



Alexander Wheeler
Assistant Director, SCI

Mishka Woodley, J.D., LL.M.
Assistant Counsel, OGC

November 2022

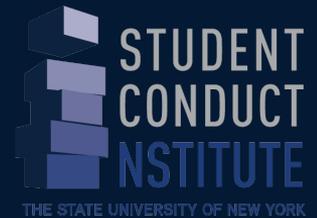
SCI LIVE@ DISTANCE BASIC COMPLIANCE TRAINING, DAY 3



DAY 3 OVERVIEW



CASE PROCESS DECONSTRUCTED



Investigator

For the duration of the Investigation process.

Advisor

Ideally assists the student throughout the entire process.

Student Conduct Administrator

Assists the student through the resolution of the process.

Informal Resolution Facilitator

Can be any individual with significant training in this area.

Hearing Board Members

- Decision-maker; may also serve as the Hearing Chair.



ROLES IN THE PROCESS



CASE PROCESS

6. PRE HEARING PREP INVESTIGATION MODEL DECONSTRUCTED

Initial Procedures Meeting Completed

- Due process rights
- Advisor of choice
- Timeline for process
- Answer questions
- Provide resources
- Discuss evidence and witnesses
- Resolution options

Investigation Begins

- Investigation Report Template
- Notice of Investigatory Interview Template
- Collection of evidence
- Witness interviews
- Review of evidence by Respondent and Complainant
- Written response from Respondent and Complainant
- Once completed the information is sent to the Student Conduct office.

Post Investigation Procedures Meeting

- Detail due process rights
- Indicate right to advisor of choice (advisor guide) ✕
- Describe timeline for process
- Answer questions & provide resources
- Discuss **new** evidence and witness procedures
- Discuss charges and allegations
- Offer resolution options (Informal Resolution & Hearing process)
- Disability accommodations
- Retaliation policy reminder
- Describe potential sanction outcomes
- Decorum policy ✕
- Determining relevance guide ✕
- Share their appeal rights
- Correspondence communication

Resolution Options

- **Informal Resolution**
 - Complainant has agreed in writing.
 - Title IX Coordinator agrees.
 - Respondent has agreed to participate.
 - Facilitator reaches out to both parties.
 - Both parties agree to the resolution.
 - Informal Resolution Model ✕
- **Hearing**
 - Managing all schedules
 - Notice of Hearing
 - Parties confirm attendance with advisors
 - Pre-Hearing preparation & logistics
 - Selection of Board Members
 - Order of Hearing
 - Determination

Key Players:



Reviewing Today

Case Rationale
Map

Investigative
Report Template

Conflict of Interest
Chart

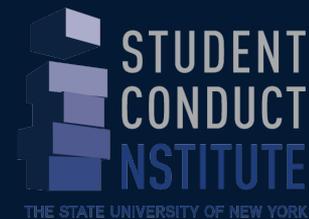
Model Script for
Title IX Hearings

Model Decorum
Policy

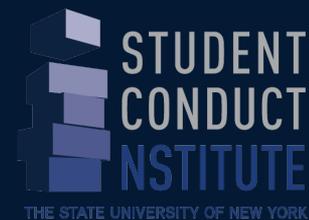
Guide for
Determining
Relevance



TOOLS FOR TODAY*



INVESTIGATIONS



Avoid repeated disclosures

Consider the impact of trauma:

Training and procedure review

Check your body language and demeanor

Questioning and word usage (Help me understand... and what are you able to tell me about what you experienced?)

- Describing another individual's experience
- Framing your questions, avoiding why questions



2021-2022: Neurobiology of Sexual Assault Trauma (Part 3) - Introduction
Online | Jul 1, 2021
98685 seats available

Hours: 0.25

Info



2021-2022: Neurobiology of Sexual Assault Trauma (Part 3) - When Attack Is Detected Stress Kicks In
Online | Jul 1, 2021
98589 seats available

Hours: 0.25

Info

Sign-up



2021-2022: Neurobiology of Sexual Assault Trauma (Part 3) - Reflexes and Habits
Online | Jul 1, 2021
98527 seats available

Hours: 0.25

Info

Sign-up

TRAUMA INFORMED PRACTICES

Evidence Collection

Interviews of parties & witnesses must take place after Notice of Allegations

Both inculpatory & exculpatory evidence must be collected

Evidence will be directly related to the allegations

The collection process may include evidence that institution does not intend to rely on

Evidence Sharing

Parties may review evidence with advisors present

May set reasonable rules around evidentiary review and sharing

Redaction of “irrelevant” evidence

- Mandatory inspection process with 10-day min. review period

Investigative Report

- Summarizes relevant evidence directly related to allegations

Cannot make determination regarding responsibility- sole role of the hearing panel

Parties must have opportunity to review at least 10 days before hearing



INVESTIGATIVE PROCESS

Prompt

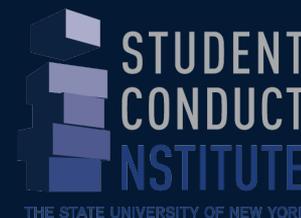
- All time frames must be published based on a specific number of days with room for “good cause” delay.
- Rules (and case law) balance prompt resolution and adequate time to prepare and respond to charges.

Courts have identified the following delays as unjustified:

- Year-long delay in finishing the investigation
- Attributable to winter/summer break
- Attributable to athletics events/eligibility
- Institutional operational/admin error
- Physical harm to respondent/complainant



TITLE IX INVESTIGATION: PROMPT AND IMPARTIAL PROCESS



Impartial

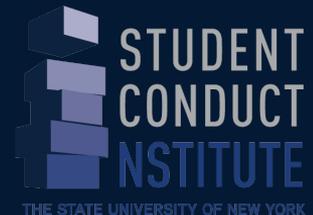
- Must collect *exculpatory* and *inculpatory* evidence
 - **Exculpatory** = *increases probability of a finding of non-responsibility/ non-liability*
 - **Inculpatory** = *increases probability of a finding of responsibility/ liability*
- Must follow code
- Cannot have bias or conflict of interest

Action Items

- Included in your policy
- Opportunity for assessment
- Evidence collection steps reviewed
- Policy related to reasonable delays in process



**TITLE IX INVESTIGATION:
PROMPT AND IMPARTIAL PROCESS**



- Actual bias is a high *legal* standard, but *perception* of bias is in the eyes of the parties to the process and should be avoided.



- *Liability* arises from:
 - truly lop-sided investigations and adjudications, or
 - statements of investigator or panelist showing presumption of responsibility based on sex stereotypes, or
 - misapplying trauma-informed practice to explain away all inconsistencies in complainant's statements



TITLE IX: CONFLICTS & BIAS

“In the intimate setting of a college or university, prior contact between the participants is likely and does not per se indicate bias or partiality.”
Gorman v. Univ. of Rhode Island, 837 F.2d 7, 15 (1st Cir. 1988).

Prohibited Conflicts of Interest and Bias

- For or against complainants and respondents generally
- For or against the specific parties
- Overlapping investigator, decision-maker, and appeals roles

Not a per se conflict or bias

- Gender, research interests, work history
- Advocacy background
- Title IX Coordinator serving as Title IX Investigator
- Title IX Coordinator serving as facilitator in informal resolution process



The State University
of New York

TITLE IX: CONFLICTS & BIAS

Other Characteristics		
Student of the recipient	No	"The Department notes that the final regulations do not preclude a recipient from allowing student leaders to serve in Title IX roles so long as the recipient can meet all requirements in § 106.45 and these final regulations, and leaves it to a recipient's judgment to decide under what circumstances, if any, a recipient wants to involve student leaders in Title IX roles." <i>Id.</i> at 30,253.
Gender	No	The Department cautions recipients not to apply generalizations when evaluating particular Title IX personnel for bias, warning that this may result in an unreasonable determination. <i>Id.</i> at 30,252.
Sexual assault survivor	No	
Self-professed feminist	No	
Supporting women's or men's rights	No	
Having had personal, negative experiences with men or women	No	
Determining whether bias exists is a fact-specific endeavor. <i>See id.</i> at 30,252. The Department encourages recipients to apply a common-sense and "objective" reasonable person standard when evaluating personnel. <i>Id.</i>		
Grievance Process Participation		
Signing a formal complaint as the Title IX Coordinator	No	"Even where the Title IX Coordinator is also the investigator, the Title IX Coordinator must be trained to serve impartially, and the Title IX Coordinator does not lose impartiality solely due to signing a formal complaint on the recipient's behalf." <i>Id.</i> at 30, 135.
Participating in an emergency removal decision	No, unless it biases the employee	"Section 106.44(c) does not preclude a recipient from using Title IX personnel trained under § 106.45(b)(1)(iii) to make the emergency removal decision or conduct a post-removal challenge proceeding, but if involvement with the emergency removal process results in bias or conflict of interest for or against the complainant or respondent, § 106.45(b)(1)(iii) would preclude such personnel from serving in those roles during a grievance process." <i>Id.</i> at 30,235.
Serving as a party advisor	Exempt from requirement not to have bias	"The final regulations impose no prohibition of conflict of interest or bias for such advisors, nor any training requirement for such advisors, in order to leave recipients as much flexibility as possible to comply with the requirement to provide those advisors." <i>Id.</i> at 30,254 n.1041.
Title IX coordinator serving as...		
...investigator	No	"The final regulations would not remove the expertise of Title IX Coordinators from the grievance process. Section 106.45(b)(7)(i) does not prevent the Title IX Coordinator from serving as the investigator; rather, this provision only prohibits the decision-maker from being the same person as either the Title IX Coordinator or the investigator." <i>Id.</i> at 30,370.
...informal resolution facilitator	No, but not recommended	"These final regulations do not require a recipient to provide an informal resolution process pursuant to § 106.45(b)(9) and do not preclude the Title IX Coordinator from serving as the person designated by a recipient to facilitate an informal resolution process." <i>Id.</i> at 30,558.
...decision-maker	Yes	"Separating the functions of a Title IX Coordinator from those of the decision-maker is no reflection on the ability of Title IX Coordinators to serve impartially and with expertise. Rather, requiring different individuals to serve in those roles acknowledges that the different phases of a report and formal complaint of sexual harassment serve distinct purposes." <i>Id.</i> at 30,370.

©2020 State University of New York



The State University of New York

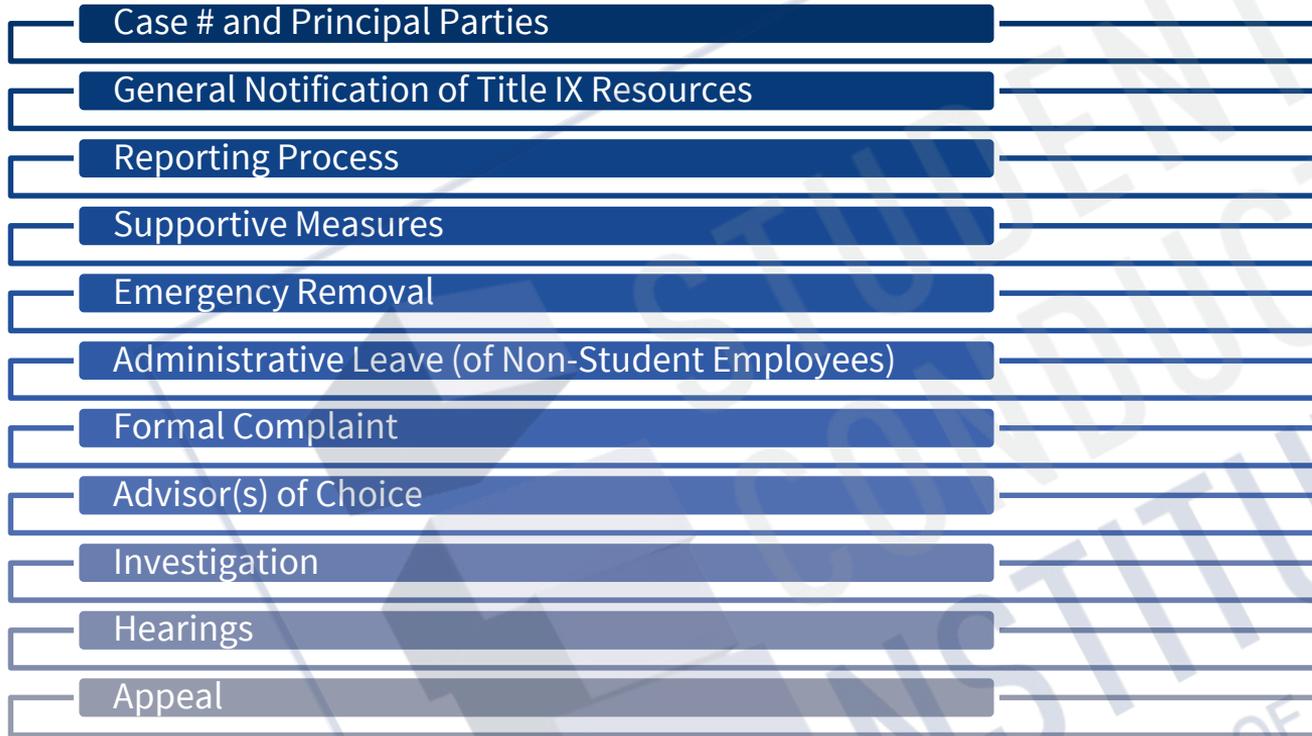
TITLE IX TOOLKIT

Student Conduct Institute

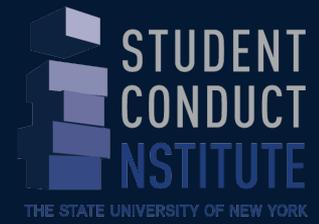
Is it Bias? Guide



THE STATE UNIVERSITY OF NEW YORK



CASE RATIONALE MAP



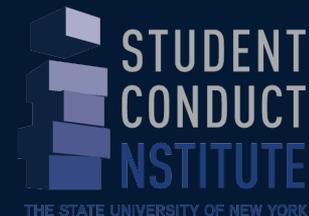
TITLE IX TOOLKIT

Student Conduct Institute Case Rationale Map for Title IX Coordinators

Investigation	
16.	Did the institution commence an investigation upon receipt of a formal complaint?
	<input type="checkbox"/> Yes <input type="checkbox"/> No
17.	Delays:
	<input type="checkbox"/> There were no delays in the investigative process
	<input type="checkbox"/> There was a delay in the investigative process
	Date: Click or tap here to enter text.
	Length: Click or tap here to enter text.
	Reason: Click or tap here to enter text.
	Justification: Click or tap here to enter text.
	<input type="checkbox"/> Notice was sent to Complainant (<i>attach documentation</i>)
<input type="checkbox"/> Notice was sent to Respondent (<i>attach documentation</i>)	
Objection(s) (if any): Click or tap here to enter text.	
Response to Objection(s) (if any): Click or tap here to enter text.	



CASE RATIONALE MAP



Summary of the Relevant Evidence

In this section, include a summary of all relevant evidence. This section can be organized in several ways. It is important that, however organized, the evidence is summarized clearly and accurately, and without opinion or bias. In this section, the writer should cite the evidence and information in the Appendices.

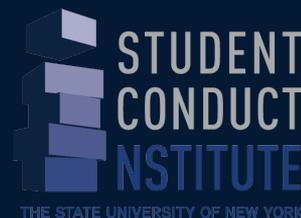
In a case involving one allegation, the report might be organized as follows:

- 1) History between the Parties
 - a) *The Reporting Party's Account*
 - b) *The Responding Party's Account*
 - c) *Witness A's Account*
- 2) The Hours Leading up to the Reported Incident
 - a) *The Reporting Party's Account*
 - b) *The Responding Party's Account*
 - c) *Witness B's Account*
 - d) *Witness C's Account*



TITLE IX TOOLKIT

Investigative Report Template
For Investigations of Title IX Sexual Harassment
July 1, 2020





Investigation Overview

Jurisdiction

Investigator Information

Objective of the Investigation
Report

Prohibited Conduct Alleged

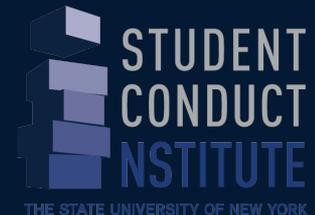
Witness List

Evidence Collected

Procedural Next Steps after
Conclusion of investigation



INVESTIGATIVE REPORT TEMPLATE



Testimony

Text Messages

Social Media Posts

Medical Records

Public Safety/Police Records

Videos / Surveillance Footage

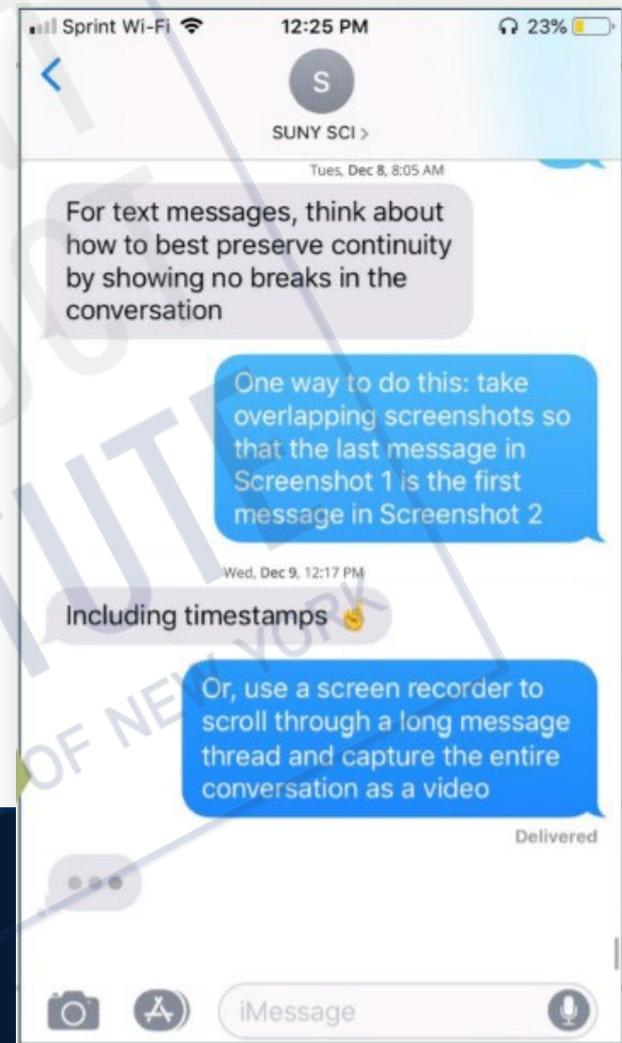
Pictures

ID Card Data / Network Usage Location Data

Email

Voice notes

EVIDENCE COLLECTION





CASE PROCESS

6. PRE HEARING PREP INVESTIGATION MODEL DECONSTRUCTED

Initial Procedures Meeting Completed

- Due process rights
- Advisor of choice
- Timeline for process
- Answer questions
- Provide resources
- Discuss evidence and witnesses
- Resolution options

Investigation Begins

- Investigation Report Template
- Notice of Investigatory Interview Template
- Collection of evidence
- Witness interviews
- Review of evidence by Respondent and Complainant
- Written response from Respondent and Complainant
- Once completed the information is sent to the Student Conduct office.

Post Investigation Procedures Meeting

- Detail due process rights
- Indicate right to advisor of choice (advisor guide) ✕
- Describe timeline for process
- Answer questions & provide resources
- Discuss **new** evidence and witness procedures
- Discuss charges and allegations
- Offer resolution options (Informal Resolution & Hearing process)
- Disability accommodations
- Retaliation policy reminder
- Describe potential sanction outcomes
- Decorum policy ✕
- Determining relevance guide ✕
- Share their appeal rights
- Correspondence communication

Resolution Options

- **Informal Resolution**
 - Complainant has agreed in writing.
 - Title IX Coordinator agrees.
 - Respondent has agreed to participate.
 - Facilitator reaches out to both parties.
 - Both parties agree to the resolution.
 - Informal Resolution Model ✕
- **Hearing**
 - Managing all schedules
 - Notice of Hearing
 - Parties confirm attendance with advisors
 - Pre-Hearing preparation & logistics
 - Selection of Board Members
 - Order of Hearing
 - Determination

Key Players:



TIXC



Conduct Staff



UPD



Hear Staff



Hearing Board



Appeals Board



Registrar

Overview

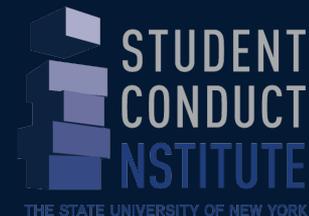
- Detail due process rights
- Reminder - right to advisor of choice
- Describe timeline for process
- Review charges and allegations
- Answer questions & provide resources
- Discuss new evidence and witness procedures
- Offer resolution options (Informal Resolution & Hearing process detailed)
- Disability accommodations ✂
- Retaliation policy reminder ✂
- Decorum policy ✂
- Relevance determination policy ✂
- Describe potential sanction outcomes
- Share their appeal rights
- Correspondence clause

Action Items

- ✓ **Virtual vs in-person meetings**
 - Clear expectations and reminders in your meeting notices (e.g. Advisor of choice notice)
- ✓ **Location of meeting and privacy concerns**
- ✓ **Preparation of materials in advance**
 - Referral Packet
 - Visual of hearing space if in person
- ✓ **Schedule with adequate time**
- ✓ **Build in flexibility and anticipate challenges**
 - Emotional state of all parties
 - Breaks may be necessary
 - Working with the student's advisor



POST-INVESTIGATION PROCEDURAL MEETING



CASE PROCESS

B. PRE-HEARING PREP INVESTIGATION MODEL DECONSTRUCTED

Initial Procedures Meeting Completed

- Due process rights
- Advisor of choice
- Timeline for process
- Answer questions
- Provide resources
- Discuss evidence and witnesses
- Resolution options

Investigation Begins

- Investigation Report Template
- Notice of Investigatory Interview Template
- Collection of evidence
- Witness interviews
- Review of evidence by Respondent and Complainant
- Written response from Respondent and Complainant
- Once completed the information is sent to the Student Conduct office.

Post Investigation Procedures Meeting

- Detail due process rights
- Indicate right to advisor of choice (advisor guide) ✕
- Describe timeline for process
- Answer questions & provide resources
- Discuss **new** evidence and witness procedures
- Discuss charges and allegations
- Offer resolution options (Informal Resolution & Hearing process)
- Disability accommodations
- Retaliation policy reminder
- Describe potential sanction outcomes
- Decorum policy ✕
- Determining relevance guide ✕
- Share their appeal rights
- Correspondence communication

Resolution Options

- **Informal Resolution**
 - Complainant has agreed in writing.
 - Title IX Coordinator agrees.
 - Respondent has agreed to participate.
 - Facilitator reaches out to both parties.
 - Both parties agree to the resolution.
 - Informal Resolution Model ✕
- **Hearing**
 - Managing all schedules
 - Notice of Hearing
 - Parties confirm attendance with advisors
 - Pre-Hearing preparation & logistics
 - Selection of Board Members
 - Order of Hearing
 - Determination

Key Players:



TIXC



Conduct Staff



UPD



Hall Staff



Hearing Board

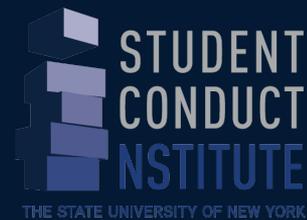


Appeals Board

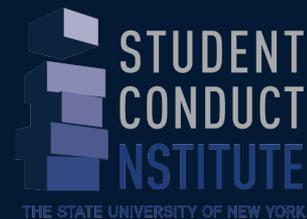


Registrar

BREAK



HEARINGS



Virtually

Technology

- Accessibility needs
- Internet signal strength
- Party access to appropriate equipment – don't make assumptions
- Technology settings
- Recording ability (double check cloud space & storage)
- Double check provided links
- Back up plan & back up tech person role that does not wear other hats in the process

Hearing Space and Parties

- Physical space for party and advisor
- Hearing board member location
- Your location
- Witness & Investigator invites
- All party and advisor confirmations (back up advisors)
- Confidentiality and privacy of communications (tip pan the room)

PRE-HEARING PREPARATION

In-Person

Technology

- Accessibility needs
- Recording ability (double check cloud space & storage)
- Smart equipment (e.g. for the purposes of showing evidence)
- Back up tech person role that does not wear other hats in the

Hearing Space and Parties

- Space considerations for where students will be placed – enter/exit building?
- Space availability (multiple spaces)
- Masks and visitor policies
- Access to documents and evidence
- Proximity to restrooms
- Proximity to a printer
- Fire alarm plan
- Water, tissues, snacks, pens, paper (for all)
- Witness & Investigator invites
- All party and advisor confirmations (back up advisors)



Training completion check

Confirm availability and availability expectations

Conflict of Interest and Bias Check

Access to evidence in advance of the hearing

Select a method of communication for the Board for the Hearing (Virtual Hearing)

Selection of chairperson

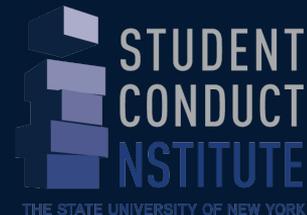
Hearing script

Reminder of relevant policies & tools

- Title IX Grievance Policy
- Code of Conduct (if applicable)
- Decorum Policy
- Guide for Determining Relevance
- Determination Regarding Responsibility Template
- Sanction Guidelines



HEARING BOARD PREPARATION



Date/Time/Location(or links)

Consider multiple days for scheduling (depending on the case)

Policy & Tool Reminders

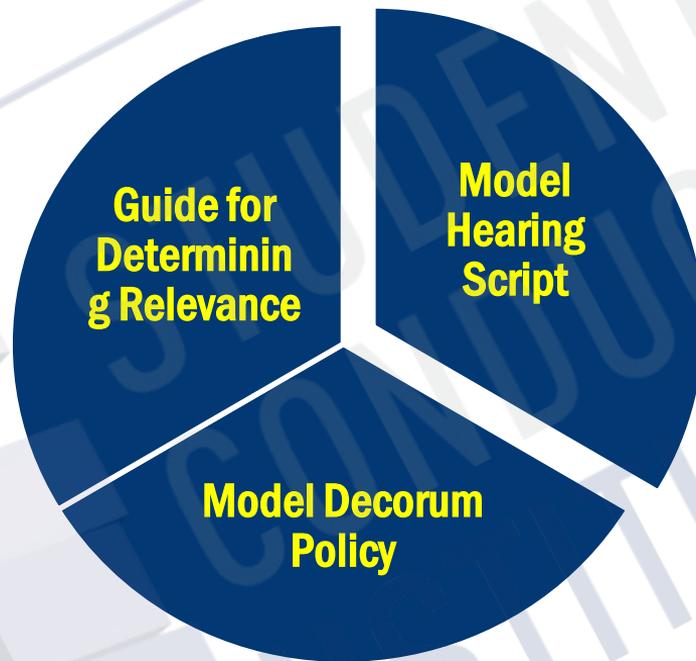
- **Title IX Grievance Policy**
- **Code of Conduct (if applicable)**
- **Advisor Guide**
- **Decorum Policy**
- **Guide for Determining Relevance**
- **Tech Guide (if applicable for how students and advisors can participate virtually)**

Order of the hearing

Failure to appear clause

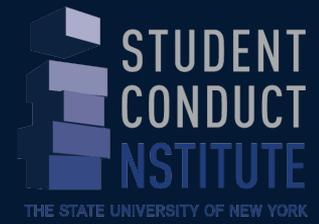
New evidence and witness reminder

HEARING NOTICE TO STUDENTS & ADVISORS



RESOURCE DOCUMENTS

**CODE WORD
TWO: Marcy**



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.”

Advisors who violate the rules of decorum may be removed



See, 85 Fed. Reg. 30026-30310

DECORUM

**CODE WORD
TWO: Marcy**

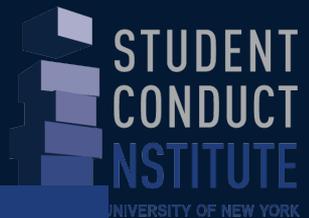


Rules to consider

- 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



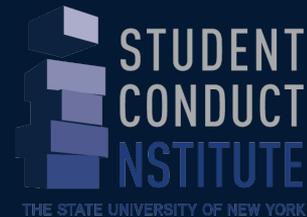
DECORUM



- All parties, advisors, witnesses, and decision-makers:
 - must be present at the same time either physically or remotely via secure technology.
- Decision-makers
 - Must be able to see and hear parties and witnesses (either physically or via secure technology).
 - Ask questions of the parties and witnesses.
 - Decide whether or not question is relevant.
- Advisors
 - ask relevant cross-examination questions. (*Does the question make a fact at issue more or less likely to be true?*)
- **“No Adverse Inference” Rule –**
 - No inference of responsibility from decision not to testify
- **The Title IX “Suppression Rule” has been VACATED**



LIVE HEARING PROCESS FUNDAMENTALS





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.



LIVE HEARING PROCESS EXCLUSIONS



TITLE IX TOOLKIT



Student Conduct Institute Guide for Determining Relevance

Generally probative questions

- The question is relevant because it asks whether a fact material to the allegations is more or less likely to be true.
- The question is irrelevant because it asks about a detail that does not touch on whether a material fact concerning the allegations is more or less likely to be true. See, 85 Fed. Reg. 30026, 30343 (May 19, 2020).

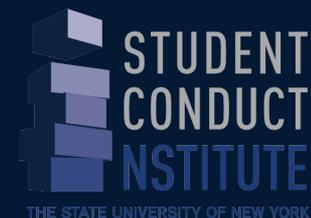
Question regarding Privileged Information

- The question is irrelevant because it calls for information shielded by a legally-recognized privilege [identify the privilege].
- The question is relevant because, although it calls for information shielded by a legally-recognized privilege [identify the privilege], that privilege has been waived in writing, and the question tends to prove that a material fact at issue is more or less likely to be true.

Question about Complainant's Prior Sexual Behavior or Sexual Predisposition

- The question is relevant because although it calls for prior sexual behavior information about the complainant, it meets *one of the two exceptions* to the rape shield protections defined in 34 C.F.R. § 106.45(b)(6)(i), and it tends to prove that a material fact at issue is more or less likely to be true [denote which exception].
 - Exception one: The question is asked to prove that someone other than the respondent committed the conduct alleged by the complainant.
 - Exception two: The question concerns specific incidents of the complainant's prior sexual behavior with respect to the respondent and is asked to prove consent
- The question is irrelevant because it calls for prior sexual behavior information about the complainant without meeting one of the two exceptions to the rape shield protections defined in 34 C.F.R. § 106.45(b)(6)(i).

GUIDE FOR DETERMINING RELEVANCE



THE STATE UNIVERSITY OF NEW YORK



TITLE IX TOOLKIT



Student Conduct Institute Sample Hearing Script¹

I. Introduction: STATE UNIVERSITY OF NEW YORK

Administrative Hearing Officer: We are officially on the record at ____ am/pm on Month, Day, Year for case number _____. I would ask everyone to turn off cell phones for the duration of the hearing and please could you all present your phones to ensure this practice? Thank you. My name is _____, and I am serving as today's hearing officer. Today's hearing is being recorded, therefore please be reminded to speak clearly throughout the hearing. The recording of this hearing will be made to be used in any deliberations by the decision-maker(s) or appeal board, and may be accessed by the parties prior to any appeal. This recording represents the sole official verbatim record of today's Title IX Hearing and is the property of this institution.

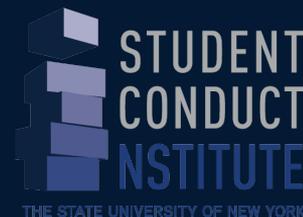
Would each member of the hearing panel please introduce themselves? We will begin to my left.
[introduction]. |

III. Privacy & Decorum Expectations

This is a closed hearing, and not open to the public. The individuals participating in this process can and should expect that the information discussed and the documents presented are to be kept to this hearing space in order to protect the privacy of all individuals involved. Providing materials to any other party not expressly participating in this process may be considered retaliatory and is not permitted.



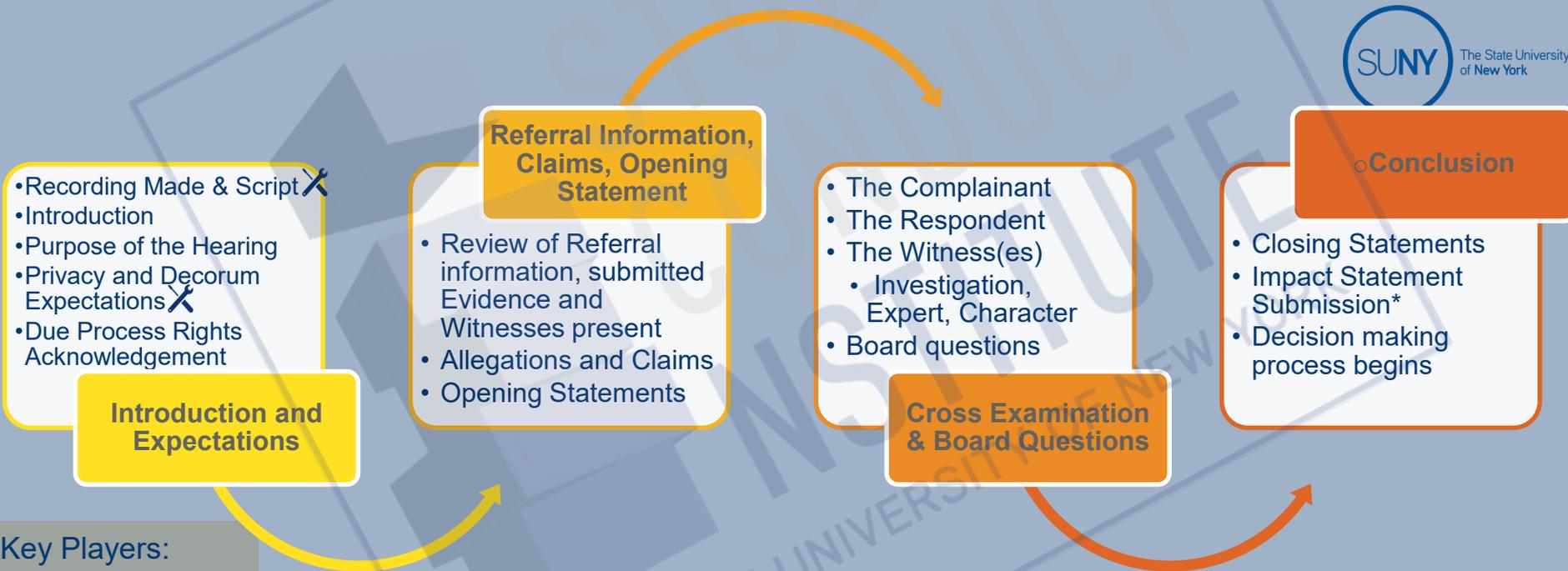
SAMPLE HEARING SCRIPT



CASE PROCESS

HEARING

DECONSTRUCTED



Key Players:



TIXC



Conduct Staff



UPD



Hall Staff



Hearing Board



Appeals Board



Registrar



Homework alert! State Module Assignment



Review, tools, and legal requirements.
*Determination letters.



Review and legal requirements.



Overview



DAY 4 OVERVIEW





The State University
of New York