



HUSCH BLACKWELL

**Title IX Hearings,
Part One**





A String of Musts . . .

- “the recipient’s grievance process **must** provide for a live hearing.”
- “At the live 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.”
- “Such cross-examination at the live hearing **must** be conducted directly, orally, and in real time by the party’s advisor of choice and never by a party personally”
- “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.”



What The Regulations Say...

- “If a party does not have an advisor present at the live hearing, the recipient **must** provide without fee or charge 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.”
- “At 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.”



What The Regulations Say...

- “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 respect to the respondent and are offered to prove consent.”
- **“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”**
- “Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.”

Practical Questions



- What are some of the statements we might not be able to consider?
- How are we going to minimize risk of witnesses not participating?

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Hypothetical

- Respondent is a wealthy member of the law faculty and has hired Paige Duggins-Clay to represent him in a Title IX hearing initiated by a complaint filed by poor freshman student Complainant
- Q1: how to overcome concerns of Complainant & witnesses about hearing?
- Q2: Complainant cannot afford an attorney. Who will you provide?



Rewind: 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.**”
- Fair to note undisputed material facts
- Disputed material facts are for hearing



Investigation Lays Foundation for Smooth Hearing



1. Appoint hearing officer
2. Allow parties meaningful opportunity to challenge for bias – what does this look like?
3. Provide hearing officer a copy of the investigation report and a copy of all evidence transmitted to the parties by the investigator
4. Hearing officer should carefully review in preparation

Recommended Next Steps

After the hearing officer is appointed, the hearing officer should:

1. set a deadline for the parties to submit any written response to the investigation report
2. set a date for a pre-hearing conference
3. set a date and time for the hearing
4. provide a copy of the University's Hearing Procedures (if any)

Recommended Next Steps

A Party's written response to the investigation report should include:

1. Disagreement with the investigative report
2. What evidence should be categorically excluded
3. A list of any witnesses that the Party contends should be requested to attend the hearing
4. A list of any witnesses that the Party intends to bring to the hearing
5. Any request that the parties be separated physically
6. Any other accommodations that the Party seeks
7. The name and contact information of the advisor
8. If the Party does not have an advisor who will accompany the Party at the hearing, a request that the University provide an advisor for purposes of conducting questioning

Recommended: Pre-Hearing Conference

- Discuss the hearing procedures with the parties
- Address matters raised in the parties' written responses to the investigation report
- Discuss whether any stipulations may be made to expedite the hearing
- Identify and discuss witnesses and ensure witnesses have been served with notices of attendance
- Anything else?



Please Welcome Joe Storch!



Preparing for the Hearing

- For a physical space, consider the following:
 - If all in the same room, two exits are helpful
 - Even if all parties want to be in the same space, they will need separate rooms to take a break, confer with their advisors, etc.
 - Have photos of or a schematic of the room to share with participants so they can see the set up in advance.
 - Make things easy for everyone – set up the room(s) in advance with notepads, pens, highlighters, sticky notes, tissues, hand sanitizer, and water.
 - If meeting in person, have copies of all reports, evidence, etc. available
- Consider a “Rules of Engagement” document – written expectations for all involved.

Preparing for the Hearing

- Create a script for the hearing
 - If you use a database like Maxient, make the script into a “letter/form” – can print a customized copy for each hearing and insures consistency.
 - Give each party a copy of the script so they can follow along.
- Color-code or sticker any documents you provide to the parties in hard copy
 - This will allow you to collect them more easily at the end of the hearing to insure that you get them all back.
- Make sure all parties, including witnesses, have received written notice

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.

During the Hearing

- Start with the investigation report
 - Allow the parties to make an opening statement commenting on or responding to the report
 - The goal of the hearing is to explore inconsistencies/areas of disagreement in the report – not to start from square one like a criminal trial
- Consider starting with the hearing officer/hearing panel asking the first round of questions to each participants.
 - It helps to set a respectful tone and de-escalate the situation.
 - It helps the hearing officer/panel to establish credibility with the parties when they see decisionmakers ask hard questions and take the proceedings seriously.

During the Hearing

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. In general, personally, I am more permissive with questions as long as they are not overly repetitive or inappropriate.
 - Not everyone asks questions well. A poorly worded question, in and of itself, is not a reason to not ask it.

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QUESTIONS?