sexual Assault:** Any sexual act directed against another person, forcibly and/or against that person's will or not forcibly/against will where the victim is incapable of giving consent.
 - “Sexual conduct is considered to be against a person's will where that person has not given **consent** as defined in this policy.”
 - “Sexual conduct is considered forcible where it occurs by means of **physical force or coercion** as defined in this policy.”
- **Domestic Violence:** Any felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim, co-parent of a child, cohabiting person, or similarly situated person.
 - In Mississippi, Simple Domestic Assault applies to anyone in the above groups who “**attempts to cause or purposely, knowingly or recklessly causes bodily injury to another**; or (b) negligently causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm; or (c) attempts by **physical menace to put another in fear of imminent serious bodily harm**.” So it's pretty broad.
- **Dating Violence:** Physical violence against a person who does not meet the Domestic Violence definition, but is or has been in a romantic or intimate relationship with the victim, as determined by (1) length of relationship; (2) type of relationship; and (3) frequency of interaction.
- **Stalking:** A course of conduct (based on sex) directed at a specific person that would cause a reasonable person to fear for his or her safety, or the safety of others, or suffer substantial emotional distress.

CONSENT, FORCE & COERCION

- **CONSENT** refers to words or actions that clearly show an active, knowing, and voluntary agreement to engage in a particular sexual activity.
 - **Determined objectively:** Would a reasonable person observing the encounter interpret words/actions as agreement?
 - **May be withdrawn** at any time by clear words or actions.
 - **Silence or the absence of resistance** by themselves are not consent.
 - **Consent with one person** is not consent to sexual activity with another.
 - **Incapacity** prevents a person from giving effective consent, but mere **impairment** does not.
 - **A person under the age of consent** cannot give effective consent, no matter what.
- **PHYSICAL FORCE** refers to physical contact with any person, by means of one's own body or an object, for the purpose of causing bodily harm or injury, or of forcibly constraining movement.
 - **Blocking exit** is a form of physical force, even if no actual contact is made.
 - **Verbal threats of physical force** can also preclude consent.
- **COERCION** is threatening an adverse consequence that is not physical force, but is nonetheless severe enough as to prevent a reasonable person from exercising free will in the decision whether to consent.

BASIC STEPS FOR AN INVESTIGATION



YOUR ROLE AS AN INVESTIGATOR

- Your job as an investigator is to conduct an impartial investigation, collect the relevant facts—whether they support guilt or innocence—and summarize what you have found fairly and objectively for the Title IX Coordinator.
- You **may not** serve either as an advocate for a party or as an adjudicator. That would constitute a conflict of interest.
- You must strive to be unbiased. If you feel you have a bias for or against an individual, a group, or a general side (complainants/respondents), you must let the Title IX Coordinator know and recuse yourself.
- Being unbiased doesn't mean you don't draw conclusions. While the ultimate outcome is up to the adjudicator, you may be asked to draw conclusions about relevance, credibility, and other issues in some situations—for example, in helping the Coordinator prepare the Investigative Report. Your conclusions must be based on a fair and objective assessment of the evidence.

INVESTIGATION OVERVIEW

- **Burden on Institution:** “The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties.” (106.45(b)(5)(i))
- You cannot simply ask the parties to provide all relevant evidence, as they may not know what that means.
- Ask more specific questions. For example:
 - Are there texts, social media messages, emails?
 - Are there names of witnesses? People who were there shortly beforehand or shortly after? People to whom the parties described the events very shortly after they happened?
- Also, you should independently follow up on leads—e.g., locations that might have security footage, records of card swipes to enter buildings, etc.
- You are not required to be perfect, or be law enforcement, but you must make a good faith effort.
- You should cooperate with law enforcement, and generally allow them to complete their work and give you the all clear. However, the Title IX process in some cases must proceed before a final legal outcome is reached.

INVESTIGATION PROCEDURE

- **Advance notice:** Parties must be informed in writing of all meetings of any kind related to the investigation, including investigative interviews. This means “date, time, location, and purpose.” Notice must be sufficiently early to allow “sufficient time for the party to prepare.” Under new regulations, this means *at least 24 hours in advance*.
- **Advisors:** Parties must be informed in writing of their right to be accompanied to all meetings by an advisor of their choice.
- **You may not impose “gag orders.”**
 - Students and employees are free to discuss matters and seek relevant information or evidence from others.
 - However, intimidation, threats or any other action that would deter a reasonable person from participating in an investigation is retaliation, and can be sanctioned.
 - One obvious exception is communication between the complainant and respondent. If the institution has implemented a no-contact order, which is common, this must be followed.
- **Parties must be permitted to view the evidence collected.** This normally occurs through the pre-hearing report, but they may also request to review it sooner via written request to the Title IX Coordinator. The general rule is, err on the side of conspicuous symmetry in how investigations are carried out.
- **Basic Rule of Thumb:** If you are at all in doubt, call the Title IX Coordinator.

INVESTIGATION TIPS

- The default order for investigation usually looks something like:
 - Receive formal complaint and provide written notices.
 - Interview complainant.
 - Interview respondent.
 - Based on initial interviews (1) gather any documentary evidence; (2) identify and schedule interviews of potential witnesses.
 - Interview potential witnesses.
 - After reviewing documentary evidence and witness interviews, re-interview complainant and then respondent. This interview should focus on identifying any inconsistencies or potential weaknesses and giving parties an opportunity to address them.
- The timeline for investigation and adjudication is now “reasonably prompt”, which provides some flexibility.
- Whether to record meetings should be decided in consultation with the Title IX Coordinator. Parties sometimes change their stories, and you may need to be able to verify what was said. There may be some exceptions, such as follow-up interviews to clear up minor details.
- Strong note-taking is important. Notes should be accurate and fair. Pause the interview as needed to make sure you are getting all relevant information.
- Be transparent with the parties. In some cases, an investigator may need to convey the opposing party’s strongest position will be, and give the interviewee an opportunity to respond. This will help you uncover red herring issues and focus on the points and evidence that matter.

INVESTIGATION TIPS

- As an investigator, your role is neither prosecutor nor defense counsel. You are an objective and impartial fact-gatherer.
- Personal experiences, biases, or empathy cannot change the way you approach an investigation.
- It is possible to balance compassion and investigative rigor. During initial interviews, the best approach is to allow each party to tell their story in the manner they see fit, then to follow up with specific questions to fill in details.
- Interviews generally should not be games of “gotcha,” in which investigators try to catch parties in contradictions.
- If a statement seems inconsistent or contradicted by evidence, the best practice is to tell the interviewee your concern and give them an opportunity to provide an explanation. If a story doesn’t hold together, that will become clear in time without the need for aggressive interrogation.
- Understand that both parties likely are under great stress. Provide ample time for them to answer, and understand that brief confusion or lack of recollection is not, in itself, evidence of fabrication.
- However, the mere fact that a party cannot recall information or has trouble recounting events should not be viewed as evidence of trauma suggesting that sexual violence occurred.

A photograph of two women sitting at a desk in an office or classroom setting. The woman on the left has long, wavy red hair and is wearing a grey t-shirt. The woman on the right has short brown hair, wears glasses, and a blue button-down shirt. They are both looking at each other and appear to be in conversation. On the desk in front of them are several stacks of papers, a pen holder filled with black pens, and a blue pen. In the background, there are some papers on the wall and a globe on a stand.

TITLE IX ADVISING

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MISSISSIPPI STATE UNIVERSITY
OCTOBER 2020

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THE ADVISOR'S ROLE

- At HCC, an appointed advisor's role is to advise the party—complainant or respondent—on issues related to HCC policy and procedure, as well as assisting the party in identifying potentially relevant evidence or issues and presenting them to the investigator or adjudicator.
- An advisor may be present for any meeting, interview, or hearing in HCC's process, at the discretion of the party. It is the responsibility of the party to ensure their advisor's availability.
- An advisor may raise procedural questions or objections at any point to the Title IX Coordinator.
- The ultimate responsibility for presenting arguments and positions lies with the party; the advisor's role is to suggest possible alternatives, but they have neither the power nor the responsibility to compel a party to take any particular approach.
- An advisor's communications with a party are confidential with respect to HCC's process, but HCC cannot guarantee that communications will be privileged against external discovery. You should advise the party of this at the outset.
- An advisor is not expected to be impartial—their duty is to advocate for the party they are assigned to. However, the advisor is expected to behave professionally at all times and to adhere to all rules and procedures outlined in P&P 1.7 on Sexual Harassment.
- An advisor/advisee relationship is confidential with respect to HCC. But it is not an attorney-client relationship, and you should advise the party of this at the outset.

ADVISING CONSIDERATIONS

- Taking inventory of relevant evidence. Texts, emails, social media messages, possible security camera footage or card swipes.
- Taking inventory of potential witnesses. Witnesses to the actual event, individuals present shortly before or after the event, witnesses to admissions by the opposing party.
- Preparing the party to state their position clearly to investigators.
- Try to be candid with the party about your appraisal of the case.
- Considering possible informal resolution. This is never required, but parties may wish to explore it as an option.
- Considering the ramifications of possible parallel criminal or civil proceedings.
- When to consider admission of responsibility or voluntary withdrawal of charge.

THE ADVISOR'S ROLE IN HEARINGS

- The advisor is responsible for cross-examination of opposing parties and witnesses at the hearing and should prepare accordingly.
- The hearing advisor also may raise procedural issues or objections at the hearing.
- The advisor does not present testimony. Generally, it is the duty of the party to speak on factual issues, although the adjudicator does have discretion to consider explanations from the advisor when he or she determines they may be helpful.
- The hearing advisor will assist a party receiving an adverse outcome in any internal appeal process.



TITLE IX ADJUDICATION

BRETT HARVEY
MISSISSIPPI STATE UNIVERSITY
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THE ADJUDICATOR'S ROLE

- The adjudicator oversees the live hearing and renders the college's decision as to responsibility or non-responsibility.
- The adjudicator is assisted by the Title IX Coordinator, who may offer opinions and advice on procedural questions or explanations of the contents of the Investigation Report, but may not offer opinions on the ultimate merits of the matter.
- The adjudicator may not serve as an investigator or advocate, and may not serve as an appellate adjudicator in the same matter he or she heard in the first instance.
- The investigator must be impartial and fair, and weigh all relevant evidence, both inculpatory and exculpatory. If an investigator has a bias toward any individual, group, or type of party (e.g., complainants or respondents) they must disclose this immediately and recuse.
- The adjudicator has discretion to conduct the live hearing as he or she deems fit, but must provide both parties equal and fair opportunity to present relevant evidence.
- Finally, the adjudicator is responsible for writing an opinion explaining the basis for the outcome of the hearing.

THE INVESTIGATIVE REPORT

- The investigative report is prepared by the Title IX Coordinator in conjunction with the investigator.
- It summarizes all relevant evidence, both inculpatory and exculpatory, and is provided to the parties and the adjudicator(s).
- What is “relevant evidence”?
 - Federal regulations are somewhat evasive on this point, saying the word “relevant” should be defined consistent with its “ordinary meaning.” (p. 811, n.1018)
 - This does not permit exclusion based on other factors like undue prejudice or cumulative evidence, which would be considered by a court evaluating whether to admit evidence.
 - The simplest approach may be to ask: **“Does this evidence make any fact material to the ultimate outcome more or less likely to be true?”** If so, it should be included in the investigative report, even if the report ultimately suggests that its impact on the ultimate decision is low.
- The report may or may not include recommended findings or conclusions, but the decision-maker is obliged to make an independent, objective determination based on relevant evidence.

THE LIVE HEARING

- Regulations require a “live hearing”.
 - At this hearing, the “decision-maker(s) must permit each party’s advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.” (106.46(b)(6))
 - **Direct Cross-Examination:** “Cross-examination must be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally.”
 - **Remote Option:** “At the request of either party, the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.”
 - Must be recorded, either audiovisual or audio, or transcribed.
- **Advisors Required:** “If a party does not have an advisor present at the live hearing, the recipient must provide without charge or fee to that party, an advisor of the recipient’s choice, who may be but is not required to be an attorney, to conduct cross-examination on behalf of that party.”



THE LIVE HEARING

The order of the hearing is flexible, but typically runs as follows:

- Reading of the charge and respondent's plea
- Parties' opening statements
- Complainant's Testimony and Cross
- Respondent's Testimony and Cross
- Witness Testimony and Cross
- Any further questions from Adjudicator
- Parties' closing statements
- Adjourn for determination of responsibility/non-responsibility
- Announcement of determination
- If responsible, parties' statements on sanction
- Adjourn to determine sanction and prepare Written Determination.

RELEVANCE OF QUESTIONS AND EVIDENCE

- **Questions:** “Only relevant cross-examination and other questions may be asked of a party or witness.” (106.45(b)(6)(i))
- “Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”
 - We suggest the following approach: (1) The question is asked; (2) the decision maker considers it; (3) the decision maker tells the witness they may or may not respond; and (4) if not, the decision maker briefly explains the rationale for excluding the question.
 - **Rape Shield Provision:** “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with the respect to the respondent and are offered to prove consent.”
- **Evidence:** While the investigation report can make recommendations as to the relevance of evidence (including exhibits and witnesses) the regulations strongly suggest that the decision maker must make final determinations as to what evidence is admissible.
 - The simplest approach may be to ask: “Does this evidence make any fact material to the ultimate outcome more or less likely to be true?”
 - An adjudicator may admit evidence but assign it little or no weight in a determination.
- These real-time decisions are another reason why individual adjudicators, as opposed to panels, may be preferable.

LIVE TESTIMONY REQUIRED

- *“If a party or witness does not submit to cross-examination at the live hearing, the decision maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision maker cannot draw an inference about the determination regarding responsibility based solely on the party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.” (106.45(b)(6))*
- DOE has repeatedly confirms that this allows parties to keep out *any* factual statement, including a direct recorded confession by refusing to testify.
- Per DOE regulations, refusal to testify or answer ANY relevant question must result in the entirety of the party or witness’s statement(s) being disregarded, and the matter being decided based on any remaining evidence.
- Documents such as police reports likely will need live witnesses to authenticate them.

WRITTEN DETERMINATION

The adjudicator's written determination must include:

- A statement of the allegations considered
- A descriptions of the procedural steps from the receipt of the formal complaint (which will be provided in the Investigative Report)
- Findings of relevant fact
- Conclusions applying relevant HCC policies to facts
- A statement of the result for each separate allegation, including any sanction or other remedy and the rational for the same, and
- A statement of possible grounds and procedures for appeal.

APPEALS

- An appeal may be made by any party from (1) any pre-hearing dismissal; or (2) the outcome of a hearing.
- A party may appeal by submitting a written notice of appeal to the Title IX Coordinator within seven days of any decision.
- The Title IX Coordinator will inform parties of how to submit written statements on appeal.
- The appellate adjudicator will consider ONLY the hearing record, the parties' written statements, and applicable policies. He or she may not conduct a new hearing or hear new testimony.
- The appellate adjudicator may (1) affirm the outcome; (2) reverse the outcome and remand to the hearing adjudicator for further proceedings to determine remaining questions; or (3) if the case leaves no remaining material questions, reverse the outcome and render a new, final outcome.
- The appellate adjudicator may not have served in any other capacity in connection with the investigation in question.
- The decision of the appellate adjudicator is final.