



HEARINGS IN A POST REGULATORY WORLD

Day One

Lee College
Davis Crow

GRAND RIVER | SOLUTIONS



Senior Solutions Specialist
He/Him/His

MEET YOUR FACILITATOR

Davis Crow

Davis Crow serves as a Senior Solutions Specialist with Grand River Solutions. In this role, he serves as a hearing officer, investigator, and trainer for institutions of higher education. Davis has extensive experience serving as a hearing officer and adjudicating cases involving discrimination and sexual misconduct. Davis also has conducted numerous investigations into complaints involving Title VI, Title VII, and Title IX.

ABOUT US

Vision

We exist to create safe and equitable work and educational environments.

Mission

To bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

AGENDA

● Title IX Requirements for Hearings

● Hearing Overview

● Pre-Hearing Tasks

● Developing Questions

● The Hearing

● Practical Application

TITLE IX REQUIREMENTS FOR HEARINGS



01

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Title IX of the Education Amendments Act 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."

20 U.S.C. § 1681 (1972).



SEXUAL HARASSMENT: SECTION 106.30

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) 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;
- (2) 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
- (3) "**Sexual assault**" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "**dating violence**" as defined in 34 U.S.C. 12291(a)(10), "**domestic violence**" as defined in 34 U.S.C. 12291(a)(8), or "**stalking**" as defined in 34 U.S.C. 12291(a)(30).

AND... ONLY COVERED, IF:

Place of Conduct

- On campus **OR**
- Campus Program, Activity, Building, **AND**
- In the United States

Required Identity

- Complainant participating/attempting to participate in Program or Activity, **AND**
- Control over Respondent

PROCEDURAL REQUIREMENTS FOR INVESTIGATIONS

Notice to BOTH parties

Equal Opportunity to
Present Evidence

An advisor of choice

Written notification of
meetings, etc., and
sufficient time to prepare

Opportunity to review all
directly related evidence,
and 10 days to submit a
written response to the
evidence prior to
completion of the report

Report summarizing
relevant evidence and 10-
day review of report prior
to hearing

PROCEDURAL REQUIREMENTS FOR HEARINGS

Must be live, but can be conducted remotely

No Compelling participation

Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters

Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution

Decision maker determines relevancy of questions and evidence offered

Written decision must be issued that includes finding and sanction

HEARING TECHNOLOGY: REQUIREMENTS AND CONSIDERATIONS



If hearings cannot be in person, or if someone chooses to participate remotely, must have a remote participation platform available.

All hearings must be recorded.

Participants must be able to communicate with decision makers and advisors during the hearing

THE REQUIREMENT OF IMPARTIALITY



SECTION 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision-maker, or facilitator of informal resolution not to have a conflict of interest or bias:

- For or against complaints or respondents generally, or
- An individual complainant or respondent



ACTIVITY: IS THERE A CONFLICT OF INTEREST?

Complainant: Alex, a senior student and President of the Student Government Association (SGA) at a small liberal arts college.

Respondent: Jack, a junior student, and member of the college's basketball team.

Hearing Officer: Dean Thompson, who is the Dean of Students but also Alex's direct supervisor as the SGA advisor.

Additional Context: Dean Thompson has a close professional and mentoring relationship with Alex, having worked with them extensively on SGA projects and initiatives. Additionally, Dean Thompson has a vested interest in maintaining a positive relationship with Alex, as the SGA President plays a crucial role in representing student interests and collaborating with college administrators.

HEARING OVERVIEW

02



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WHAT IS THE PURPOSE OF A HEARING?



PURPOSE OF THE HEARING

1. Review and Assess Evidence

2. Make Findings of Fact

3. Determine Responsibility/ Findings of Responsibility

4. Determine Sanction and Remedy

PROCESS PARTICIPANTS

- The Parties:
 - Complainant
 - Respondent
- Advisors
- Hearing Facilitator/Coordinator
- Decision Maker (s)
 - Hearing Chair
- Investigator



THE PARTICIPANTS

The Parties

Complainant

An individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Respondent

An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Slide 19

EB1 If it's a private training, pull campus policy definitions.
Elizabeth Brady, 2023-10-20T14:10:09.285

EB1 0 [@Merissa McKasty] I re-added these. We will keep them hidden during the presentation, but unhide them when we share the slides.
Elizabeth Brady, 2024-01-12T14:58:32.832

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THE PARTICIPANTS

Advisors

There are two types of Advisors



Advisor: throughout the whole process



Hearing Advisor: hearing, for purposes of asking questions

THE PARTICIPANTS

Advisors

- Can be anyone, including a lawyer, a parent, a friend, and a witness
- No particular training or experience required (institutionally appointed advisors should be trained)
- Can accompany their advisees at all meetings, interviews, and the hearing
- Advisors should help the Parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith
- May not speak on behalf of their advisee or otherwise participate, except that the advisor will conduct cross examination at the hearing.
- Advisors are expected to advise their advisees without disrupting proceedings



THE PARTICIPANTS

Advisors: Prohibited Behavior

An Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting may be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability determine how to address the Advisor's non-compliance and future role.



THE PARTICIPANTS

The Hearing Facilitator/Coordinator

- Manages the recording, witness logistics, party logistics, curation of documents, separation of the parties, and other administrative elements of the hearing process
- Non-Voting
- Optional, not required



THE PARTICIPANTS

Decision Maker or Makers

Decision Maker

One-person.

Decision Maker Panel

A panel.

Requires a hearing chair.

EB1

We need a slide that differentiates between single or panel

Elizabeth Brady, 2023-10-20T14:10:09.285

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THE PARTICIPANTS

The Decision-Makers

- **A panel**
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate



THE PARTICIPANTS

The Hearing Chair

- Is a decision-maker
- Answers all procedural questions
- Makes rulings regarding relevant evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written deliberation statement
- Assists in preparing the Notice of Outcome



THE PARTICIPANTS

The Decision Maker

- One person
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written deliberation statement
- Assists in preparing the Notice of Outcome



THE PARTICIPANTS

The Investigator

- Can present a summary of the final investigation report, including items that are contested and those that are not;
- Submits to questioning by the Decisionmaker(s) and the parties (through their Advisors).
- Can be present during the entire hearing process, but not during deliberations.
- Questions about their opinions on credibility, recommended findings, or determinations, are prohibited. If such information is introduced, the Chair will direct that it be disregarded.



PRE-HEARING TASKS: HEARING PANEL & CHAIR

What should be done in advance of the hearing?

03

DK1

THE INVESTIGATION IS COMPLETE!

EB2

Rapid Fire #1

It is time to schedule the hearing...

Using the chat box:
share your “To Do” List
for coordinating the
hearing.



Slide 30

DK1

Ditto on this slide

Diana Kunce, 2023-11-13T22:06:23.049

EB2

[@Davis Crow] [@Jessica Brown] [@Emma Hempel] I think this should go at the end of the section because if they are attending a training on this, they might not know the answers

Elizabeth Brady, 2024-01-12T14:53:21.003

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RAPID FIRE RECAP

Arranging for space

Arranging
technology

Scheduling pre-
hearing meetings
with parties &
advisors

Scheduling
prehearing
meetings of
the panel

Providing
report and
record to
panel and
parties

Scheduling
the hearing

Conflict
checks

Call for
written
submissions

Accommodations

Other considerations?

PRE-HEARING MEETINGS

- Review the Logistics for the Hearing
- Set expectations
 - Format
 - Roles of the parties
 - Participation
- Decorum
- Impact of not following rules
- Cross Examination/Questioning Format & Expectations



DECISION MAKER OR HEARING PANEL AS A WHOLE



Review evidence and report

Review applicable policy and procedures

Preliminary analysis of the evidence

Determine areas for further exploration

Develop questions of your own

HEARING PANEL CHAIR OR DECISION MAKER

Compile questions on behalf of the Panel

May convene a pre-hearing meeting

Review questions submitted by the parties

Anticipate challenges or issues

Become familiar with the script

YOU AND YOUR TEAM DID A GREAT JOB SCHEDULING THE HEARING AND ARRANGING ALL THE LOGISTICS!

- It is now one week prior to the hearing. You have already received and reviewed the report and record and you will be meeting with the rest of the panel (or spending some quiet time by yourself) to prepare for the hearing.

Rapid Fire #2

Use the chat box to share what you plan to discuss/think about during the prehearing meeting.



RAPID FIRE RECAP



Development
of
introductory
comments

Initial discussion of
the evidence

Areas for
further
exploration

List of
questions for
the parties
and the
witnesses

Anticipation
of potential
issues

Logistics

Review of
any written
submissions
by the
parties

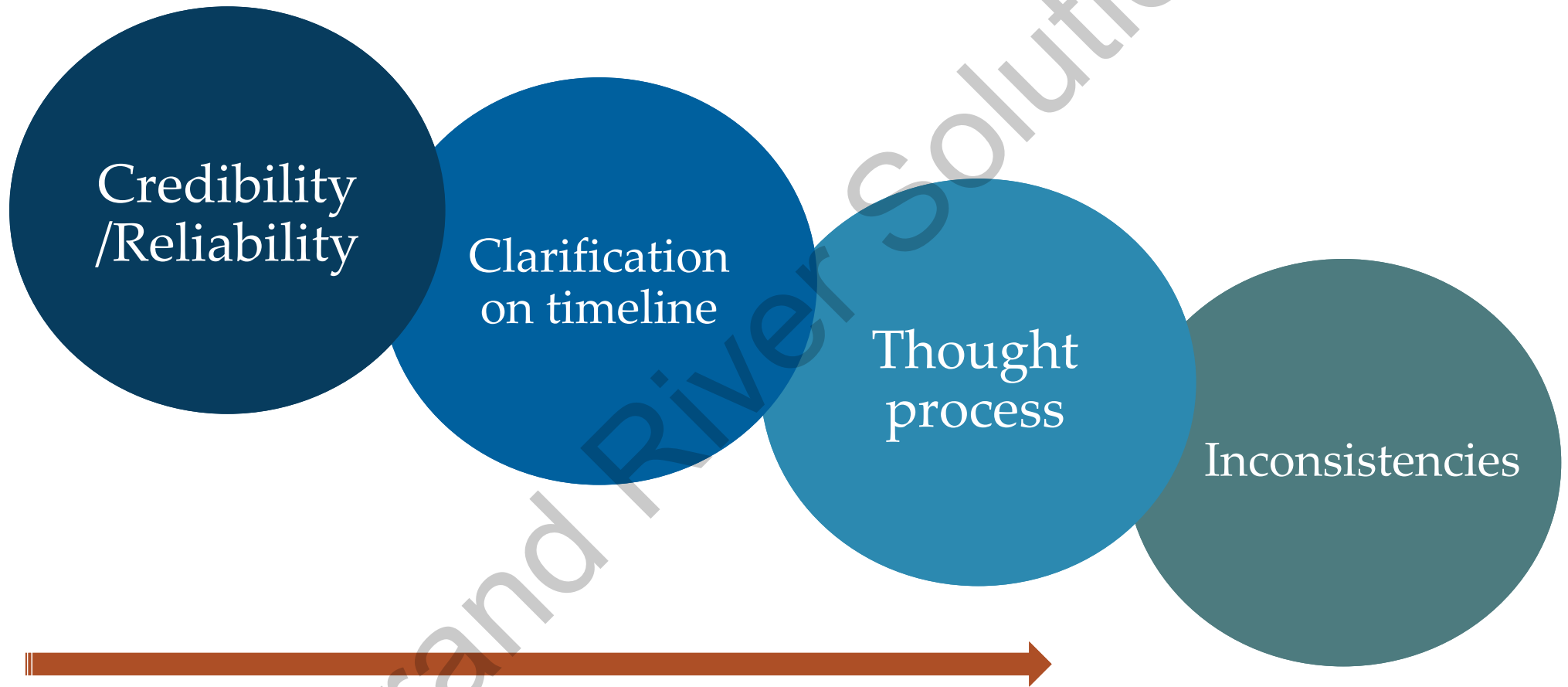
Other
considerations?

PRE-HEARING TASKS: DEVELOPING QUESTIONS

03(a)

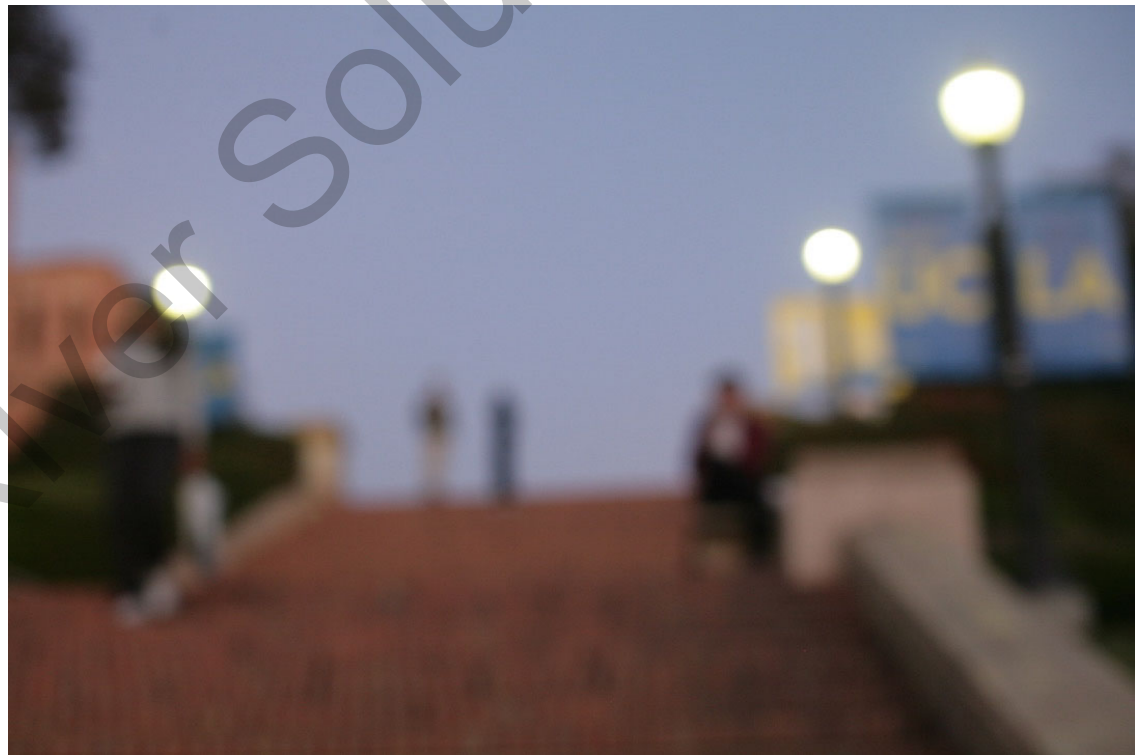


COMMON AREAS OF EXPLORATION



COMMON AREAS OF WHERE CLARITY OR ADDITIONAL INFORMATION IS NEEDED

- Credibility
- Reliability
- Timeliness
- Inconsistencies
- Details about the alleged misconduct
- Facts related to the elements of the alleged policy violation
- Relevancy of certain items of evidence
- Factual basis for opinions



CHARLIE AND RAMONA HYPOTHETICAL ACTIVITY

You will read a short hypothetical & policy definition and then answer:

- What are the elements of the policy?
- Develop questions addressing each of the policy elements based upon the facts you know and what you need to find out at the hearing.
- What areas of concern/exploration do you have? Why are you asking?



EB1

[@Davis Crow] [@Jessica Brown] [@Emma Hempel] [@Merissa McKasty] - Where is the hypothetical for this?
How will we share it with folks? Ahead of time?

Elizabeth Brady, 2024-01-10T18:04:01.185

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CHARLIE AND RAMONA HYPOTHETICAL

Complainant Charlie and Respondent Ramona are involved in a Title IX complaint.

Specifically, Charlie has alleged that Ramona sexually harassed her during their time in a mathematics course that they took together during the Fall 2023 semester, and that this harassment occurred both in and outside of class. Sexual Harassment is defined by the applicable policy as,

Conduct on the basis of sex that satisfies one or more of the following: (1)

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; (2) 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 (3)

"Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as

defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C.

12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

During the investigation, Investigator Ian interviewed both parties and two witnesses, one requested by each party. In Charlie's

interview, she stated that Ramona sexually harassed her by frequently showing her pornographic images during class and while studying outside of class. Charlie said that Ramona began showing her the images in late September 2023. Charlie said that Ramona would show her sexually explicit images despite Charlie telling her to stop, and that Ramona would reference the explicit images to Charlie when she could not pull up the pictures. Charlie said that this continued for several weeks before she finally ended her friendship with Ramona.

When Ian interviewed Ramona, she stated that while she had shown Charlie sexually explicit images, Charlie seemed to be interested in them and would ask to see more.

Ramona said that she would not have shown Charlie the images if Ramona did not think Charlie wanted to see them, and that Ramona only referenced the images to make jokes about them because Charlie seemed to find them to be funny. Ramona stated that Charlie ended their friendship after she received a particularly poor grade on an exam in the course that they were in, and that she told Ramona that she couldn't be friends with her because she needed to focus on her academics.

Witness #1, an acquaintance and classmate of both Charlie and Ramona in the mathematics course they were taking together, said that she noticed that Charlie seemed to be uncomfortable in her interactions with Ramona in October 2023. Witness #1 said that she noticed that Charlie would appear to avoid Ramona prior to class, and that she observed her tell Ramona to stop talking to her during class. Witness #1 stated that Charlie later told her about the alleged sexual harassment after the complaint against Ramona was filed.

Witness #2 is a friend of Ramona's and would occasionally be present during Charlie and Ramona's study sessions that would take place outside of their mathematics class. Witness #2 stated that these sessions mostly occurred at Ramona's off-campus residence, and that most of Charlie and Ramona's time was spent studying. Witness #2 said that she was familiar with Ramona's alleged sharing of sexually explicit images, but that Charlie participated and shared explicit images as well. Witness #2 stated that Charlie seemed to enjoy herself whenever they would share these images and laugh about them with Ramona and Charlie.

Slide 41

- EB1** [@Davis Crow]
Elizabeth Brady, 2023-11-14T15:26:06.407
- EH2** [@Merissa McKasty] Can we make this one pretty?
Emma Hempel, 2023-12-29T15:32:10.397
- MM2 0** [@Emma Hempel] done
Merissa McKasty, 2023-12-29T21:26:03.324

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WHAT FACTS DO I KNOW?

- The investigative report indicates:
 - *Student Jane was a TA for Prof. John Doe. Due to Jane's position, she and Prof. Doe spent a lot of time alone in Prof. Doe's office and lab.*
 - *Jane reported that "on more than one occasion" while alone with Prof. Doe in his office, Prof. Doe hugged her for "longer than [she] was comfortable with."*
 - *Prof. Doe told Investigator: "I'm a huggy guy." I treat my students like family, but there is never anything sexual implied when I hug a friend or student.*
 - *Jane said that in October and November Prof. Doe touched her knee and moved his hand up her leg touching her thigh while they were working alone in the lab. Jane said she "froze" in the moment, but after each instance she went home and cried.*
 - *Prof. Doe denied that this happened and said "at most" he may have accidentally grazed Jane's leg while they were working.*

OK1

this

Oliver Klicker, 2023-05-13T22:17:29.206

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POLICY ANALYSIS

- Break down the policy into elements
- Organize the facts by the element to which they relate



POLICY DEFINITION: SEXUAL HARASSMENT

- Conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies the Complainant equal access to the recipient's education program or activity.

- Was it on the basis of sex?
- Was it severe?
- Was it pervasive?
- Was it objectively offensive?
- Did it deny equal access to education program or activity?

SAMPLE QUESTIONS FOR HEARING

- Complainant: About how many occasions were you alone with Respondent?
- Complainant: Approximately how many times did Respondent hug you?
- Complainant: Can you help me understand why you are no longer a teaching assistant for Respondent?
- Respondent: Can you elaborate on what you meant when you told the Investigator, "I'm a huggy guy?"
- Respondent: You told the investigator you may have accidentally grazed Complainant's leg. Can you recall the time that happened?

THE HEARING

04



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ORDER OF PROCEEDINGS

1. Introductions and instructions by the Chair; Opening Statements

2. Presentation by Investigator

3. Presentation of information and questioning of the parties and witnesses

4. Closing Statements

5. Deliberation & Determination

OPENING INTRODUCTIONS AND INSTRUCTIONS BY THE CHAIR

- The University has a script for this portion of the proceedings, and it should be used.
- Introduction of the participants.
- Overview of the procedures.
- Overall goal: manage expectations.
- Be prepared to answer questions.



EB1 [@Merissa McKasty] Unhide when sharing slides with participants
Elizabeth Brady, 2024-01-12T15:22:57.822

MM1 0 Will do!
Merissa McKasty, 2024-01-12T15:38:51.261

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OPENING STATEMENTS

Optional: Not required by the regulations; institution may choose to allow.

- Prior to questioning beginning during the hearing, each party may be given the opportunity to make an opening statement.
- Intended to be a brief summary of the points the party would like to highlight.
- Directed to the Decision Maker and only the Decision Maker.
- Both parties should give opening statement before either is questioned.
- Typically, the complainant goes first.

The logo consists of a square frame containing a stylized house icon with a chimney.

PRESENTATION OF INFORMATION

PRESENTATION OF INFORMATION & QUESTIONING OF THE PARTIES



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01. The Hearing Panel will question Complainant first

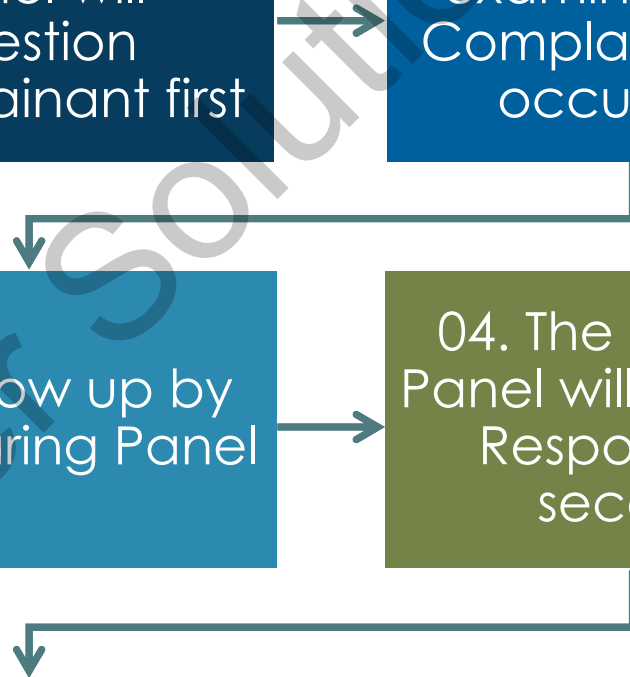
02. Cross examination of Complainant will occur next

03. Follow up by the Hearing Panel

04. The Hearing Panel will question Respondent second

05. Cross examination of Respondent will occur next

06. Follow up by the Hearing Panel



QUESTIONING OF THE WITNESSES

01

The Chair will determine the order of questioning of witnesses

02

The Hearing Panel will question first

03

Advisor cross-examination will occur next (suggested: Complainant's advisor followed by Respondent's advisor)

04

Follow up by the Hearing Panel

CLOSING STATEMENTS

Prior to the conclusion of the hearing, each party will have the opportunity to make a closing statement.

- Intended to be a brief summary of the points the party would like to highlight.
- Directed to the Decision Maker and only the Decision Maker
- Not time to introduce new information or evidence.

EB1 [@Merissa McKasty] Unhide when sharing slides with participants
Elizabeth Brady, 2024-01-12T15:22:43.149

MM1 0 Will do!
Merissa McKasty, 2024-01-12T15:24:46.544

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GENERAL QUESTIONING GUIDELINES

FORMAT OF QUESTIONING

The Hearing Panel or the advisor will remain seated during questioning

Questions will be posed orally

Questions must be relevant

WHEN QUESTIONING....

- Be efficient
- Be prepared to go down a road that you hadn't considered or anticipated exploring.
- Explore areas where additional information or clarity is needed.
- Take your time. Be thoughtful. Take breaks if you need it.
- Listen to the answers.



FOUNDATIONAL QUESTIONS TO ALWAYS CONSIDER ASKING

Were you interviewed?

Did you see the interview notes?

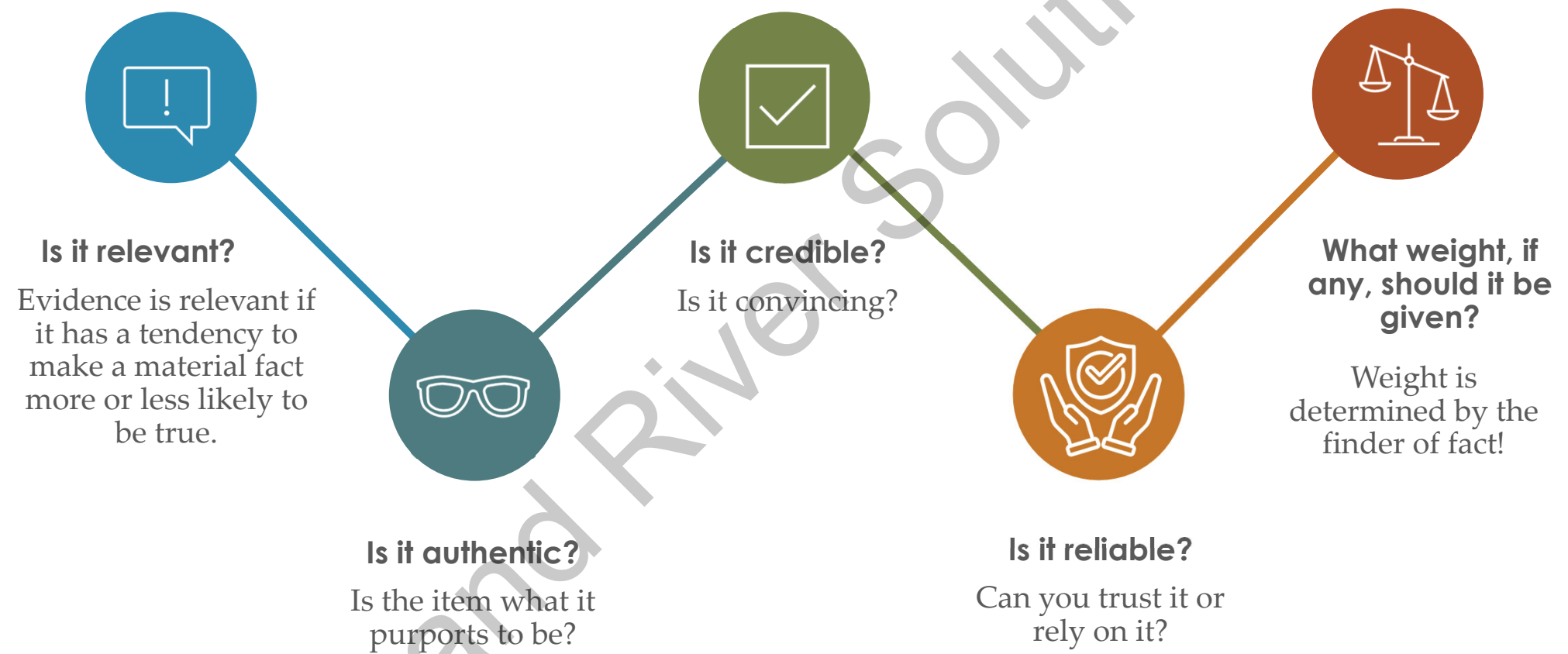
Did the notes reflect your recollection at the time?

As you sit here today, has anything changed?

Did you review your notes before coming to this hearing?

Did you speak with any one about your testimony today prior to this hearing?

EVIDENTIARY CONSIDERATIONS DURING QUESTIONING



Slide 58

EH1 [@Merissa McKasty] can we make slide 53 look different from slide 48?
Emma Hempel, 2023-12-12T19:56:09.542

MM1 0 [@Emma Hempel] Done!
Merissa McKasty, 2023-12-15T18:54:49.223

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WHAT CONSTITUTES A RELEVANT QUESTION?

- The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”
- See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:
- “Evidence is relevant if:
 - (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - (b) the fact is of consequence in determining the action.”

WHEN ARE QUESTIONS RELEVANT?

- Logical connection between the evidence and facts at issue
- Assists in coming to the conclusion – it is “of consequence”
- Tends to make a fact more or less probable than it would be without that evidence

Credibility: The Person is convincing

RELIABILITY: THE PERSON'S STATEMENTS CAN BE TRUSTED



Assessing Credibility and Reliability

NO FORMULA EXISTS, BUT CONSIDER THE FOLLOWING:

Sufficiency of detail and specificity

Internal consistency

Corroboration

Inherent plausibility

Material omission

Motive to falsify

Past record

Ability to recall events

CREDIBILITY/RELIABILITY ANALYSIS

STEP BY STEP

1. Determine the material facts based on the notice of allegations
2. Determine which material facts are undisputed and disputed
3. If any material facts are disputed, consider whether a credibility/reliability analysis will help reconcile the dispute

"Jack stated that he never kissed Marcy at the party and went home early, which Marcy denied. Meanwhile, several witnesses corroborated Marcy's statement that he was at the party until 3 a.m. In addition, a witness submitted a photograph showing Jack kissing Marcy at the party. Given that Marcy's statements were corroborated by witness statements and a photograph taken at the party, her statements were found more reliable regarding this material fact."

QUESTIONING TO ASSESS RELIABILITY

- Inherent plausibility
- Logic
- Corroboration
- Other indication of reliability



QUESTIONING TO ASSESS CREDIBILITY

NO FORMULA EXISTS, BUT CONSIDER ASKING QUESTIONS ABOUT THE FOLLOWING:

Opportunity to view

Ability to recall

Motive to fabricate

Plausibility

Consistency

Coaching

CREDIBILITY VERSUS RELIABILITY

- **Reliability**

- I can trust the consistency of the person's account of their truth.
- It is probably true and I can rely on it.

- **Credibility**

- I trust their account based on their tone and reliability.
- They are honest and believable.
- It might not be true, but it is worthy of belief.
- It is convincingly true.
- The witness is sincere and speaking their real truth.

OPINION EVIDENCE

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?



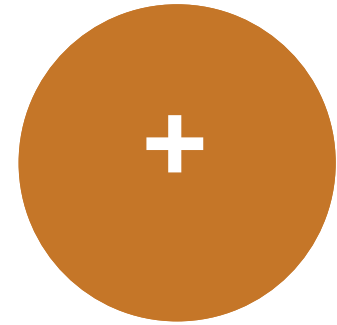
IS IT AUTHENTIC?



Question the person who offered the evidence.

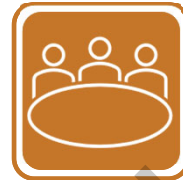


Have others review and comment on authenticity.



Are there other records that would corroborate?

TRAUMA-INFORMED
PRACTICES PROVIDE
TOOLS & TECHNIQUES
FOR ENGAGING WITH
THE COMPLAINANT,
RESPONDENT, AND
WITNESSES.



Format/Structure of the
Hearing



Format of Questions



Approach to
Clarification

EH1

WHAT ARE SOME DIFFICULT QUESTIONS YOU STRUGGLE WITH ASKING?



Slide 70

EH1 [@Merissa McKasty] reformat this slide
Emma Hempel, 2023-12-29T16:29:11.599

MM1 0 [@Emma Hempel] Done
Merissa McKasty, 2023-12-29T21:47:18.023

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THE “HARD” QUESTIONS

Details about the sexual
conduct

Seemingly inconsistent
behaviors

Inconsistent
evidence/information

What they were wearing

Alcohol or drug
consumption

Probing into reports of lack
of memory

HOW TO ASK THE HARD QUESTIONS

- **Lay a foundation for the questions**
 - Explain why you are asking it
 - Share the evidence that you are asking about, or that you are seeking a response to
- **Be deliberate and mindful in your questions**
 - “Can you tell me what you were thinking when...”
 - “Help me understand what you were feeling when...”
 - “Are you able to tell me more about...”



SPECIAL CONSIDERATIONS FOR QUESTIONING THE INVESTIGATOR

- The Investigator's participation in the hearing is as a fact witness;
- Questions directed towards the Investigator shall be limited to facts collected by the Investigator pertinent to the Investigation;
- Neither the Advisors nor the Decision-maker(s) should ask the Investigator(s) their opinions on credibility, recommended findings, or determinations;
- The Investigators, Advisors, and parties will refrain from discussion of or questions about these assessments. If such information is introduced, the Chair will direct that it be disregarded.

SPECIAL CONSIDERATIONS FOR PANELS

If a panel, decide in advance who will take the lead on questioning

Go topic by topic

Ask other panelists if they have questions before moving on

Do not speak over each other

Pay attention to the questions of other panelists

Ok to take breaks to consult with each other, to reflect, to consult with the TIXC or counsel

REPORT OUT



Group 1, 2, 3: Questions for
Complainant and Witnesses
Emma and Charlie



Groups 4, 5, 6: Questions for
Respondent and Witnesses
Professor McPhee and Tom

TITLE IX HEARINGS IN A POST REGULATORY WORLD

Day 2

Davis Crow & Jessica Brown

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OUTSTANDING QUESTIONS FROM DAY ONE



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OVERVIEW OF DAY TWO

- | Advisor Questioning
- | Deliberations
- | Practical Application
- | Questions



BREAK OUT! #1

All groups: Areas or topics that you would like to explore further in the hearing



Say hi!



Pick a scribe



Discuss

Group 1: Questions for Complainant and Witnesses Professor McPhee

Group 2: Questions for Respondent and Witness Taylor

Group 3: Questions for Witness Tom and Witness Charlie

REPORT OUT



Group 1: Questions for Complainant and Witnesses Professor McPhee



Group 2: Questions for Respondent and Witness Taylor



Group 3: Questions for Witness Tom and Witness Charlie

THE DECISION MAKER'S ROLE IN ADVISOR QUESTIONING



05

CROSS EXAMINATION

WHO DOES IT?

1

Must be conducted by the advisor

2

If party does not appear or does not participate, advisor can appear and cross

3

If party does not have an advisor, institution must provide one

THE ROLE OF THE DECISION MAKER DURING QUESTIONING BY THE ADVISORS

- After the Advisor poses a question, the proceeding will pause to allow the Chair to consider it.
- Chair will determine whether the question will be permitted, disallowed, or rephrased. The Chair may explore arguments regarding relevance with the Advisors.
- The Chair will limit or disallow questions on the basis that they are irrelevant, unduly repetitious (and thus irrelevant), or abusive.
- The Chair will state their decision on the question for the record and advise the Party/Witness to whom the question was directed, accordingly. The Chair will explain any decision to exclude a question as not relevant, or to reframe it for relevance.
- The Chair has final say on all questions and determinations of relevance. The parties and their advisors are not permitted to make objections during the hearing. If they feel that ruling is incorrect, the proper forum to raise that objection is on appeal.

THE PARTICIPANTS

Advisors: Prohibited Behavior

An Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting may be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability determine how to address the Advisor's non-compliance and future role.



WHEN ASSESSING RELEVANCE, THE DECISION MAKER CAN:

- Ask the person who posed the question why their question is relevant
- Take a break
- Ask their own questions of the party/witness



RELEVANT VS. IRRELEVANT



Logical connection
between the
evidence and facts
at issue



Assists in coming to
the conclusion – it is
“of consequence”



Tends to make a fact
more or less probable
than it would be
without that evidence

BREAK OUT! #2

EB1

All groups: Review questions and determine whether they are relevant and allowed to be asked or irrelevant/impermissible



Say hi again!



Pick a scribe



Discuss

Group 1: Questions for Complainant and Witnesses Professor McPhee

Group 2: Questions for Respondent and Witness Taylor

Group 3: Questions for Witness Tom and Witness Charlie

Slide 87

EB1 [@Emma Hempel] [@Jessica Brown] [@Davis Crow] [@Merissa McKasty] Is this still a second breakout room? I can't find the first one. But I probably missed it.

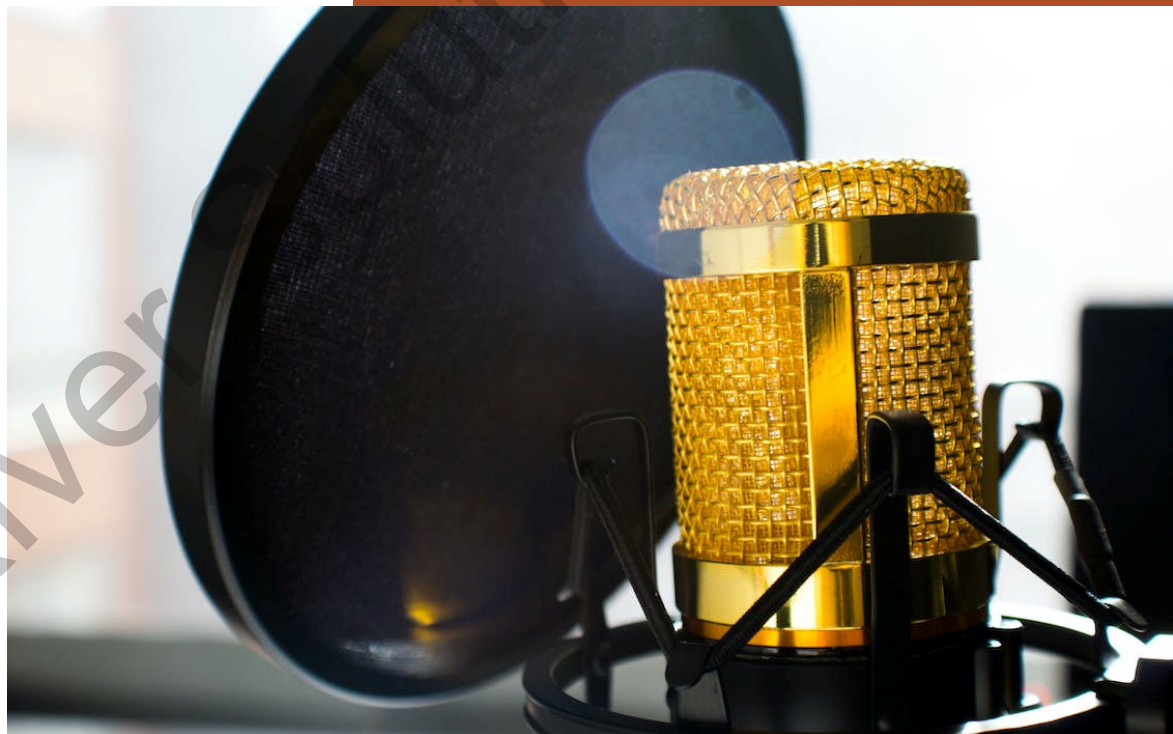
Elizabeth Brady, 2024-01-10T18:05:23.803

MM1 0 [@Elizabeth Brady] Breakout 1 is on slide 62

Merissa McKasty, 2024-01-10T22:31:23.927

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REPORT OUT



DK1

Same photo as break out.

Diana Kunce, 2023-11-13T22:06:13.610

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GROUP 1 QUESTIONS SUBMITTED BY RESPONDENT'S ADVISOR

Questions for Complainant

1. Isn't it true you found Alex attractive after you first met?
2. You wanted to hook up with Alex, didn't you?
3. You made this complaint only because you wanted your boyfriend's attention, isn't that true?
4. You kept calling Alex and asking him for help because you couldn't finish your part of the project without him, isn't that true?
5. You told the investigator you imagined seeing Alex everywhere. Where do you think you saw him?
6. Why were you always thinking of Alex?
7. And how often do you hallucinate?
8. How often has this happened in the past?
9. Why did you ask your boyfriend to walk you to your car when you knew you were supposed to meet Alex there?
10. You said you were frightened by seeing Alex in the parking garage. Did he have a weapon? Did he try to touch you? Did he try to hit you? Describe each and every way he tried to attack you that night.

EB1

[@Davis Crow] [@Emma Hempel] [@Merissa McKasty] [@Jessica Brown] I rearranged these so that each group can do a set of questions and if we run low on time, each group has a chance to talk. Otherwise people get bored if they have to listen to two full groups ahead of them.

Elizabeth Brady, 2024-01-10T18:17:35.626

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GROUP 2

QUESTIONS SUBMITTED BY COMPLAINANT'S ADVISOR

Questions for Respondent

1. Do you keep stalking Stevie because you're OCD?
2. Have you ever been removed from another group project because you could not get along with others?
3. When you first talked to Stevie about your girlfriend breaking up with you, who was your girlfriend, or did you make that up just so you could talk to Stevie?
4. Why did you keep offering to work with Taylor in person instead of by Zoom?
5. Did you have a thing for Taylor?
6. Did you and Taylor ever end up hooking up?

GROUP 3

QUESTIONS SUBMITTED BY **COMPLAINANT'S** ADVISOR

Questions for Tom

1. Can you think of any reason for Alex to be hanging out in the garage with flowers, other than to frighten Stevie?
2. Alex was pretty creepy, wasn't he?
3. Did you see him throw an object at Stevie?
4. Do you believe he was acting in self-defense when he threw the object?
5. You said Stevie is really pretty and guys hit on her a lot. Don't you think someone who has had a lot of male attention would be in the best position to know which kind of male attention is acceptable, and when it is stalking?

GROUP 1

QUESTIONS SUBMITTED BY **COMPLAINANT'S** ADVISOR

Questions for Witness Professor McPhee

1. Why didn't you tell Alex to stop stalking Stevie?
2. Weren't you supposed to forward Stevie's Title IX Complaint to the Coordinator, and don't you think that if you had done so, she would have been spared his stalking?

GROUP 2

QUESTIONS SUBMITTED BY **COMPLAINANT'S** ADVISOR

Questions for Taylor

1. Did Alex seem fixated on Stevie when you were all part of the class project?
2. Did Alex insist that the two of you work together in person instead of online?
3. How often did he force you to work in person with him after classes?
4. Were you afraid of him?

GROUP 3

QUESTIONS SUBMITTED BY **RESPONDENT'S** ADVISOR

Questions for Tom

1. When you saw Alex in the parking garage, were you frightened?
2. What, specifically, did Alex do that was frightening?
3. Does Stevie always overreact?
4. What, specifically, did Alex throw at her?

GROUP 1

QUESTIONS SUBMITTED BY **RESPONDENT'S** ADVISOR

Questions for Witness Professor McPhee

1. What grade did she have up to the project and what grade did she get on the project?
2. Isn't it true that Stevie was doing poorly in class?
3. After she made this complaint, did she get some special treatment or accommodation in your class?
4. Isn't it true that, once you told her she would have to do the work, she suddenly made up a story about Alex to paint him in a bad light?
5. Isn't it true that, before she told you this lie, you had no reason to think poorly of Alex?

GROUP 2

QUESTIONS SUBMITTED BY **RESPONDENT'S** ADVISOR

Questions for Taylor

1. Were you frustrated when working on the group project? Why?
2. Why did you think Alex was more frustrated than others?
3. Why did you think he was “taking it out” on Stevie if he was frustrated with the whole group?
4. Are you and Stevie friends?
5. Did Stevie tell you what to say in the investigation? If so, what?
6. Are you one of those “Believe all victims” people?

GROUP 3 QUESTIONS SUBMITTED BY **COMPLAINANT'S ADVISOR**

Questions for Witness Charlie

1. So are you the one who suggested Alex stalk Stevie's social media to find a food or drink she liked?
2. Why do you think Stevie and Alex had a plan to get together one night and talk? Do you know for sure that there were confirmed plans?
3. What proof did Alex give you to prove there was a real plan, and not an imaginary one?
4. You said Stevie was "rude" because you could not do a lot of work on the group project. What did you mean by that?
5. How long have you known Alex?
6. Isn't it true you just don't like Stevie?
7. Have you ever been accused of sexual harassment or stalking?
8. Isn't it true that you would say anything to support a guy who has been accused?

GROUP 3

QUESTIONS SUBMITTED BY **RESPONDENT'S** ADVISOR

Questions for Witness Charlie

- No Questions

AFTER THE HEARING

05





Deliberations

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PREPONDERANCE OF THE EVIDENCE

- Standard of proof by which determinations of responsibility are made
- **"More likely than not"**
- It does not mean that an allegation must be found to be 100% true or accurate
- **A finding of responsibility =**
 - There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated
- **A finding of not responsible =**
 - There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated

WEIGHING THE EVIDENCE & MAKING A DETERMINATION

1. Evaluate the relevant evidence collected to determine what weight, if any, you will afford that item of evidence in your final determination;
2. Apply the standard of proof and the evidence to each element of the alleged policy violation;
3. Make a determination as to whether or not there has been a policy violation.



FINDINGS OF FACT

- **A "finding of fact"**

- The decision whether events, actions, or conduct occurred, **or** a piece of evidence is what it purports to be
- Based on available evidence and information
- Determined by a preponderance of evidence standard
- Determined by the fact finder(s)

- **For example...**

- Complainant reports that they and Respondent ate ice cream prior to the incident
- Respondent says that they did not eat ice cream
- Witness 1 produces a timestamped photo of Respondent eating ice cream

- **Next steps?**

POLICY ANALYSIS

- Break down the policy into elements
- Organize the facts by the element to which they relate



ALLEGATION: FONDLING

Fondling is the:

- ☐ touching of the private body parts of another person
- ☐ for the purpose of sexual gratification,
- ☐ Forcibly and/or without the consent of the Complainant,
 - ☐ including instances where the Complainant is incapable of giving consent because of their age or **because of their temporary or permanent mental or physical incapacity.**

ANALYSIS GRID

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.	Respondent acknowledges and admits this element in their statement with investigators. <i>"We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</i>	Complainant: drank more than 12 drinks, vomited, no recall Respondent: C was aware and participating Witness 1: observed C vomit Witness 2: C was playing beer pong and could barely stand Witness 3: C was drunk but seemed fine Witness 4: carried C to the basement couch and left her there to sleep it off.

ANALYSIS GRID

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.	Respondent acknowledges and admits this element in their statement with investigators. "We were looking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."	Complainant: drank more than 12 drinks, vomited, no recall Respondent: C was aware and participating Witness 1: observed C vomit Witness 2: C was playing beer pong and could barely stand Witness 3: C drank but seemed fine Witness 4: carried C to the basement couch and left her there to sleep it off.

DID YOU ALSO ANALYZE...?

On campus?

Program or Activity?

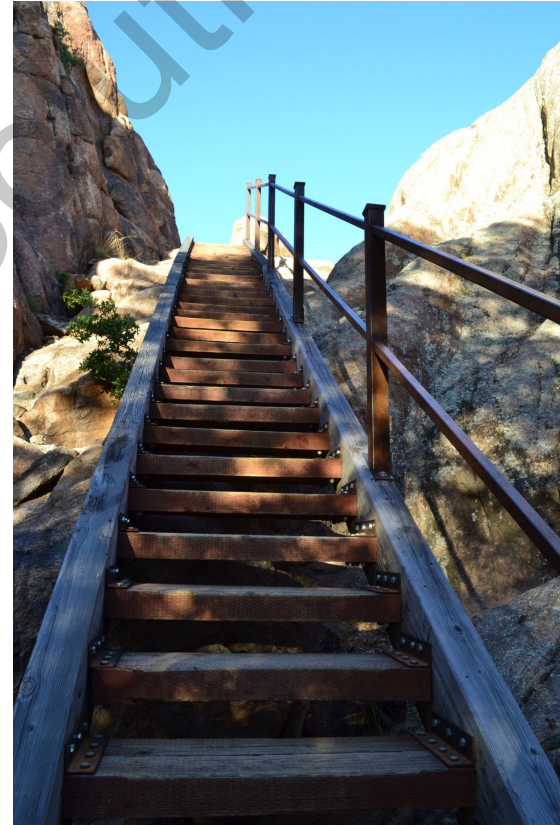
In a building owned/controlled by a recognized student organization?

Substantial control over respondent and context?

Complainant was attempting to access program/activity?

GOALS OF SANCTIONS/DISCIPLINE

1. End the harassment
 2. Prevent its recurrence
 3. Remedy the harm
- What steps would be reasonably calculated to end harassment and prevent recurrence?



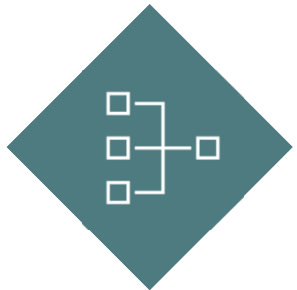
SANCTIONING



State Law



Learning Environment



System Policy



Measures Available

THE SANCTION DOES NOT UNDO THE FINDING

- No lesser sanction if you disagree with findings
- Sanctioning officer must assume findings are correct

DETERMINING THE PROPER SANCTION

- Consistency
- Foreseeability of repeated conduct
- Past conduct
- Does bias creep in?
- Remorse?
- Victim impact?



AGGRAVATING CIRCUMSTANCES

- Premeditation
- Predation
- Physical violence
- Repeated violation
- Multiple policy violations in one incident
- Harm to others, impact on complainant and/or community
- Did the behavior continue after intervention?
- Effort to conceal or hide the incident?
- Refusal to attend past trainings
- Past failures to comply with directives



FINAL REPORT

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and remedies
- Procedure for appeal



THE FINAL DETERMINATION SHOULD STAND ON ITS OWN



S Simple and Easy to Comprehend

T Transparent/Clear

A Accurate

N Neutral/Unbiased

D Draw Attention to Significant Evidence and Issues

ADVISOR'S ROLE POST-HEARING

- May meet with their advisee to review decision and respond to procedural questions.
- Institutionally-appointed advisors typically do not advise nor assist the party in developing an appeal.
- Advisor of choice may assist in advising party whether or not to appeal and in the drafting of an appeal.



PRACTICAL APPLICATION

06

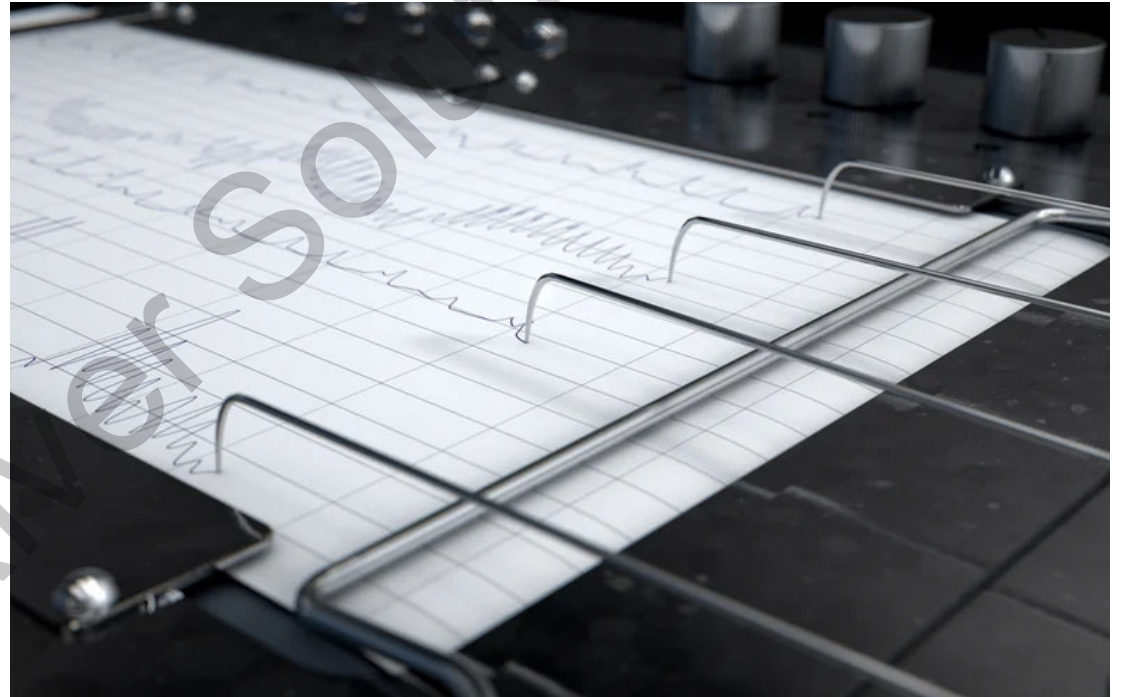


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SCENARIO 1

Respondent provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations.

- **The Investigator determines the report is irrelevant. Must the Investigator share the report with the decision maker?**

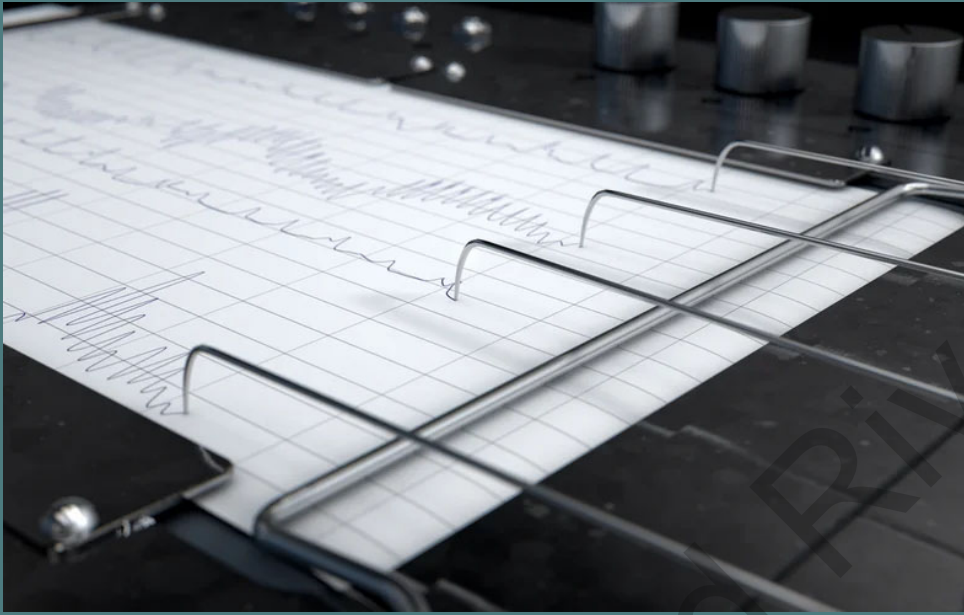


SCENARIO 2



- Respondent appears at the hearing with Witness 7. Respondent would like Witness 7 to provide information testimony about text messages between them and Complainant that indicate that Complainant has made the allegations up.
- **Can the HP hear from Witness 7 at the hearing?**

SCENARIO 3



Respondent provides a polygraph report to Investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations. The polygrapher appears and answers all relevant questions on cross.

Must the Hearing Panel find Respondent not responsible because of the findings in the report?

SCENARIO 4



During the hearing, the Complainant becomes upset, shuts down, and stops answering question.

If you are the Hearing Chair, how do you respond?

DK1

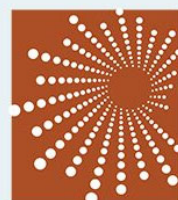
No universities look like this. Empty board rooms are scary too.

Diana Kunce, 2023-11-13T22:08:01.603

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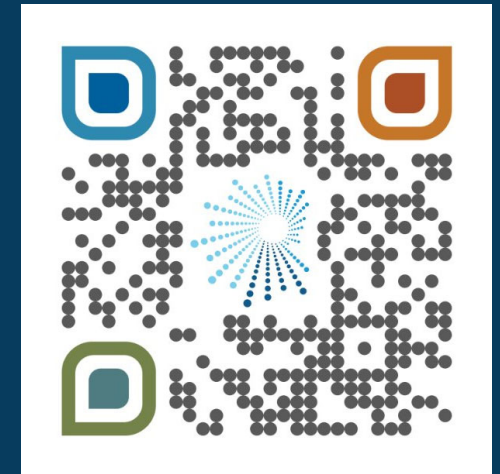


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Your Opinion Is Invaluable!



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RAPID FIRE #3

LET'S ANALYZE THE CASE PACKET

On Campus?

Program or Activity?

In a building owned/controlled by a recognized student organization?

Substantial control over respondent and context?

Complainant was attempting to access program/activity?

RAPID FIRE #4

Policy Analysis

- Break down the policy into elements
- Policy is on page 5 of the packet



DK1

Can we do something more interesting here?

Diana Kunce, 2023-11-13T22:06:37.861

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ALLEGATION: STALKING

Stalking is:

- a course of conduct;
- directed at a specific person;
- that would cause a reasonable person to:
 - fear for his or her safety;
 - the safety of others; or
 - suffer substantial emotional distress;
- **Conduct can occur**
 - in person; or
 - online
- Must involve an education program or activity of the College

CASE STUDY

"The Formal Complaint charges Respondent with sexual assault for engaging in sexual contact with Complainant when she was incapacitated by alcohol. Specifically, Complainant alleges that she was at a party with friends when they met Respondent. Complainant reported that prior to the party she pre-gamed with Witness 1 and they split a bottle of prosecco. Complainant stated that while at the party, Respondent and Witness 2 approached her and her friend, Witness 3, and asked if they would be their partners in a round of beer pong. Complainant reported that she paired up with Respondent and they played several rounds. She further alleged that that Respondent was the one who filled their cups. Complainant stated that she "got drunk fast" and her last memory was of Respondent handing her a celebratory shot because they had won the tournament. Her next memory was waking up on a couch in a bedroom that was unfamiliar to her, naked from the waist down. Respondent was on the floor next to her, asleep. He was under a blanket but was also naked."

WITNESS 1

Witness 1 was interviewed by the investigator and reported that she and Complainant are roommates, but they are not close. Witness 1 is an athlete and tends to hang out with her teammates. She stated that for this reason, they rarely hang-out, but that the night of the alleged incident they did because they were planning on going to the same party. Witness 1 stated that they split a bottle of prosecco, but that Complainant drank most of it because Witness 1 had an early practice the next morning and didn't want to get "too messed up." Witness 1 said that they went to the party together, but then went their separate ways. Witness 1 stated that towards the end of the night, she saw Complainant and described her as "a disaster." She also reported that Respondent was "practically carrying her" and she approached them and offered to take Complainant home. According to Witness 1, Complainant said she was fine, but her words were slurred, and she could barely stand. Witness 1 told Respondent to take care of her and he said, "I'm just going to put her to bed." She didn't see either party again that night.

At the hearing, Witness 1 gave testimony that was substantially the same as what she told the investigator."

WITNESS 3

Witness 3 was Complainant's best friend at the time of the incident. They are no longer close and Witness 3 is now dating Witness 2.

Immediately following the alleged incident, Witness 3 told the investigators that Complainant was already drunk when she got to the party. She stated that Respondent and Witness 2 asked them to play beer pong and they agreed. She stated that the parties seemed to hit it off immediately. She stated that they won the tournament and so played at least five rounds and that by the end of the game Complainant was the "drunkest she had ever seen her." Witness 3 stated that Complainant was slurring her words, couldn't stand on her own, and was really loud, which is not like her. Witness 3 stated that that she was pretty drunk too, but not as bad as Complainant. Witness 3 stated that she left the party with Witness 2.

At the hearing, Witness 3 stated that she may have exaggerated her description of Complainant when she spoke to the investigators. She told the decision makers that although Complainant drank a lot, she wasn't that out of it, because she had a high tolerance and drank a lot all the time.

WITNESS 2

Witness 2 told the investigators that he is Respondent's best friend and teammate. Witness 2 stated that when looking for partners for the beer pong tournament, Respondent saw Complainant and Witness 3 and suggested that they approach them because Complainant "was hot" and Witness 3 "looked drunk enough to be a good time." Witness 2 said that Complainant was fine and didn't appear to be that drunk. He also stated that she made most of the winning shots after several rounds of the game so she couldn't have been too messed up. When asked who was filling the cups, he said that he wasn't sure who did it each round, but he definitely saw Complainant fill them on two occasions. After the tournament was over, he helped Witness 3 get home and so didn't see Complainant and Respondent again that night. He also mentioned that he and Witness 3 are now dating.

At the hearing, Witness 2 testified that Complainant was fine. He also stated that Respondent never filled Complainant's cup and that Complainant was all over Respondent the entire night.