



Determination Officer Training

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- Institutional Policy and Definitions
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- What ifs and Other Considerations



Section 1

Learning Objectives

Our Plan

Learning Objectives

- 1 | Purpose of a Hearing
- 2 | Following Policy & Procedure
- 3 | Evaluating Materials
- 4 | Conducting a Hearing
- 5 | Asking Questions
- 6 | Putting it all Together



Secnario #1: Sexual Harassment Case

- Student A told their advisor that they were being sexually harassed by another student
- The advisor reported it to the Title IX Coordinator, who met with the student
- Student A provided more information to the Title IX Coordinator

Scenario #1

- Student A alleged that they first met Student B during first year orientation. She stated that the two of them started talking and became friendly, attending several events together. At first Student A liked Student B, but then Student A found Student B weird.
- Student A alleged that one day Student A was sitting in the student lounge when Student B sat next to Student A. Student B started asking Student A about their sexual experience and whether they were a virgin. Student B put their hand on Student A's thigh and rubbed it up and down their thigh. Then a friend came over to talk to Student A, and Student B stopped.
- Student A alleged that Student B texted Student A several times asking them what they were up to and if Student A wanted to get together. Student A started avoiding Student B and ignored Student B's messages. Student B got angry, so Student A blocked Student B.
- Student A alleged that Student A started to see Student B standing outside their classes, and Student b would try to talk to Student A.

Secnario #2: Sexual Assault Case

- Student A told her teacher that she was struggling in class because a student in the class had been sexually harassing her and she could not focus in class when she saw him
- The teacher reported it to the Title IX Coordinator, who met with the student
- The student provided more information to the Title IX Coordinator

Scenario # 2

- Student A alleged that when she returned home after being out with her friends, Student B followed her home.
- She alleged that she agreed to letting him in her room because he "just wanted to talk and get to know her better"
- She alleged that he kept asking for a kiss and told her that he would leave once she kissed him, so she kissed him.
- She alleged that he pushed her down on her bed and put his hands on her breasts and on her vagina over her pants
- She alleged that she froze and does not know what happened next, including how her pants came off, but the next thing she recalls was him penetrating her with his penis.
- He eventually stopped. He did not ejaculate. He put his clothes on and left.

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Section 2

Determination Officer Purpose and Role

The process is neutral and is about what relevant evidence exists to make findings.
It is not about providing justice to any party.

JUSTICE.

Process Goal

- Gather and evaluate the most relevant and reliable information and evidence
- Determine whether specific definitions of behavior prohibited by policy have been violated

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Keep the End in Mind

Title IX Regulations Require the Determination of Responsibility to Include:

- Identification of allegations potentially constituting sexual harassment
- Information about the policies and procedures that were used to evaluate the allegations
- The decisionmaker's evaluation of the relevant and not otherwise impermissible evidence
- Determination whether sex-based harassment occurred
- With a finding of responsibility:
 - Any disciplinary sanctions the school will impose on the respondent
 - whether remedies other than the imposition of the sanctions will be provided to the complainant (and to others if the school identifies other students experiencing the effects of the harassment)
- The school's appeal process

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hearing officer

- What are your purpose and goals?
- How do you ensure fairness?
- How do you structure the hearing process?
- How do you prepare?
- What do you do throughout the hearing?

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Fairness

It comes out in the wash....

What happens if we make **assumptions**? **Go with our gut**?

What happens if we **take sides**?

What do we do if we have **preferential/negative feelings**?

INVESTIGATOR AND HEARING OFFICERS: What are you trying to accomplish?

- **Fairly gather evidence**
Inculpatory and exculpatory
Hear fully from the parties and witnesses
- **Related to the allegations and the definition**
What are the allegations? What are potential paths?
What is the definition? What are the elements?
- **Tell the parties' story and experience**



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Section 3

Institutional Policy and Definitions



Where do we begin, what are we dealing with, and how do we move forward?

- School process
- School resources
- School personnel

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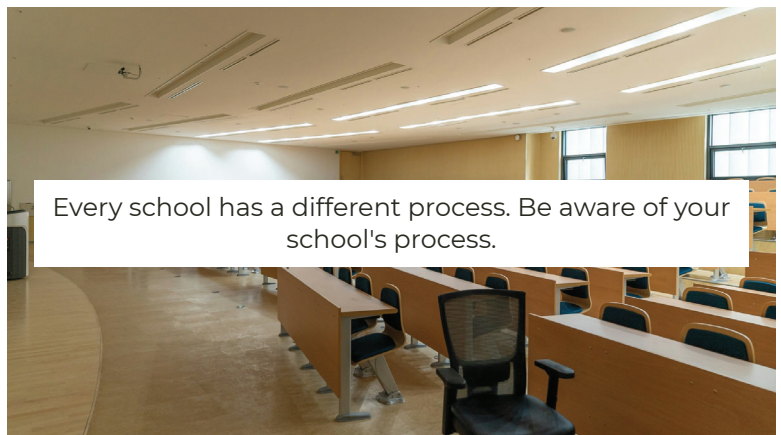
Process steps- *generally*

There may be meetings throughout



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Every school has a different process. Be aware of your school's process.

Definitions: It is Elemental

- Purpose of the process is to determine if a specific definition of prohibited behavior has been violated
- Generally, the standard is "the preponderance of the evidence"
- This is determined by reliable evidence that makes something more likely than not true
- So, take the definition and break it down into components that need to be proven

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Definitions: Sexual Assault

GENERAL COMPONENTS: READ THE INSTITUTION'S POLICY FOR THEIR DEFINITIONS

Rape

- Penetration of anus/vagina
- With body part or object

Fondling

- Touching
- Sex organs/genitals
- Over/under clothing

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Consent

General overview: read your institution's definition

Consent IS

- An agreement
- Evidenced by words, sounds, conduct
- Knowing and voluntary
- Present for each act each time

Consent does NOT exist where:

- There is an absence of a "no" (without more)
- Behavior is compelled by force, threats, coercion
- A party is incapacitated
- A party is a minor

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Rape Definition

- Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, or by a sex-related object. This definition also includes instances in which the victim is incapable of giving consent because of temporary or permanent mental or physical incapacity (including due to the influence of drugs or alcohol) or because of age. Physical resistance is not required on the part of the victim to demonstrate lack of consent.

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Focus In...

- Penetration, no matter how slight,
 - of the vagina or anus
- or oral penetration by a sex organ of another person, or by a sex-related object.

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Consent Definition Example

- Conduct is unwelcome if a person did not consent to it. Consent is agreement, assent, approval, or permission given voluntarily and may be communicated verbally or by actions. That a person welcomes some sexual contact does not necessarily mean that person welcomes other sexual contact. Similarly, that a person willingly participates in conduct on one occasion does not necessarily mean that the same conduct is welcome on a subsequent occasion.
- In addition, when a person is incapacitated, meaning so impaired as to be incapable of giving consent, conduct of a sexual nature is deemed unwelcome, provided that the Respondent knew or reasonably should have known of the person's incapacity. The person may be incapacitated as a result of drugs or alcohol or for some other reason, such as sleep or unconsciousness. A Respondent's impairment at the time of the incident as a result of drugs or alcohol does not, however, diminish the Respondent's responsibility for sexual harassment under this Policy.

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Focus in...

- Consent is agreement, assent, approval, or permission
- given voluntarily and
- may be communicated verbally or by actions.

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Consent

- Consent to one type of sexual activity does not equal consent to other types of sexual activity.
- Consent can be withdrawn at any point during sexual activity and the sexual activity must stop immediately.
- A verbal "no" establishes lack of consent.
- Silence, without clear actions demonstrating permission, cannot be assumed to indicate consent—the absence of "no" does not equal "yes."
- Consent cannot be obtained by coercion, force, or threat.
- Consent cannot be given by someone if they are mentally or physically incapacitated.

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Definitions: Sexual Harassment

Conduct of a sexual nature

- Words
- Actions
- Pictures/videos

Unwelcome

- From the perspective of the complainant

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Example

- Sexual harassment is unwelcome conduct on the basis of sex. Sexual harassment includes unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, graphic, or physical conduct of a sexual nature that satisfies one or more of the following: (1) an employee of the University either explicitly or implicitly conditioning the provision of an aid, benefit, or services of the University, such as an individual's employment or academic standing (for example, academic evaluation, grades, or advancement) on an individual's participation in unwelcome sexual conduct (quid pro quo); quid pro quo sexual harassment can occur whether a person resists and suffers the threatened harm, or the person submits and avoids the threatened harm. Both situations could constitute discrimination on the basis of sex; or (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 University's education or work programs or activities; or (3) sexual assault, dating violence, domestic violence, and stalking.

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Example, Continued

- Whether the conduct constitutes sexual harassment may depend on a variety of factors, including: the degree to which the conduct affected one or more person's education or employment; the type, frequency, and duration of the conduct; the relationship between the parties; the number of people involved; and the context in which the conduct occurred.

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Pick the Applicable Subsection

- **Sexual harassment is unwelcome conduct on the basis of sex.** Sexual harassment includes unwelcome sexual advances; requests for sexual favors; and other verbal, nonverbal, graphic, or physical conduct of a sexual nature that satisfies one or more of the following: (1) an employee of the University either explicitly or implicitly conditioning the provision of an aid, benefit, or services of the University, such as an individual's employment or academic standing (for example, academic evaluation, grades, or advancement) on an individual's participation in unwelcome sexual conduct (quid pro quo); quid pro quo sexual harassment can occur whether a person resists and suffers the threatened harm, or the person submits and avoids the threatened harm. Both situations could constitute discrimination on the basis of sex; or (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 University's education or work programs or activities;** or (3) sexual assault, dating violence, domestic violence, and stalking.

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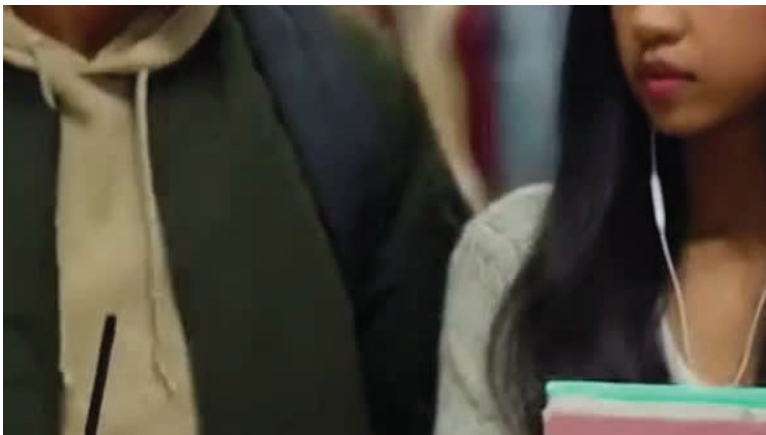
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Focusing In

- 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 or work programs or activities

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Elements

- ☆ unwelcome conduct
- ☆ so severe, pervasive, and objectively offensive that
- ☆ it effectively denies a person equal access to the University's education or work programs or activities
- 📌 *determined by a reasonable person*

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Section 4

Preponderance of the Evidence and Relevance

Making the Decision

Preponderance of the Evidence



Relevance

- Relevant means, with regards to **evidence**, having some value or tendency to prove a matter of **fact** significant to the case.
- Relevance is assessed in the context of the entire case. It requires a determination whether, as a matter of human experience and logic, the existence of a particular fact, **directly or indirectly**, makes the existence or non-existence of a material fact more probable than it would be otherwise
- Evidence is relevant if:
 - it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - the fact is of consequence in determining the action.

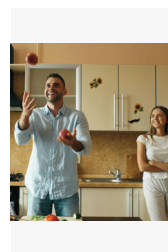
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Relevant to...



Specific Act



Plausibility



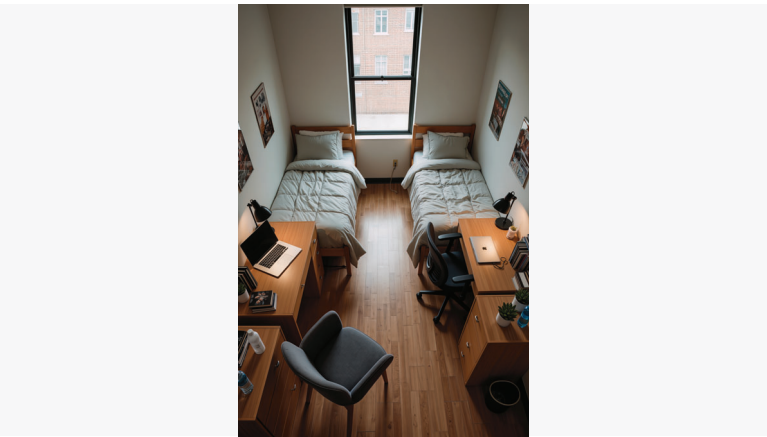
Consistency/Reliability



Motive

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Adding it all Up

Evidence - Texts, social media - Photos - Emails - Written statements, interview statements	Witnesses - What did they see? - How did they describe material interactions or incidents? - Which witnesses are consistent? - When did they become involved?
Motive - Someone's reason to withhold or embellish - Overly aligned with a party - Fear of getting in trouble for something else - Revenge, embarrassment	Plausibility - Would a reasonable person find it possible? - Positions of bodies, feasibility of act - Ability to see - Impact of drugs or alcohol

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Credibility Determinations

Credibility Determinations- Let's Discuss How

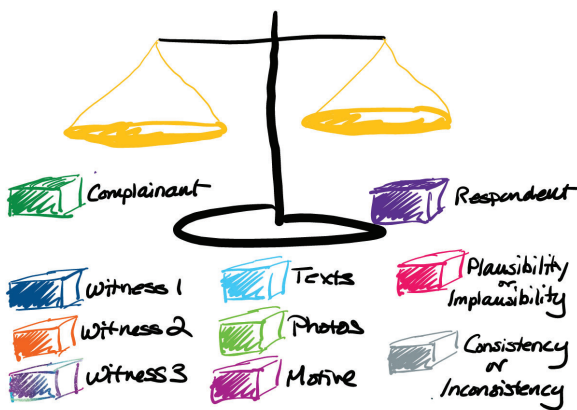
The EEOC recommends using the following information to assess credibility:

- **Plausibility.** Is the witness's version of the facts believable? Does it make sense?
- **Demeanor.** Should you make decisions based on how they come across?
- **Motive.** Does the person have a reason to lie?
- **Corroboration.** Are there documents or other witnesses that support the witness's version of events?
- **Past record.** Should this matter with respect to the case before you?

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Section 5

Preparation

Preparing for a Hearing

- 1 | Get your policy out
- 2 | Report review
- 3 | It's elemental.....
- 4 | Questions

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Report Review- It's Elemental

- What are you looking for?
- Relevance
- Consistency, credibility
- Objective evaluation
- Inculpatory and exculpatory
- What is missing?

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Questions. Curiouser and curiouser.

- What is missing?
- What do you want to know?
- What do you want to test?
- What do you need to test?
- What about some “defenses?”

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Handling Inconsistent Information

- Be familiar what they have stated to different stakeholders in the report. Look at the level of in/consistency.
Both consistency and inconsistency matter.
- How do you handle an inconsistent statement during the hearing?
- How do you handle an inconsistent statement in fact finding and decision-making?

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Section 6

The Hearing

Purpose of the hearing

- Test information
- Fill in gaps
- Address in/consistencies in report/evidence
- Assess credibility of parties and witnesses

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HEARING OFFICERS: What are you trying to accomplish?

- **Fairly gather evidence**
Inculpatory and exculpatory
Hear fully from the parties and witnesses
- **Related to the allegations and the definition**
What are the allegations? What are potential paths?
What is the definition? What are the elements?
- **Tell the parties' story and experience**



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Where do you find the information?

- People
- Places
- Communications
- Things



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Adjudicator
Demeanor

Organization and Direction Discussion

- How are you tracking issues?
- What system works to help you keep information at your fingertips?
- How do you ensure you kick the tires on relevant issues and elements?
- How do you work together as a panel?

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Myths and Biases- What are Some?

- Myths about sexual assault, dating violence, sexual harassment, discrimination, harassment....etc.
- Myths/biases about complainants and respondents
- Myths and expectations about human behavior
- Myths/biases about witnesses, advisors, lawyers, etc.
- Implicit Bias
- Affinity Bias
- Confirmation Bias
- Halo/Horns
- Myths and biases based on identity

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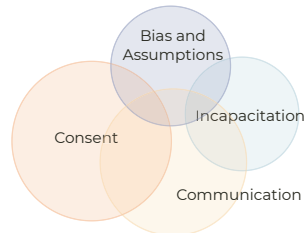
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Bias & Assumptions, Consent, and Incapacitation

Where is the intersection and what does it mean?



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Hearing- Live with Cross Examination

- The decision-maker must explain to the party's advisor asking questions any decision to exclude questions as not-relevant (include relevant).
- Provide both parties equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.

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Parties, advisors, hearing officers, and panelists.
What happens if someone shows up without an advisor?

Hearing Prep

- 1 | Technical set up
- 2 | Evidence availability
- 3 | Housekeeping & agenda
- 4 | Ground rules & expectations of behavior

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Off we go

- 1 | Introduction
- 2 | Opening Statements
- 3 | Questions- panelists then advisors
Assessing questions.....
- 4 | Closing Statements
- 5 | What ifs.....?



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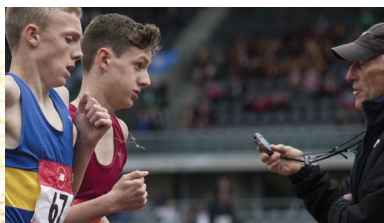
Consolidation

- You have multiple complainants
- You have multiple respondents
- Why are they all in one place?
Conspiracy?
Overlapping facts?
- How do you manage this information for fact finding?



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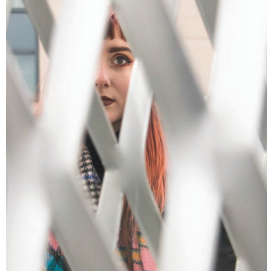
Timing



Rules of Decorum

Trauma

- What is it?
- Who gets it?
- How does it impact a hearing?
- How do we consider it appropriately?



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What will you do with the information?

- Write your notice of outcome so that a person with NO knowledge of the matter can understand what is going on

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Who is driving
the bus?

questions are fine so long as:

- They are relevant to the definitions
- They are relevant to credibility *for this matter*
- They are asked appropriately
- They are not otherwise prohibited

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Note: Prior Sexual Conduct

- 1. Questions about or evidence of a Complainant's sexual predisposition is never considered relevant for the purposes of an investigative report or questioning in a live hearing.
- 2. Questions about or evidence of a Complainant's sexual history is only considered relevant for the purposes of an investigative report or questioning in a live hearing if:
 - a. Such questions and evidence about the Complainant's prior sexual history are offered to prove that someone other than the Respondent committed the conduct alleged by the complainant; or
 - b. Such questions and evidence concern specific incidents of the Complainant's prior sexual history with respect to the Respondent and are offered to prove consent.

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Note: Privileged Information

- The University will not require, allow, rely upon, or otherwise permit questions or use of evidence that constitutes, or seeks disclosure of, information protected under a legally recognized privilege. Notwithstanding the foregoing, if a person holding such a privilege has waived the privilege, then the information may be used during an investigation or live hearing.
- In gathering evidence, the University will not access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the University obtains that party's voluntary, written consent to do so.

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When asking Questions, Know the definitions, obtain/Know each party's version

- Findings must show you've kicked the tires on the elements of the definitions
- Information must be gathered that relates to and tests the elements
- Pay attention to each person's statements- why?
- Go there. You have to go there.

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General: how do you handle...

- Refusal to answer a question
- Potential misunderstanding of the question
- Incoherent answers, rambling, off topic
- Discomfort with the question
- Interrupting advisor
- Rude person who makes snide comments

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types of questions

Broad and open ended Tell me what happened the night of homecoming What happened at the dance?	Background Tell me about your relationship with Sam How do you know Chris? How long have you worked in X department?	More directed Okay. So you got to her room. What happened next? What happened next? How did they respond? How did you respond?
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types of questions: detail

- you said she seemed drunk. what did she do or say that made you think that?
- you said you felt threatened. what did they do or say that made you feel that way?
- you said she seemed into it. what did she do or say that made you feel that way?
- What time of day was it? What date?
what if they can't remember?
- You said you touched them. Where did you touch them?
- How long was their hand on you? Was it moving? How?
- Which hand did they use to touch you?
- How did your pants come off? Did you or they remove them?

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types of questions: addressing inconsistencies

- You said you yelled at them to stop. Your roommate who was present said you were giggling/did not say anything. Do you have any thoughts on that/would you like to respond or address that?
- You said you did not know he was interested in Maria and would not care; he provided a text from you that night that says "yeah. I was gonna stay but M was there. I'm no second choice" That seems inconsistent. Can you tell me about this?
- In the investigation report you said they sat on your stomach and then with their right hand touched your genitals and then breasts; now, at hearing, you said that they sat on your thighs. Can you walk me through these seemingly inconsistent statements?
- You just provided detail that was not contained in the investigation report. Can you tell me why you are sharing this now?

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general: Consistency- How do you handle this scenario?

- Complainant gave one sequence of events in their report to the RA
- Complainant gave a different sequence of events to a friend
- Complainant gave another sequence of events to the investigator- **what do you do?**
- Now you are at the hearing....**what do you do?**
Hearing officer, advisor

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how do you organize your thoughts to ask the best questions?

- Do not make your mind up when reading the report
- Do not make your mind up during the hearing
- Do not make your mind up immediately after the hearing
- Lay out all of the information, evidence, and statements. Read the hearing transcript (listen to audio). Evaluate and assess.
- First: determine statement reliability of parties and witnesses.
- Second: look at the specific stories told by parties and witnesses.
- Third: look at the elements of the definitions. Apply.

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Section 1

Examples and Practice

Exercise

- Read each party's version of the interaction.
- What background information do you need?
- What information makes you go "hmmmm"?
- What is missing?
- What witnesses would be relevant?
- Make a list of questions you would ask each party and witness.

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Scenario #1

Complainant

- Student A alleged that they first met Student B during first year orientation. She stated that the two of them started talking and became friendly, attending several events together. At first Student A liked Student B, but then Student A found Student B weird, and her friends told her that Student B was a "total weirdo."
- Student A alleged that one day Student A was sitting in the student lounge when Student B sat next to Student A. Student B started asking Student A about their sexual experience and whether they were a virgin. Student B put their hand on Student A's thigh and rubbed it up and down their thigh. Then a friend, Student C, came over to talk to Student A, and Student B stopped.
- Student A alleged that Student B texted Student A several times asking them what they were up to and if Student A wanted to get together. Student A started avoiding Student B and ignored Student B's messages. Student B got angry, so Student A blocked Student B.
- Student A alleged that Student A started to see Student B standing outside their classes, and Student B would try to talk to Student A.

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Scenario #1

Respondent

- Student B stated that they first met Student A during first year orientation. Student B stated that the two of them started talking and became friendly, attending several events together. They held hands at the most recent event.
- Student B stated that one day he saw Student A sitting in the student lounge, and Student A invited him over to sit next to them. Student A told Student B that their ex-partner was texting her and how they lost their virginity to that partner, but wished they had saved it for someone nice like Student B. Student B stated that they liked hearing this because they were interested in Student A. Student B put their hand on Student A's thigh and rubbed it up and down their thigh. Then a Student C came over to talk to Student A, and Student B stopped touching Student A. Student C gave Student B a "strange" look and told Student A to come with them to the dining hall.
- Student B texted Student A several times asking them what they were up to and if Student A wanted to get together. Student A started ignoring Student B's messages. Student B asked Student A why she was ignoring their messages, but she did not reply.
- Student B stated that they had a class that down the hall from Student A's class and met at the same time as Student A's class. On one of these days, Student B approached Student A to ask what was going on. Student A ran away from Student B.

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Scenario # 2

Complainant

- Student A alleged that when she returned home after being out with her friends, Student B followed her home.
- She alleged that she agreed to letting him in her room because he "just wanted to talk and get to know her better"
- She alleged that he kept asking for a kiss and told her that he would leave once she kissed him, so she kissed him.
- She alleged that he pushed her down on her bed and put his hands on her breasts and on her vagina over her pants
- She alleged that she froze and does not know what happened next, including how her pants came off, but the next thing she recalls was him penetrating her with his penis.
- He eventually stopped. He did not ejaculate. He put his clothes on and left.

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Scenario # 2

Respondent

- Student B stated that he and Student A had met earlier in the semester through friends. He stated that they were friendly and engaged in "flirty" banter. They saw each other at a party that night and spent time talking and dancing.
- Student B stated that he walked Student A home because the "vibe was right". He asked if he could come into her room, and she said "yes."
- When they got into the room, they sat on her bed and started kissing.
- They laid down on the bed together and continued to kiss. He touched her breasts and vagina over and under her clothes.
- They each took off their own clothes. She performed oral sex on him, and he digitally penetrated her. She moved on top of him and inserted his penis into her vagina.
- He stated he eventually stopped. He did not ejaculate. He put his clothes on and left. She texted him the next day and asked if he wanted to hang out again, but he told her he had a good time but was busy.

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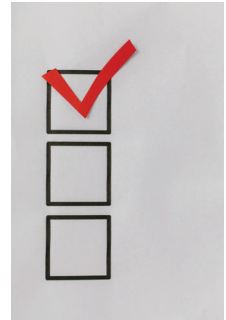
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Section 7

Making the Decision

Get the
definition
out



Line up your elements

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First Things
First:
Statement
Reliability.
Add it all Up

Evidence

Texts, social media
Photos
Emails
Written statements, interview
statements

Witnesses

What did they see?
How did they describe material
interactions or incidents?
Which witnesses are consistent?
When did they become involved?

Motive

Someone's reason to withhold or
embellish
Overly aligned with a party
Fear of getting in trouble for
something else
Revenge, embarrassment

Plausibility

Would a reasonable person find
it possible?
Positions of bodies, feasibility of
act
Ability to see
Impact of drugs or alcohol

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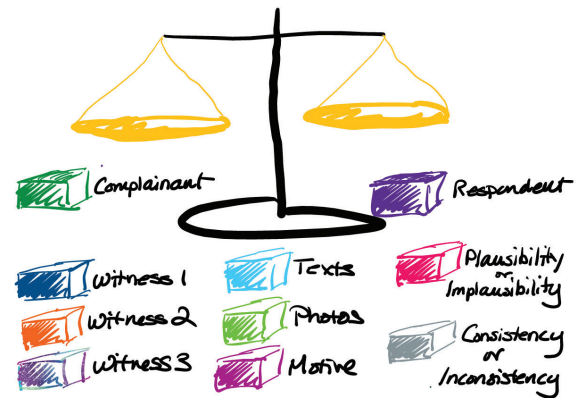


Objective AND Subjective Evaluation

Objective: reasonable person standard.

Subjective: this person.

Balance the two.



Take those Factual Findings and Plug them into the Definition(s)

- What happened?
- What are the RELEVANT acts?
- Do the acts satisfy ALL the elements of the applicable definition(s)?

Keep the End in Mind

Title IX Regulations Require the Determination of Responsibility to Include:

- Identification of allegations potentially constituting sexual harassment as defined in regs
- Description of procedural steps taken throughout
- Findings of fact used to support the determination
- Conclusions regarding the application of the code of conduct to the facts
- Statement of and rationale for:
 - The result as to each allegation, including a determination regarding responsibility
 - Any sanctions the recipient imposes
 - Any remedies provided to the complainant designed to restore or preserve access to the program or activity

Appeals

- **Parties may appeal:**

Determination regarding responsibility and
Dismissal of a formal complaint or an allegation
thereof

Appeal grounds

- 1 | Procedural irregularity that would change the outcome of the matter
- 2 | New evidence that was not reasonably available at the time of determination regarding responsibility or dismissal was made, that would affect the outcome of the matter
- 3 | The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against parties generally or the individual party that affected the outcome of the matter
- 4 | Others...

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Section 8

What ifs and Other Considerations

What ifs

- A party or advisor does not appear
- A party refuses to answer a question or avoids a question
- An advisor is rude or obnoxious
- A party seeks to introduce new information just before or during the hearing
- A party says they did not read the report
- A party falls off the zoom
- A party is reacting during the hearing

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Thank you

