HEARING PANEL AND ADVISOR TRAINING

The Five Colleges of Ohio

AUGUST 1, 2023

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Agenda

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- Themes
- Issues related to Dating Violence, Domestic Violence, Sexual Assault, and Stalking – Investigations and Adjudications
- Overview of Policy/Process
- Conducting a Hearing
  - Scope/Jurisdiction
- Title IX definition of Relevant and its practical implications
- Cross examination techniques (Advisors vs. Panel)
- Mock hearing

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Training Requirements 1 of 2

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	Def. Sexual Harassment	Scope of Ed. Prog/Activity	Conducting grievance process	Serving impartially	Tech training	Drafting investigative report
Coordinator	X	X	X	x		
Investigator	**X**	**X**	**X**	**X**		**X**
Decision-Maker	**X**	**X**	**X**	**X**	*	
Appeals	X	X	X	X	*	
Informal Res. Facilitator	x	X	x	X		
Advisor						

Training Requirements 2 of 2

Under Clery Act, must receive annual training on:

- Issues related to sexual assault, domestic violence, dating violence, stalking
- How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

Presentation Rules

- Questions are encouraged
- "For the sake of argument…" questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

Themes

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Themes (1 of 2)

- Title IX meant to ensure equitable access, regardless of sex
- We have an obligation to protect our community – including both parties
- Transparency in the process encourages participation, reduces stress, and increases trust in the outcome

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Themes (2 of 2)

- Use language of the policy (complainant, respondent, report), not language of criminal law (victim/survivor, perpetrator, allegation)
- Be incredibly mindful not to prejudge the outcome of the case
- Base decisions on evidence, not your "gut"

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Sexual Harassment - IX

- Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
  - [*Quid pro quo*] An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;
  - [Unweclome conduct] Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity; or
  - [Clery crimes] Sexual assault, dating violence, domestic violence, or stalking

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SH – IX (continued)

- **Sexual Assault (**Definitions from National Incident-Based Reporting System)**
  - Rape (non-consensual penile/vaginal penetration)
  - Sodomy (non-consensual oral/anal penetration)
  - Sexual Assault with an Object (penetration with object or body part other than genitalia)
  - Fondling – Must be done "for the purpose of sexual gratification"
  - Incest
  - Statutory rape

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Data and Statistics

- Included in the Preamble, but with caveats
- Data sets should not influence your decision in any particular case
- The studies are available in the regulatory text and at the links in the slides.

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Sexual Assault Data

- 43.6% of women and 24.8% of men experienced some form of contact sexual violence in their lifetime, with 4.7% and 3.5% experiencing such violence in the 12 months preceding the survey.

Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html (last visited June 2020).

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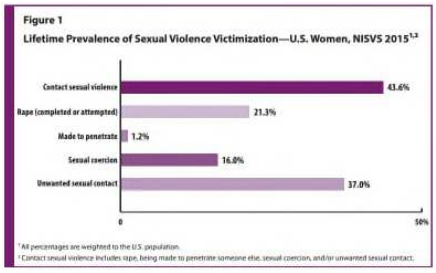
Sexual Assault Data - 1



Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html

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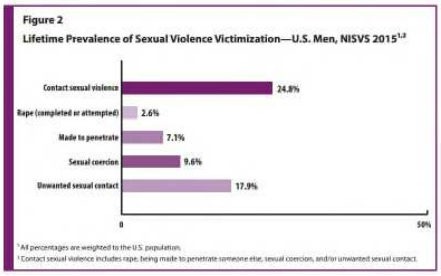
Sexual Assault Data - 2



Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html

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Sexual Assault Data:

Prevalence Data for Postsecondary Institutions

- More than 50 percent of college sexual assaults occur in August, September, October, or November, and students are at an increased risk during the first few months of their first and second semesters in college.

Preamble, p. 30076 (Official) notes that "Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence."

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Sexual Harassment: Dating Violence

"Dating Violence" means **an act of violence** committed **on the basis of sex** by a person who is or has been **in a romantic or intimate relationship with the complainant.** The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

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Sexual Harassment: Domestic Violence

"Domestic violence" is an act of violence committed on the basis of sex by:

- A current or former spouse or intimate partner of the complainant;
- A person with whom the complainant shares a child in common;
- A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- A person similarly situated to a spouse of the victim under the domestic/family violence laws of the jurisdiction;
- Any other person against an adult or youth victim who is protected from that person's acts under the domestic/family violence laws of the jurisdiction

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Data: Intimate Partner Violence

"Nearly 1 in 5 women and about 1 in 7 men report having experienced severe physical violence from an intimate partner in their lifetime."

"41% of female IPV survivors and 14% of male IPV survivors experience some form of physical injury related to IPV."

"1 in 6 homicide victims are killed by a current or former intimate partner."

Source: CDC.gov, "Preventing Intimate Partner Violence" fact sheet, accessed Sept. 20, 2020.

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Sexual Harassment: Stalking

"Stalking" is engaging in a course of conduct directed at a specific person on the basis of sex that would cause a reasonable person with similar characteristics under similar circumstances to:

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress.

As mentioned before, to qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)

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Stalking: Course of Conduct

"Course of Conduct"

- Under VAWA regulations: means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

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Stalking: Reasonable Person

"Reasonable person"

Under VAWA regulations: means a reasonable person under similar circumstances and with similar identities to the victim.

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Stalking: Substantial Emotional Distress

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"Substantial emotional distress"

Under VAWA regulations: means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

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Stalking Data - 1

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- 4.5 million women and 2.1 million men are stalked in one year in the United States.
- Over 85% of stalking victims are stalked **by someone they know**.
- **61%** of female victims and **44%** of male victims of stalking are stalked by a **current or former intimate partner**.

- First statistic: National Intimate Partner and Sexual Violence Survey: 2015 Data Brief (CDC)
- Second and third statistics: National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (CDC)

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Stalking Data - 2

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- **11%** of stalking victims have been **stalked for 5 years or more**.
- **46%** of stalking victims experience **at least one unwanted contact per week**.

[Matthew J. Breiding et al., "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011", (referenced in Preamble, p. 30079 fn 366 (Official))

Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 63, No. 8 (2014): 7] (referenced in Preamble, p. 30079 fn 366 (Official))

[Katrina Baum et al., (2009). "Stalking Victimization in the United States," (Washington, DC:BJS, 2009).]

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Impact of Stalking on Victims

- **46%** of stalking victims fear not knowing what will happen next.

[Baum et al., (2009). "Stalking Victimization in the United States." BJS.]

- **29%** of stalking victims fear the stalking will never stop.

[Baum et al.]

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More Impact of Stalking

- **1 in 8** employed stalking victims **lose time from work** as a result of their victimization and **more than half** lose **5 days of work or more**.
- 1 in 7 stalking victims move as a result of their victimization.

[Baum et al.]

- The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims.

[Eric Blauuw et al. "The Toll of Stalking," Journal of Interpersonal Violence 17, no. 1(2002):50-63.]

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Overview of Your Policy/Process

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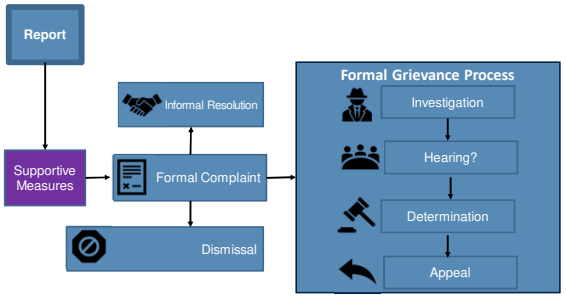
Overview of the Process



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Overview of the Process: Supportive Measures (1 of 5)

- Non-disciplinary and non-punitive
- Individualized
- "As reasonably available"
- Without fee or charge to either party
- Available at any time (regardless of whether a formal complaint is filed)

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Overview of the Process: Supportive Measures (2 of 5)

Designed to:

- ***restore or preserve access*** to the University's education program or activity, without unreasonably burdening the other party;
- protect the safety of all parties and the University's educational environment; and
- deter sexual harassment

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Overview of the Process: Supportive Measures (3 of 5)

- Counseling
- Extensions of deadlines (course-related adjustments)
- Modifications of work/class schedules
- Campus escort services
- Mutual contact restrictions
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- "and other similar measures"

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Overview of the Process: Supportive Measures (4 of 5)

Role of the TIXC upon receiving a report:

- promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,
- consider the complainant's wishes with respect to supportive measures,
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint

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Overview of the Process: Supportive Measures (5 of 5)

- Must maintain confidentiality to the greatest extent possible
- Note: Title IX Coordinator may ask you to help with accommodations and may not be able to tell you all the details as to *why*.

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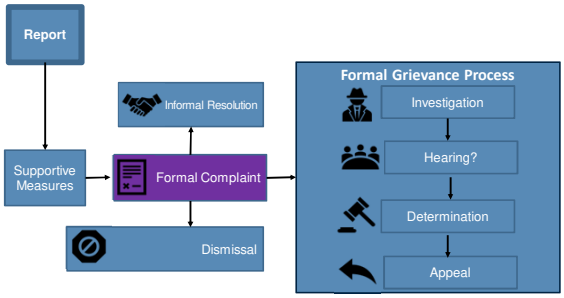
Formal Complaints



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Overview of the Process: Formal Complaint (1 of 2)

A document filed by a complainant or signed by the Tile IX Coordinator alleging Prohibited Conduct against a respondent and requesting the University investigate the allegations

- In response to a formal complaint, University must follow a grievance process (set by 106.45)
- Title IX Coordinator must offer complainant supportive measures (regardless if files formal complaint – if complainant does not want to file a formal complaint)

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Overview of the Process: Formal Complaint (2 of 2)

Once a Formal Complaint is filed, there are four possibilities:

- Informal Resolution
- Formal Grievance Process (Hearing)
- Mandatory Dismissal from Hearing Process and Resolution through Investigative Process
- Formal Complaint is withdrawn

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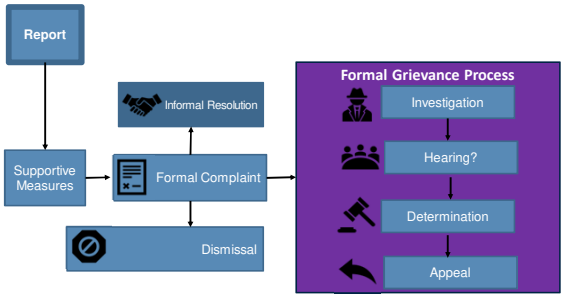
Formal Process



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Overview of the Process: Formal Grievance Process

Basic requirements:

- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed

Includes the presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process

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Overview of the Process: Written Notice

- University's grievance process and informal resolution process
- Allegations with sufficient time for review with sufficient detail, such as date, location if known
- Parties may have an advisor of choice

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Overview of the Process: Investigation

- Only of a formal complaint
- Burden of proof and evidence gathering rests with University
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert)
- Cannot restrict ability to discuss complaint or gather information
- Advisors of choice (But compare to Advisors in Title IX Hearing)
- Ability to review report and to provide written response (TIX)

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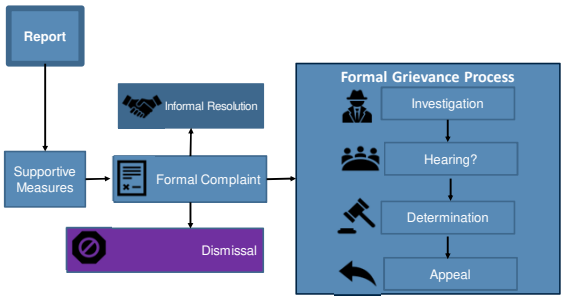
Dismissal



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Dismissal (1 of 3)

- University MUST investigate allegations in a formal complaint
- BUT University MUST dismiss from the hearing process is
  - if conduct alleged would not constitute Sexual Harassment – Title IX, even if proven, OR
  - Conduct did not occur within University's education program or activity or in the United States

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Conducting a Hearing

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Overview of the Title IX Process: Hearings

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- Must provide a live, cross-examination hearing
- Parties must have an advisor and the University must provide an advisor for a party if the party does not have one
- Advisors ask only relevant cross-examination questions—no party-on-party questioning
- May be virtual, but must be recorded or transcribed

Advisors

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If a party does not have an advisor present at the live hearing, the recipient **must provide** without fee or charge to that party, an advisor **of the recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. (106.45(b)(6)(i) and preamble 30339)

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Why Cross-Examination: Theory

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According to the Department, the process in 106.45 best achieves the purposes of:

(1) effectuating Title IX's non-discrimination mandate by ensuring **fair, reliable outcomes** viewed as **legitimate** in resolution of formal complaints of sexual harassment so that victims receive remedies

(2) **reducing and preventing sex bias** from affecting outcomes; and

(3) ensuring that Title IX regulations are consistent with **constitutional due process and fundamental fairness** (30327)

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Live Cross-Examination: Regulations (1 of 2)

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In this process:

- Decision-maker must permit each party's advisor to ask the other party and any witnesses **all relevant** questions and follow-up questions, including those challenging **credibility**
- Must be conducted directly, orally, and in real time by the party's advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

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Reminders

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- Withhold pre-judgment: The parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases

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More Reminders

- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

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Overview of the Process: Written Determinations (1 of 2)

- Procedures
- Findings of fact
- Conclusions
- Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will provided to complainant

Overview of the Process: Determinations (2 of 2)

- Procedures and bases for appeal by both parties
- Provide written determination to parties simultaneously

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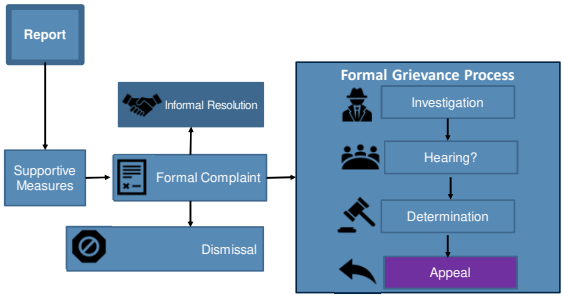
Appeal Decisions



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Overview of the Process: Appeals (1 of 2)

- University must offer to both parties the following bases of appeal:
  - Procedural irregularity that affected outcome
  - New evidence not reasonably available at the time regarding responsibility or dismissal that could affect outcome
  - Conflict of interest or bias by the Title IX Coordinator, investigator, and/or decision-maker that affected the outcome

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Overview of the Process: Appeals (2 of 2)

- The decision-maker for the appeal cannot be the same decision-maker from the hearing, or the Title IX Coordinator or investigator
- Must provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the determination
- Must issue a written decision describing the result of the appeal and rationale and provide the decision simultaneously to the parties

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Informal Resolution

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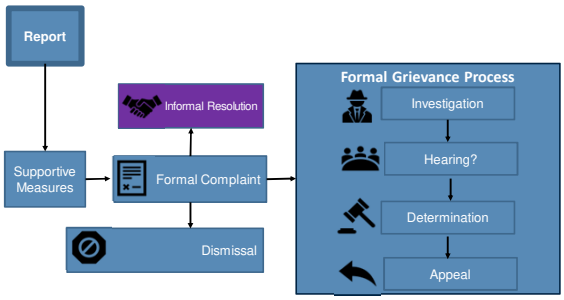
Informal Resolutions



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Overview of the Process: Informal Resolution (1 of 2)

- At any time prior to the determination regarding responsibility, the University may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- University cannot require this and also cannot offer unless a formal complaint is filed

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Overview of the Process: Informal Resolution (2 of 2)

- University can offer informal resolution if:
  - Provides written notice to the parties
  - Obtains the parties' voluntary, written consent to the informal process

University cannot offer this option in certain cases of employee sexual harassment of a student

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Questions?

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Fundamental Values in the Title IX Process

Remember your Institutional Ethic of Care

Value: Equity

"What we do for one, we do for the other" (as appropriate)

- Until we have reached the end of the process, we don't know whether anyone did anything wrong.
- Treat both parties equitably with regard to access to supportive measures, evidence, opportunities to provide information, and in every other respect that is appropriate.

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Value: Transparency

If they hear nothing, they'll assume you're doing nothing or actively working against them.

- Give regular updates to the parties and their advisors.
- Answer questions truthfully, to the extent permitted considering privacy.
- Be cautious before deciding to withhold anything that may be relevant. What is the concern? Does it serve the parties and the process?

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Value: Integrity

Personal integrity – and integrity within the process

- Watch for conflicts of interest and bias so as to be fair and maintain confidence in the process.
- Don't use or share information outside the process. All evidence should be "on the table" for all parties and advisors to see.

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HIGHWAY TO THE HEARING ZONE

Checkpoint one: All of these

- Complainant: Complainant was participating or attempting to participate in your education program or activity when formal complaint was filed
- Definition: Reported conduct in formal complaint could constitute "sexual harassment" under Title IX definition if proved
- Setting: Reported conduct occurred in your education program or activity
- U.S.A.: Reported conduct occurred against a person in the United States

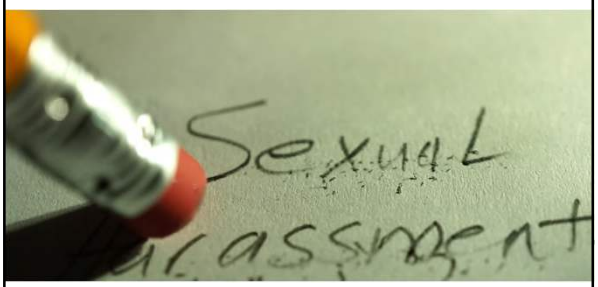
SCOPE OF YOUR EDUCATION PROGRAM AND ACTIVITY

Education Program/Activity

- 106.2(h) – All the operations of a college or university
- 106.44(a) – Includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by an officially recognized student org

Within the Scope?

- Co-curricular trip to Cuba – ?
- Fraternity party in recognized house – ?
- Holiday party for students at prof's house – ?
- Athletes traveling to game, but not with team – ?
- Holiday party at employee's house, invites co-workers and others – ?
- Off-campus apartment – ?



A quick discussion on "Sexual Harassment"

Sexual Harassment

- Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
  - [*Quid pro quo*] An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
  - [Unwelcome conduct] Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
  - [Clery crimes] Sexual assault, dating violence, domestic violence, or stalking

Sexual Harassment: *Quid Pro Quo*

- Only applies to employee respondents (can be any complainant)
- DOE interprets this broadly to encompass implied *quid pro quo*
- No intent or severe or pervasive requirements, but must be unwelcome
  - DOE: "[A]buse of authority is the form of even a single instance…is inherently offensive and serious enough to jeopardize educational access."

Sexual Harassment: Unwelcome Conduct

- The second definition: "severe, persistent, and objectively offensive" **and** deny equal access (which is not the same as under Title VII)
- Does not require bad intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant (30159)

Severe?

- Takes into account the circumstances facing a particular complainant
- Examples: age, disability status, sex, and other characteristics
- Preamble discussion states that this removes the burden on a complainant to prove severity (30165)

Pervasive?

- Preamble indicates pervasive must be **more than once** if it does not fall into the above (30165-66)
- Preamble reminds us that quid pro quo and Clery/VAWA (domestic violence, dating violence, stalking) terms do not require pervasiveness

Objectively Offensive?

Reasonable person is very fact-specific (30167)

- Because so fact-specific, different people could reach different outcomes on similar conduct, but it would not be unreasonable to have these different outcomes
- Preamble notes that nothing in the Regulations prevents institutions from implicit bias training

Hypotheticals – Sexual Harassment

Let's put these definitions to the test…see your hypo packet

- Chuck and Mary Sue

7
6

Consent – Explicit?

These may be worded slightly differently depending on the party.

- "They gave consent" → "What did you say to them, and what did they say to you?"
- Did you have any conversation about sexual activity?
- Did the other person say anything to you that suggested they were consenting?
- Did the other person do anything that suggested they were consenting?
- Who initiated the sexual activity?

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7

Consent – Implicit?

These may be worded slightly differently depending on the party.

- Who took off your clothes? Who took off the other person's clothes?
- Was there a condom? Who provided it? Was there any conversation about using protection?
- Did you touch the other person? If so, where?
- Did they touch you? If so, where?

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Questions for Respondent

If they say there was consent, these can help get more details.

- What did the other person say to you to show consent?
- What actions did the other person do to show consent?
- Were they making any noises during the encounter?
- Did they help position their body during the encounter?
- Did they move your hands during the encounter?

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Incapacitation

First, explain why you need information on alcohol/drug use.

- "I want to understand the role that drugs or alcohol may have played in this situation."
- "I want to understand whether you were capable of giving consent, or whether you were incapacitated due to drugs or alcohol."
- "I want to understand whether the other person was sober enough to understand and consent."
- "I am trying to get a sense of how intoxicated the person may have been when you saw them."

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Incapacitation Questions (1 of 2)

You need a good physical description of relevant symptoms

- How much alcohol? Any drugs?
- Any medications that may have affected your ability to stay awake, or that might have interacted with alcohol?
- "They were drunk" → What did "drunk" look like?
  - Slurring? Clumsy? Uncoordinated?
  - Able to walk on their own? Need assistance to navigate or complete tasks?
  - Vomiting?
  - Able to carry on a conversation?
  - Oriented to who/what/where/when/why?

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Incapacitation Questions (2 of 2)

You need a good physical description of relevant symptoms

- Was it a cup or a CUP?
- How many "fingers" of alcohol on the solo cup?
- What type of alcohol was consumed?
- What did they eat? When?

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Respondent's Awareness

Did Respondent know or should have known of incapacitation?

- Was Respondent there?
- Did Respondent see when Complainant was [fill in symptom]?
- Did Respondent bring Complainant any alcohol/drugs?
- Did Respondent say anything about Complainant's level of intoxication?
- Was any planning done to take care of Complainant? Was Respondent part of that conversation or plan?

8
3

Incapacitation: Timeline

This will be critical

- Drinks
- Drugs
- Food
- Complainant's own recall
- Behavioral observations from other
- Electronic information – texts, videos, audio files
- Security footage
- Cards swipes

8
4

What is Relevant?

Review of Relevance (1 of 7)

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- Regulations do not define "relevant," but tells us what is not relevant
- Per *Regulations* 34 C.F.R. 106. 45(b)(6)(i):
  - "Only relevant cross-examination and other questions may be asked of a party or witness."
  - "**Before a complainant, respondent, or witness answers** a cross-examination or other question, **the decision-maker must first determine whether the question is relevant** and explain any decision to exclude a question as not relevant."

Review of Relevance (2 of 7)

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Under the **preponderance of the evidence** standard:

- Does this help me in deciding if there was more likely than not a violation/highly probable to be a violation?
- Does it make it more or less likely/does it make it highly probable?
- Why or why not?

If it doesn't move this dial: likely not relevant.

Review of Relevance (3 of 7)

What is NOT relevant:

Questions and evidence about the **complainant's sexual predisposition or prior sexual behavior** are not relevant, **UNLESS**

1) 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 by the complainant, or
2) If 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.

[34 C.F.R. 106.45(b)(6)(i)]

Review of Relevance (4 of 7)

What is NOT relevant:

Information **protected by a legal privilege**

[34 C.F.R. 106.45(b)(1)(x)]

This will vary state-by-state, so check with your legal counsel. Most common in this context are:

a) Attorney-client privilege
b) Doctor-patient/counselor-patient
c) Fifth Amendment/right not to incriminate self (not really applicable in this venue, but sometimes raised and cannot force to answer questions)

Review of Relevance (6 of 7)

What is NOT relevant:

A party's **treatment records** (absent voluntary written wavier by the party)

[34 C.F.R. 106.45(b)(5)(i)]

- PRACTICE TIP – LOOK for that written waiver in the materials provided to you

Review of Relevance (7 of 7)

What is NOT relevant:

No improper inference from a party or witness **declining to participate** in cross-examination.

[34 C.F.R. 106.45(b)(6)(i)]

Decorum During Hearings

- Relevant questions must not be abusive
- Enforcement of decorum must be applied evenhandedly
- "…where the substance of a question is relevant, but the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically 'leans in' to the witness's personal space), the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner." (Preamble, 30331)
- The decision maker may remove any advisor, party, or witness who does not comply with expectations of decorum. (Preamble 30320)

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Scenario Overview

Charlie and Jesse – Intimate Partner Violence?
Credibility Assessment Scenario

Outline of Evening

- Dinner
- Walk – Argument?
- In the car – Violence?
- Aftermath

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Definition of Dating Violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

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Brainstorm

- What are the elements of dating violence?
  - Are any agreed to by the parties?
- What are the key things that will need to be decided to determine if a policy violation occurred?
- What other things may help with a credibility assessment?

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Conducting a Process That Protects and Holds Accountable

Overview of the Process

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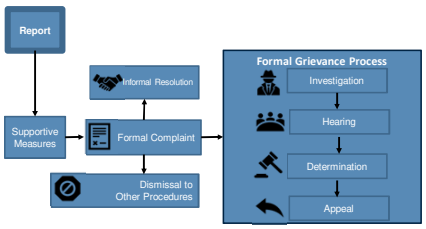

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Split Roles

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Team Charlie
Team Jesse
Panel & Volunteers

Need volunteers for three parts:
- Complainant Charlie Chaste
- Respondent Jesse Jacobs
- Witness Whitney Wildcat

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Three Roles: Three Spotlights

Role: Hearing Panel Member

- Reviews the evidence file, final investigation report, and responses of the parties
- Considers what is missing, what is unclear, and what elements are disputed
- Asks relevant questions at hearing, adjusting as other questions are asked
- Is neutral in both the manner they act and the questions they asked

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Hearing Panel Member: Your Goal

- Have enough information on every element of every charge so that you can render a decision by a preponderance of the evidence
- Have enough information to make decisions regarding the credibility of the parties and witnesses
- Make relevancy determinations after every question asked by the advisors
- Maintain decorum at all times, by all participants

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Role: Advisor

- Reviews the evidence file, final investigation report, and responses of the parties
- Assists their party with preparation of relevant questions for hearing
  - Goals is to assist the Decision-Makers with understanding the case from their party's perspective
- Asks relevant questions at hearing, adjusting as other questions are asked
- Is not neutral, as the role is inherently biased towards their party, but still maintains decorum standards at all times

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Advisors: Your Goal

The role of the advisor is to help the Panel understand your party's perspective by:

- Highlighting important evidence to help your party prove that the elements are met/not met
- Highlighting discrepancies in the evidence that disprove the other party's story
- Highlighting credibility issues of the other party and witnesses where they are testifying against your party

LIVE CROSS-EXAMINATION: Theory and Practice

Cross Tools: What are the goals of cross-examination?

- Obtain **factual admissions** helpful to your party's case.
- **Corroborate the testimony** of your party's witnesses.
- Minimize the other party's case by ***impeachment*** *of witness* being questioned.
- Minimize the other party's case by ***impeachment*** *of other witnesses* through the witnesses being questioned.
- Reduce **confusion and seek truth**.

Cross Tools: Impeachment 1 of 5

- What bias might a witness have?
- Do you understand the relationship between the witness and the parties?
- Experts: getting paid for testimony
  - You charge fees based on an hourly rate?
  - You were paid to produce a written report?
  - Based on this report, you're testifying today?
  - You're charging money for each hour you're here?

Cross Tools: Impeachment 2 of 5

- Perception and Recall
  - What is the witness's perception of the facts?
    - Has time impacted recall or ability to remember clearly?
    - How many times has the witness talked to a party about this case?
    - Was there anything that impacts the person's physical or mental ability to perceive or recall facts accurately?
  - Does the witness form a conclusion without knowing certain information?

Cross Tools: Impeachment 3 of 5

- Example: Intoxication level information from witness.
  - You did not see the consumption, or keep track of how long the party was consuming alcohol?
  - You did not measure the alcohol poured by ____ at the party?
  - Your statements are based on information provided by others? the other party?
  - Party's statements were made after they had been drinking alcohol (consuming other drugs, etc)?

Remember: Determine whether the person is not speaking from personal knowledge.

Cross Tools: Impeachment 4 of 5

- Inconsistency in statements
  - If a fact was very important, why is the hearing the first time it has come up?
  - What possible reasons might the witness have for changing their testimony?
  - Did a witness receive coaching from the party or others between making one statement and another?
  - Has the witness's perspective or motive changed between statements?
  - Does changing this fact help the other party's case?

Cross Tools: Impeachment 5 of 5

- Lack of Corroborating Evidence
  - Example: Card swipes
    - You said that you entered the building by yourself at 1:00 a.m.
    - Security footage doesn't show you entering.
    - Your card swipe record doesn't show you entering.
    - Can you help me understand why there is a discrepancy?

Advisors: Thought Process

Advocating for your party in the Hearing 1 of 7

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Preparation

- Review the entire investigation hearing report
- Review all evidence (some may have non-relevant evidence also—know if you disagree with any relevancy determinations made by the investigator)
- Meet with your party to review what your party thinks and wants
- Discuss strategy

Advocating for your party in the Hearing 2 of 7

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Preparation

- Realize that your party may want to take a more aggressive approach – If you are not comfortable with the approach, discuss it with the party and check to see if you can advise your party
- Discuss the expectations of decorum vs. the expectations of questioning the other party and witness

Advocating for your party in the Hearing 3 of 7

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Preparation

- Determine who your witnesses are and whether your party thinks they will show up to the hearing
- Be careful of the line between asking a party to participate and explain the importance of their statements vs. coercing a party to participate who has the right not to participate

Advocating for your party in the Hearing 4 of 7

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Preparation

- Consider a script
  - List each allegation and policy definition/elements for the policy violation (e.g., sexual assault—know which definition and what must be met to show sexual assault under the policy)
  - Standard of review: this can be helpful to have written out so that you can support relevancy determinations for your questions to show why relevant

Advocating for your party in the Hearing 5 of 7

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The Hearing

- Ask one question at a time and wait for the Decision-Maker to determine if it is relevant
- If the Decision-Maker has a question about why the question is relevant, be prepared to answer that question (see preparation)
- Be respectful of the process so that you can effectively ask your party's questions – if you think you or someone else is becoming too heated, ask for a break to regroup

Advocating for your party in the Hearing 6 of 7

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The Hearing

- Be aware that the other advisor may not be as prepared as you are and the decision-maker has a duty to ask questions the advisor does not—this doesn't mean the decision-maker is biased or trying to help the other side – you may not like it, but it's a requirement for the decision-maker

Advocating for your party in the Hearing 7 of 7

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Post-hearing

- The decision-maker will issue a decision to both parties at the same time.
- Under the regulations, the advisor is not required to have any further role in the process (this may be especially true if the advisor is appointed by the institution)
- Other advisors (attorney or parent), may choose to work with the party to appeal on the bases listed in the decision

How Do You Choose Questions?

What Don't You Know?

Decision-makers: If you need to know it to make a determination, you have the obligation to ask the question.

Advisors: If you don't know the answer to the question before you ask it, it may harm your party. Weigh the benefits of asking carefully before proceeding.

What Do You Know?

Decision-makers: It can be helpful to ask questions when you think you already know the answer, to ensure that you are able to sequence events correctly and that you understand nuances in the testimony.

Advisors: If the testimony is going to help tell your party's story, it can be helpful to bring it to the forefront of the decision-maker's mind.

Disputed Facts?

Decision-makers: Question on disputed facts so that you can weigh credibility, make a determination, and explain your rationale.

Advisors: Highlight areas for the decision-maker where the other party's story doesn't make sense, by asking questions to discredit the witness, or to provide corroborating evidence for your party's story.

Make Your Plans

- Decision-makers:
  - What themes do you wish to draw out?
  - What disputed points do you need information on?
  - Who will cover which topics?
  - Which questions will be asked?
- Advisors:
  - Use this discussion to help frame your questions. What key points do you think need to be addressed with each witness to highlight your party's story?
  - What information is most critical of your party's story, and what can help highlight the weaknesses in that information as compared to the strengths in your information?

Pick a Goal

- Consider choosing a goal for yourself to try to reach through questioning:
  - Advisor: "By questioning Sarah, I will try to show that Respondent was more aware of Complainant's intoxication level than the report suggests."
  - Decision-maker: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
  - Etc.

Break & Preparation for Practice Session

Decision-Maker
Hearing Practice and Debrief

Hearing Toolbox

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Hearing Toolbox: Breaks

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- Preamble discusses the use of breaks to allow parties to recover from panic attacks or emotional questioning
- Also helpful to reset tone and reduce emotion and tension
- Can use to review policy and procedures to address relevancy issues that arise

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Hearing Toolbox: Questions

- Do you have the information you need on each element to be able to evaluate the claims?
- Consider neutral phrasing of questions:
  - "In the report you said… Help me understand…"
  - "You stated… Tell me more about that."
  - "Could you give more information about what happened before/after…"

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Objectively Evaluating Evidence and Resolving Credibility Disputes

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Objectively Evaluating Relevant Evidence

- As addressed in the preamble and discussed earlier, the decision-maker should evaluate:
- **"consistency, accuracy, memory, and credibility** (30315)
- **"implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility"** (030330)
- Standard of proof and using it to guide decision

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Resolving Credibility Disputes

OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
  - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
  - Is corroborative evidence lacking where it should logically exist?

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Resolving Disputes

OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant's reaction or behavior after the alleged harassment
  - Were there witnesses who saw that the complainant was upset?
  - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
    - May not manifest until later

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Resolving Disputes

OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
  - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

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Resolving Disputes

OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
  - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
  - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

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#1 Keep an Open Mind

- Keep an open mind until all statements have been tested at the live hearing
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the evidence that can remain (statements in the record might have to be removed from consideration if not tested in live-hearing)

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#2 Sound, Reasoned Decision

- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

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#3 Consider All/Only Evidence

- You must make a decision based solely on the relevant evidence obtained in this matter and only statements in the record that have been tested in cross-examination
- You may consider nothing but this evidence

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#4 Be Reasonable and Impartial

- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any actual or perceived conflict of interest

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#5 Weight of Evidence

- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

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#5 Weight of Evidence

- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

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Weight of Evidence Example

The preamble provides in the discussion:

"[W]here a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations **the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level weight or credibility**, so long as the decision-maker's evaluation treats both parties equally **by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence**." (30337)

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#6 Evaluate Witness Credibility

- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.

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#6 Evaluate Witness Credibility

- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

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#6 Evaluate Witness Credibility

- Credibility is determined fact by fact, not witness by witness
  - The most earnest and honest witness may share information that turns out not to be true

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#7 Draw Reasonable Inferences

- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning.

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#8 Standard of Evidence

Use the your standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.

- Preponderance of the evidence: a fact is more likely than not to be true (30373 fn. 1409)
- Clear and convincing: a fact is highly probable to be true (30373 fn. 1409)

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#8 Standard of Evidence

- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

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#9 Don't Consider Impact

- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.
- **Do not consider the impact of your decision**.

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The Written Decision

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Resolving Disputes

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Fact Finding Process:

1. • List undisputed facts – what do parties agree on? = **findings of fact**
   • List disputed facts – what do parties disagree on?
2. • What undisputed facts address each element?
   • What disputed facts must be resolved for each element?
3. • Weigh the evidence for each **relevant** disputed fact
   • Resolve disputed facts = **findings of fact**

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Goals

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- Be consistent in terminology
- Be clear as to the source of information. Compare:
  - "Bob stated that this happened."
  - "This happened."

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Unambiguous

- Could someone unfamiliar with the incident pick up the decision and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Review for clarity and consistency.

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Relevant

- Include any decisions made that exclude information as not relevant and the explanation given in hearing
- Check to ensure that your report does not contain any information you are prohibited from including?

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Sensitive

- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?
- Maintain neutral, evidence-driven tone.

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Empathetic

- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
  - Clearly/obviously
  - Innocent/guilty
  - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

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Specific

- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like
- Be careful of pronoun usage so that we always know who is saying or doing what

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Questions?

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