



TEXAS TECH UNIVERSITY SYSTEM™

TTUS's New Title IX Regulation and Grievance Process Hearing Panelist Training

Darren Gibson
Shareholder, Littler Mendelson, PC

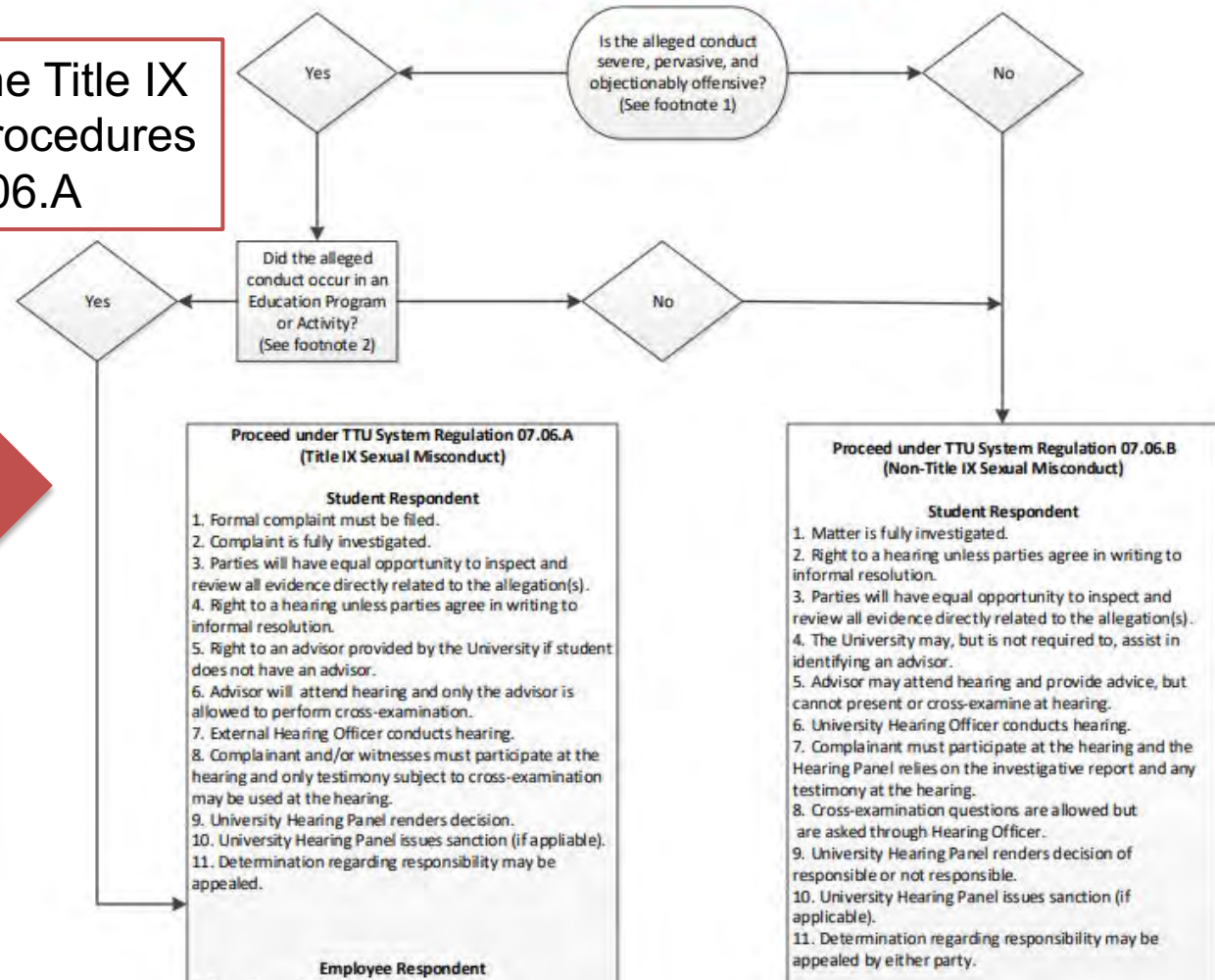
November 10, 2020

Sexual Misconduct Applicable Policy Regulation 07.06.A



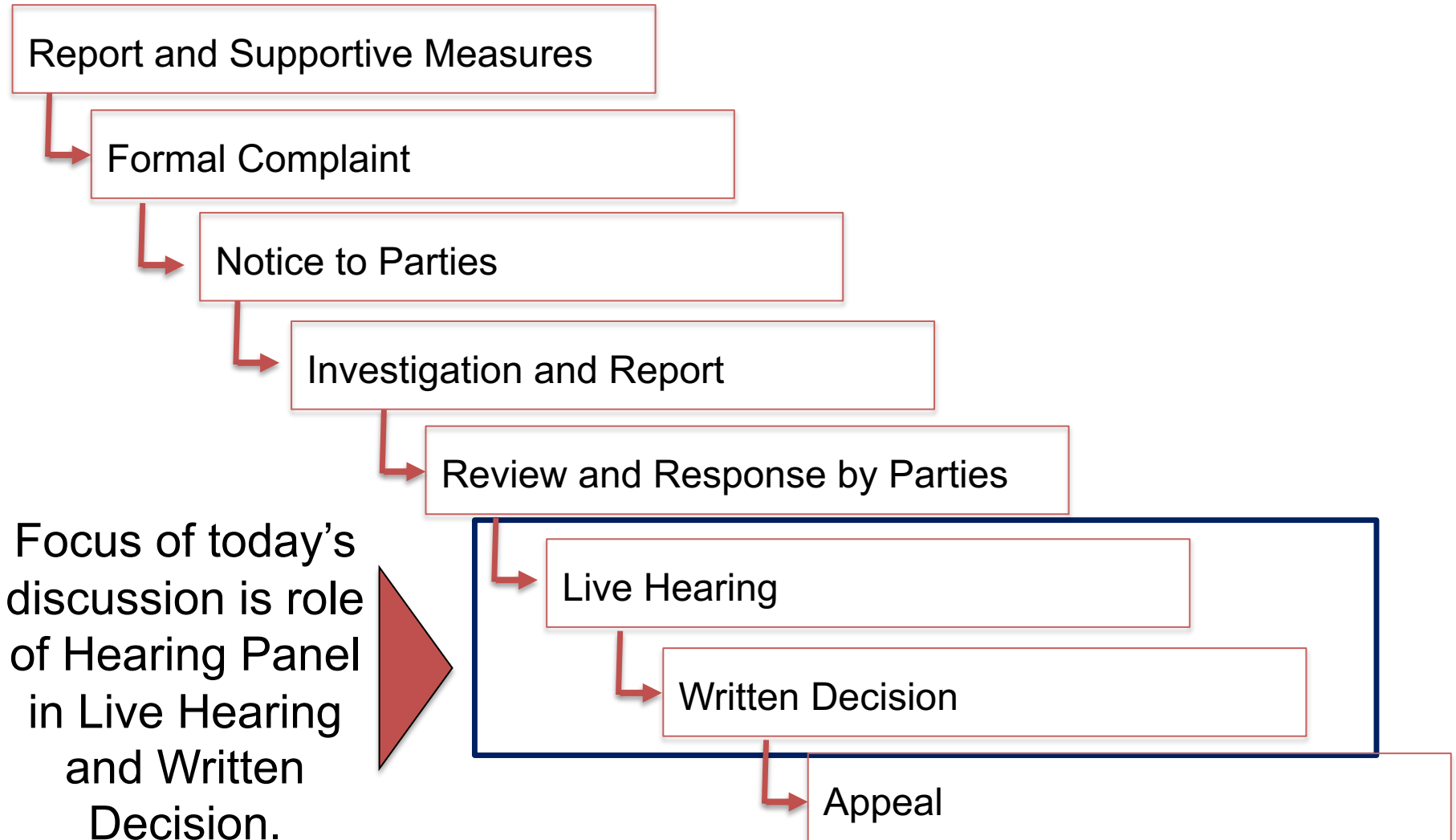
Sexual Misconduct Policy Applicability

We are focusing on the Title IX Sexual Misconduct Procedures under Regulation 07.06.A



Title IX Adjudication Process

Live Hearing and Written Decision



Live Hearing –Regulation 07.06.A: Attachment 2, Hearing Procedures



- If the Formal Complaint is not dismissed or resolved by Informal Resolution, new Title IX regulations require live hearings with cross examination.
- Live hearings will be conducted pursuant to the Title IX Sexual Misconduct Hearing Procedures, set forth in Attachment 2 to Regulation 07.06A.

Live Hearing, Location and Virtual Hearings

Att. 2 Section 1.a.



- Live hearing may be conducted with all parties physically present in the same geographic location *or virtually*.
- If the hearing is virtual, or with the parties located in separate rooms, the University must use technology that enables the Hearing Panel, Hearing Officer, parties, and witnesses to simultaneously see and hear the party or the witness answering questions.



Hearing Panel

Att. 2 Section 1.b.



- University must appoint a four-member Hearing Panel, with an independent Hearing Officer as chair.
- Hearing Panel will be decision-maker that evaluates all relevant evidence and renders a determination.
- Hearing Panel asks questions and elicits information from parties and witnesses.



Hearing Officer

Att. 2 Section 1.b. and 2.a.



- University will appoint an independent Title IX Hearing Officer.
- Hearing Officer oversees and conducts the hearing and chairs the Hearing Panel.
- Responsible for directing and overseeing hearing in accordance with Rules of Order and Decorum.
- When a licensed attorney, Hearing Officer will provide confidential legal advice in deliberations and drafting written determination.



Rules of Order and Decorum

Att. 2 Section 1.f.



- University will adopt rules of order and decorum provided for and enforced by Hearing Officer.
- The rules will include:
 - time limits,
 - hearing order,
 - requirements that participants not badger a witness, and
 - questioning shall be relevant, respectful, and non-abusive.



Advisors

Att. 2 Section 1.d.



- Complainant and Respondent shall have an advisor present at the hearing.
- If party does not have an advisor of their choice present, University will provide an advisor of the University's choosing, without fee or charge to that party.
- Advisor may be, but is not required to be, an attorney.
- Advisors only permissible roles at the hearing are to advise the party and to conduct cross-examination on behalf of that party.



Recording or Transcript

Att. 2 Section 2.b.



- Hearing will be no more than four (4) hours, absent exceptional circumstances.
- University will create a record of the live hearing.
- Record must be made available to parties for inspection and review upon request.
- But, the Panel's deliberations not be part of record.



What Evidence May Be Introduced at Hearing?

Att. 2 Section 2.c.



- Only evidence provided by parties to Investigator during the investigation, and/or identified or included in the Investigative Report may be used at the hearing.
- Any new evidence must be provided to Title IX Coordinator at least 5 days prior to the hearing and to other party at least 3 days prior to the hearing.
- Failure to comply will result in new evidence being excluded from consideration.

Opening and Closing Statements

Att. 2 Section 2.d.



- At the direction of the Hearing Officer, the parties will have an opportunity to offer their own opening and closing statements.
- Hearing Office may set time limits for the parties' opening and closing statements.



Direct Examination

Att. 2 Section 2.f.i.



Direct examination may be conducted by Hearing Officer or Hearing Panel.



Cross Examination

Att. 2 Section 2.f.ii.



- Must be conducted directly, orally, and in real time by party's Advisor and never by party personally.
- Only relevant questions may be asked of party or witness.
- For each question, prior to a response, Hearing Officer must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.



Relevance Determinations During Hearing

Att. 2 Section 2.e.i.



The Hearing Officer must determine:

- Whether a cross-examination question must be excluded on relevance
- Whether any evidence must be excluded on relevance



Specific Information Deemed Not Relevant

Att. 2 Section 2.e.i.



Information that will be deemed not relevant includes:

- Information protected by a legal recognized privilege;
- Questions or evidence about Complainant's sexual predisposition or prior sexual behavior
 - Unless offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
 - If evidence concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.
- Any party's medical, psychological, and similar records (unless the party has given voluntary written consent).
- Party or witness statements that have not been subjected to cross-examination.



Examples of Irrelevant Questions

- ✓ Questions about complainant's prior sexual history with others unrelated to specific incident.
- ✓ Questions about what complainant or respondent told their therapists or their attorneys.
- ✓ Questions about statements by witnesses who are not testifying at the hearing.
- ✓ Questions about facts unrelated to allegations.

Failure to be Subject to Cross Examination

Att. 2 Section 2.e.ii.



- If party or witness does not submit to cross-examination:
 - Hearing Panel must not rely on any statement of that party or witness in reaching a determination.
- However, if a party or witness does not attend hearing or refuses to answer cross-examination or other questions:
 - Hearing Panel cannot draw an inference regarding responsibility based solely on that absence or refusal to answer.



Excluding Statements If No Cross Examination – OCR Guidance



If a party or witness chooses not to appear or opts not to answer cross-examination questions, the decision-maker merely excludes that party or witness's statements, and evaluates any evidence that does not involve those statements.

U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES

**OFFICE FOR
CIVIL RIGHTS**



[Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar](#),
U.S. Department of Education (July 23, 2020)

Exclusion Does Not Affect Alleged Harassing Statements – OCR Guidance



A Respondent's alleged verbal conduct, that itself constitutes the sexual harassment at issue, is not subject to exclusion for lack of cross-examination.

U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES

**OFFICE FOR
CIVIL RIGHTS**



[Office for Civil Rights Blog](#) (May 22, 2020)

Examples of When to Exclude Witnesses Statements



- ✓ When a witness refuses to submit to cross-examination, even if the witness has already submitted to direct examination.
- ✓ When a witness or party stops responding to cross examination questions.
- ✓ When a witness or party does not appear for the hearing.

Reaching a Decision

Policy Section 8.h.



- Hearing Panel will deliberate, weigh evidence, and make a determination regarding responsibility.
- Hearing Officer will provide privileged guidance to Hearing Panel.
- Hearing Officer will draft written decision, with input from Hearing Panel, to ensure all requirements met.

Written Determination Required Components

Policy Section 8.h



Following hearing, Hearing Panel will issue a written determination that includes:

- 1) identification of the allegations;
- 2) description of the procedural steps in Grievance Process;
- 3) findings of fact supporting responsibility determination;
- 4) conclusions regarding application of policy to facts;
- 5) a determination and rationale regarding responsibility for each allegation;
- 6) any disciplinary sanctions or other remedies; and
- 7) information concerning parties' ability to appeal.

Impact Statements Policy Section 8.i.



- Hearing Panel may request, and the parties may provide, impact statements for consideration, but only:
- after a determination regarding responsibility, and
 - before a decision regarding sanctions.



Potential Sanctions and Remedies – Students

Policy Section 9



Possible sanctions or remedies that may be imposed on student respondents can include:

- disciplinary reprimand;
- educational training;
- scheduling adjustment;
- housing reassignment;
- disciplinary probation;
- withholding of grades, official transcript, and/or degree;
- bar against readmission / enrollment, and/or withdrawal;
- suspension of privileges;
- time-limited disciplinary suspension;
- disciplinary expulsion;
- or any other sanctions or remedies as deemed appropriate.

Potential Sanctions and Remedies – Employees

Policy Section 9



Possible sanctions or remedies that may be imposed on employee respondents can include:

- employment probation;
- job demotion or reassignment;
- suspension with or without pay for a specified period of time;
- dismissal or termination from employment;
- ineligibility for re-hire;
- other coaching, conduct or corrective actions;
- or any other sanctions or remedies as deemed appropriate.

Response of Hearing Panel in Appeal Section 8.j.



In the event of an appeal:

- Appeal officer may submit the written appeal and the non-appealing party's response to the Hearing Panel.
- The Hearing Panel may respond in support of the appeal or the original decision to the appeal officer.



Tips for Being a Good Hearing Panelist

- ✓ Know the Title IX Policy and Procedures:
 - Prior to the hearing, review Regulation 07.06.A and Attachment 2
- ✓ Review the Record
 - Read investigation report and parties' responses.
 - Review documents identified as key evidence by investigator and parties.
- ✓ Come with an Open Mind
 - Be open to all possible outcomes at outset of hearing.
- ✓ Work Collaboratively Towards a Decision

