

Training for CSU Hearing Officers

Part A

Systemwide Title IX Compliance and the Office of General Counsel

Office of the Chancellor
The California State University
April 2023

The CSU – Overview



The CSU is the nation's largest four-year public university system

23 campuses stretching 800 miles from Humboldt in the north to San Diego in the south.

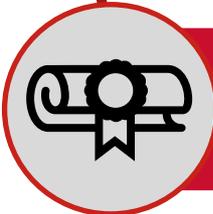
The CSU educates the most ethnically, economically and academically diverse student body in the nation.

The CSU – Overview

Source: [CSU Fact Book 2022](#)



477,466 students enrolled in the CSU in fall 2021



Nearly half of California's bachelor's degrees are awarded by the CSU



The CSU employs nearly 56,000 faculty and staff

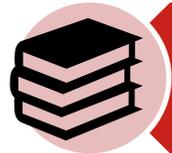
CSU Students and Employees



Half of CSU students are underrepresented minorities



Nearly one third of CSU undergraduates are the first in their family to attend college



87% of first-time freshmen come from CA public high schools



55% of the CSU workforce are women and nearly 60% of all Latinx and Black employees are women



The median age for the CSU workforce is 46.3

Sources: [CSU Fact Book 2022](#) and [2021 CSU Employee Profile](#)

Cultural Humility and Particular Considerations When Interacting With College Students

Cultural Humility

"Cultural humility is a humble and respectful attitude toward individuals of other cultures that pushes one to challenge their own cultural biases, realize they cannot possibly know everything about other cultures, and approach learning about other cultures as a lifelong goal and process."

(Gonzalez & Levitas, 2020)

Other Considerations

- The effect of social/peer pressure on willingness of parties and witnesses to participate in process
- Relationship with and influence of family
- Cultural influences
- English is not the first language
- Socioeconomic differences
- Immigration/undocumented status
- Perception by either party or witnesses that the process is not fair

Complications Arising from Social Media and Texts/Slang/Emojis

- Understanding the diversity of social media platforms and terminology
 - Snapchat, Instagram, TikTok, BeReal
- Impact of texting on communication
- Heavy use of slang
 - Terms such as: Agro, Cheugy, Cuffed, Emo, Finsta, Simp, Ship, Smash, Snatched, Sus,
 - Abbreviations: lol, smh, fomo, idk, ttyl, tbh, v, p
 - Emojis don't always mean what they seem
- Complexity around labeling of sexual acts or behaviors
- Don't hesitate to ask for clarification!



Trauma-Informed Principles

- Acknowledge that some questions might seem unusual or may feel uncomfortable.
- Explain that questions serve to help us understand your experience of the event.
- Phrasing of questions is important.
- In general consider reframing:
 - Questions that start with "why"
 - Directives such as "explain to me..."
 - Requests for a chronological account with prompts such as "and then what happened?"

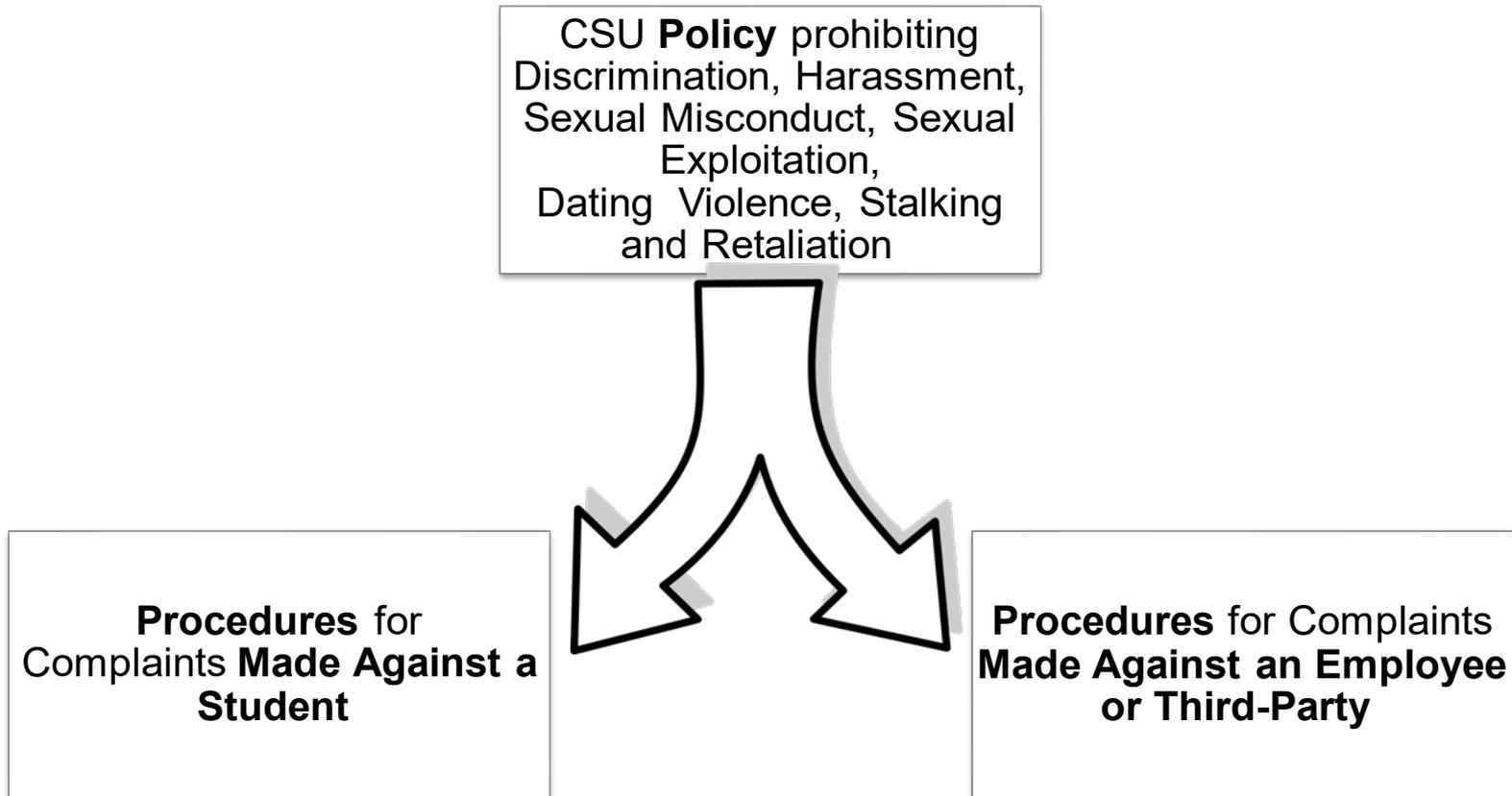
Reflection Exercise

Imagine a recent sexual experience, and then being asked to discuss that experience in graphic detail ...

- How would these factors impact the experience:
 - The other person is a stranger
 - The other person has authority over you
 - The other person is a different age, gender, race/ethnicity, sexual orientation or socioeconomic status from you

CSU Policy and Procedures

CSU Policy and Procedures - Structure



INTRODUCING TRACKS 1, 2, AND 3

Track 1 – Federal Mandated Hearing Process

- Formerly Addendum B
- Applies when the alleged conduct:
 - Meets the definition of Sexual Harassment under Article VII.C of the Policy; **and**
 - Occurred in the United States; **and**
 - Occurred in an education program or activity at the university, as defined in Track 1.

Track 2 – State Mandated Hearing Process

- Formerly Addendum A
- Applies when:
 - The complaint is against a **student**; **and**
 - The complaint is one of Sexual Misconduct, Dating Violence, or Domestic Violence; **and**
 - The credibility of one (or both) of the Complainant and the Respondent ("the Parties") , or any witness is central to the determination as to whether the Student violated the policy; **and**
 - The Student is facing a severe disciplinary sanction (expulsion or suspension) if found to be in violation of university Policy.

Track 3 – Non-Hearing Process

- Applies to all other complaints that allege a Policy violation (Title IX and DHR)
- No hearing involved
- Investigator determines whether a violation of Policy occurred

Hearings – Creating a New Process

- Historically, the primary purpose of the disciplinary process was educational
- OCR Guidance and VAWA increased the rights of Complainants and added other procedural requirements
- Court cases heightened the procedural due process requirements
- Federal Title IX Regulations – 2020 (anticipated new regulations in summer 2023)
- CA SB-493 – January 1, 2022

Prohibited Conduct

Track 1	Track 2
Sexual Harassment <ul style="list-style-type: none"> • Quid Pro Quo • Hostile Environment 	Sexual Misconduct
Sexual Assault <ul style="list-style-type: none"> • Rape • Fondling • Incest • Statutory Rape 	Dating Violence
Dating Violence	Domestic Violence
Domestic Violence	
Stalking	

Prohibited Conduct: Sexual Misconduct

What Do We Mean by “Sexual Misconduct” (under CSU Policy)?

- "Engaging in any sexual activity without first obtaining Affirmative Consent to the specific activity constitutes Sexual Misconduct..."
 - All “sexual activity” must be with “affirmative consent”
 - Note: obtaining affirmative consent for sexual activity between students is required by California law (in addition to CSU policy).
- “Sexual Activity” includes but is not limited to kissing, touching intimate body parts, fondling, intercourse, penetration, no matter how slight, of the vagina or anus with any part or object, and oral copulation of a sex organ by another person.
- ***Every sexual activity must be analyzed separately.***

Affirmative Consent

CSU Policy: All sexual activity between members of the CSU community must be based on Affirmative Consent: If there is not affirmative consent, it is “sexual misconduct”

- What is “Affirmative Consent”?
 - Informed, affirmative, conscious, voluntary, and mutual agreement to engage in sexual activity
 - Consent must be ongoing throughout a sexual activity and can be revoked at any time, including after sexual activity begins
 - **Affirmative Consent can never be given by a person who is determined under CSU policy to be “Incapacitated”**

Poll Activity: Real World Examples of Affirmative Consent ... or Not

Scenario #1: Respondent says: “We talked at the party. He agreed to come to my room. I could tell from the vibe he wanted to have sex.”

Scenario #2: Respondent says: “They took their clothes off. I asked if I could kiss them, and they said yes. They kissed me back and removed my shirt.”

Scenario #3: Respondent says: “In the past, when we were in bed together and she rubbed against my leg with hers, it meant she wanted to have sex. So, when she rubbed her leg against mine this time, I took off her top and underwear, and we had sex.”

What Constitutes “Incapacitation” (Under CSU Policy)?

- The role of drugs and alcohol in campus sexual assault
- Whether an intoxicated person (as a result of using alcohol or other drugs) is incapacitated depends on the extent to which the alcohol or other drugs impact the person’s decision-making ability, awareness of consequences, and ability to make informed judgments.



Incapacitation (continued)

- A person's own intoxication or incapacitation does **not** diminish that person's responsibility to obtain affirmative consent before engaging in sexual activity.
 - In other words, you should evaluate the situation when viewed from the perspective of a **sober, reasonable** person in the Respondent's shoes.
- It is **not** a valid excuse if the Respondent (subjectively) believed the Complainant gave affirmative consent if:
 - The belief arose from Respondent's intoxication or recklessness.
 - The Respondent "did not take **reasonable steps**, in the circumstances known to the Respondent at the time, **to ascertain whether the person affirmatively consented.**"

What If Respondent Says They Did Not Know Complainant was Incapacitated?

It shall *not* be a valid excuse that a person affirmatively consented to the sexual activity **if the Respondent knew or reasonably should have known** that the person was unable to consent to the sexual activity under any of the following circumstances:

- The person was asleep or unconscious.
- The person was incapacitated due to the influence of drugs, alcohol or medication, so that the person could not understand the fact, nature or extent of the sexual activity
- The person was unable to communicate due to a mental or physical condition.

Prohibited Conduct: Dating Violence

Track 2

Physical violence or threat of physical violence committed by a person—

- a) who is or has been in a social relationship of a romantic or intimate nature with the Complainant; and
- b) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - The length of the relationship.
 - The type of relationship.
 - The frequency of interaction between the persons involved in the relationship.

Prohibited Conduct Domestic Violence

Track 2

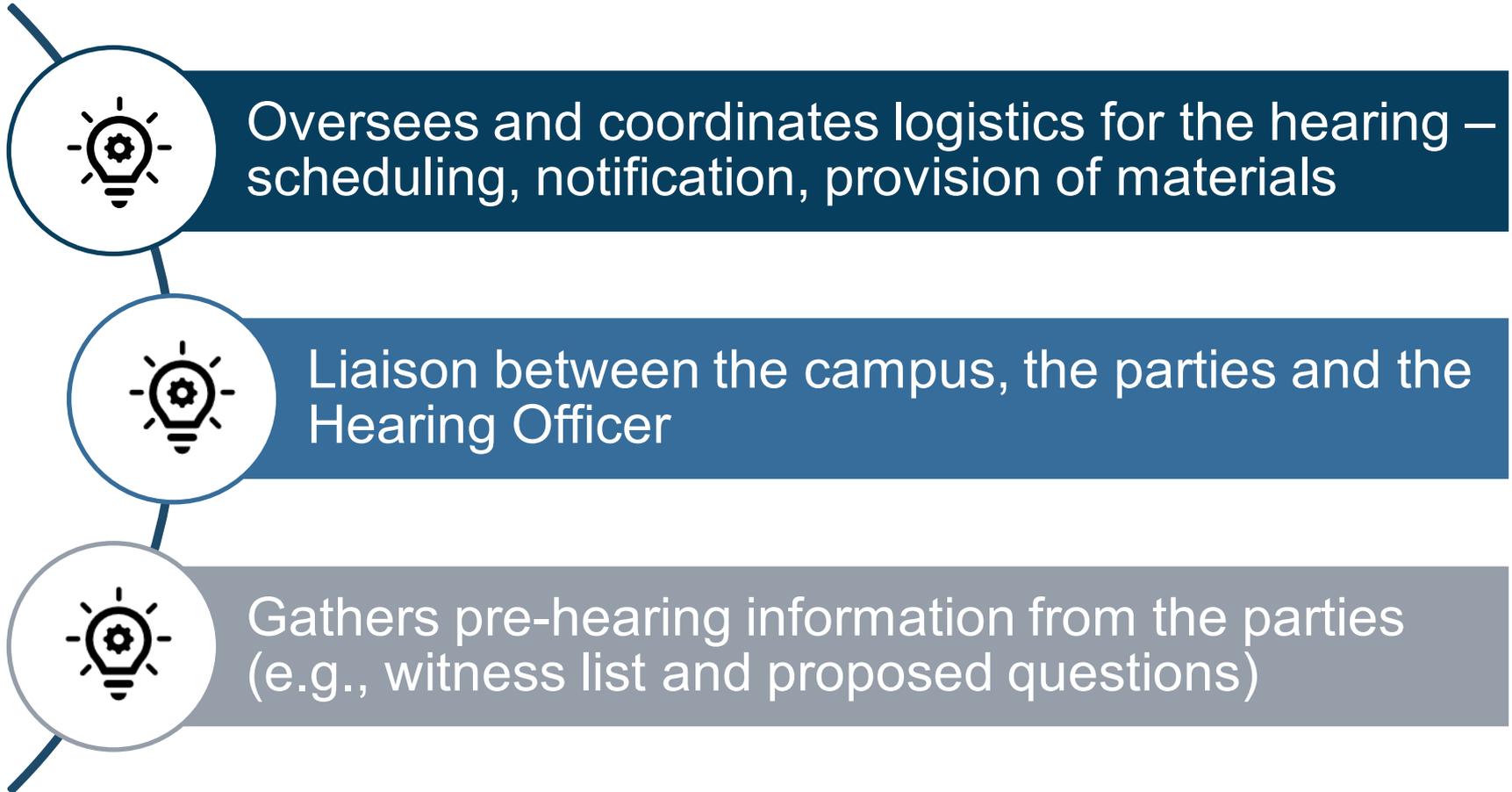
Physical violence or threat of physical violence committed by a current or former spouse or intimate partner of the Complainant, by a person with whom the Complainant shares a child in common, by a person who is cohabitating with or has cohabitated with the Complainant as a spouse or intimate partner, by a person similarly situated to a spouse of the Complainant.

Key Roles in the Hearing Process

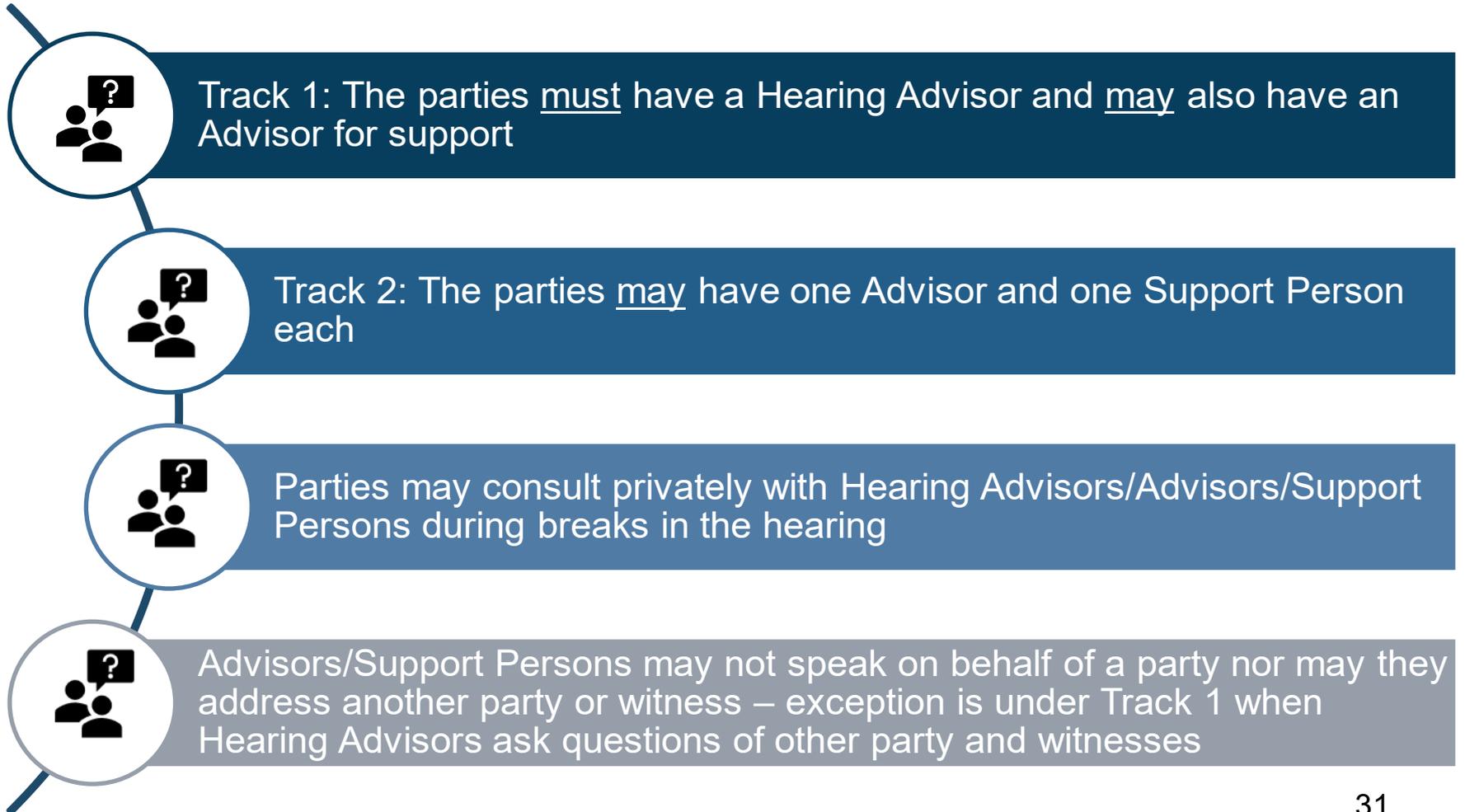
The Role of the Hearing Officer

- ▶▶▶ Reviews all relevant evidence and prepares questions to be asked of the parties and witnesses
- ▶▶▶ For Track 1, Hearing Advisors and Hearing Officer conduct questioning; for Track 2, only Hearing Officer conducts questioning
- ▶▶▶ Maintains order during the hearing – parties, advisors, witnesses
- ▶▶▶ Makes whatever rulings are necessary to ensure a fair hearing
- ▶▶▶ Responsible for ensuring all relevant information is obtained to make a decision

The Role of the Hearing Coordinator



The Role of Hearing Advisors/Advisors/Support Persons



Pre-Hearing and Hearing Logistics

Final Investigation Report and Party Submissions

Final Investigation Report:

- Interview summaries
- Additional relevant evidence received during review of evidence
- All tangible evidence attached or made available for review
- **Material disputed and undisputed facts**

Party Submissions

- Conflict objection to assigned hearing officer
- List of witnesses
- Questions

Witnesses



- Parties **may(Track 1)/will (Track 2)** submit proposed witness lists:
 - ✓ Names of witnesses
 - ✓ Current contact information for witnesses
 - ✓ Explanation of the relevance of each proposed witness's testimony and the disputed issue to which the witness's testimony relates
- Generally, witnesses should have been interviewed during the investigation
- Hearing Coordinator will share final witness list with Parties
- Hearing Coordinator will notify each witness of the date, time and location of the hearing
- It is CSU practice to have the Investigator/Title IX Coordinator appear as a witness regarding the investigation process (including any lack of party participation)

Advance Submission of Questions



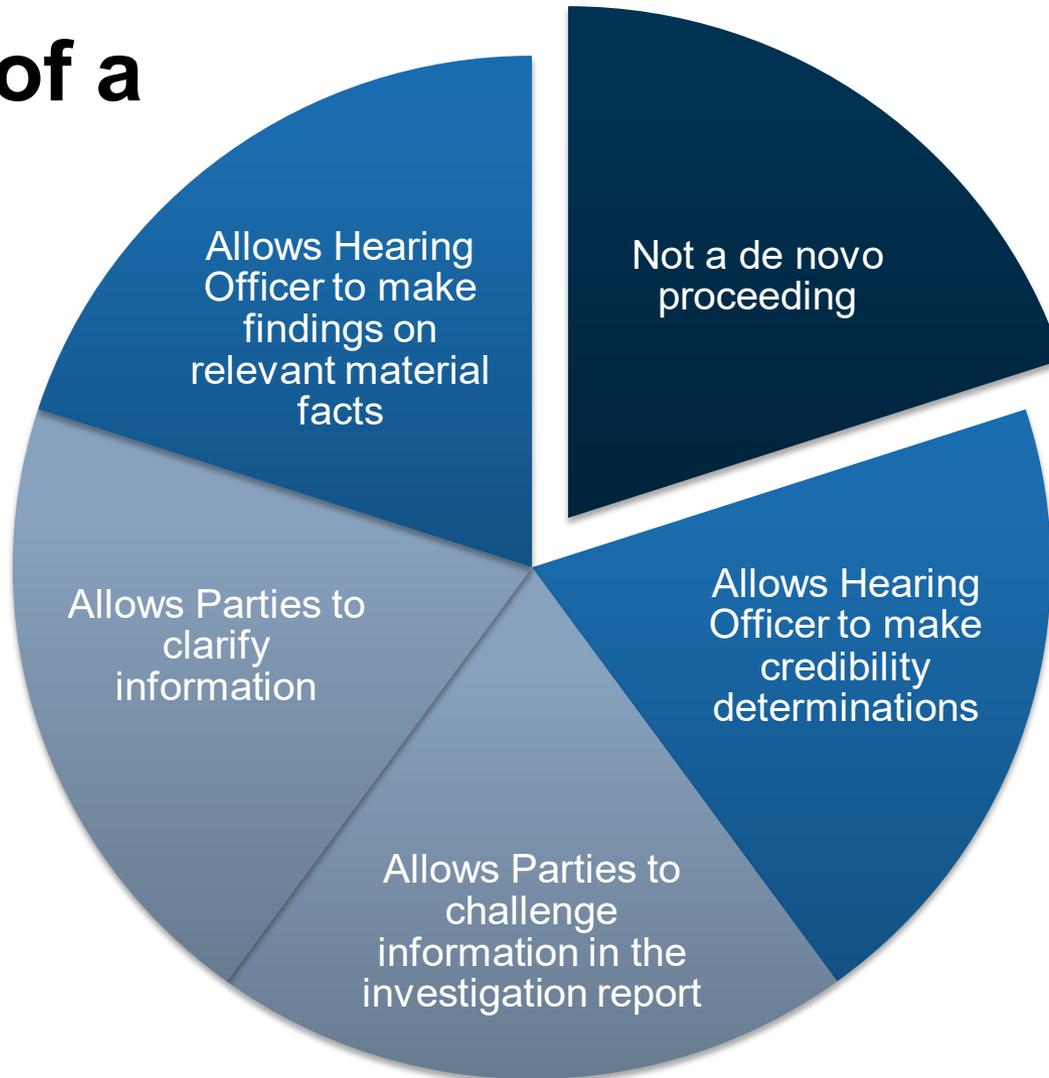
- ❑ The Parties **may (Track 1)/will (Track 2)** submit a list of proposed questions for the other Party and witnesses to the Hearing Coordinator
- ❑ The questions will be provided to the Hearing Officer
- ❑ **Track 1:** Not required but parties are strongly encouraged to provide questions in advance of the hearing – streamline process and opportunity for Hearing Officer to resolve relevancy concerns prior to the hearing
- ❑ The proposed questions will **not** be shared with the other Party
- ❑ The Hearing Officer will make all determinations regarding pre-hearing matters, including (for Track 1) which witnesses have **relevant** testimony and will participate and which questions, if submitted, are **relevant** and will promptly notify the Hearing Coordinator who, in turn, will promptly notify the Parties

Hearing Officer Pre-Hearing Issues

- Hearing officer can identify witnesses that they would like to participate in the hearing and not identified by the Parties
- Finalize witness list
- Review and finalize hearing questions-include rationale when submitted questions not asked
- Hearing Officer will draft their own hearing questions
- Resolve any other matters submitted by the parties

The Hearing

Purpose of a Hearing



Who attends the hearing?

- Hearing Officer
- Complainant
- Respondent
- Witnesses
- Hearing Advisor(s)
- Support Person(s) (called an “Advisor” in Track 1 cases)
- Title IX Coordinator
- Title IX Investigator (if not also the Title IX Coordinator)
- Hearing Coordinator
- Student Conduct Administrator or other appropriate University administrator
- An administrator from the CSU Chancellor’s Office
- Technology support/Interpreter/Security, if needed

The Hearing Process

**Conducted via
videoconference in
most cases**

**Parties must be able
to simultaneously
see and hear all the
proceedings and
testimony**

**Ensure all evidence
provided during the
investigation is
available**

**Hearing Officer provides
overview of the
proceedings and Parties
can ask questions of the
Hearing Officer about the
process**

**Each Party has the
opportunity to make an
opening statement of no
more than 10 minutes –
must be made by party
themselves, not the
Hearing Advisor/Advisor**

**No closing
statements under
procedures**

Hearing Process (*cont.*)

Opening

- Hearing Officer gives overview of process
- Parties may ask procedural questions

Testimony

- Investigator/Title IX Coordinator is **generally** first witness
- Parties provide opening statements

Questioning

- Hearing Officer asks questions of Parties and witnesses (including questions proposed by Parties)
- Hearing Officer gives Parties the opportunity to ask additional questions through Hearing Advisor (Track 1) or the Hearing Officer (Track 2)

Closing

- Hearing Officer closes hearing with explanation of remaining procedural steps

Non-Participation in the Hearing

What if a Party or Witness does not participate in the hearing?

Parties are not required to participate in a hearing, but there is risk in them not attending:

- Absent extenuating circumstances, the Hearing Officer will not rely on prior statements made by the Parties or witnesses during the investigation whose credibility is central to the determination unless those Parties or witnesses make themselves available for examination by the Hearing Officer
- **Track 1 only:** Non-appearing Party's Hearing Advisor will still be able to question the other Party and Witnesses

The Disruptive Party or Advisor

- The Hearing Officer may excuse from the hearing anyone (including either Party or their Hearing Advisor/Advisor/Support Person) whose behavior causes a material disruption
- Should a Hearing Advisor be removed from a Track 1 proceeding, the University will provide a Hearing Advisor
- The Hearing Officer, in their discretion, may postpone the hearing
- In making a determination whether to postpone the hearing, the Hearing Officer will consider the equity of postponement as to both Parties
- Apply approach to disruptive Parties and Advisors for both Parties

Questioning

Questioning

Where a Party has a question or objection regarding an inquiry, they may communicate with the Hearing Officer, preferably in writing.

Hearing Advisors, Advisors, and Support Persons are not permitted to engage in discussions with the Hearing Officer regarding questioning at any time during the hearing.

Hearing Officers should encourage Parties to seek clarification if they do not understand a question or why it is being asked.

Parties **cannot** propose questions to be asked of themselves.

For any questions proposed by a Party that the Hearing Officer does not ask or that is deemed not relevant when posed by a Hearing Advisor, the Hearing Officer should document in some manner (on the “record” so that the issue can be reviewed on appeal) why the questions were not asked or deemed not relevant, whether before the hearing, during the hearing or after the hearing.

Track 2: When to Decline to Ask a Question Proposed by a Party

The Hearing Officer always has discretion to rephrase questions proposed by a Party.



The request seeks information about the **Complainant's sexual history** with anyone other than the Respondent (unless offered to prove that someone other than the Respondent committed the alleged misconduct, or unless offered to prove consent).



The request seeks information about the **Respondent's sexual history** with anyone other than the Complainant unless such information is used to prove motive or pattern of conduct.

Track 2: When to Decline to Ask a Question Proposed by a Party (cont.)

- The requested question:
 - seeks information that is **unreasonably duplicative** of evidence in the Hearing Officer's possession;
 - is **not relevant** to disputed issues; or
 - is not relevant to material disputed issues, is argumentative or harassing or unduly intrudes on a witness' privacy.

Communications Between Hearing Officer and University – Are They Privileged?

- With anyone other than a member of the Office of General Counsel of the CSU: **Probably not.**
- With a member of the Office of General Counsel of the CSU: **Probably**, if seeking legal guidance about policy interpretation or legal sufficiency of report. We can review the hearing decisions for legal sufficiency.
- Requests for guidance should be directed to campus Hearing Coordinator.

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