

MGH Institute of Health Professions

Title IX Hearing Board Training

DATE: FEBRUARY 14, 2023

PRESENTER:

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Required Training – Why We Are Here

Title IX regulations require that the Institute must ensure that Title IX Decision-Makers – the Hearing Board Members – receive training on:

1. The definition of sexual harassment in the federal regulations;
2. The scope of the Institute's education program or activity;
3. How to conduct the grievance process – including hearings;
4. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias;
5. Any technology to be used at a live hearing; and
6. 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

Today's Focus

Overview of
Title IX Law

Review of the
Institute's Policy
on Title IX
Hearings

Preparing to
Serve on a Title
IX Hearing
Board

Title IX



What Does Title IX Actually Prohibit and Say?

Prohibits sex discrimination in educational institutions that receive federal funds.

The law reads:

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Title IX – Sexual Harassment Defined

Conduct on the basis of sex that satisfies one or more of the following:

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
3. Sexual assault, dating violence, domestic violence or stalking.

Title IX – Required Response to Sexual Harassment

Once the Institute has actual knowledge of sexual harassment in its education program or activity against a person in the United States, the Institute must respond promptly in a manner that is not deliberately indifferent. The Institute is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

The Institute's response must treat complainants and respondents equitably by offering supportive measures to a complainant and by following a grievance process that complies with federal regulations before the imposition of any disciplinary sanctions or other similar actions against a respondent.

Title IX – Education Program or Activity

“Education Program or Activity” includes locations, events, or circumstances over which the Institute exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Overview of the Formal Process

Step I - Formal Complaint

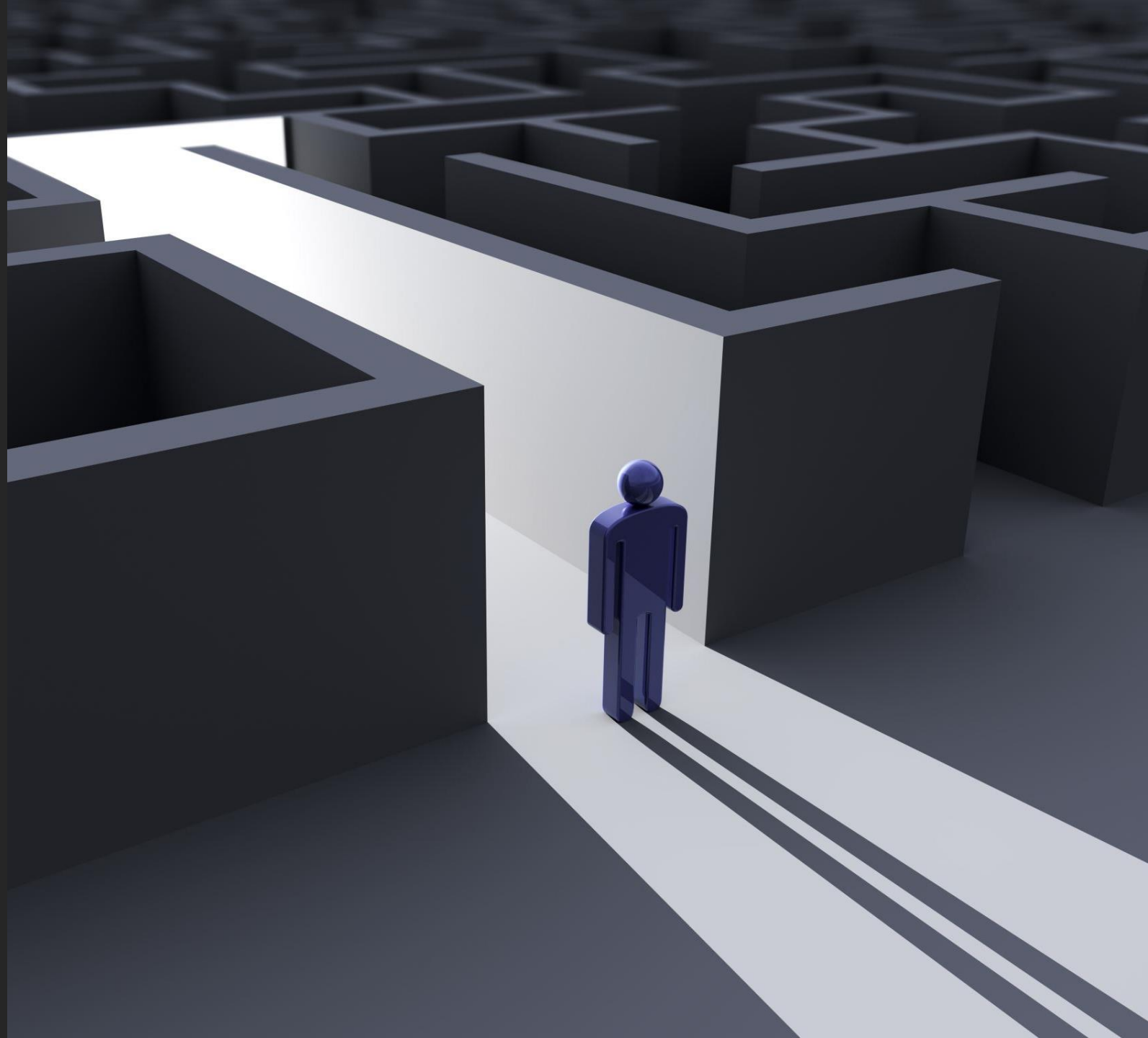
Step II - Notice of Allegations

Step III - Investigation

Step IV - Live Hearing

Step V - Deliberation

Step VI - Written Determination



The Investigation

When an initial Title IX assessment concludes that the alleged conduct in a report is covered within the scope of the Policy, the Institute may initiate an investigation based on the Reporting Party's request or its own determination that there exists a potential risk of harm or threat to public safety.

A magnifying glass with a dark frame is positioned over a textured, light-brown surface. The word "INVESTIGATION" is printed in large, bold, dark blue capital letters across the center of the lens. The background surface has a mottled, aged appearance with some darker spots.

The Investigator

The Institute will designate a trained Title IX investigator to conduct the investigation.

The investigator may be an employee of the Institute, an external investigator, or both.

The Institute will typically use one or two investigators who shall be impartial and free of any actual conflict of interest.

Investigative Steps

Gather information from the Reporting Party, the Responding Party, and any other individuals who may have information relevant to the determination - including by interviews.

May consider prior or subsequent conduct, excluding sexual conduct, that is relevant to evaluating the current conduct.

Interviews may be audio-recorded, and notes of the interview will be maintained by the Institute until the parties have had the opportunity to review and comment on the draft investigation report.

Gather any available physical evidence, including documents, communications between the parties, and other electronic records as appropriate, all as described more fully below.

The Reporting Party and Responding Party will have an equal opportunity to be heard, to submit information, and to identify witnesses who may have relevant information.



The Investigative Report

1. Summarizes the information gathered
2. Synthesizes the areas of agreement and disagreement between the parties and any supporting information or accounts
3. Analyzes the relevant facts determined through the investigation, referencing any supporting documentation or statements
4. May include summaries of interviews with the Reporting Party, Responding Party and third-party witnesses
5. May include photographs of relevant sites or physical evidence, electronic records, and forensic evidence

Review of Report



Reporting Party and Responding Party are given the opportunity to review the draft report

They may raise concerns about the inclusion of any evidence, even if relevant, that a party believes may be more harmful than probative

Both parties may pose written questions to the other for the purpose of cross-examining the other party

The investigator(s) will review the questions to ensure that they are relevant and reasonable in number. The investigator(s) will then present the approved cross-examination questions to the other party who will be expected to provide a written response within the seven (7) day review period. Both the cross-examination question(s) and written response(s) will be included in the final investigation report



Final Investigative Report

Investigator prepares a final investigative report after determining whether any information included in the draft report should be excluded

Investigator determines whether there is sufficient information to find, by a preponderance of the evidence, i.e., whether it is more likely than not, that the Policy was violated

Investigator submits the final written report and investigative finding including all investigation materials, the cross-examination questions and answers, the Reporting Party and Responding Party responses, the finding of whether this Policy and any additional policies being explored through this investigation have been violated, and the rationale for the finding

Title IX Hearing Board - Selection

A three-person Title IX Hearing Board will be assigned by the Title IX Coordinator from a pool of staff trained in hearing Title IX cases

The parties will have the opportunity to object to a Hearing Board member due to bias or for any other reason which would prevent them from making a fair assessment of the evidence.

The final decision on any such requests for recusal will be made by the Title IX Coordinator.



Title IX Hearing Board - Role

The Hearing Board will hear the case and determine, based on the preponderance of the evidence, whether the Responding Party is responsible for a violation of the Policy

A majority of two votes is necessary for a positive or negative finding of responsibility in a Title IX case

The Hearing Board's Role

Review the investigative report and any written statements provided by the parties in response to the investigative report, all exhibits, and any additional relevant evidence introduced at the Hearing

Determine the format of the hearing

Provide all parties with an equitable opportunity to be heard and to reach a full and fair determination as to responsibility and imposition of any sanction, should there be a finding of responsibility

Determine the relevance of every question posed by the parties' advisors and briefly explain any decision to exclude a question as not relevant

The Hearing Board's Role

Resolve all outstanding questions of fact, including the credibility of witnesses and the adequacy of the proof of the allegations and render a decision.

Reach credibility determinations if appropriate, but do not base credibility determinations on a person's status as a Complainant, Respondent, or witness.

Prepare a written decision, which includes the finding of responsibility or nonresponsibility and rationale for the decision.

Determine sanction, if appropriate.



Hearing Board Chair

The Hearing Board Chair will be selected by the members of the Hearing Board.

The Chair will orally explain the hearing process and will provide an opportunity for all parties to ask procedural questions prior to initial statements and the presentation of information

The Hearing Board Chair decides whether questions are relevant

Hearing Board - Preparation

Review the Investigator's Report containing all pertinent information regarding the incident in question prior to the date of the Hearing

Review additional information that is offered to the Investigator in the form of written statements, documents, items, or oral information from the Reporting Party, the Responding Party, and witnesses will be forwarded to the Hearing Board once relevance to the case is established

Review all inculpatory and exculpatory evidence that must be provided to the Hearing Board by the Investigator for consideration

Live Hearing – In-Person or Video



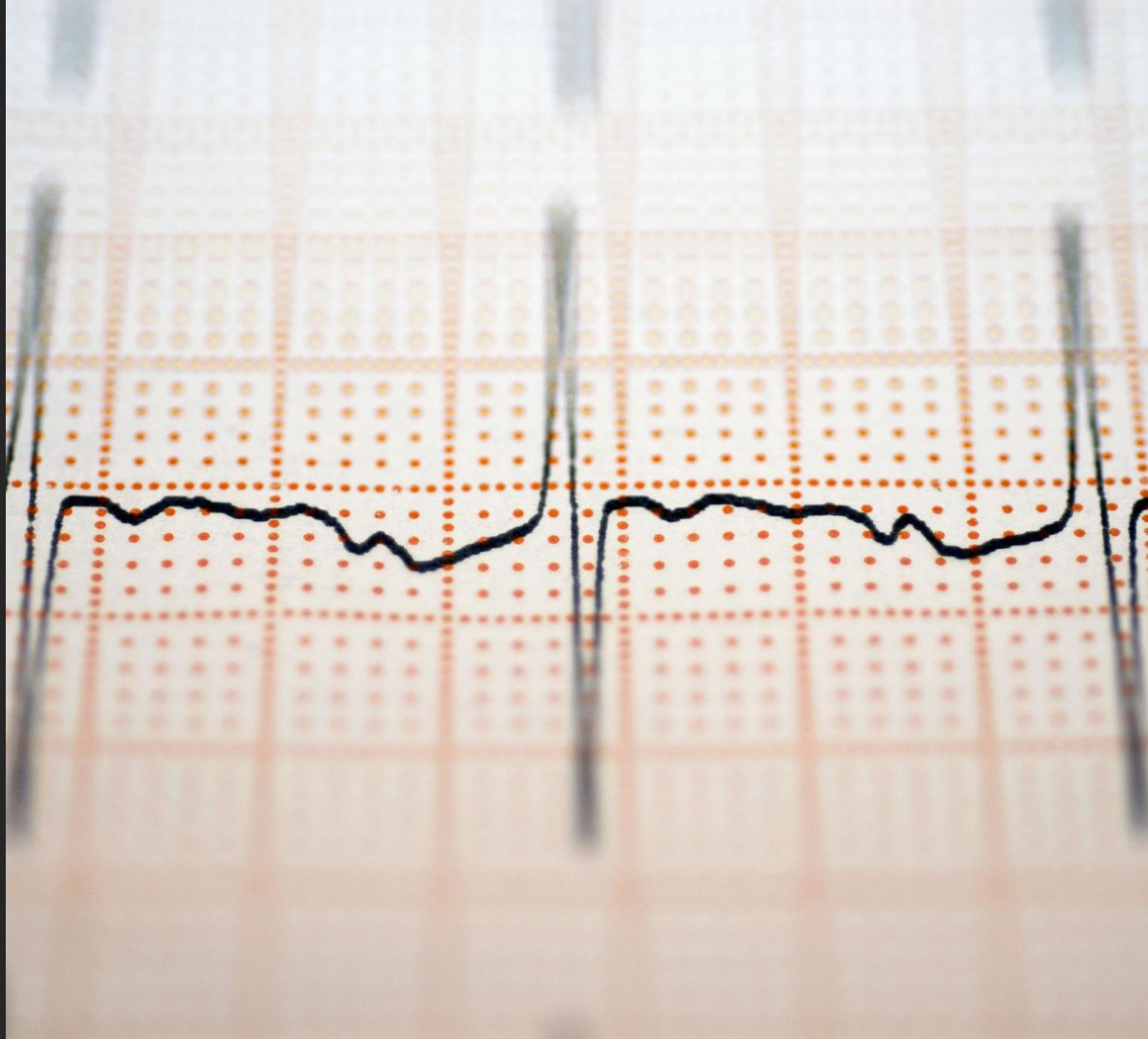
Hearing will be conducted either live with all parties physically present in the same geographic location or, at the Institute's discretion, virtually



Either party participating in the hearing will have the opportunity to do so without having to physically face the other party

Equitable Treatment

Treat complainants and respondents equitably



Objective Evaluation



The Hearing Panel must objectively evaluate all relevant evidence



Must consider both inculpatory and exculpatory evidence



Credibility determinations may not be based on a person's status

Required Presumption – Not Responsible

The Hearing Board must presume that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made after deliberations



Preponderance of Evidence

The **standard of evidence** used to determine responsibility is preponderance of the evidence – more likely than not – and the same standard must apply to all complaints of sexual harassment



The parties must have the same opportunities to have others present during the Hearing, including the opportunity to be accompanied by the advisor of their choice, who may be, but is not required to be, an attorney.

Presence of Advisors



Rules of Decorum

Participants are expected to treat one another respectfully and conduct themselves professionally and in accordance with the Policy

All participants should speak one at a time and avoid talking over one another

Parties should wait until their allotted time to talk and not interrupt others

Parties and witnesses are not permitted to record the hearing

Parties and witnesses should not answer any question until the Chair has determined whether the question is relevant

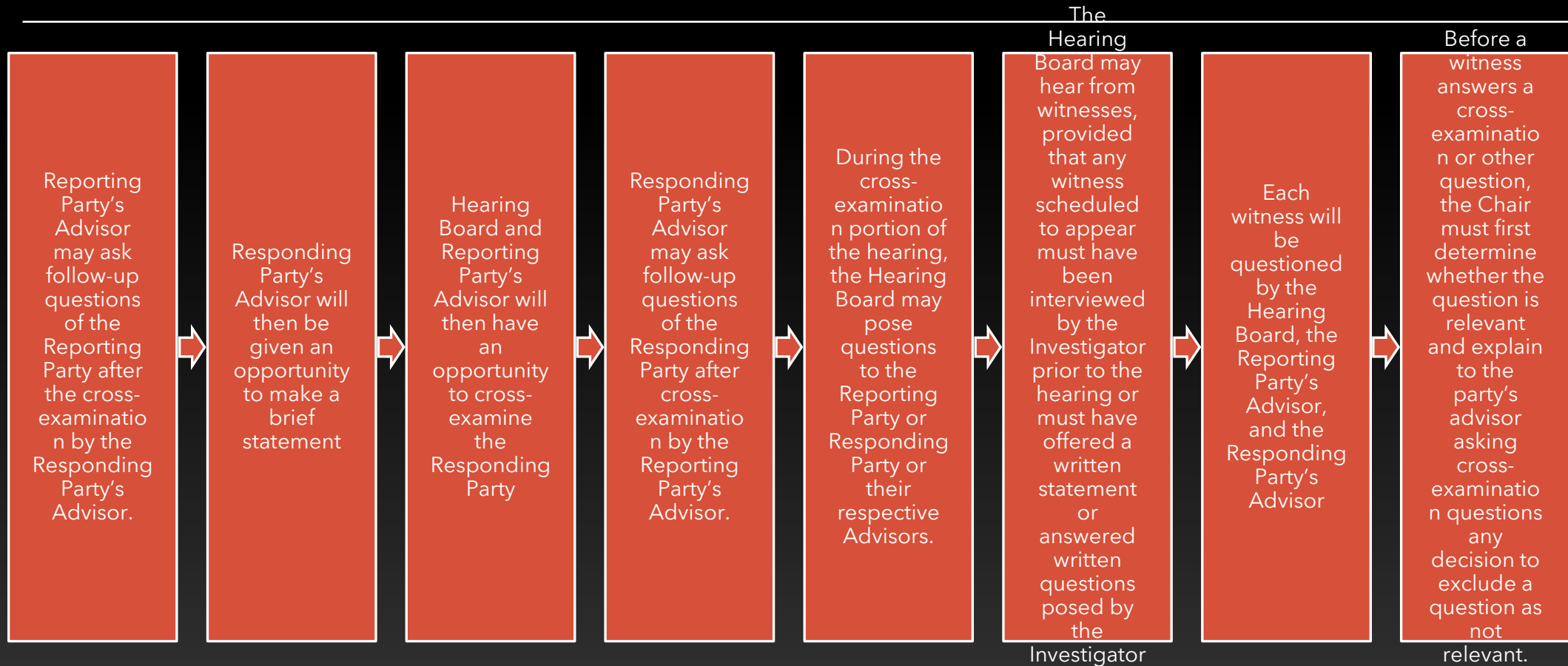
Parties are permitted to consult with their advisors during the hearing

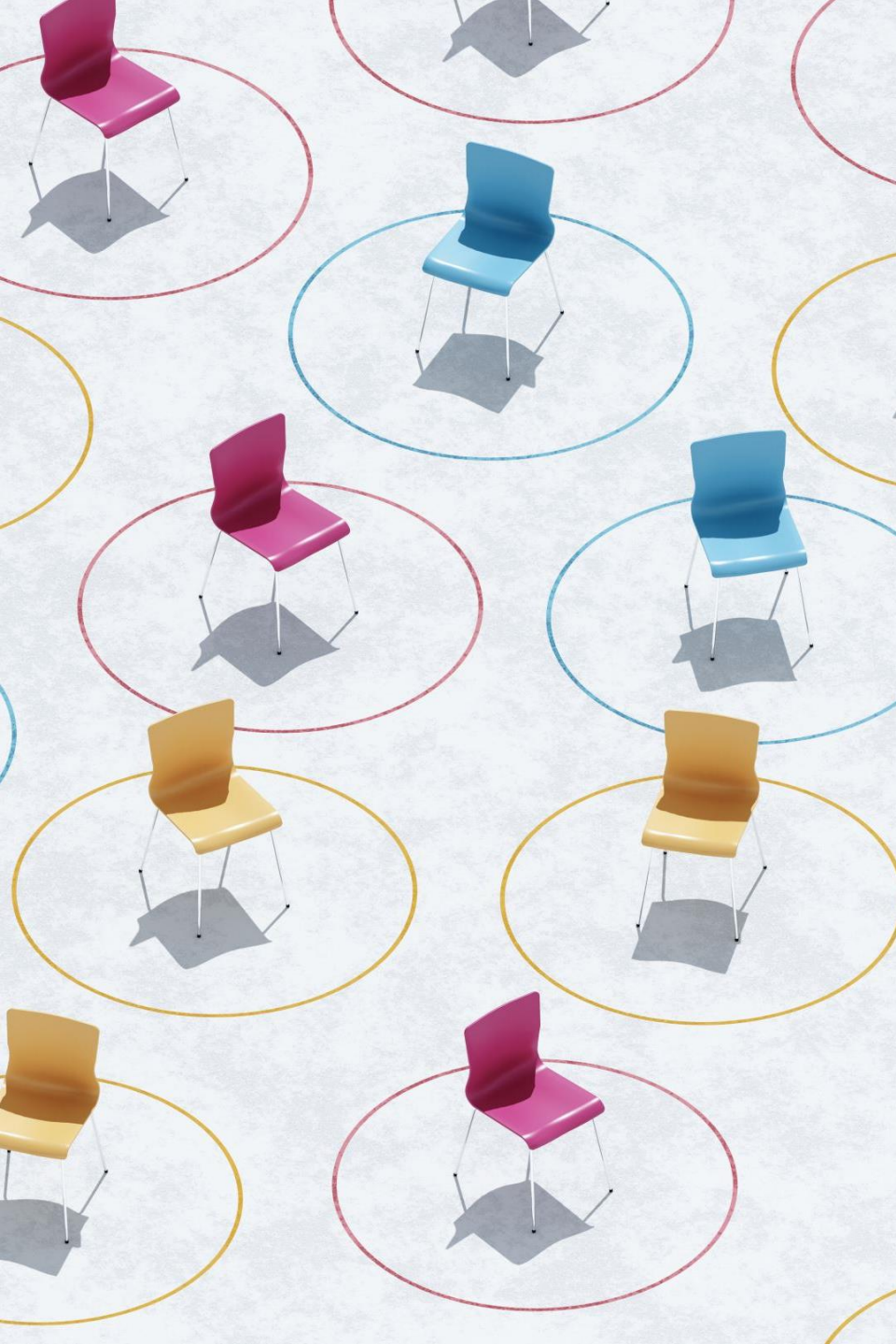


General Hearing Format – Part I

1. Investigator provides a brief opening statement and a summary of the investigation and findings of fact.
2. Hearing Board, the Reporting Party's Advisor, and Responding Party's Advisor may then make inquiries of the Investigator.
3. Only relevant questions may be asked. Before the Investigator answers a question, the Chair must first determine whether the question is relevant and explain to the party's Advisor asking questions any decision to exclude a question as not relevant.
4. Reporting Party's Advisor will be given an opportunity to make a brief statement.
5. Hearing Board and Responding Party's Advisor will then be given an opportunity to cross-examine the Reporting Party.

General Hearing Format – Part II





General Hearing Format – Part III

At the conclusion of the presentation of all witnesses, the Reporting Party (or their Advisor) and the Responding Party (or their Advisor) will each be given a brief final opportunity to address any outstanding issues of fact and submit additional written questions to the Chair

The Chair will determine the appropriateness and relevance of the questions

If any questions are approved, the Reporting Party and Responding Party will be permitted to ask their questions in the same questioning format as previously used in the hearing, with the Reporting Party being the first to ask, followed by the Responding Party

Relevance Issues

Only relevant cross-examination and other questions may be asked of a party or a witness.

Questions and evidence about the Reporting Party's sexual predisposition or prior sexual behavior are not relevant unless such questions and evidence are offered to prove that someone other than the Responding Party committed the conduct alleged by the Reporting Party or if the questions and evidence concern specific incidents of the Reporting Party's prior sexual behavior with respect to the Responding Party and are offered to prove consent.

The hearing will not consider: incidents not directly related to the alleged violation unless they evidence a pattern; the character of either party; or prior disciplinary action of any kind involving either party (except that the Hearing Board may consider previous disciplinary action when considering sanctions).

The parties may each submit a written impact statement prior to the hearing for the consideration of the Hearing Board or at the sanction stage in the event a determination of responsibility is reached. The impact statement is not relevant prior to the sanction stage.



Recording of the Hearing

Notes may be taken by the participants in the hearing solely for their personal use

The Institute shall create and maintain an audio or audiovisual recording, or transcript, of any hearing, in compliance with the Institute's record retention guidelines

This recording shall be the sole property of the Title IX Coordinator and will be made available only for review by the Reporting Party, Responding Party, or the Institute for the purpose of an appeal

The recording will not be released to any party nor will the Title IX Coordinator make copies

The recording will be maintained with the hearing record for a period of four (4) years from the date the hearing concludes

Advisor Role at the Hearing

Any questioning of the other party must be conducted by the party's advisor

If a party does not have an advisor for the Hearing, the Institute will provide an advisor free of charge

The advisor will attend the Hearing and conduct questioning on behalf of that party.

The Role of the Advisor

The Advisor may not speak on behalf of the advisee during the Hearing except in the capacity of conducting cross-examination on behalf of the advisee.

Not Submitting to Cross-Examination



If a party or witness does not submit to cross-examination at the live hearing, the Hearing Board may not rely on any statement of that party or witness in reaching a determination regarding responsibility



The Hearing Board 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

Prior Sexual Behavior – Complainant

Questions and evidence about the complainant's sexual predisposition or **prior sexual behavior** are not relevant, unless the complainant's prior sexual behavior is offered:

- To prove that someone other than the respondent committed the conduct alleged by the complainant, or
- To prove consent, if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent.

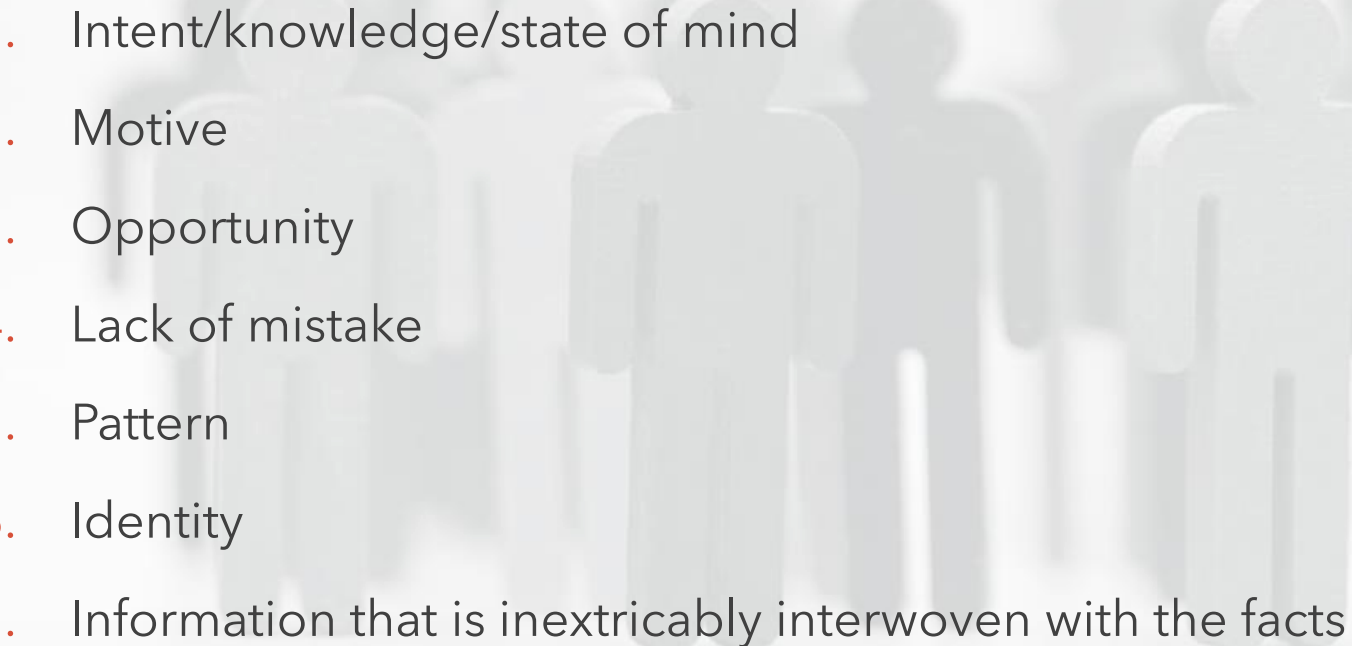
Prior Sexual Behavior - Respondent

Evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence

“Evidence of a pattern of inappropriate behavior by an alleged harasser” permitted if relevant

Prior or Subsequent Misconduct

Prior or subsequent misconduct may be relevant to demonstrate:

1. Intent/knowledge/state of mind
 2. Motive
 3. Opportunity
 4. Lack of mistake
 5. Pattern
 6. Identity
 7. Information that is inextricably interwoven with the facts
- 

The Role of Alcohol

Central nervous system depressant

Impairs cognition and psychomotor skills

Progressively impairs all body functions

Decreases inhibitions

Impairs perceptions

May cause blackouts or loss of consciousness

May cause memory loss

Effects exacerbated when mixed with other drugs

Intoxication breeds vulnerability

A person may be less likely to think someone is trying to sexually assault him/her/them

A person intent on harming another may not need to use physical force

A person may not realize incident has occurred

A person may delay in reporting for multiple reasons

No toxicological evidence of BAC/impairment level due to delay in report

Incapacitation

Consent may never be given by minors, mentally disabled persons, those who are incapacitated, and those who are by law unable to give consent.

If a person is mentally or physically incapacitated or impaired so that such person cannot understand the fact, nature, or extent of the sexual situation, there is no consent; this includes impairment or incapacitation due to alcohol or drug consumption that meets this standard or being asleep or unconscious.

Deliberations

At the conclusion of the Hearing, the Hearing Board will excuse everyone from the room and deliberate

Must resolve all outstanding questions of fact, including the credibility of witnesses and the adequacy of the proof of the allegations

Apply the preponderance of evidence standard and render a decision

Decide on sanctions, if any

Ask the Title IX Coordinator to return and share the decision on the charge(s) and a sanction, if any

Deliberation Statement

The Hearing Board will issue a written deliberation statement after making its decision. The statement will include:

- A conclusion about whether the Responding Party is responsible for a violation of Title IX under the Policy
- The rationale for the result as to each allegation
- Any disciplinary sanctions imposed on the Responding Party
- Whether remedies will be provided to the Reporting Party

Sanctioning Discretion

Upon reaching a determination that a respondent is responsible for sexual harassment, the final regulations do not restrict a recipient's discretion to impose a disciplinary sanction against the respondent, including suspension, expulsion, or other removal from the Institute's program or activity



Sanctioning Discretion

The regulations do **not require any particular disciplinary sanctions** against respondents, because the Title IX regulations are focused on requiring remedies for victims, leaving disciplinary decisions to the Hearing Board's discretion

The regulations do not intrude on the Hearing Board's discretion to use disciplinary sanctions as educational tools of behavior modification rather than, or in addition to, punitive measures

The regulations do not impose a standard of proportionality on disciplinary sanctions

Questions



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