CASE PROCESS DECONSTRUCTED

1. Incident Reported
2. Student Conduct Process Initiated
3. Pre-Hearing Prep Investigation
4. Hearing
5. Appeal Process
6. Decision Implementation
3. PRE-HEARING PREP INVESTIGATION MODEL

Key Players:
- Conduct Staff
- Registrar
- UPD
- Hall Staff
- Hearing Board
- Appeals Board
- TIXC

Logistics *(physical set up, zoom, teleconference, etc.)*

Meeting with both parties regarding hearing process *(as needed)*

Continue with Case Rationale Map

Technology *(see Tech Guide)*

Coordination of Schedules

Relationship with Investigator

INVESTIGATIONS & PRE-HEARING PREP:
RECAP OF LEGAL REQUIREMENTS
<table>
<thead>
<tr>
<th>Evidence Collection</th>
<th>Evidence Sharing</th>
<th>Investigative Report</th>
</tr>
</thead>
<tbody>
<tr>
<td>Interviews of parties &amp; witnesses after Notice of Allegations</td>
<td>Mandatory inspection process with 10-day min. review period</td>
<td>Summarizes relevant evidence directly related to allegations</td>
</tr>
<tr>
<td>Both inculpatory &amp; exculpatory evidence must be collected</td>
<td>Parties may review evidence with advisors present</td>
<td>Cannot make determination regarding responsibility</td>
</tr>
<tr>
<td>Evidence will be directly related to the allegations</td>
<td>May set reasonable rules (e.g. confidentiality agreement)</td>
<td>Parties have opportunity to review at least 10 days before hearing</td>
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<tr>
<td>May include evidence that institution does not intend to rely on</td>
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**Investigative Process**

- **Prompt**
  - Require publication of a time frame based on a specific number of days with room for “good cause” delay
  - Final Rules (and case law) anticipate balance between prompt resolution and adequate time to prepare and respond to charges

- **Impartial**
  - Must collect exculpatory and inculpatory evidence
  - Must follow code
  - Cannot have bias or conflict of interest
BIAS AS DUE PROCESS VIOLATION

• Courts assume investigators & decision-makers are honest "unless actual bias, such as personal animosity, illegal prejudice, or a personal or financial stake in the outcome can be proven." Doe v. Trustees of Boston College, 892 F.3d 67, 84 (1st Cir. 2018).

• Student would have to prove:
  1. Investigator/decision-maker was biased against them because of their gender identity, race, or status as a member of another protected class
  2. Investigator/decision-maker’s adverse actions “flowed” from that bias

TITLE IX FINAL RULE

Prohibited Conflicts of Interest and Bias

• Conflict of interest/bias for or against complainants and respondents generally
  - CAUTION: “Believe All Women” (or All Men)

• Conflict of interest/bias for or against the specific parties

• Overlapping investigator, decision-maker, & appeals roles

Not a per se conflict or bias

• Gender, research interests, work history
  - Advocacy background

• TIX Coordinator serving as TIX Investigator

• TIX Coordinator serving as facilitator in informal resolution process
• Case Rationale Map
• Investigative Report Template
• Confidentiality Agreement
• Conflict of Interest Chart

3. PRE-HEARING PREP INVESTIGATION MODEL

Continue with Case Rationale Map
Witness information
Compiling evidence
Evidence and witness lists shared (10 day clock)
Title IX Investigation & Investigative Report (10 day clock)
Pre-hearing review of case by hearing body

Key Players:
- TIXC
- Conduct Staff
- UPD
- Hall Staff
- Hearing Board
- Appeals Board
- Registrar
• All parties, advisors, witnesses, and decision-makers may be physically present in same location, or

• They may participate remotely via secure technology, but

• All parties, advisors, witnesses, and decision-makers must be able to see and hear one another.
4. HEARING

Hearing begins
Both parties have same opportunities throughout the hearing
  • Opening and closing statements, to ask questions of one another, to bring witness, to question witnesses, to have an advisor, to submit evidence, to review submitted evidence

Witnesses appear
Cross Examination
Evidence reviewed
Decision making process
Outcome determination begins to be formulated

Recording made

Key Players:
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RESOURCE DOCUMENTS
- Model Hearing Script
- Model Decorum Policy
- Guide for Determining Relevance
Colleges and universities “are in a better position than the Department to craft rules of decorum best suited to their educational environment” and build a hearing process that will reassure the parties that the institution “is not throwing a party to the proverbial wolves.” See, 85 Fed. Reg. 30026, 30319.

Advisors who violate the rules of decorum may be removed
  • "Incentivizes" parties to work with advisors who follow the rules
  • "Incentivizes" colleges and universities to appoint advisors who follow the rules
  • So that hearings are conducted with respect for all. Id., 30320.
Rules to consider

• Questions in neutral tone
• No accusatory questions
• Require parties and advisors to refer to other persons by the name and gender pronoun used by that person
• No "duty of zealous advocacy" inferred or enforced, even for attorney-advisors
• No abusive behavior: yelling, screaming, badgering, leaning in, or approaching witnesses/parties without permission
• No use of profanity or personal attacks
• No use of repetitive questions
Questioning Process
• Decision-maker asks questions of the parties and witnesses
• Advisors ask “relevant” cross-examination questions
• Decision-maker decides if questions are relevant

Relevance Determination
• General rule: does the question make a fact at issue more or less likely to be true?

Specific exclusions governing Title IX hearings:
• “Rape Shield” (with two exceptions). 34 C.F.R. § 106.45(6)(i).
  • Offered to prove someone else committed alleged conduct
  • Offered to prove consent
  • Privileged information. 34 C.F.R. § 106.45(1)(x).
  • Undisclosed medical records. See, 85 Fed. Reg. 30026, 30294
  • Duplicative questions. See, 85 Fed. Reg. at 30331.
All parties & witnesses must “submit” to cross-examination for their statements to be considered

- Decisions can be made in the absence of a party or witnesses, but cannot be based on their out-of-hearing statements
- No inference of responsibility from decision not to testify

“Submit” means answering all questions posed

- Where party or witness does not answer a relevant question, none of their statements can be used in determination of responsibility

What are some words that come to mind when you think about trauma informed hearing?
4. HEARING

Weighing Testimony & Evidence

Digital Age Discussion

Trauma Informed Hearing Process
- repeated disclosure
- language
- memory formation

Alcohol, Drugs, Intoxication and Incapacitation
- counterintuitive responses
- order of events
- no right or wrong way to respond

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