



# OEO/AA Hearing Committee Training



# Agenda

- Compliance (Jess Morrison)
  - University Policy
  - Title VII
  - Title IX
  - Hearing Requirements
  - Title IX Regulations
- Best Practices and Practical tips
  - Pre-Scheduled Hearing dates
  - Box Folders
  - Best Practices and Common issues
- Open Discussion and Questions

# Compliance

## **[Interim] Policy 1-012: *University Non-discrimination Policy***

“This Policy applies to all academic and administrative units of the University, and to all members of the University community, including faculty, staff, students, patients, visitors, and participants in University programs or activities.”

“The University of Utah does not discriminate against individuals on the basis of **[Protected Class]**... in employment, treatment, admission, access to educational programs and activities, or other University benefits or services. Additionally, the University provides reasonable accommodations to ensure equal access to qualified persons with disabilities.”

Discrimination means treating someone differently, i.e., **disadvantaging the person**, on the basis of being a **member of a protected class** described in University Policy 1-012 when:

- such conduct **adversely affects** a term or condition of an individual's employment, education, living environment, or participation in a university program or activity; or
- a person's membership in a protected class is used as **the basis for or a factor in decisions** affecting that individual's employment, education, living environment, health care, or other participation in a university program or activity.

## Title VII of the Civil Rights Act of 1964

Title VII of the act created the Equal Employment Opportunity Commission (EEOC) to implement the law.

**Trivia:** What current SCOTUS justice was the Chairman of the EEOC for eight years?

- Race
- Ethnicity
- Color
- National Origin
- Age
- Religion
- Disability
- Protected Veteran's Status
- Sex
- Sexual Orientation
- Gender
- Gender Identity
- Gender Expression
- Genetic Information
- Pregnancy
- Pregnancy-Related Conditions

# Protected Classes

The EEOC enforces laws that prohibit discrimination based on race, color, religion, sex, national origin, disability, or age in hiring, promoting, firing, setting wages, testing, training, apprenticeship, and all other terms and conditions of employment.

Isn't the EEOC missing some protected classes?

## Title IX of the Education Amendments of 1972

“No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under **any education program or activity** receiving Federal financial assistance[.]”

The Department of Education’s Office of Civil Rights (OCR) is responsible for enforcing Title IX.

**Trivia:** What current SCOTUS justice was the Assistant Secretary at OCR?

# All Hearings

- **Closed Hearing.** Hearings shall be closed to the public.
- **Witnesses.** The Committee, Complainant, and Respondent may all call witnesses. It is the responsibility of the party or the committee to encourage a particular witness to attend.
- **Documentary Evidence.** The parties may submit documentary evidence. The Committee may also request documentary evidence.
- **Rules of Evidence.** The Committee shall not be bound by strict rules of legal evidence or procedure and may consider any evidence it deems relevant.
- **Privacy.** Committee Chairs and Committee members are prohibited from discussing any matter related to the hearing (includes parties, witnesses); applies before and after the hearing.
- **Electronic Hearings.** When possible.
- **Recording of Hearings.** Yes, but not the deliberations.

# All Hearings

- **Role of Office of General Counsel.** The Office of General Counsel may provide a staff attorney to be present at hearings in order to provide guidance to the Committee on substantive law and procedural matters.
- **Disruptive Behavior.** The Committee has authority to exclude from the hearing any party, advisor, or other participant whose behavior the Committee finds disruptive after having provided a warning.
- **Time Allocation.** Each party shall have up to forty- five (45) minutes for personal and/or opening statements, presentation of evidence and questioning of witnesses, and concluding remarks. The Committee Chair shall have discretion to grant extensions of time when necessary.
- **Sanctions.** Committee makes a determination
- **Remedies.** Committee makes a determination. Can overlap with Sanctions.



# Presumption of No Responsibility

The 2020 amendments require schools to presume that the Respondent is not responsible for the alleged misconduct. **Does this mean that school must also assume the Complainant is lying or that the alleged harassment did not occur?**

**No.** A school should never assume a complainant of sexual harassment is lying or that the alleged harassment did not occur.

The 2020 amendments require a school to include in its Title IX grievance process “a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.” However, the preamble explains that “[t]he presumption does not imply that the alleged harassment did not occur,” or that the respondent is truthful or a complainant is untruthful. Instead, the preamble says that the presumption is designed to ensure that investigators and decision-makers serve impartially and do not prejudge that the respondent is responsible for the alleged harassment. Schools that have relied on this presumption to decline services to a complainant or to make assumptions about a complainant’s credibility have done so in error.

# Failure of a Party to Participate

## Sexual Misconduct Hearings:

- **Failure of a Party to Participate.** In the event **either party** fails to attend the hearing without prior notice to the Hearing Coordinator and good cause, **the Committee may proceed with the hearing**. Neither party is required to participate in the hearing in order for the hearing to proceed, subject to restrictions in Section (III)(I)(4).
  - (III)(I)(4) The OEO/AA **will not draw an inference about the determination of responsibility** based solely on a party's or witness's decision not to participate in the investigative or hearing process; **however, evidence for review will be limited to that provided by parties and witnesses who participate** in the investigation.

## Discrimination Hearings:

Failure of **the party who requested the hearing** to attend the hearing, without prior notification and good cause, shall constitute a **waiver of the right to a hearing, and a waiver of any appeal rights**. In such cases, the OEO Report and any proposed sanctions shall become final and binding. If the party who did not request the hearing fails to attend, the Hearing Committee may proceed with the hearing and take testimony and evidence and reach a decision on the basis of that testimony and evidence.

# 2020 Title IX Regulations

## What is cross-examination?

At a live hearing, “each party’s advisor [must be permitted to] ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”

## Is a school permitted to limit questions that may be asked by each party of the other party or witness?

**Yes.** Questions must be relevant. More specifically, the 2020 amendments state that questions about the *complainant’s prior sexual behavior* are not relevant, subject to certain limitations. Any school may exclude as not relevant questions that are duplicative or repetitive.

The 2020 Amendments state that “questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged” or the “questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.”

# 2020 Title IX Regulations

## How should a committee evaluate answers to cross-examination questions?

The 2020 amendments do not require that answers to cross-examination questions “be in linear or sequential formats” or that any party “must recall details with certain levels of specificity.”

The preamble adds that the 2020 amendments “**protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence**” because “decision-makers must be trained to serve impartially without prejudging the facts.”

## May a committee consider statements made by a party or witness who does NOT submit to cross-examination at a live hearing?

Yes.

The committee may not draw any inference solely from a decision of a party or witness not to participate at the hearing, including not to submit to cross-examination.

# 2020 Title IX Regulations

**What types of statements made by a party or witness who does NOT submit to cross-examination at a live hearing may a committee consider?**

The committee may consider statements made by the parties or witnesses that are otherwise permitted under the regulations, even if that party or witness does not submit to cross-examination at the live hearing.

For example, a committee may consider statements made by the parties and witnesses during the investigation. A committee may also consider emails or text exchanges between the parties leading up to the alleged sexual harassment and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. Additionally, a committee may consider police reports, Sexual Assault Nurse Examiner (SANE) documents, medical reports, and other documents that satisfy the regulation's relevance rules even if those documents contain statements of a party or witness who is not cross-examined at the live hearing.



# Hearing Process and discussion

S.J. QUINNEY  
COLLEGE OF LAW

# Hearing Timing

## Initial Notification

- Hearing Coordinator receives notice of Final Report issued by the consultants. This is when the clock starts for the 40-day window.
- Hearing Coordinator sends initial notice to parties outlining the Hearing process.
- Empanels a committee which includes a Hearing Chair, 2 committee members and 2 Alternate members.

## 15-Day's to hearing

- Parties are notified of committee members
- Additional documentary evidence and witness list is requested from each party
- Pre-hearing meeting request sent to each party

## 10-Day's to hearing

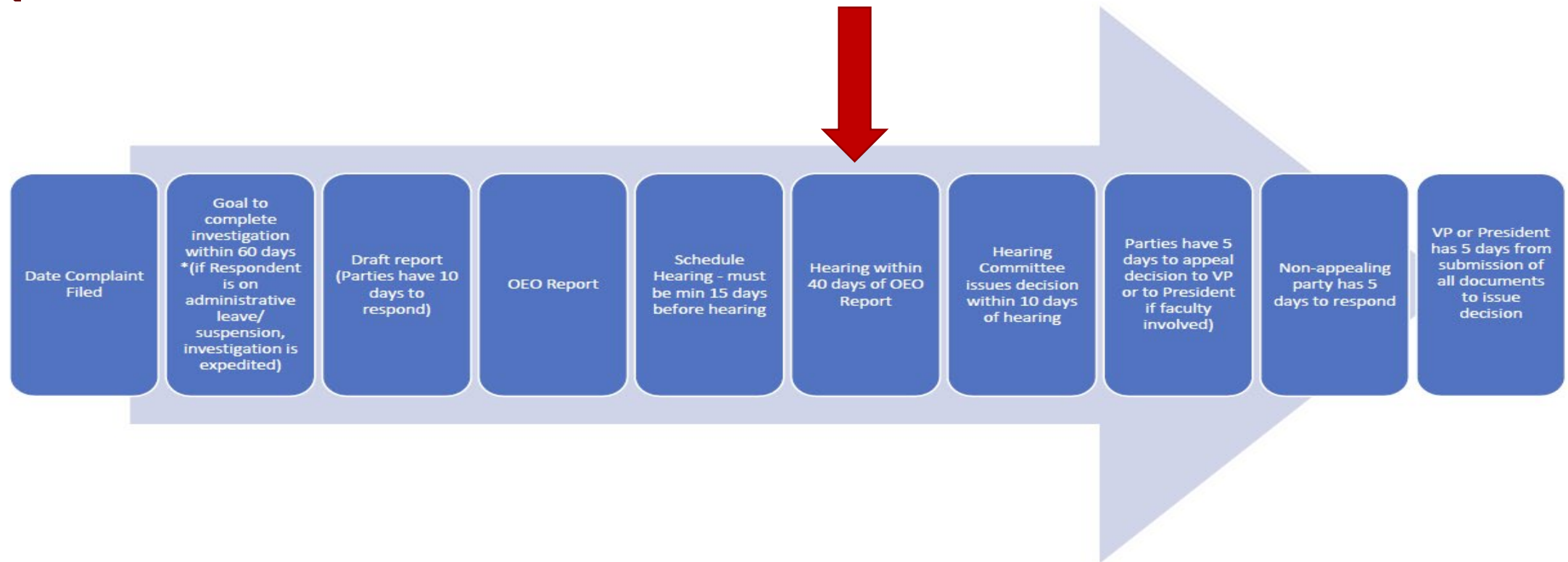
- Witnesses are notified of hearing
- Parties must have identified an advisor or a need for a University appointed advisor
- Parties must have provided any documentary evidence, accommodations needed and witness list

## 5-Day's to hearing

- UBox folder with hearing documents provided to Parties, Advisors, and committee members
- Zoom link Provided
- Pre-hearing meeting has been held with parties

# Hearing Timing

## Hearings





# What does a Hearing look like?

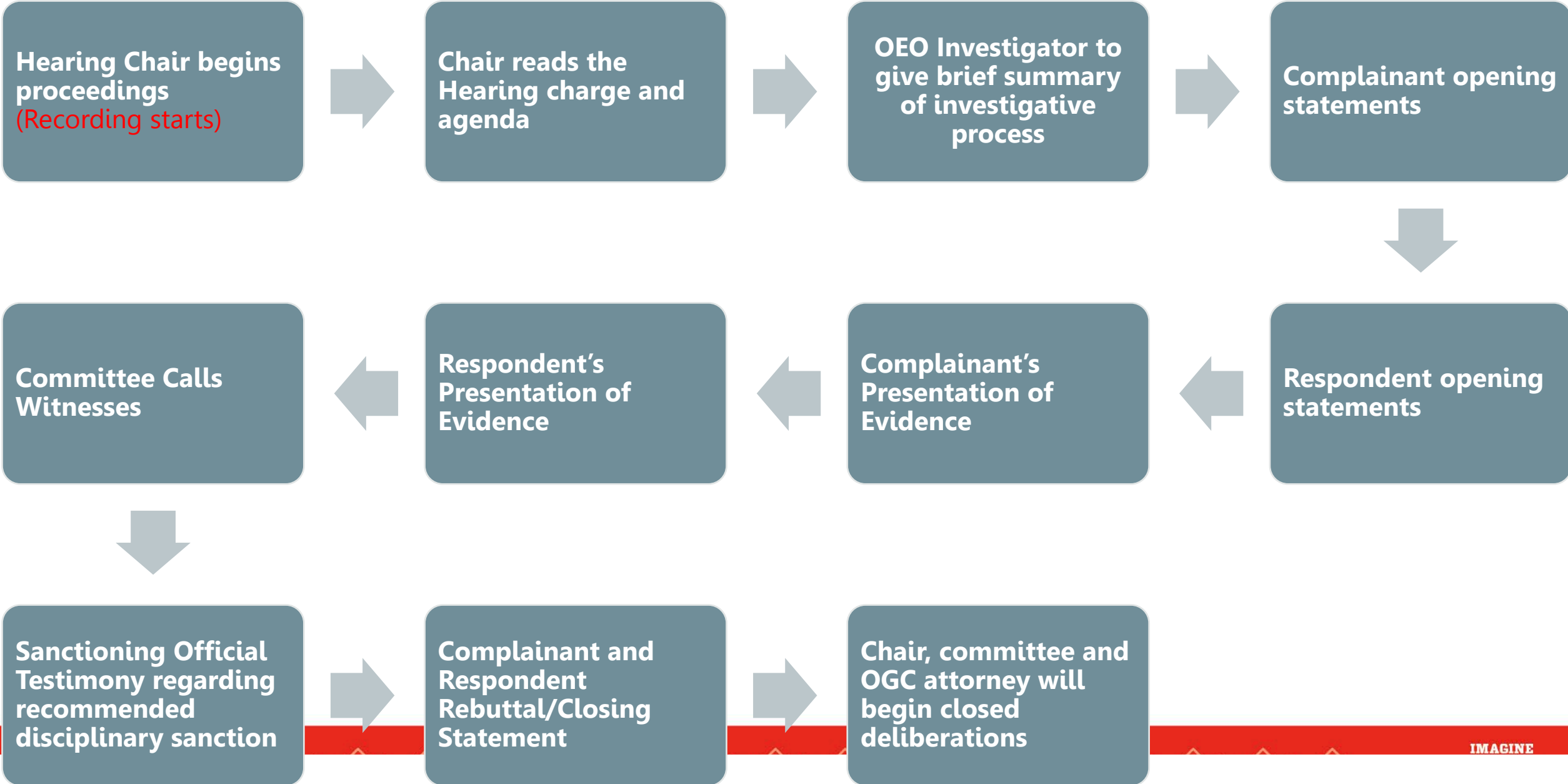
## Discrimination Cases:

- Hearing must be **requested** by a party
  - Cause finding: a live hearing will be held
  - Insufficient evidence finding:
    - An Initial Review Hearing held first;
    - May proceed to a full Hearing
- Each party will have 45 minutes in total to present their case
- Parties may have an advisor of their choice, but not required
- Parties may have a support person

# What does a Hearing look like?

## Sexual Misconduct Cases:

- All cases **automatically go to a live hearing** for determination by a Hearing Committee
- The hearing committee is the decision maker
- Each party will have 45 minutes in total to present their case
- Parties are **required to have an advisor** present
  - May have an Advisor of their choice; or
  - A University appointed Advisor
- Parties may have a support person



**Hearing Chair begins proceedings**  
(Recording starts)

**Chair reads the Hearing charge and agenda**

**OEO Investigator to give brief summary of investigative process**

**Complainant opening statements**

**Committee Calls Witnesses**

**Respondent's Presentation of Evidence**

**Complainant's Presentation of Evidence**

**Respondent opening statements**

**Sanctioning Official Testimony regarding recommended disciplinary sanction**

**Complainant and Respondent Rebuttal/Closing Statement**

**Chair, committee and OGC attorney will begin closed deliberations**

# Hearing Attendees

Hearing Committee Chair and  
two additional voting Committee  
members

Hearing Committee OGC  
advising attorney

OEO Consultant

COMPLAINANT  
(Support Person)  
(Advisor)

RESPONDENT  
(Support Person)  
(Advisor)

Observers:  
2 Alternate committee members  
OEO Director  
OEO Associate Director

One of these three:

1. Human Resources

2. Office of Dean of Student

3. Academic Affairs

## Hearing Committee

- Is the decision-maker with regard to a finding of responsibility related to allegations of Sexual Misconduct, and Discrimination
- The panel consist of the Committee Chair, one Committee member of the same status as the Complainant (student, staff, or faculty), and one Committee member of the same status as the Respondent (student, staff, or faculty)
- Committee member may be disqualified due to bias, conflict of interest, or for other good cause
- Sanctions and Remedies:
  - At the conclusion of the hearing, the Committee shall determine the appropriate sanctions and remedies

- Conflict of Interest with a party?
- Committee questions during the hearing?
- Serving as an Alternate Committee member
  - Can an Alternate ask questions during the Hearing?
- Hearings are closed and private
- Hearings are held remotely by Zoom
- All hearings recorded
  - Committee members and parties need to be always on camera during the hearing

A large red ribbon graphic on the left side of the page, with the text "Hearings held" centered inside it in white.

## Hearings held

### **2019**

Discrimination: 6

Sexual Misconduct: 8

### **2020**

Discrimination: 9

Sexual Misconduct: 6

### **2021**

Discrimination: 3

Sexual Misconduct: 14

### **2022 to date**

Discrimination: 5

Sexual Misconduct: 28



# Questions