

Training for CSU Hearing Officers

Part B

Systemwide Title IX Compliance and the Office of General Counsel

Office of the Chancellor
The California State University
April 2023

Bias and Serving Impartially

Bias

“Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an **objective** (whether a **reasonable person** would believe bias exists), **common sense approach** to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists [...].”
(FR 30252)

Examples of generalizations (provided by OCR in preamble):

- Assuming that all self-professed feminists, or self-described survivors, are biased against men
- Assuming that a male is incapable of being sensitive to women
- Assuming that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents in a Title IX role

(FR 30252)

Serving Impartially

Serving impartially includes avoiding the following:

- **Prejudgment of the facts at issue** – an opinion about a situation or a person that is formed before knowing or considering all of the facts (Cambridge English Dictionary)
- **Conflicts of interest** – a conflict between the private interests and the official responsibilities of a person in a position of trust (Merriam Webster Dictionary)
- **Bias** – the action of supporting or opposing a particular person or thing in an unfair way, because of allowing personal opinions to influence your judgment (Cambridge English Dictionary)

Serving Impartially

“The Department wishes to emphasize that parties should be treated with **equal dignity** and **respect** by Title IX personnel [...]” (FR 30254)

- Reflect on your own experiences and biases regarding:
 - What constitutes sexual assault?
 - Voluntary intoxication
 - Reporting delays
 - “If I were in their shoes...”
 - “When I was in college...”
- Consider your communications (verbal and written) – language and tone
- Continue to ask yourself whether there are additional facts to explore to ensure that your decision and report are as complete and impartial as possible
- Apply limitations on Support Advisor (and Hearing Advisor) role(s) equitably

To Note: Addendum B/Track 1 Hearings

The Final Regulations – Key Requirements

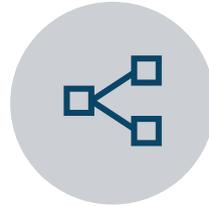


Apply to **employees**, as well as **students**.

Institutions may choose whether to use preponderance of the evidence or clear and convincing (CA law requires the preponderance standard).



The CSU must provide an advisor to conduct questioning if a party does not already have one (can be, but not required to be, an attorney).



Include dating and domestic violence, and stalking (in addition to sexual harassment and sexual misconduct).

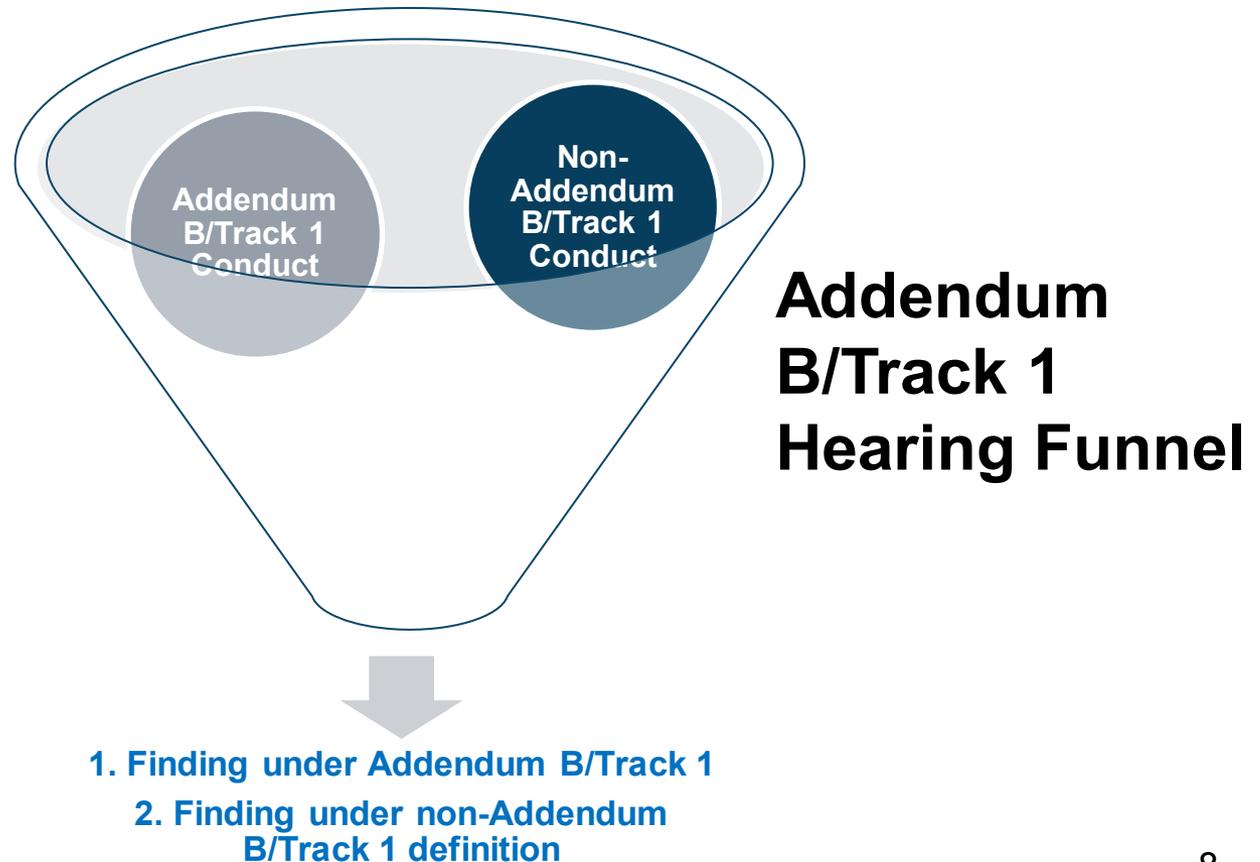


Live questioning will be conducted by a party's advisor during a hearing.



Institutions can address conduct falling outside the Regulations under their own codes of conduct.

Allegations may be funneled through one process in terms of procedure, but different policies/definitions may apply



Track 1/Addendum B Prohibited Conduct

Sexual Harassment Quid Pro Quo

Quid Pro Quo - Definitions

Addendum B/Track 1

- An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual's participation in **unwelcome sexual conduct**

Non-Hearing

- **Unwelcome verbal, nonverbal or physical conduct of a sexual nature** where:
 - Submission to, or rejection of, the conduct is explicitly or implicitly used as the basis for:
 - (Students) for any decision affecting a CP's academic status or progress, or access to benefits and services etc.... **or**
 - (Employees) any decision affecting a term or condition of the CPs employment, or an employment decision

Sexual Harassment Hostile Environment

“Hostile Environment” - Definition

Addendum B/Track 1

- Unwelcome conduct “on the basis of sex” determined by a reasonable person to be so severe, pervasive **and** objectively offensive that it effectively denies a person equal access to an education program or activity

Non-Hearing

- Unwelcome verbal, nonverbal or physical conduct of a sexual nature where:
 - Sufficiently severe, persistent or pervasive that its effect could be considered by a Reas. P, and is, considered by the CP, to:
 - limit their ability to participate in or benefit from services, activities, etc....
 - create an intimidating, hostile, or offensive environment

Sexual Assault

Sexual Misconduct/Sexual Assault

Addendum A/Track 2

- Sexual Misconduct
 - Sexual activity
 - No affirmative consent
 - Incapacitation

Addendum B/Track 1

- Sexual Assault
 - Rape
 - No affirmative consent
 - Incapacitation
 - Fondling
 - No affirmative consent
 - Incapacitation
 - Incest
 - Statutory Rape

Sexual Assault Under Addendum B/Track 1

What is “Sexual Assault”?

- Rape
- Fondling
- Incest
- Statutory Rape

Stalking

Non-Hearing

Engaging in a Course of Conduct directed at a specific person that would cause a Reasonable Person to fear for the safety of self or others' safety or to suffer Substantial Emotional Distress.

Addendum B/Track

1 (CONDUCT ON THE BASIS OF SEX)

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- a) fear for the safety of self or others' safety;
or
- b) suffer substantial emotional distress

The Role of the Hearing Advisor – Track 1/Addendum B

Hearing Advisors

- A Hearing Advisor will be responsible for asking the other Party and any witnesses questions and follow-up questions, including those that challenge credibility, during the hearing
- Hearing Advisor may be anyone – an attorney, family member, friend, witness in the case
- If a Party does not have a Hearing Advisor, the University will provide one
- Parties may also have 1 additional advisor each (for support only)

The University-Assigned Hearing Advisor

- The CSU has created a group of Hearing Advisors from across various campuses
- Serves when a Party does not select a Hearing Advisor
- Asks questions of the other party and witnesses
- Serves as the voice of a Party during hearing questioning, even if the Party is not present
- Does not “represent” a Party

Questioning – Track 1/Addendum B

Purpose of Questioning

- Questioning is intended to give Parties an opportunity to ask **relevant** questions of witnesses in order to assist the Hearing Officer in determining the **credibility** of the witness

Advance Submission of Witness List and Questions (Add. A/Track 2 vs. Add. B/Track 1)

- Advance submission of witness list and questions encouraged but not required

Questioning – Addendum B/Track 1

Generally, the Hearing Officer will begin questioning of the parties and each witness

Hearing Advisors will be permitted to ask **relevant** questions once the Hearing Officer has concluded their questioning of the other Party and each witness

Hearing Advisor asks question → Hearing Officer to determine relevance → if deemed relevant, witness answers

Generally, duplicative questions will not be relevant

Questioning – Addendum B/Track 1

Hearing Advisor
asks question of
Party

Hearing Officer
will indicate
whether question
is relevant*

If question is
deemed relevant,
Party will answer

*With explanation if
deemed not relevant

Questioning – Track 1

Hearing Officer has the discretion to request information from the Parties or Hearing Advisors regarding questions prior to making a determination about the relevancy of the question

Objections to questions are **not** permitted

Question should be asked in a **respectful, non-abusive manner**. The Hearing Officer determines whether a question satisfies this requirement

Hearing Officer may require that Hearing Advisor rephrase a relevant question or repeat the question

Evidentiary Issues – Track 1

“Relevant”

- The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied (FR 30247, FN 1018)
- Addendum B, Article II.F – **Relevant means having significant and demonstrable bearing on the matter at hand**
- Even if a question relates to a Relevant subject or issue, the Hearing Officer may determine that the Party or witness being asked the question is not required to answer if the question is repetitive or duplicative of prior questions

“Relevant”

The following evidence is considered **irrelevant**:

- A question is considered **NOT** relevant if it relates to the **Complainant's sexual predisposition** or **prior sexual behavior**. Exceptions to the **latter only**:
 - such questions about the Complainant's prior sexual behavior is offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant; or
 - if the question concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and is asked to prove consent.
- Any party's medical, psychological, and similar treatment records without the party's voluntary, written consent
- Any information protected by a legally recognized privilege without a waiver

The Distinction between “Directly Related” and “Relevant”

- Preliminary Investigation Report must include all evidence that is **Directly Related** to the allegations raised in the Formal Complaint
- **Directly Related** – anything that is not incidental to a matter at issue
- Final Investigation Report will summarize all **Relevant** evidence
- Possible that a Party may seek to argue at hearing that you should consider information deemed by the Investigator to be Directly Related but not Relevant – you will then need to determine whether it is Relevant

Post-Hearing

Report and Recommendations

HEARING OFFICER MAKES WRITTEN FINDINGS OF FACT AND CONCLUSIONS ABOUT WHETHER UNIVERSITY POLICY WAS VIOLATED*



THE STANDARD OF PROOF IS PREPONDERANCE OF THE EVIDENCE



TITLE IX COORDINATOR WILL REVIEW THE REPORT TO ENSURE COMPLIANCE WITH PROCEDURES



HEARING COORDINATOR SHOULD SEND REPORT TO PARTIES NO LATER THAN **15 WORKING DAYS** AFTER HEARING.

*Hearing Decision Report template available

Determination Regarding Responsibility

- The Hearing Coordinator will transmit the Hearing Officer's Report to the Parties, the T9C and Student Conduct Administrator/appropriate administrator **within 15 Working Days**
- Title IX Coordinator will review the Hearing Officer's report to ensure compliance with procedures
- Where **no** violation – President (or designee) is informed, and Parties notified of outcome
- Where violation – Parties may submit impact statement (within **5 working days**) and T9C and SCA/appropriate administrator may submit written statement
 - Hearing Officer reviews statements and makes disciplinary recommendation to President/designee
 - A Decision Letter will be sent to the Parties by the president or designee

No Violation Found

Usually within 15 Working Days of hearing:

- Hearing Coordinator sends report to Title IX Coordinator, appropriate University Administrator and Parties

Title IX Coordinator will review the Hearing Officer's report to ensure compliance with procedures

President (or designee) is informed, and Parties notified of outcome via Decision Letter

Violation Found

Usually within 15 Working Days of the close of the hearing:

- Hearing Coordinator sends report to Title IX Coordinator, appropriate University Administrator and Parties (Title IX Coordinator will review the Hearing Officer's report to ensure compliance with procedures)

Within 5 Working Days of receipt of report:

- Parties may submit written impact statement (2000-word limit)
- Appropriate University Administrator and Title IX Coordinator submit written statement → aggravating/mitigating factors and recommendation as to disciplinary outcome

Within 5 Working Days of Hearing Officer's receipt of statements:

- Hearing Officer submits Final Hearing Officer's Report to President or Designee with recommendation and rationale for disciplinary outcome

Within 10 Working Days of receipt of Final Hearing Officer's Report:

- President or Designee issues Decision Letter

Appeals – Track 1

Appeal granted where:

- There was no reasonable basis for the findings or conclusions that resulted in the investigation or hearing outcome;
- Procedural errors occurred that would have likely changed the outcome of the hearing.
- New evidence that was not reasonably available at the time of the hearing and would have likely affected the hearing officer's decision about whether the Respondent violated the Policy.
- The Title IX Coordinator, Investigator, or hearing officer had a Conflict of Interest or Bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter; or
- The sanction(s) imposed was objectively unreasonable, or arbitrary based on substantiated conduct.

* Note rewording of appeal bases – Addendum B vs. Track 1.

Appeals – Track 2

Appeal granted where:

- There was no reasonable basis for the findings or conclusions that resulted in the investigation or hearing outcome.
- Procedural errors occurred that would have likely changed the outcome of the investigation or hearing.
- New evidence that was not reasonably available at the time of the investigation or hearing and would have likely affected the investigation outcome or hearing officer's decision about whether the Respondent violated the Policy.
- The sanction(s) imposed was objectively unreasonable, or arbitrary based on substantiated conduct.

Environmental/Atmospheric Considerations during Hearings

Suggestions for the Hearing Environment

- Consider in advance of hearing how you would like to be addressed – we suggest first name, last name, or other non-judicial title, such as “Hearing Officer”
- Sharing your preferred pronouns, if comfortable
- We suggest use of a neutral digital background for your privacy and to minimize distractions for hearing participants
- Please ensure you are conducting the hearing from a physical location that offers privacy
- Consider asking, at appropriate times, if the parties need a break – they may be reluctant to ask, even if told at the beginning that they may request breaks

The Remote Hearing

The Remote Hearing

- Discuss video conferencing logistics with the campus Hearing Coordinator in advance of the hearing:
 - Who will have overall responsibility for administration of the video conference?
 - Who is responsible for the audio recording?
 - Who will be taking a back-up recording?
 - Going on and off the record
 - How will the campus facilitate private discussion between a party and their Advisor/Hearing Advisor/Support Person? Example: Use of virtual breakout rooms
 - Track 2: When a party wishes to submit proposed questions **during** the hearing, how will those be sent to the Hearing Officer? By email, via the Hearing Coordinator? Zoom chat directly to the Hearing Officer?

How we can help

Support from the Chancellor's Office Civil Rights Team

- Available for questions today and after today
- Pre-hearing meeting ahead of your first CSU hearing (and in advance of other hearings, if requested)
- Templates/Guidance
 - Hearing Officer Script
 - Hearing Decision Template
 - Guidance and Clarification for CSU Hearing Officers
- CO Civil Rights Team member attendance during your first CSU hearing – available to assist with procedural questions

Contacting Us:

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