

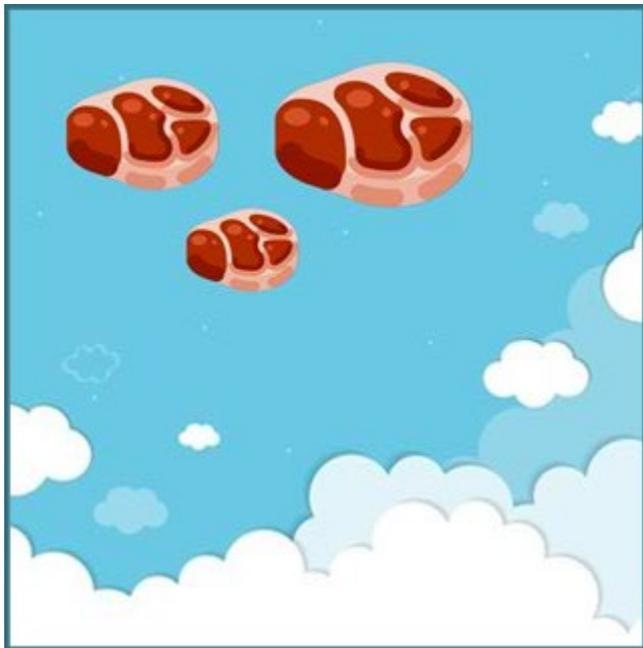


**HUSCH BLACKWELL**

# **Title IX Hearings, Part Two**

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# Hearing Officer(s) Preparation: *Doe v. Purdue University, et al. (2019)*



- Denied MTD on due process and Title IX claims
- Student suspended with conditions; later expelled
- Claimed due process was inadequate, e.g.:
  - Not provided with investigative report
  - No opportunity for cross-examination
  - Complainant & witnesses found credible by committee, but not interviewed in person by fact-finder
- Court found material issues of fact and denied MTD:
  - ***“... two of the three panel members candidly admitted that they had not read the investigative report...”***

# Law School Final



# Hypothetical Investigative Report

- **Complainant Employee** contends she was sexually assaulted by Supervising Respondent on campus following a fundraising event. Complainant contends she was incapacitated from drinking at the event. In her interview, Complainant mentions that she was sexually assaulted as a child and that this latest assault has left her with a PTSD diagnosis from her psychologist.
- **Supervising Respondent** denies having sex with Complainant and states he has no idea if Complainant Employee was drunk or not.
- **Employee Witness** was interviewed by Investigator and testified that Complainant was slurring words and could barely stand up as the event was winding down. Employee Witness does not know what happened after he left the event and is reluctant to “get involved” because Supervising Respondent is his boss.

# Hypothetical Investigative Report: Evidence

- During her interview, Complainant Employee mentioned that she had a **SANE exam** done and filed a police report. The SANE exam was obtained and shows vaginal abrasions and semen. As part of the report, the Complainant also discussed her last consensual sexual encounter which was two weeks before the alleged incident.
- According to the **police report** (which was also obtained in the investigation), the police concluded their investigation and have declined to pursue criminal charges because the investigating officer determined the Complainant was “not credible.” During the police interview, though, Respondent said he had consensual sex with Complainant Employee.

# Q1: Pre-Hearing Initial Issues

- A. Conflicts?
- B. Framing the material issues. What are the issues which should be the focus of the hearing? Stipulations?
- C. Framing the logistical challenges. What are the practical problems the hearing officer will need to navigate through?

# Typical Hearing Structure

- Hearing officer/chair provides opening remarks
  - Affirm notice
  - Discuss purpose of hearing/goals / explain ground rules
  - Discuss role of hearing officer(s)
  - Address standard of evidence
  - Welcome questions
- Consider investigation report/summary
  - Invite parties to make opening statement about report
- Questioning of parties & witnesses
  - Hearing Officer(s) should go first
  - Manage Cross-examination questions
- Deliberation
- Written determination



# During the Hearing

- In an in-person hearing, plan for parties to enter and exit the room separately (with their advisor, etc.). Give them enough time to vacate hallways, etc.
- Discuss how the parties can request breaks and expectations during breaks.
  - Put into the script at the beginning.
  - Plan for a break every 60-90 minutes, if the parties do not ask for one.
- Know when to stop.
- New/additional evidence may be presented during the hearing, even if it is technically not permitted.
  - Discuss in advance how to address this should it occur.
  - Label anything submitted during the hearing with the date and who supplied it.

# Managing Cross-Examination

## Evaluating questions

- Hearing officer/panel must evaluate each question prior to the participant answering for relevancy and/or appropriateness (e.g. sexual history)
- If a question is deemed irrelevant, hearing officer/panel must state the rationale for that decision.
  - Consider making a written notation of the question, denial, and rationale for the record.
  - Discuss your philosophy on this in advance.
  - A poorly worded question, in and of itself, is not a reason to not ask it.

# Q2: The Hearing

- A. Respondent refuses to answer a cross examination question regarding the inconsistency between his statements to investigator and police. What happens next?
- B. Respondent objects to introduction of the SANE exam because the nurse did not testify at hearing. How do you resolve?
- C. Respondent's advisor would like to question Complainant on her childhood sex assault. Should you allow? What is basis for denial?
- D. Halfway through hearing, Complainant informs you that she just received a forensic expert report demonstrating that semen from SANE exam shares Respondent's DNA. Complainant indicates expert is prepared to testify now. How do you handle?



**QUESTIONS?**