

Hope College

Equal Opportunity, Harassment and
Nondiscrimination Policy

Training Session #2

Grievance Process Pool Members

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Nothing presented in this training is, or should be considered, legal advice.

What this training session will cover:

- Disparate Treatment and Impact
- The Role of the Investigator in Process A & B
- Evidence and Relevance
- Features of Informal Resolution in Process A & B
- Features of Hearings [Process B]
 - Hearing Notice
 - Pre-Hearing Preparations
 - Format/Technology
 - Hearing Chair/Panelists
 - Evidentiary Considerations/Witnesses
 - Rules of decorum

Disparate Treatment v. Disparate Impact

Disparate treatment and disparate impact are two types of discrimination that can occur in the workplace, housing, education, or other areas.

Disparate Treatment

Disparate treatment occurs when individuals are treated differently because of their membership in a protected class, such as race, gender, religion, or age.

Example: In a hiring process, if a qualified candidate is not hired because of their race or gender, despite meeting all the job requirements, it constitutes disparate treatment.

Example: A company consistently promoting only male employees to managerial positions while equally qualified female employees are overlooked could be considered disparate treatment.

Disparate Impact

Disparate impact occurs when a policy or practice, although neutral on its face, disproportionately affects individuals of a particular protected class.

Example: A company implements a requirement that all employees must be able to lift 50 pounds as part of their job duties. While this requirement may seem neutral, it disproportionately affects women who, on average, may have less upper body strength than men. If the lifting requirement isn't directly related to job performance, it could be considered disparate impact.

Example: An apartment complex implementing a policy that prohibits renting to individuals with felony convictions, which disproportionately affects African American applicants due to the higher rates of incarceration in that demographic group.

Disparate Treatment and Impact

In both cases, it's essential to analyze the intent behind the actions or policies and their actual effects on protected groups. While disparate treatment involves intentional discrimination, disparate impact focuses on the disproportionate outcomes of seemingly neutral policies or practices. Both are prohibited under various anti-discrimination laws, including the Civil Rights Act of 1964 in the United States.

Role of the Investigator

[Process A & B]

What does the Investigator Do? In Both Process A & B

Determine the identity and contact information of the
Complainant

What does the Investigator Do? In Both Process A & B

In coordination with campus partners (e.g., the SDEC),
initiate or assist with any necessary supportive measures

What does the Investigator Do? In Process A vs. Process B

Process A--Identify all policies implicated by the alleged misconduct

PROCESS B--Identify all policies implicated by the alleged misconduct *and notify the Complainant and Respondent of all of the specific policies implicated*

What does the Investigator Do? In Process A vs. Process B

Process A-- Assist the SDEC with conducting an initial assessment to determine if there is reasonable cause to believe the Respondent has violated policy. **If there is insufficient evidence to support reasonable cause, the process is closed with no further action**

Process B-- Assist the SDEC with conducting a prompt initial assessment to determine if the allegations indicate a potential policy violation

[Policy and Processes | Title IX \(hope.edu\)](https://hope.edu/policy-and-processes/title-ix)

Title IX--The Department declines to add a reasonable cause threshold into § 106.45. The very purpose of the § 106.45 grievance process is to ensure that accurate determinations regarding responsibility are reached, impartially and based on objective evaluation of relevant evidence; the Department believes that goal could be impeded if a recipient's administrators were to pass judgment on the sufficiency of evidence to decide if reasonable or probable cause justifies completing an investigation.

What does the Investigator Do? In Both Process A & B

Commence a thorough, reliable, and impartial investigation by identifying issues and developing a strategic investigation plan, including a witness list, evidence list, intended investigation timeframe, and order of interviews for all parties and witnesses

What does the Investigator Do? In Both Process A & B

Process A-- Meet with the Complainant to finalize their statement, if necessary

Process B-- Meet with the Complainant to finalize their **interview**/statement, if necessary

What does the Investigator Do?

Process A (Notice)

Process A-- Prepare the initial Notice of Investigation and Allegation (NOIA) on the basis of the initial assessment. Notice may be one step or multiple steps, depending on how the investigation unfolds, and potential policy violations may be added or dropped as more is learned. Investigators will update the NOIA accordingly and provide it to the parties.

Notice should inform the parties of their right to have the assistance of a Pool member as a process Advisor appointed by the Hope College or other Advisor of their choosing present for all meetings attended by the advisee

When formal notice is being given, it should provide the parties with a written description of the alleged violation(s), a list of all policies allegedly violated, a description of the applicable procedures, and a statement of the potential sanctions/responsive actions that could result

Give an instruction to the parties to preserve any evidence that is directly related to the allegations

What does the Investigator Do?

Process B (Notice)

Prepare the initial Notice of Investigation and Allegation (NOIA). The NOIA may be amended with any additional or dismissed allegations

The SDEC will provide written notice of the investigation and allegations (the “NOIA”) to the Respondent upon commencement of the Formal Grievance Process. This facilitates the Respondent’s ability to prepare for the interview and to identify and choose an Advisor to accompany them. The NOIA is also copied to the Complainant, who is to be given advance notice of when the NOIA will be delivered to the Respondent.

What does the Investigator Do?

Process B (Notice)

The NOIA will include:

- A meaningful summary of all of allegations,
- The identity of the involved parties (if known),
- The precise misconduct being alleged,
- The date and location of the alleged incident(s) (if known),
- The specific policies implicated,
- A description of the applicable procedures,
- A statement of the potential sanctions/responsive actions that could result,
- A statement that Hope College presumes the Respondent is not responsible for the reported misconduct unless and until the evidence supports a different determination,
- A statement that determinations of responsibility are made at the conclusion of the Process and that the parties will be given an opportunity to inspect and review all directly related and/or relevant evidence obtained during the review and comment period,
- A statement about Hope College's policy on retaliation,

What does the Investigator Do?

Process B (Notice)

- Information about the privacy of the process,
- Information on the need for each party to have an Advisor of their choosing and suggestions for ways to identify an Advisor [Can be a member of the Pool],
- A statement informing the parties that Hope College's Policy prohibits knowingly making false statements, including knowingly submitting false information during the resolution process,
- Detail on how the party may request disability accommodations during the interview process,
- A link to Hope College's VAWA Brochure,
- The name(s) of the Investigator(s), along with a process to identify, in advance of the interview process, to the SDEC any conflict of interest that the Investigator(s) may have, and
- An instruction to preserve any evidence that is directly related to the allegations.

What does the Investigator Do?

Process B (Notice)

Amendments and updates to the NOIA may be made as the investigation progresses and more information becomes available regarding the addition or dismissal of various charges.

Notice will be made in writing and may be delivered by one or more of the following methods: in person, mailed to the local or permanent address(es) of the parties as indicated in official Hope College records, or emailed to the parties' Hope College-issued email or designated accounts. Once mailed, emailed, and/or received in-person, notice will be presumptively delivered.

What does the Investigator Do? In Both Process A & B

Provide the parties and witnesses with an opportunity to review and verify the Investigator's summary notes from their respective interviews and meetings, unless the interview was recorded

What does the Investigator Do? In Both Process A & B

Make good faith efforts to notify the parties of any interview involving the other party, within reason

Additionally, in Process B-- When participation of a party is expected, provide that party with written notice of the date, time, and location of the meeting, as well as the expected participants and purpose

What does the Investigator Do? In Both Process A & B

Interview all available, relevant individuals and conduct follow-up interviews as necessary

What does the Investigator Do? In Both Process A vs. Process B

Process A--Allow each party the opportunity to suggest questions they wish the Investigator(s) to ask of the other party and witnesses

Process B--Allow each party the opportunity to suggest witnesses and questions they wish the Investigator(s) to ask of the other party and witnesses, and document in the report which questions were asked, with a rationale for any changes or omissions.

What does the Investigator Do? In Both Process A & B

Complete the investigation promptly and without unreasonable deviation from the intended timeline

What does the Investigator Do? In Both Process A & B

Provide regular status updates to the parties throughout the investigation

What does the Investigator Do? In Process A vs. Process B

Process A--Prior to the conclusion of the investigation, summarize for the parties the list of witnesses whose information will be used to render a finding

Process B--Prior to the conclusion of the investigation, provide the parties and their respective Advisors (if so desired by the parties) with a list of witnesses whose information will be used to render a finding

What does the Investigator Do? In Both Process A & B

Process A--Write a comprehensive investigation report fully summarizing the investigation and all evidence

Process B--Write a comprehensive investigation report fairly summarizing the investigation; all witness interviews, and addressing all relevant evidence.
Appendices including relevant physical or documentary evidence will be included

Investigation Process A vs. B

Process A

- ▶ Investigator's report contains a recommendation to the Decision-makers on a determination, based on a preponderance of the evidence, whether a policy violation is more likely than not to have occurred.

*Title IX: The Department emphasizes that the decision-maker must not only be a separate person from any investigator, but the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore **independently reach a determination regarding responsibility without giving deference to the investigative report.***

Process B

- ▶ The Investigator(s) will gather, assess, and synthesize evidence, but make no conclusions, engage in no policy analysis, and render no recommendations as part of their report.

[Policy and Processes | Title IX \(hope.edu\)](https://hope.edu/policy-and-processes/title-ix)

What does the Investigator Do?

Process A

Provide parties with a copy of the draft investigation report when it is completed, including all relevant evidence, analysis, credibility assessments, and recommended finding(s)

Provide each party with a full and fair opportunity to respond to the report in writing within five (5) days and incorporate that response into the report

Investigators may choose to respond in writing in the report to the responses of the parties, and/or to share the responses between the parties for their responses, while also ensuring that they do not create a never-ending feedback loop

Share the report with the SDEC or legal counsel for review and feedback.

Provide the final report to the SDEC with a recommendation to the Decision-makers on a determination, based on a preponderance of the evidence, whether a policy violation is more likely than not to have occurred.

What does the Investigator Do? In Process B

Prior to the conclusion of the investigation, provide the parties and their respective Advisors (if so desired by the parties) an electronic or hard copy of the draft investigation report as well as an opportunity to inspect and review all of the evidence obtained as part of the investigation that is directly related to the reported misconduct, including evidence upon which the Hope College does not intend to rely in reaching a determination, for a ten (10) business day review and comment period so that each party may meaningfully respond to the evidence. The parties may elect to waive the full ten days.

The Investigator(s) may elect to respond in writing in the investigation report to the parties' submitted responses and/or to share the responses between the parties for additional responses

What does the Investigator Do? In Process B

The Investigator(s) will incorporate relevant elements of the parties' written responses into the final investigation report, include any additional relevant evidence, make any necessary revisions, and finalize the report. The Investigator(s) should document all rationales for any changes made after the review and comment period

The Investigator(s) shares the report with the SDEC and/or legal counsel for their review and feedback

The Investigator will incorporate any relevant feedback, and the final report is then shared with all parties and their Advisors through electronic transmission or hard copy at least ten (10) business days prior to a hearing. The parties are also provided with a file of any directly related evidence that was not included in the report



Evidence and Relevance **[Process B Focus]**

§ 106.45 (1)(iii) Grievance process for formal complaints of sexual harassment.

*“A recipient must ensure that **decision-makers** receive training on . . . 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”*

*“A recipient also must ensure that **investigators** receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence”*

(emphasis added)

§ 106.45 (1)(ii) Grievance process for formal complaints of sexual harassment.

“(1)Basic requirements for grievance process. A recipient’s grievance process must—

. . .

(ii) Require an objective evaluation of all relevant evidence - including both inculpatory and exculpatory evidence - . . .

(emphasis added)

§ 106.45 (1)(x) Grievance process for formal complaints of sexual harassment.

“(1)Basic requirements for grievance process. A recipient’s grievance process must—

... .

(x) Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.”

(emphasis added)

. . . § 106.45 does not set parameters around the “quality” of evidence that can be *relied* on, § 106.45 does prescribe that all relevant evidence, inculpatory and exculpatory, whether obtained by the recipient from a party or from another source, *must be objectively evaluated* by investigators and decision-makers free from conflicts of interest or bias and who have been trained in (among other matters) how to serve impartially.

(emphasis added)

Inculpatory Evidence

Evidence showing or tending to show one's involvement in a crime or wrong.

Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 676.

Exculpatory Evidence

Evidence tending to establish a defendant's innocence.

Bryan A. Gardner, Black's Law Dictionary 10, (2014). Pg. 675.

Evidentiary Standard

Using a **preponderance of the evidence standard**, and considering relevant definitions in the Policy, the hearing panel weighs the evidence to determine whether the Respondent violated the Policy.

50.01% likelihood or 50% and a feather

Which side do you fall on?

Contrast this with “**clear and convincing**” and “**beyond a reasonable doubt.**”

[A] recipient must objectively evaluate all relevant evidence (inculpatory and exculpatory) but retains discretion, to which the Department will defer, with respect to how persuasive a decision-maker finds particular evidence to be.

Title IX Final Rule (2020) at 30337.

[T]he proposed rules do not speak to admissibility of hearsay, prior bad acts, character evidence, polygraph (lie detector) results, standards for authentication of evidence, or similar issues concerning evidence . . .

Id. at 30247-48 (internal citations omitted).

Relevance

The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.

Id. at 30247 n. 1018.

Definition of “Relevant”

Having significant and demonstrable bearing on the matter at hand.

Affording evidence tending to prove or disprove the matter at issue or under discussion.

*[R]elevance is the sole gatekeeper
evidentiary rule in the final regulations . . .*

Title IX Final Rule (2020) at 30354.

Relevance Cont'd

The new Title IX regulations specifically . . .
. . . *require investigators and decision-makers to be trained on issues of relevance, including how to apply the rape shield provisions (which deem questions and evidence about a complainant's prior sexual history to be irrelevant with two limited exceptions).*

Id. at 30125 (emphasis added).

Prior Sexual History/Sexual Predisposition

Section 106.45(b)(6)(i)-(ii) protects complainants (but not respondents) from questions or evidence about the complainant's prior sexual behavior or sexual predisposition, mirroring rape shield protections applied in Federal courts.

Id. at 30103 (emphasis added).

Rape Shield Language

[T]he rape shield language in § 106.45(b)(6)(i)-(ii) bars questions or evidence about a complainant's sexual predisposition (with no exceptions) and about a complainant's prior sexual behavior subject to two exceptions:

*1) if offered to **prove that someone other than the respondent committed the alleged sexual harassment, or***

*2) if the question or evidence concerns sexual behavior between the complainant and the respondent and is offered to prove **consent.***

Id. at 30336 n. 1308 (emphasis added).

Consent and Rape Shield Language

[A] recipient selecting its own definition of consent must apply such definition consistently both in terms of not varying a definition from one grievance process to the next and as between a complainant and respondent in the same grievance process. The scope of the questions or evidence permitted and excluded under the rape shield language in § 106.45(b)(6)(i)-(ii) will depend in part on the recipient's definition of consent, but, whatever that definition is, the recipient must apply it consistently and equally to both parties, thereby avoiding the ambiguity feared by the commenter.

Id. at 30125.

Rape Shield Language

[T]he rape shield language in this provision:

- *considers all questions and evidence of a complainant's sexual predisposition irrelevant, with no exceptions;*
- *questions and evidence about a complainant's prior sexual behavior are irrelevant unless they meet one of the two exceptions;*
- ***and questions and evidence about a respondent's sexual predisposition or prior sexual behavior are not subject to any special consideration but rather must be judged like any other question or evidence as relevant or irrelevant to the allegations at issue.***

Id. at 30352 (emphasis added).

Features of Informal Resolution [Processes A & B]



Informal Resolution [Process A & B]

- ▶ Informal Resolution is applicable
 - ▶ 1) when the parties voluntarily agree to resolve the matter through mediation, facilitation, restorative practices, or another form of informal resolution,
 - ▶ 2) or when the Respondent accepts responsibility for violating Policy and desires to accept a sanction at the end of the resolution process,
 - ▶ 3) or when the SDEC can resolve the matter informally by providing supportive measures/remedies to resolve the situation.
- ▶ It is not necessary to pursue Informal Resolution first in order to pursue Formal Resolution, and any party participating in Informal Resolution can stop the process at any time and request the Formal Resolution process. Further, if an Informal Resolution fails after the fact, Formal Resolution may be pursued.

Informal Resolution [Process A & B]

- ▶ Informal Resolution is a process, such as mediation or restorative practices, by which a mutually agreed upon resolution of an allegation is reached. It may be used for less serious, yet inappropriate, behaviors and is encouraged as an alternative to the Formal Resolution process (described below) to resolve conflicts. The parties must consent to the use of Informal Resolution.
- ▶ The SDEC determines if Informal Resolution is appropriate, based on the willingness of the parties, the nature of the conduct at issue, and the susceptibility of the conduct to Informal Resolution.
 - ▶ Violence/sexual violence?
 - ▶ **Never under Process B when student is complainant and employee is a respondent**
- ▶ The SDEC, with the consent of the parties, may negotiate and implement an agreement to resolve the allegations that satisfies all parties and Hope College.



Features of a Hearing [Process B only]

Hearing Notification

The notice will contain:

- A description of the alleged violation(s), a list of all policies allegedly violated a description of the applicable procedures, and a statement of the potential sanctions /responsive actions that could result.
- The time, date, and location of the hearing.
- Any technology that will be used to facilitate the hearing.
- A list of all those who will attend the hearing, along with an invitation to object to any Decision-maker on the basis of demonstrated bias. This must be raised with the SDEC at least two (2) business days prior to the hearing.
- Information on how the hearing will be recorded and on access to the recording for the parties after the hearing.
- A statement that if any party or witness does not appear at the scheduled hearing, the hearing may be held in their absence and the party's or witness's testimony and any statements given prior to the hearing will not be considered by the Decision-maker(s). For compelling reasons, the Chair, working with the administrative facilitator, may reschedule the hearing.

Hearing Notification

- Notification that the parties may have the assistance of an Advisor of their choosing at the hearing and will be required to have one present for any questions they may desire to ask. The party must notify the SDEC if they do not have an Advisor, and Hope College will appoint one. Each party must have an Advisor present. There are no exceptions.
- A copy of all the materials provided to the Decision-maker(s) about the matter, unless they have been provided already.
- An invitation to each party to submit to the Chair an impact statement pre-hearing that the Decision-maker will review during any sanction determination.
- An invitation to contact the SDEC to arrange any disability accommodations, language assistance, and/or interpretation services that may be needed at the hearing, at least seven (7) business days prior to the hearing.
- Notification that parties can bring mobile phones/devices into the hearing, so long as they are turned off/not a distraction.

Timing Issues

- ▶ Hearings for possible violations that occur near or after the end of an academic term (assuming the Respondent is still subject to this Policy) and are unable to be resolved prior to the end of term will typically be held immediately after the end of the term or during the summer, as needed, to meet the resolution timeline followed by Hope College and remain within the 90–120 business day goal for resolution.
- ▶ In these cases, if the Respondent is a graduating student, a hold may be placed on graduation and/or official transcripts until the matters are fully resolved (including any appeal). A student facing charges under this Policy is not in good standing to graduate.

Hearing Panel Composition

- ▶ The SDEC will select appropriate Decision-makers from the Pool depending on whether the Respondent is an employee or a student. Allegations involving student-employees will be directed to the appropriate Decision-maker depending on the context of the alleged misconduct.
- ▶ Hope College will designate a single Decision-maker or a three-member panel from the Pool, at the discretion of the SDEC. The single Decision-maker will also Chair the hearing. With a panel, one of the three members will be appointed as Chair by the SDEC.
- ▶ The Decision-maker(s) will not have had any previous involvement with the investigation. The SDEC may elect to have an alternate from the Pool sit in throughout the resolution process in the event that a substitute is needed for any reason.
- ▶ The investigator(s) will be a witness in the hearing and therefore may not serve as a Decision-maker. Those who are serving as Advisors for any party may not serve as Decision-makers in that matter.
- ▶ The SDEC may not serve as a Decision-maker or Chair in the matter but may serve as an administrative facilitator of the hearing if their previous role(s) in the matter do not create a conflict of interest. Otherwise, a designee may fulfill this role. The hearing will convene at a time determined by the administrative facilitator or designee.

Physical Space Considerations

- ▶ If a party or parties prefer not to attend or cannot attend the hearing in person, the party should request alternative arrangements from the SDEC at least five (5) business days prior to the hearing.
- ▶ The SDEC or designee can arrange to use technology to allow remote testimony without compromising the fairness of the hearing. Remote options may also be needed for witnesses who cannot appear in person. Any witness who cannot attend in person should let the SDEC know at least five (5) business days prior to the hearing so that appropriate arrangements can be made.
- ▶ Parties concerned about being in the same room and/or seeing each other during the hearing can request an accommodation through the SDEC at least five (5) days prior to the hearing. Options might include the addition of a curtain/partition in the room so that parties cannot see each other, an option for the live hearing to occur with the parties located in separate rooms using technology that enables the Decision-maker(s) and parties to see and hear a party or witness answering questions, or a fully virtual hearing. The SDEC will consider all requests individually and determine which option will best work in each situation.

Taylor Sinclair/Jillaine Whitcomb--Technology

Dual/Joint Hearings

- ▶ In hearings involving more than one Respondent or in which two (2) or more Complainants have accused the same individual of substantially similar conduct; the default procedure will be to hear the allegations jointly.
- ▶ However, the SDEC may permit the investigation and/or hearings pertinent to each Respondent to be conducted separately if there is a compelling reason to do so. In joint hearings, separate determinations of responsibility will be made for each Respondent with respect to each alleged policy violation.

Pre-Hearing Preparations

- ▶ The Chair or SDEC, after any necessary consultation with the parties and Investigator(s), will provide the names of persons who will be participating in the hearing, all pertinent documentary evidence, and the final investigation report to the parties at least ten (10) business days prior to the hearing.
- ▶ Any witness scheduled to participate in the hearing must have been first interviewed by the Investigator(s), unless all parties and the Chair assent to the witness's participation in the hearing. The same holds for any evidence that is first offered at the hearing. If the parties and Chair do not assent to the admission of evidence newly offered at the hearing, the Chair will delay the hearing and instruct that the investigation needs to be re-opened to consider that evidence.
- ▶ The parties will be given a list of the names of the Decision-maker(s) at least five (5) business days in advance of the hearing. All objections to any Decision-maker must be raised in writing, detailing the rationale for the objection, and must be submitted to the SDEC as soon as possible and no later than two days prior to the hearing. Decision-makers will only be removed if the SDEC concludes that their bias or conflict of interest precludes an impartial hearing of the allegation(s).

Pre-Hearing Preparations

- ▶ The SDEC will give the Decision-maker(s) a list of the names of all parties, witnesses, and Advisors at least five (5) business days in advance of the hearing. Any Decision-maker who cannot make an objective determination must recuse themselves from the proceedings when notified of the identity of the parties, witnesses, and Advisors in advance of the hearing. If a Decision-maker is unsure of whether a bias or conflict of interest exists, they must raise the concern to the SDEC as soon as possible.
- ▶ During the ten (10) business day period prior to the hearing, the parties have the opportunity for continued review and comment on the final investigation report and available evidence. That review and comment can be shared with the Chair at the pre-hearing meeting or at the hearing and will be exchanged between each party by the Chair.

Pre-Hearing Meetings

- ▶ The Chair may convene a pre-hearing meeting(s) with the parties and/or their Advisors to invite them to submit the questions or topics they (the parties and/or their Advisors) wish to ask or discuss at the hearing, so that the Chair can rule on their relevance ahead of time to avoid any improper evidentiary introduction in the hearing or provide recommendations for more appropriate phrasing. However, this advance review opportunity does not preclude the Advisors from asking at the hearing for a reconsideration based on any new information or testimony offered at the hearing. The Chair must document and share their rationale for any exclusion or inclusion at this pre-hearing meeting.
- ▶ The Chair, **only** with full agreement of the parties, may decide in advance of the hearing that certain witnesses do not need to be present if their testimony can be adequately summarized by the Investigator(s) in the investigation report or during the hearing.
- ▶ At each pre-hearing meeting with a party and their Advisor, the Chair will consider arguments that evidence identified in the final investigation report as relevant is, in fact, not relevant. Similarly, evidence identified as directly related but not relevant by the Investigator(s) may be argued to be relevant. The Chair may decide on these arguments pre-hearing and will share decisions between the parties prior to the hearing to assist in preparation for the hearing. The Chair may consult with legal counsel and/or the SDEC, or ask either or both to attend pre-hearing meetings.
- ▶ The pre-hearing meeting(s) will not be recorded, unless deemed necessary by the chair and with consent of the parties.

Hearing Procedures

- ▶ At the hearing, the Decision-maker(s) has the authority to hear and make determinations on all allegations of discrimination, harassment, and/or retaliation and may also hear and make determinations on any additional alleged policy violations that have occurred in concert with the discrimination, harassment, and/or retaliation, even though those collateral allegations may not specifically fall within the policy on Equal Opportunity, Harassment, and Nondiscrimination.
- ▶ Participants at the hearing will include the Chair, any additional panelists, the hearing facilitator, the Investigator(s) who conducted the investigation, the parties (or three (3) organizational representatives when an organization is the Respondent), Advisors to the parties, any called witnesses, potentially a hearing facilitator and/or the SDEC and anyone providing authorized accommodations or assistive services.
- ▶ The Chair will answer all questions of procedure. Anyone appearing at the hearing to provide information will respond to questions on their own behalf.
- ▶ The Chair will allow witnesses who have relevant information to appear at a portion of the hearing in order to respond to specific questions from the Decision-maker(s) and the parties and will then be excused.

Evidence/Relevance in Decision-Making

Any evidence that the Decision-maker(s) determine(s) is **relevant** may be considered.

The hearing **does not** consider [**irrelevant evidence** including]:

1. incidents not directly related to the possible violation, unless they evidence a pattern;
2. the character of the parties; or
3. questions and evidence about the Complainant's sexual predisposition or prior sexual behavior, 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.

Evidentiary Considerations in Hearings

- ▶ Previous disciplinary action of any kind involving the Respondent may be considered in determining an appropriate sanction upon a determination of responsibility, as Hope College uses a progressive discipline system. This information is only considered at the sanction stage of the process.
- ▶ The parties may each submit a written impact statement prior to the hearing for the consideration of the Decision-maker(s) at the sanction stage of the process when a determination of responsibility is reached.
- ▶ After post-hearing deliberation, the Decision-maker(s) renders a determination based on the preponderance of the evidence; whether it is more likely than not that the Respondent violated the Policy as alleged.

Witnesses

▶ Witnesses (as distinguished from the parties) who are employees of Hope College are expected to cooperate with and participate in Hope College's investigation and resolution process. [Policy and Processes | Title IX \(hope.edu\)](#)

▶ Investigator as a witness

▶ Fact witnesses

▶ Expert witnesses

▶ Character witnesses?

▶ ***“[W]here a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decisionmaker's evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.”***

Title IX Final Rule (2020) at 30337 (emphasis added).

▶ **Colleges do not have subpoena power**

Rules of Decorum

§ 106.45(b) expressly allows recipients to adopt rules that apply to the recipient's grievance process, other than those required under § 106.45, so long as such additional rules apply equally to both parties. For example, a postsecondary institution recipient may adopt reasonable rules of order and decorum to govern the conduct of live hearings.

Title IX Final Rule (2020) at 30293 n. 1148.

Abusive Questioning Should Not be Tolerated

*[W]here the substance of a question is relevant, but **the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically “leans in” to the witness’s personal space), the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.***

Id. at 30331 (emphasis added).



Questions?

Thank you for your attention!