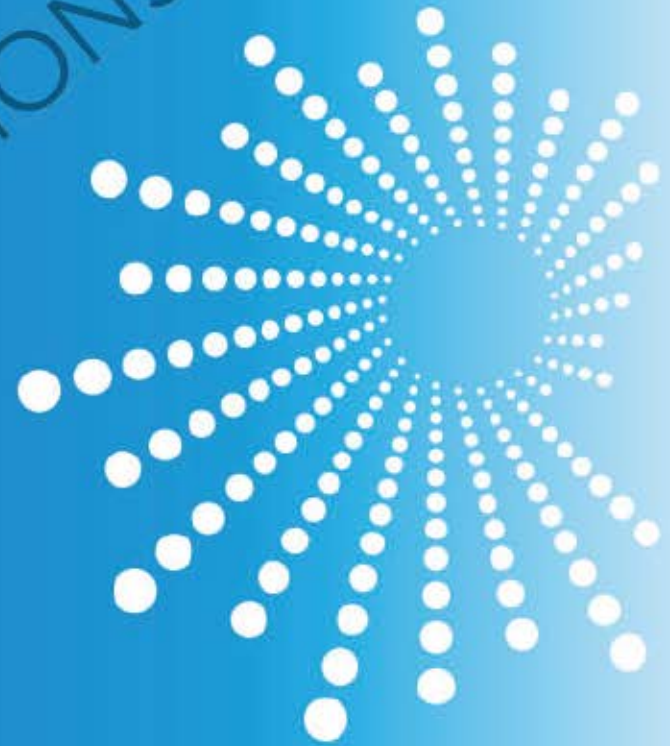


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Questions?

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Send Feedback



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.

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.

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.

”



Scenario 2B

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 2A

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 1

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?**

Credibility and Reliability

- Did Complainant make up the allegation due to jealousy (Matt, Lauren). Lauren received angry messages in response from Complainant
- Cristina saw Complainant in bar at 2:30, she had a shot / Kelly found Complainant wandering, did not know where she was
- He was pushing drinks on her/She had texted "You can buy me drinks at the Formal"
- Letter from Pastor: He is a good person, he only tells the truth
- Lauren: He always asks for consent
- Cristina: Respondent is a good person
- Social media: Lauren found Complainant on social media / Kelly, Joe, Taylor: Taylor never uses social media

Credibility/Reliability Analysis

Step by Step

1. Determine the material facts – focus only on material facts.
2. Determine which material facts are:
 - Undisputed – consistent, detailed and plausible, and/or agreed upon by the parties [e.g., Marcy and Jack attended a fraternity party on April 5, 2019]
 - Disputed – unsupported by documentary or other evidence, or are facts about which an element of doubt remains [e.g., Marcy alleged that Jack kissed her without her consent around 1am at the party, and Jack asserted he never kissed Marcy and went home early]
 - State clearly which facts are accepted, and which are rejected, and state the reasons why.

“While Jack maintained that he never kissed Marcy and went home early, several witnesses corroborated that he was at the party until 3 a.m. In addition, a photo was submitted by a witness showing Jack kissing Marcy. Therefore, I find that Jack’s version of events cannot be credited as being more likely than not to be true.”

Ability to Recollect Events

- What is the extent the person was able to perceive, recollect or communicate the version of events?
 - e.g., the person reported they were intoxicated, or the person reported they were sleeping

Past Record

- Is there a history of similar behavior in the past?
 - e.g., a supervisor had previous complaints of sexual misconduct
- If so, this might impact whether a statement should be believed.
 - For example, a respondent who states they never knew that a certain behavior was wrong, yet was written up for that same behavior, the history of similar past behavior makes the respondent's statement less believable and less reliable.

Material Omission

- Did the person omit material information?
- If so, what?
 - e.g., submitted partial text messages, or omitted text messages that could be perceived as unfavorable
- Is there a reasonable reason for the material omission?

Inherent Plausibility

- Is the testimony believable on its face?
- Does it make sense?
- Could it have occurred?
- Does it make sense that this person knows this information?
- What was their opportunity to view?

Corroboration

- Is there witness testimony (either by witnesses or people who saw the person soon after the alleged incident, or people who discussed the incidents with the person around the time they occurred) or documentary or physical evidence that corroborates the person's testimony?
- Is there witness testimony or documentary and/or physical evidence that are inconsistent with statements made during the interview or does not provide corroboration to the person's version of events?

Consistency with Other Evidence or Testimony

- Is the testimony or evidence consistent with the other evidence?
- Is the testimony or evidence inconsistent with the other evidence?
- Is there a sufficient explanation for any inconsistencies?

Internal Consistency

Consistency Over Time

- Did the person share the same version of events in all settings, including interviews, in written and/or verbal statements and between documentary evidence?
- Are there any discrepancies or contradictions?
- Is there a sufficient explanation for any discrepancies?

When your investigation reveals that a fact was not shared by a party or witness, the investigator should have explored the reason for the omission. The final report should document the exploration and accurately describe the explanation provided.

“Surveillance video from Clinton Hall depicted that at approximately two a.m. Witness A entered the room in which Complainant reports that she was assaulted. Witness A left ten minutes later. Complainant failed to share this fact with the investigators.”

“Surveillance video from Clinton Hall depicted that at approximately two a.m. Witness A entered the room in which Complainant reports that she was assaulted. Witness A left the room ten minutes later. In a follow up interview with Complainant, they were asked why they did not report Witness A’s presence in the room. Complainant responded by stating that they have no recollection of Witness A being in the room. ”

Sufficiency of Detail and Specificity

Is the level of detail provided by the person reasonable and indicative of a genuine personal experience by the person?

Determining Credibility and Reliability

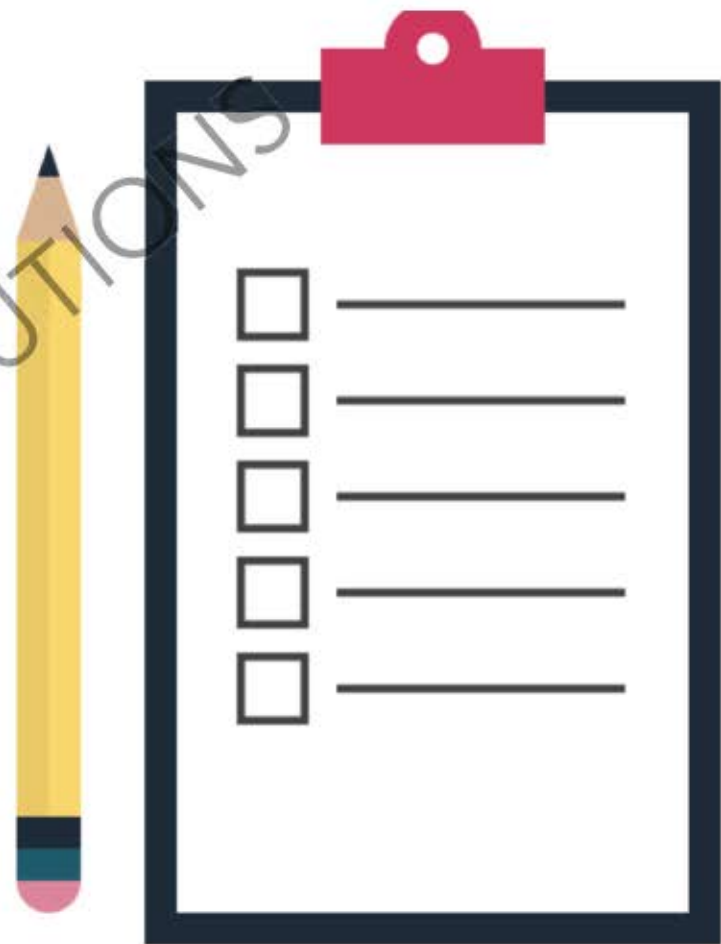
Remember: There is
No Formula!

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A hand is shown pointing at a whiteboard. The whiteboard contains several mathematical formulas, including $\frac{1}{2}$, $\frac{1}{2} < 0$, and $\frac{1}{2}$. The background is a solid orange color.

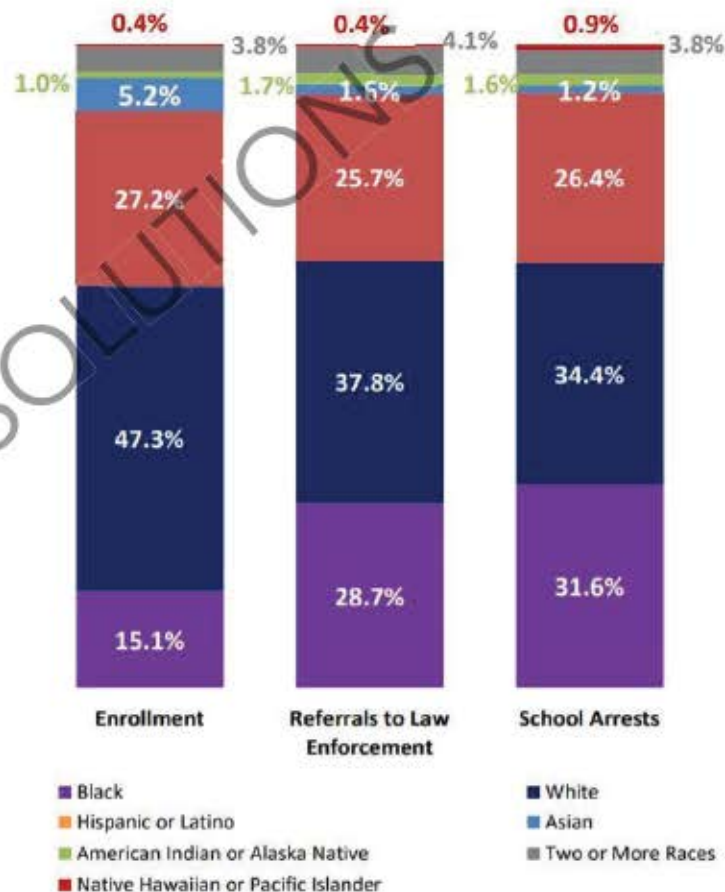
What Can We Do?

- Acknowledge bias within our systems.
- Collect the data.
- Check data for inconsistencies.
 - Can inconsistencies be explained?
- Check policies to ensure they lead to equitable outcomes.
- Create robust processes with bias checkpoints.



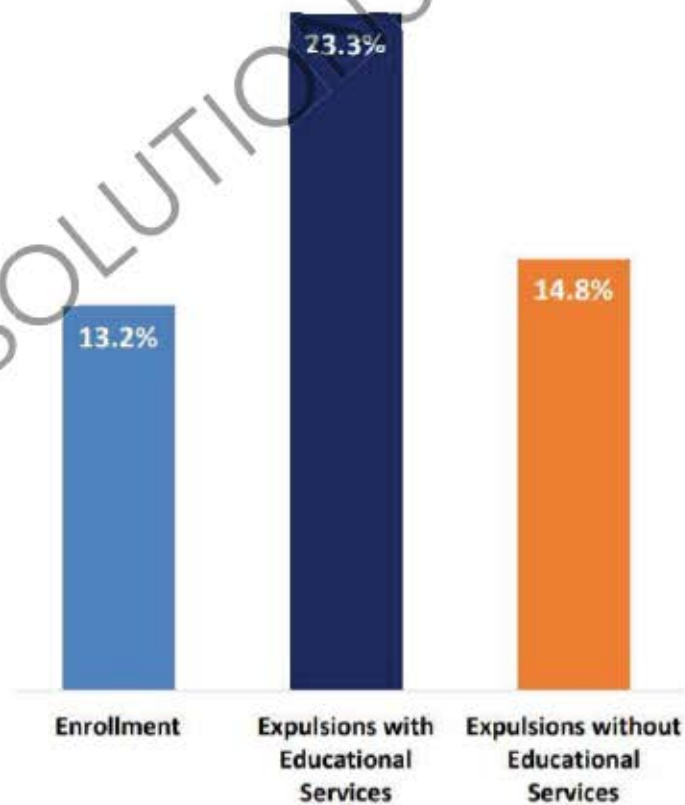
School-Related Arrests and Referrals to Law Enforcement in 2017-18

- Black students accounted for 15.1% of total student enrollment and 28.7% of all students referred to law enforcement.
- Black students were 31.6% of all students arrested at school or during a school-related activity— double their rate of enrollment.
- Similar patterns of disparities were observed for Black students served under IDEA who accounted for 2.3% of total student enrollment.
 - 8.4% of students referred to law enforcement
 - 9.1% of students who were arrested



School Expulsions Among Students Served Under IDEA (2017-2018)

- Students with disabilities served under IDEA represented 13.2% total enrollment.
- Received 23.3% of all expulsions with educational services.
- Received 14.8% of expulsions without education services.



Bias Mitigation Strategies

Confirmation Bias

- Take notice every time you feel strongly about a conclusion
- Seek out missing perspectives that challenge your opinions
- Assign someone on your team to play "devil's advocate" for major decisions

Information Bias

- Be realistic about what information is critical, what is not, and why
- Write down key factors that should be considered

Attentional Bias

- Remind yourself that you can be wrong
- Mood and physiological discomfort affect your attentiveness and decision-making
 - Check for hunger, fatigue, and emotional unease

Bias in Decision- Making and Assessment

- **Confirmation Bias:** To search for, interpret, focus on, and remember information that aligns with our preconceived opinions.
- **Information Bias:** Based on the incorrect belief that more information—even irrelevant information—must always be acquired before deciding.
- **Attentional Bias:** The tendency to pay attention to some things while simultaneously ignoring others.
 - i.e. Tunnel vision

Interpersonal Bias Mitigation Techniques

Affinity Bias

- Question your assumptions and first impressions
- Would your view of the person change if they were different/similar to you?
- Justify your decision by writing down the reasons for it

Anchoring Bias

- Ensure you have enough time to evaluate the situation
- Reflect on whether you have rushed to judgement in the past
- Ask yourself if you have thoroughly considered all key factors

The Halo/Horns Effect

- Remind yourself that people are complex
- Create two possible impressions of people when you first meet them
- Collect objective information on which impression is more accurate

B.E. FOR DOGS:

HALO EFFECT

Duke

CENTER FOR
ADVANCED
HINDSIGHT



BERMAN, FOEHL, TROWER 2018

Interpersonal Bias

Affinity Bias:

- To favor others who are like us. Affinity bias leads us to favor people who we feel we have a connection or similarity to.

Anchoring Bias:

- The tendency to be overly influenced by the first piece of information that we hear.

The Halo/Horns Effect:

- The tendency for an initial impression of a person to influence what we think of them overall. If our initial impression of someone was positive/negative, we want to look for proof that our assessment was accurate.



Experiences

- Media
- Beliefs
- Education



Implicit Bias

- Automatic Thoughts
- Feelings



Actions

- Discriminatory
- Non-Discriminatory
- Overt
- Covert

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What is Implicit Bias?

Stereotypes:
Automatic
thoughts

Prejudice:
Feelings

Discrimination:
Actions

Implicit Bias: Stereotypical thoughts below conscious awareness, which can be followed by feelings of liking or disliking (prejudice) and/or discriminatory behaviors; tends to involve a limited or inaccurate perception of others.



Implicit Bias

Awareness and Mitigation

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"Complainant claimed that they were face down in the bed with their dress pushed up so that their face was actually laying on the bottom part of their dress. They alleged that someone was having sex with them from behind."

"Complainant **reported** that they were face down in the bed with their dress pushed up so that their face was actually laying on the bottom part of their dress. They **stated** that someone was **penetrating their vagina** from behind."

Commit to Using Neutral Language

Non-Neutral/Biased	Neutral Alternatives
"Claimed/Alleged"	"Reported/Stated"
"According to X"	"X reported/X stated"
"Story/Version of Events"	"Account/Reported Recollection of Events"
"Had Sex with/Engaged in"	Simply describe what occurred
"Changed their Account/Story/Version of Events"	"When initially interviewed Respondent stated X. In a subsequent interview Respondent stated Y"

Every statement in an interview summary should make clear that it was the interviewee who made that statement:

- Not: Complainant first saw Respondent near the fountain in the middle of the quad.
- Instead "Complainant stated that she first saw Respondent near the fountain in the middle of the quad."
- Not: Witness 3 told Complainant that Respondent was creepy.
- Instead: Complainant stated that Witness 3 told him that Witness 3 believed Respondent was "creepy."

Use interviewee's words and put in quotes if it is their word.

- Not "Witness 3 was really out of it and drunk."
- Instead; "Witness 4 stated that Witness 3 was 'really out of it' and 'drunk,' which she described as . . ."

No conclusory words

- Not "the stalking started"
- Instead; complainant stated that the conduct she identified as stalking started in January.
- In some states, particularly California, attorneys litigating these cases will argue that use of a conclusory term means the investigator is agreeing that the conduct did occur. It's a huge nuisance to be a deponent in those cases.

Choosing Simple Language

Complex Language

"Adjudicated"

"Preponderance of the Evidence"

"Respondent articulated"

"Prima Facie Assessment"

"The allegation was substantiated"

"Pursuant to the policy"

"Digital Penetration"

Simple Language

"Decided/Determined"

"More likely than not"

"Respondent stated"

"Plain assessment/On its face assessment"

"The allegation was proven/supported by"

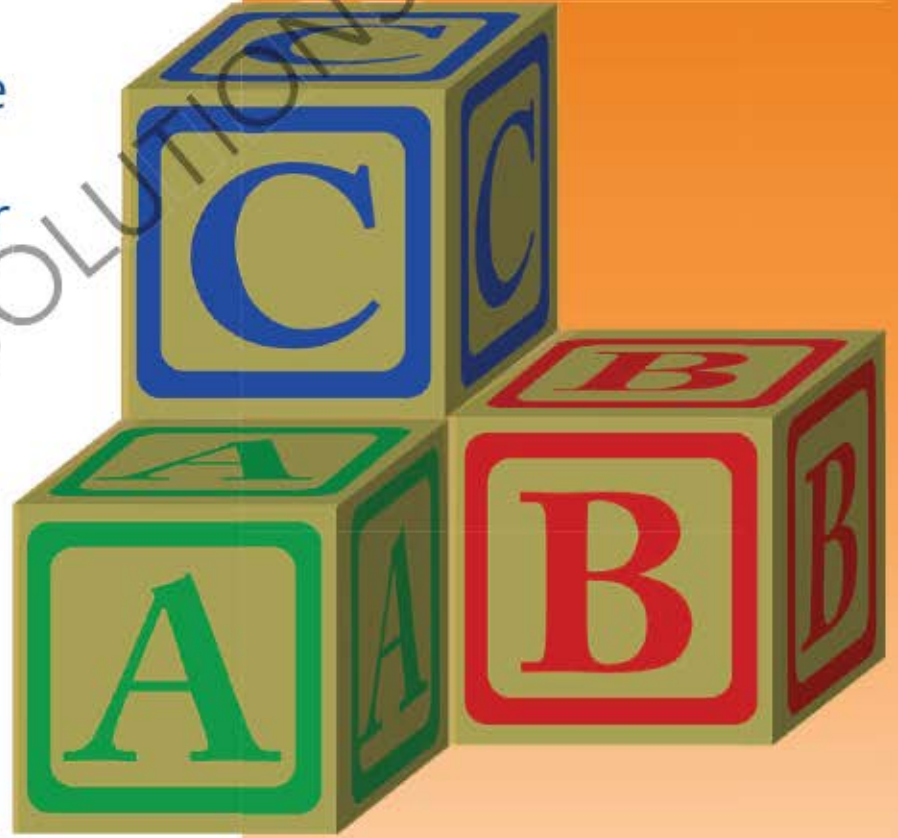
"As stated in the policy"

"Inserted their finger into (include body part penetrated)"

Simplicity

Reports should be written so that they are accessible to all readers, irrespective of their familiarity with the subject matter, or the institutions policies and the law.

- Use plain language
- Be concise
- Avoid repetition
- Consider including a section on facts in dispute/not in dispute
- Avoid or define technical language/acronyms/slang



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

Writing the Finding of Facts and Final Determination



Use the analysis grid to guide this section of the final determination



Adhere to the guidelines set forth above



Always cite to the investigative report, record, and hearing

Recommended Outline

Hearing Overview

Policy Statement

Procedural Timeline

Findings of Fact Supporting the Final Determination

Analysis and Determination of Responsibility

Sanction and Remedies

Appellate Procedures



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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

Determining the Proper Sanction

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

The Sanction Does Not Undo the Finding



No lesser sanction if
you disagree with
findings



Sanctioning officer
must assume findings
are correct

Sanctioning



State law



System policy



Learning
environment



Measures
available

Goals of Sanctions/Discipline

End the harassment, prevent its recurrence, remedy the harm

What steps would be reasonably calculated to end harassment and prevent recurrence?



Prevention

Making a Determination




1. Apply the standard of proof and the evidence to each element of the alleged policy violation.
2. Make a determination as to whether or not there has been a policy violation.

Did You Also Analyze...?

(if required by policy)

- 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?

Apply Preponderance Standard to Each Element

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.</p> 	<p>Respondent acknowledges and admits this element in their statement with investigators.</p> <p>"We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</p> 	<p>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.</p> 

Analysis Grid

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.</p>	<p>Respondent acknowledges and admits this element in their statement with investigators.</p> <p>"We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</p>	<p>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.</p>

Allegation: Fondling

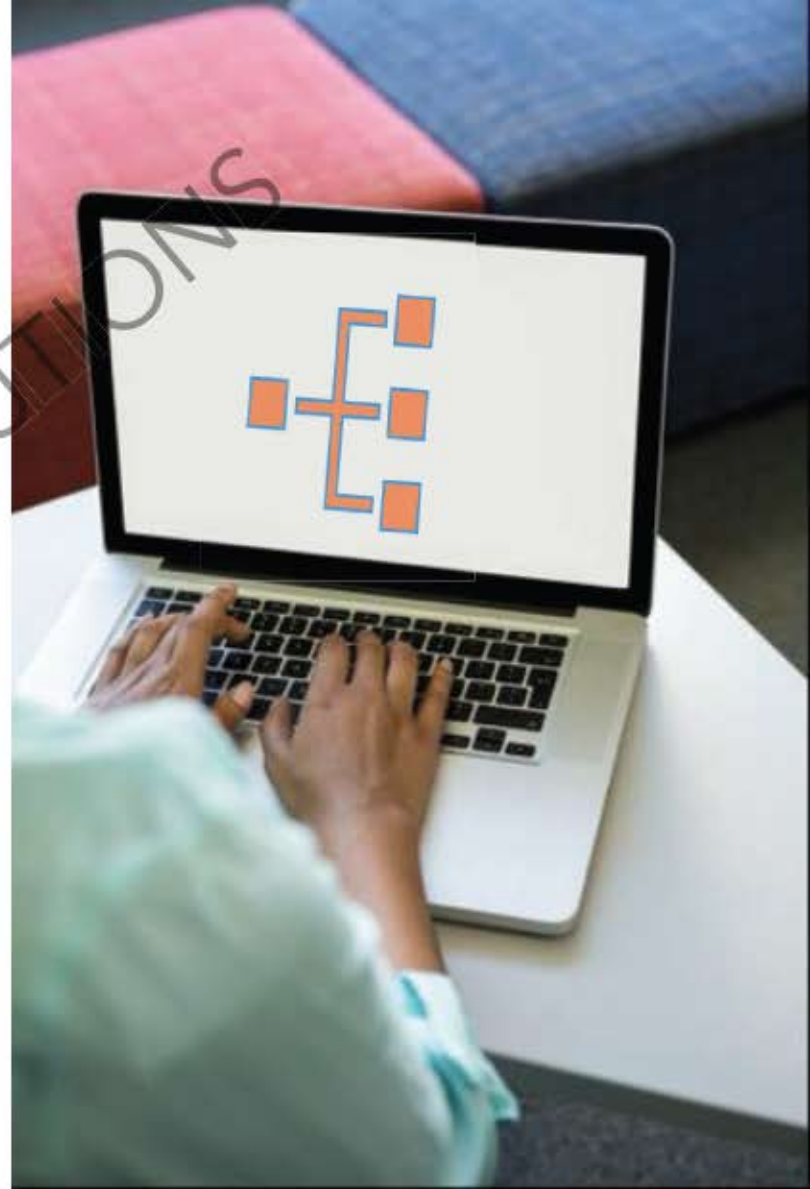
Fondling is the:

- ❑ 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.**

Policy Analysis

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

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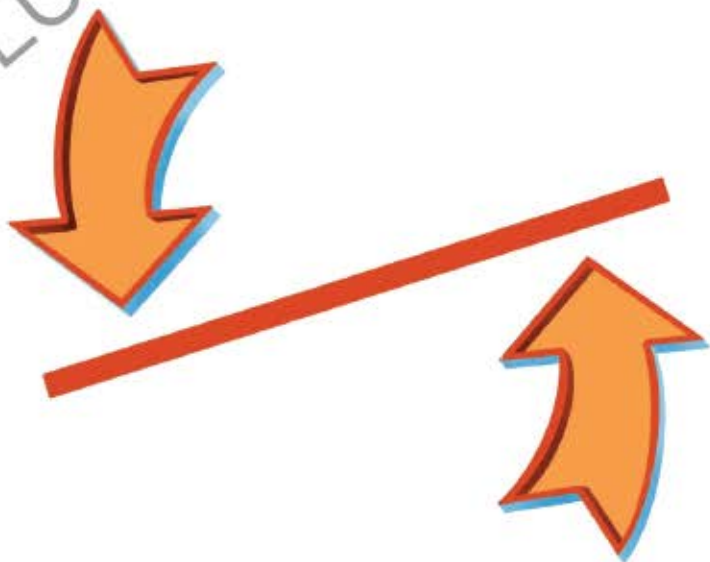


Findings of Fact

- **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?**

Weighing the Evidence & Making a Determination

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



Preponderance of the Evidence

More likely than not

Does not mean 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





Deliberations

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Making a Decision

06

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When Assessing Relevance, the Decision Maker Can:

Ask the Advisor (Process A) or Party (Process B) why their question is relevant

Take a break

Ask their own questions of the party/witness

Review the hearing record

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.

Cross Examination

Who does it?

Must be conducted
by the advisor

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

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



The Decision Maker's Role in Advisor Questioning

05a

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Quick Check In



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Decision Maker Training

Massachusetts Institute of
Technology - Day Two

Martha Compton | October 2022

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





Special Considerations for Questioning the Investigator



Ask questions about how they conducted their investigation (if not in the report)



Explore the investigator's decision making (if not in the report)



Seek clarity about evidence collected

Where it came from
Authenticity of the evidence



Ask factual questions that will assist in evaluation of the evidence



If bias is not in issue at the hearing, the Chair should not permit irrelevant questions of the investigator that probe for bias.

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Special Considerations for Questioning the Investigator During the Hearing

- 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.

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...

What are the “Hard” Questions

Details about the sexual contact

Seemingly inconsistent behaviors

Inconsistent evidence/information

What they were wearing

Alcohol or drug consumption

Probing into reports of lack of memory

Is it authentic?



Never assume that an item of evidence is authentic.



QUESTION THE PERSON WHO OFFERED THE EVIDENCE



REQUEST ORIGINALS



OBTAIN ORIGINALS FROM THE SOURCE



HAVE OTHERS REVIEW AND COMMENT ON AUTHENTICITY



ARE THERE OTHER RECORDS THAT WOULD CORROBORATE?



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?

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.

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

character, background, experience, and training

coaching

Questioning to Assess Reliability

Inherent plausibility

Logic

Corroboration

Other indicia of reliability

Common Areas of Where Clarity or Additional Information is Needed

Credibility

Reliability

Timelines

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

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?

When Questioning....



Be efficient.



Explore areas where additional information or clarity is needed.



Listen to the answers.



Be prepared to go down a road that you hadn't considered or anticipated exploring.



Take your time. Be thoughtful. Take breaks if you need it.

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Information protected by an un-waived legal privilege

Medical treatment and care

Unduly repetitious or duplicative questions

Information that otherwise irrelevant

Complainant's prior sexual history, with limited exceptions.

Irrelevant and Impermissible Questions

When is evidence 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



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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.”



Format of Questioning



The Hearing Panel or the advisor will remain seated during questioning



Questions will be posed orally



Questions must be relevant

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General Questioning Guidelines

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Closing Statements

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

- 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.

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

Presentation of Information & Questioning of the Parties

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



Presentation of Information

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Opening Introductions and Instructions by the Chair

The Institute 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.



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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.

Order of the Proceedings - Employees

01

Introductions
and
instructions
by the Chair

02

Complainant:
Opening
Statements,
Questions by
Panel, Cross
Examination

03

Respondent:
Opening
Statements,
Questions by
Panel, Cross
Examination

04

Witnesses:
Questions by
Panel, Cross
Examination
by Advisors

05

Closing
Statements

06

Deliberation
and
Determination

Order of the Proceedings - Students

01

Introductions
and instructions
by the Chair

02

Opening
Statements

03

Presentation of
information and
questioning of
the parties and
witnesses

04

Closing
Statements

05

Deliberation &
Determination



The Hearing

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05



Common Areas of Exploration



Credibility?



Clarification on timeline?



Thought process?



Inconsistencies?

Stalking. Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
Fear for the person's safety or the safety of others; or
Suffer substantial emotional distress.

1. Did Respondent engage in a course of conduct?
2. Was that course of conduct directed at Complainant?
3. Would Respondent's conduct cause a reasonable person to either
 1. Fear for their safety or the safety of others, or
 2. Suffer substantial emotional distress

Domestic Violence. Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim. Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.

- Are the parties in, or have they been in, a romantic or intimate relationship?
- Did Respondent engage in physical or sexual violence, or threats thereof against Complainant?

Hearing Panel Chair



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

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

Decision Making Prep Work



Review notice letter, report, evidence, and parties' responses



Review applicable policy and procedures



Conduct a preliminary analysis of the evidence



Determine areas for further exploration



Decide what questions you have for Investigator

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 Preparation

What should be done in advance

04

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The Participants

The Hearing Chair

- Is a decision-maker
- 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 Decision-Makers

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



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

Advisors: Prohibited Behavior

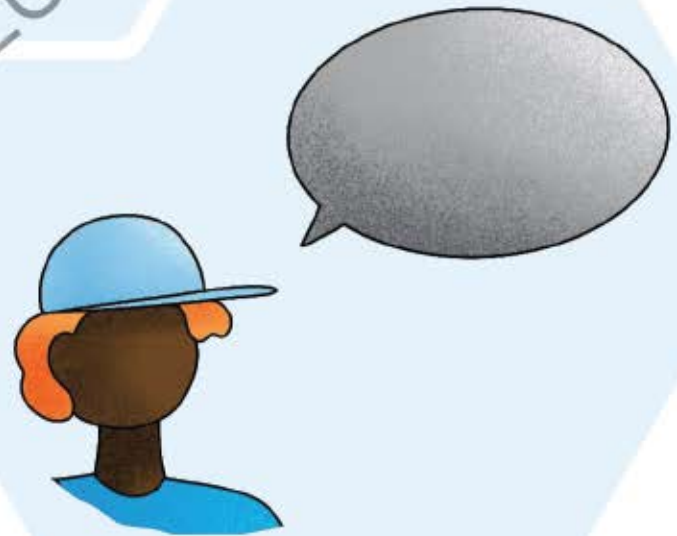
An Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting may be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability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



- 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





There are
two types of
advisors



❖ Advisor (throughout whole process)



❖ Hearing Advisor (hearing, for purposes of asking questions)

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.



The Participants

The Parties

Complainant	Respondent
<p>An individual who is alleged to be the victim of conduct that could constitute sexual harassment.</p>	<p>An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.</p>



Process Participants

03

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The Future

An understanding of trauma and its potential impact should encourage investigators to keep an open mind, and it should prevent investigators from immediately interpreting seemingly inconsistent behaviors with deception. An understanding of trauma provides another explanation for these seemingly inconsistent behaviors.

This is essential to a fair and thorough investigation.

When an investigator uses “trauma informed” tools, they are less likely to:



CONCLUDE, WITHOUT A THOROUGH INVESTIGATION, THAT THE REPORTING INDIVIDUAL IS NOT CREDIBLE



ASK QUESTIONS OR MAKE DECISIONS FOUNDED IN BIAS



CAUSE ADDITIONAL HARM



JEOPARDIZE FUTURE REPORTING



The Historical Conclusion...

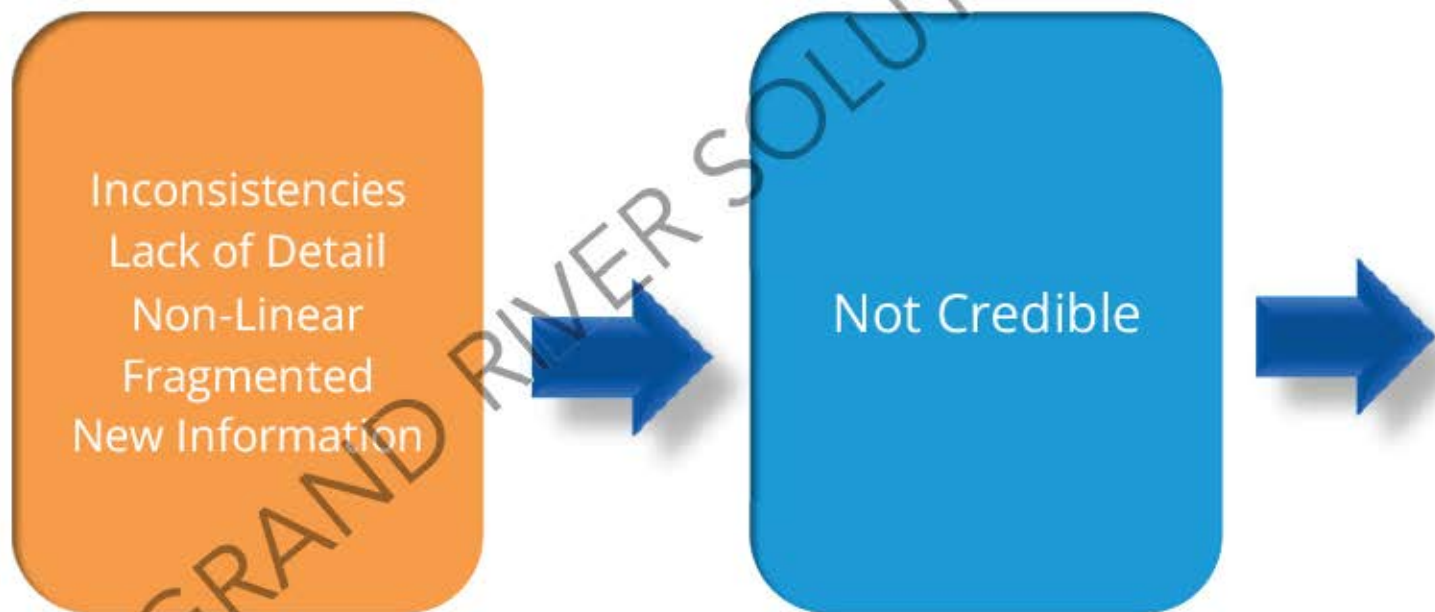
False Report
Regretted Sex
Not Provable



Investigation
CLOSED



Historically, the seemingly inconsistent behaviors that frequently accompany disclosures of sexual assault and interpersonal violence resulted in the belief that the victim was being dishonest.



Common Characteristics of Disclosures by a Trauma Brain

Inconsistent

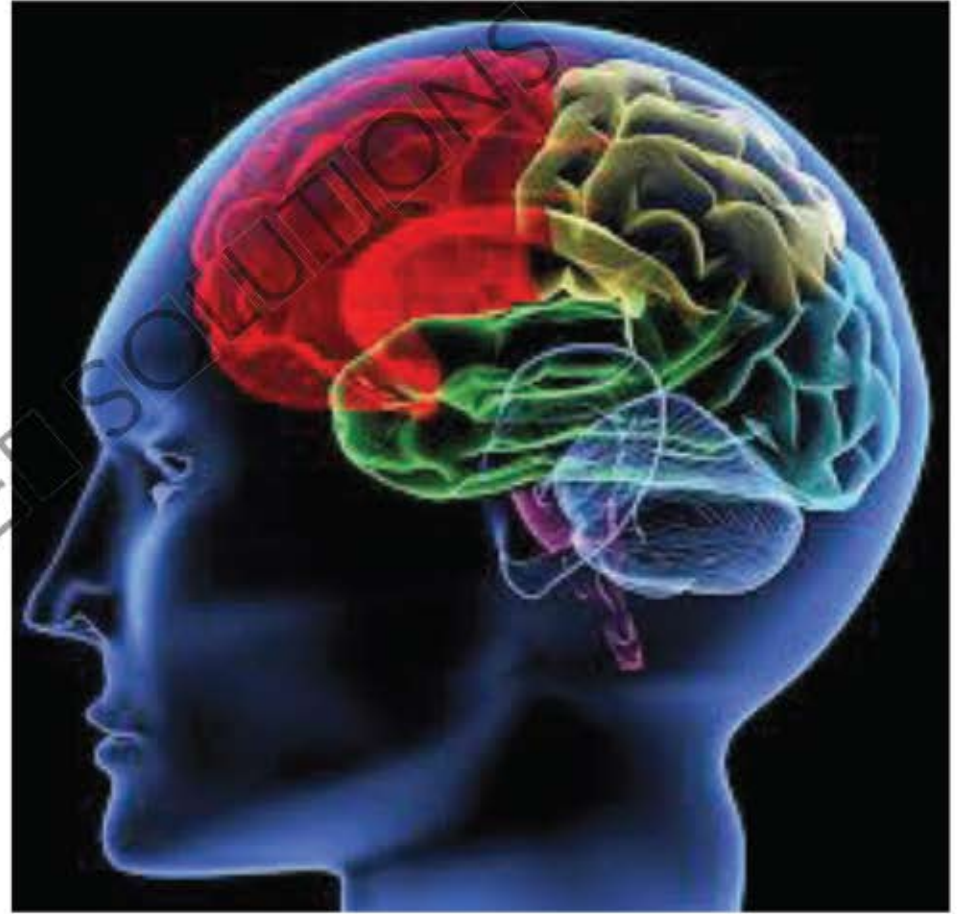
Non-linear

Fragmented

Lack of detail

New information

Affect is unexpected



When trauma occurs, there are very real changes in brain function that may affect a person's ability to make memory and to recount their experience.

Examples of Events that Might Trigger a Traumatic Response

Sexual Assault

Physical Assault
by a Stranger

Physical Assault
by an Intimate
Partner

A Car Accident

Accident that
causes serious
injury or death

Robbery

Significant
medical event



Trauma

An event that is experienced as terrifying, horrifying, or threatening and that is coupled with an actual or perceived lack of control.

Misapplication of Trauma Informed Practices

It is a misapplication
of trauma informed
principles to allow
potential evidence of
trauma to:

1. Influence the interpretation of a specific item of evidence;
2. Substitute for missing evidence;
3. To serve as a justification for not doing a full and thorough investigation;
4. Cause a biased belief in the veracity of one or more party.

Trauma Informed Practices are Designed to:

01

Encourage thorough and complete investigations

02

Assist with recollection

03

Assist with recounting

04

Reduce potential for false information

05

Minimize unnecessary re-traumatization

06

Reduce Bias

Trauma informed practices provide tools/techniques for interviewing and engaging with the Complainant, Respondent, and Witnesses.



Format/Structure of the Interview

Format of Questions



Approach to Clarification

A Trauma Informed Approach



Incapacitation

- Where alcohol or other substances are involved, incapacitation is determined by how the substance impacts a person's decision-making capacity, awareness of consequences, and ability to make informed judgments. ***Incapacitation is a state beyond drunkenness or intoxication, and a person is not incapacitated merely because they have been drinking or using drugs.***
- Incapacitation is not determined by technical or medical definitions. The question is whether a person has the physical and/or mental ability to make informed, rational judgments and decisions.

Incapacitation

Incapacitation is the physical and/or mental inability to make informed, rational judgments and decisions. Someone is incapacitated if they are asleep or unconscious. Someone can also be incapacitated by alcohol or other substances.

An individual violates this policy if the individual initiates and engages in sexual activity with someone who is incapacitated, and:

1. the individual knew the other person was incapacitated, or
2. a sober reasonable person under similar circumstances as the person initiating the sexual activity would have known the other person was incapacitated.

For purposes of this policy, silence and passivity *do not* signal consent.

Effective Consent cannot be obtained by...

- unreasonable pressure, which can generally be understood as conduct that pressures another person to “give in” to sexual activity rather than to choose freely to participate; factors that may be considered include (1) the frequency, nature, duration, and intensity of the requests for sexual activity; (2) whether and how previous requests were denied; and (3) whether the person initiating the sexual activity held a position of power over the other person;
- emotional intimidation, which can include (1) overtly degrading, humiliating, and shaming someone for not participating in sexual activity; (2) blackmail; and (3) threats to reputation;
- physical intimidation and threats, which can be communicated by words or conduct, and physical force.

Effective Consent is...

- informed;
- freely and voluntarily given;
- mutually understandable words or actions which indicate willing participation in mutually agreed upon sexual activity.

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Effective Consent

MIT students who engage in sexual behavior of any kind are expected to do so only with the effective consent of all parties involved. Doing otherwise constitutes sexual misconduct and is a violation of this policy.

Consent is ultimately about respecting another's autonomy to make choices about their own body, their own boundaries, and their own behavior. The fundamental purpose of the Institute's sexual misconduct policy is to reinforce the expectation that individuals give and receive this respect in their sexual interactions.



Consent

02

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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

Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.



Is it authentic?

Is the item what it purports to be?



Is it credible?

Is it convincing?



Is it reliable?

Can you trust it or rely on it?



What weight, if any, should it be given?

Weight is determined by the finder of fact!

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

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 during the hearing

The parties with the decision maker(s)
The parties with their advisors

Section 106.45(b)(1)(iii)

“

Title IX Coordinator, investigator, **decision maker**, or facilitator of informal resolution must receive training on...how to serve impartially, including avoiding prejudgment of the facts at issue, conflict of interest, and bias. This training material may not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

”

Section 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, 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

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

1. For or against complainants or respondents generally, or
2. An individual complainant or respondent



The Requirement of Impartiality

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Procedural Requirements for Hearings

Must be live, but can be conducted remotely

Cannot compel participation of parties or witnesses

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

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 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

Report

- Notice to school that prohibited conduct may have occurred
- Can be submitted by anyone
- Requires prompt outreach and response

Formal Complaint

- Notice to school that the impacted party (or their parents) wants the school to take action on a report
- Can only be submitted by the party themselves or Title IX Coordinator
- Requires review under Title IX

Conduct Falling Outside the Scope of Title IX

- Apply other institutional policies and procedures
- Ensure that those policies and procedures are compliant with VAWA/Clery, other intersecting federal and state laws



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

Section 106.30: Sexual Harassment

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).



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."



Title IX Requirements For Hearings

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01



Agenda

1

Title IX Requirements for Hearings

2

MA Campus Sexual Violence Act

3

Process Participants

4

Decision Maker Preparation

5

The Hearing

6

Making a Decision

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About Us

Vision

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

Mission

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



Martha Compton

She/her

Director of Strategic Partnerships and
Client Relations

Meet Your Facilitator

Martha consults and trains nationally on Title IX and student conduct and has previously served as a technical trainer for Department of Justice VAWA campus grantees. Martha is a former President of the Association for Student Conduct Administration, has been a faculty member for ASCA's Gehring Academy, and was part of the core team that developed ASCA's Sexual Misconduct Institute. A student conduct professional for over 20 years, Martha is also a former dean of students and has extensive experience in residence life, behavior intervention, emergency services, orientation, leadership, and working with student organizations.



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Decision Maker Training

Massachusetts Institute of
Technology - Day One

Martha Compton | October 2022