

**Civil Rights
Adjudication Training
for the
Texas A&M University System
(Refresher Training)**



Rick Olshak, Director of Title IX Compliance
February 2022

Civil Rights Adjudication Training

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Civil Rights Adjudication Training


Agenda

- System Regulation 08.01.01 and the Adjudicatory Process**
- The Role of the Adjudicatory Process**
- The Hearing Officer**
- The Hearing Process**
- Reading, Questioning, and Listening
- Credibility Determinations
- Consent and Predation
- Deliberations and the Finding of Fact**
- Sanctioning**
- Appeals

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Civil Rights Adjudication Training


System Regulation 08.01.01 and the Adjudicatory Process

08.01.01 Civil Rights Compliance 

Revised [July 7, 2020](#) (Effective [August 14, 2020](#))
 Next Scheduled Review: July 7, 2025
 Click to view [Revision History](#).

Regulation Summary

The Texas A&M University System (system) will provide equal opportunity to all employees, students, applicants for employment and admission, and the public. This regulation provides guidance to each member in complying with local, state and federal civil rights laws and regulations (laws) and related system policy.

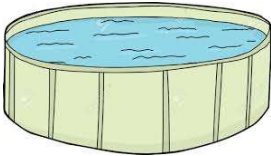
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System Regulation 08.01.01

Section 4.2.9 – Types (“Pools”) of Cases

- Title IX (4.2.10)
- Sex-based Misconduct (4.2.11)
- Other Civil Rights (4.2.12)



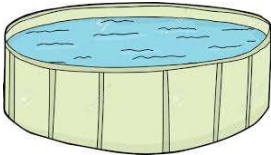
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System Regulation 08.01.01

Section 4.2.9 – Types (“Pools”) of Cases

1. Title IX (4.2.10)
2. Sex-based Misconduct (4.2.11)
3. Other Civil Rights (4.2.12)



(a) When a complaint involves allegations of misconduct that involve both sex-based allegations (1 and/or 2 above) and allegations of other civil rights violations (3 above), the process shall be conducted under the requirements established for sex-based offenses (1 or 2 above). Sex-based complaints include those complaints based on sex, sexual orientation, and/ or gender identity.

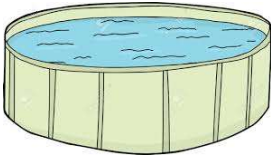
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3. Other Civil Rights (4.2.12)



(b) In addition to reviewing complaints against students for civil rights violations, members are expected to review allegations for possible violations of codes of student conduct and professional expectations of employees.

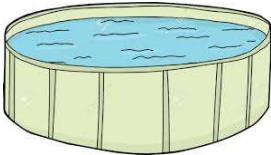
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(c) When unprofessional behavior by an employee that does not rise to the level of a violation of this regulation is discovered during the civil rights investigation and adjudication process, the information will be forwarded to the employee’s supervisor.

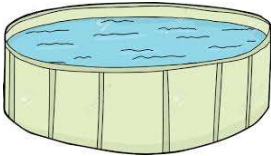
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(d) When possible violations of the code of student conduct by a student that do not rise to the level of a civil rights violation are discovered during the civil rights investigation process, and where there are no civil rights charges brought forward as a result of the investigation, the information will be forwarded for review to the student conduct process.

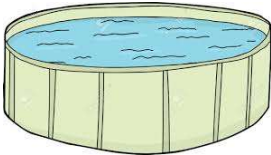
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System Regulation 08.01.01

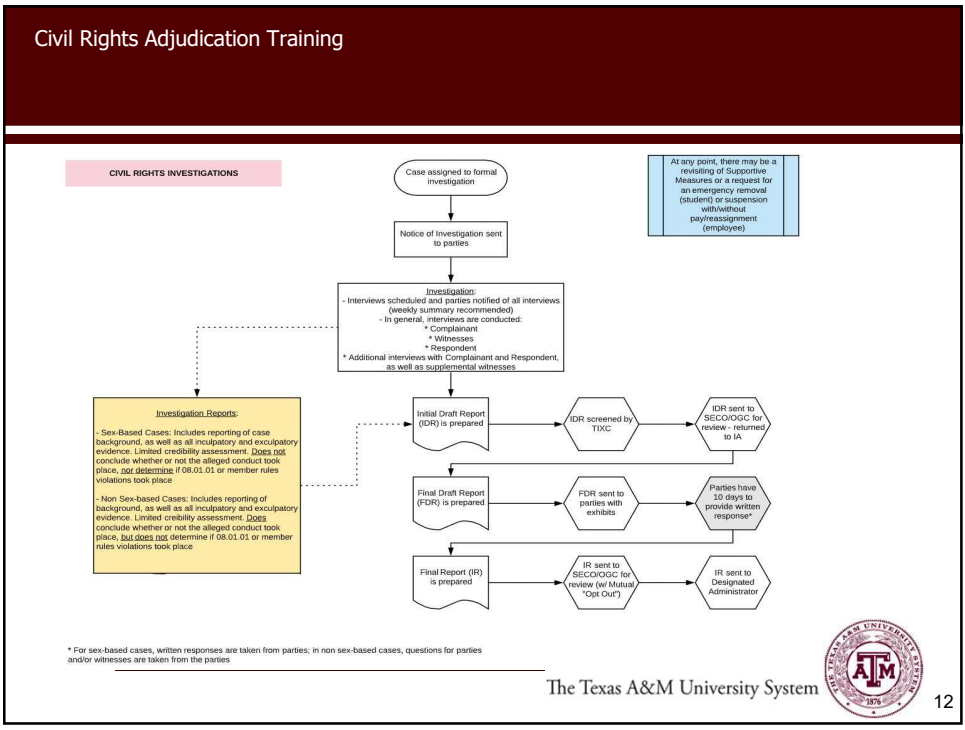
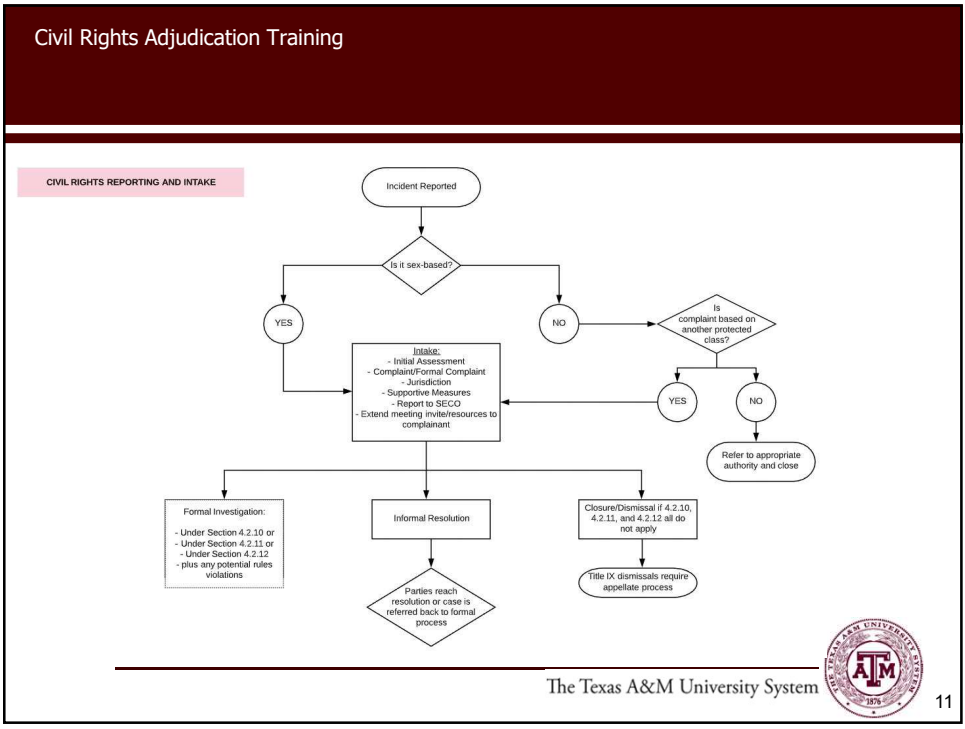
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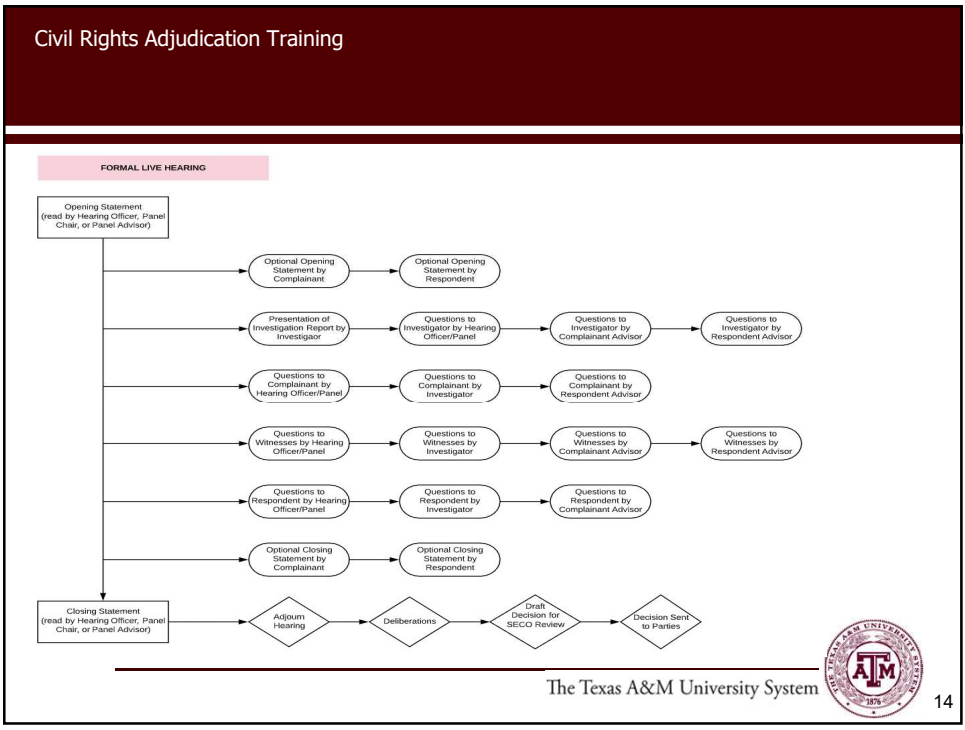
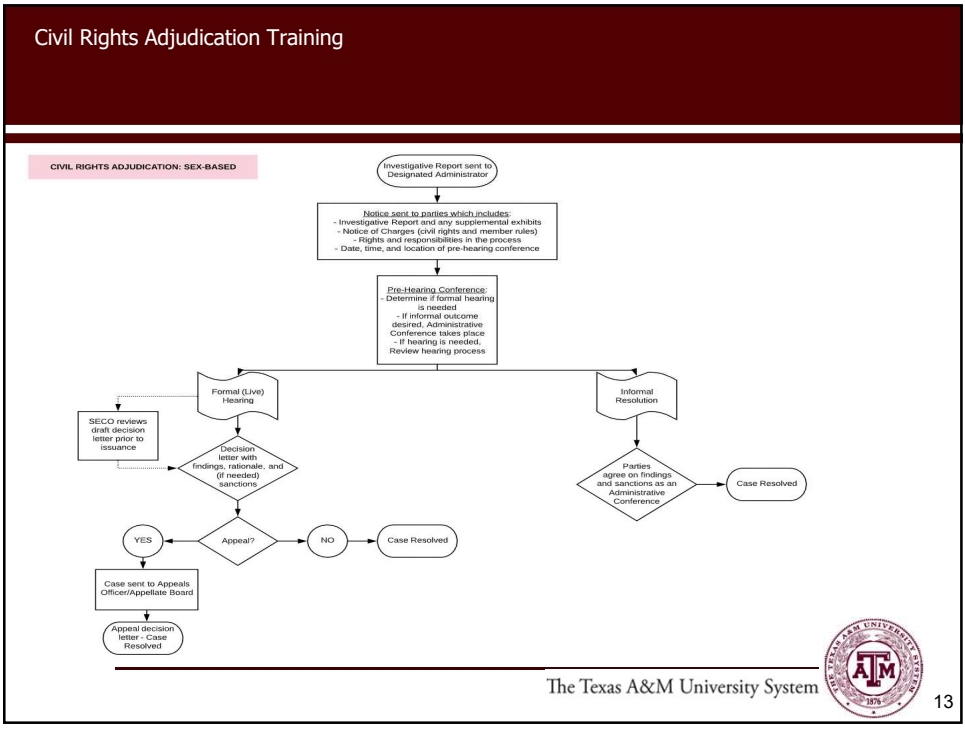
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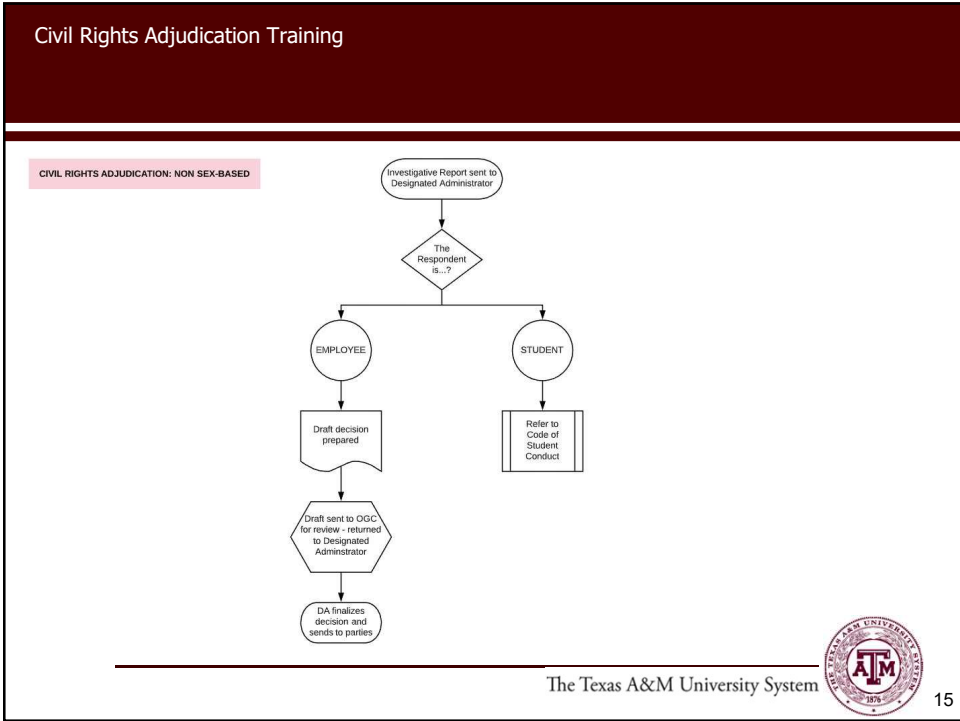


(e) When possible violations of the code of student conduct by a student that do not rise to the level of a civil rights violation are discovered during the civil rights investigation process, and where there is also going to be an adjudication of the civil rights violation (through a formal hearing, or through informal resolution methods that result in a finding and sanction), the case will be consolidated into one adjudication conducted under the processes described in 4.2.9(a).

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	TITLE IX (4.2.10)	SEX-BASED MISCONDUCT (4.2.11)	OTHER CIVIL RIGHTS (4.2.12)	STUDENT CONDUCT / EMPLOYEE PROFESSIONALISM
Supportive Measures	Yes	Yes	Yes	Yes
Requires	Formal Complaint	Report/Complaint	Report/Complaint	Awareness and Evidence
Standard of Evidence	Preponderance	Preponderance	Preponderance	Preponderance
Informal Resolution Allowed?	Yes – with SECO approval	Yes – with SECO approval	Yes – with SECO approval	Yes
Role of Investigative Authority	Collect and report inculpatory and exculpatory evidence	Collect and report inculpatory and exculpatory evidence	Collect and report inculpatory and exculpatory evidence; conclude if allegations are substantiated but not if OS.01.01 or member rules were violated	Refer to Member Rules and appropriate System Regulation
Adjudication	Formal (Live) Hearing	Formal (Live) Hearing	Written Review	Refer to Member Rules and appropriate System Regulation
Adjudicator	Hearing Officer or Hearing Panel (in role of DA)	Hearing Officer or Hearing Panel (in role of DA)	Designated Administrator	Refer to Member Rules and appropriate System Regulation
Allowed an Advisor?	Yes – provided by Member for formal hearing if no advisor is present	Yes – provided by member for formal hearing if no advisor is present	Yes	Yes
Role of Advisor	Cross-examination and Support	Cross-examination and Support	Support	Support
For a Finding...	Severe and Pervasive and Objectively Offensive (SPOO) OR Quid Pro Quo (employee respondents only)	Severe or Persistent or Pervasive and Objectively Offensive (hostile environment) OR Quid Pro Quo	Severe or Persistent or Pervasive and Objectively Offensive	Did it take place? Does it violate the published rule/expectation?
Appeal?	Yes	Yes	No	Refer to Member Rules and appropriate System Regulation

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System Regulation 08.01.01 and the Adjudicatory Process – Questions?




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The Role of the Adjudicatory Process



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The Role of the Adjudicatory Process (Hearings and Deliberations)

The role of the adjudicatory (hearing) process is:

- to review all the inculpatory and exculpatory evidence that is available,
- to see and hear the information presented, and
- to allow the parties to present information and to challenge information

The role of the deliberations process is:


- to reflect on both the information provided and your assessment of the credibility of the parties in determining what took place,
- to utilize your determination of what took place to assess whether the civil rights regulation and/or member rules were violated, and
- when determining that violations have taken place, to develop and impose sanctions that promote growth and development, repair harm caused, and protect the broader safety interests of the community.

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"Hear the case before you decide it."

- Judge Alfred P. Murrah, (b1904-d1975, U.S. Court of Appeals for the Tenth Circuit and Director of the Federal Judicial Center)


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The Role of the Adjudicatory Process (Hearings and Deliberations)


The successful hearing official:


- reviews all written information at least two days in advance of the hearing and notes areas for exploration and questioning,
- understands that their primary initial focus is to determine what happened,
- understands they can only determine what happened by considering all of the available evidence,
- relies only on the facts and information in evidence, and does not allow information outside of the hearing to factor into a determination,
- reaches credibility determinations based on observable facts and not on hunches or suspicions,
- never considers sanctioning or the implications of sanctions until a finding has been rendered, and
- creates sanctions that are intentional, designed for education and development, seek to repair harm, and to protect the members of the broader institutional community.

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The Role of the Adjudicatory Process – Questions?



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The Hearing Officer




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The Hearing Officer

Six Critical Qualities of the Hearing Officer/Panelist

- Detached/Objective with respect to subject matter
- Impartial/Unbiased when it comes to the parties involved
- Only considers facts that are in evidence; recognizing that what is considered “in evidence” may change up through the end of the hearing
- Understands issues of relevance with respect to questions and evidence
- Reaches a finding of fact before considering potential sanctions
- Imposes sanctions proportionate to the violation that are designed to educate, repair harm, and protect the community


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The Hearing Officer

Critical Skills / Knowledge Base of the Hearing Officer/Panelist

- Reading
- Listening
- Questioning
- How to conduct a pre-hearing conference
- How to conduct a live hearing
- Standards of evidence
- Types of evidence
- Credibility determinations
- Deliberations
- The finding of fact
- Sanctioning
- Appeals


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The Hearing Officer


Special Topics Relevant to Sex-Based Cases


- Sexual Harassment, Sex-Based Misconduct, and Rules Violations
- Consent and Predation
- Alcohol and Other Drugs
- Trauma and its Potential Affects on the Process

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The Hearing Officer – Questions?




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The Hearing Process




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The Hearing Process

Pre-hearing Protocol:

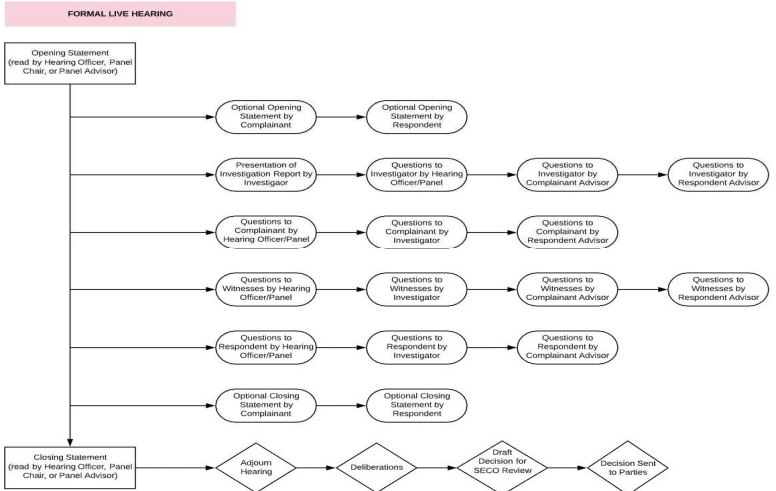
1. Attend to physical environment
 - a) Clean and protected spaces for Complainant/Advisor, Respondent/Advisor, Investigator, Witnesses
 - b) If one or more will be attending virtually, ensure technology is working
 - c) Ensure that recording technology is working
 - d) For those in physical space; water, tissues, paper, pen
2. For Panels, pre-hearing strategy
 - a) Determine areas of questioning
 - b) Assign areas of questioning and develop communication cues
3. Attend to Parties (Pre-Hearing, During Hearing, and Post-Hearing)
 - a) Waiting areas for parties
 - b) Bringing parties into the room
 - c) Handling breaks
 - d) Escorting parties out at the end of the hearing



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FORMAL LIVE HEARING



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    graph TD
      A[Opening Statement  
(read by Hearing Officer, Panel Chair, or Panel Advisor)] --> B[Optional Opening Statement by Complainant]
      A --> C[Optional Opening Statement by Respondent]
      B --> D[Presentation of Investigation Report by Investigator]
      C --> D
      D --> E[Questions to Investigator by Hearing Officer/Panel]
      E --> F[Questions to Investigator by Complainant Advisor]
      F --> G[Questions to Investigator by Respondent Advisor]
      E --> H[Questions to Complainant by Hearing Officer/Panel]
      H --> I[Questions to Complainant by Investigator]
      I --> J[Questions to Complainant by Respondent Advisor]
      E --> K[Questions to Witnesses by Hearing Officer/Panel]
      K --> L[Questions to Witnesses by Investigator]
      L --> M[Questions to Witnesses by Complainant Advisor]
      M --> N[Questions to Witnesses by Respondent Advisor]
      E --> O[Questions to Respondent by Hearing Officer/Panel]
      O --> P[Questions to Respondent by Investigator]
      P --> Q[Questions to Respondent by Complainant Advisor]
      R[Optional Closing Statement by Complainant] --> S[Optional Closing Statement by Respondent]
      D --> T[Closing Statement  
(read by Hearing Officer, Panel Chair, or Panel Advisor)]
      S --> T
      T --> U{Adjourn Hearing}
      U --> V{Deliberations}
      V --> W{Draft Decision for SECO Review}
      W --> X{Decision Sent to Parties}
  
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Responsibilities of the Hearing Chair

1. Pre-Hearing Organization
 - a) Meet with panel to determine any gaps existing within the report that require lines of questioning
 - b) Develop basic question outlines and assign questions to members of the panel; develop queues and signals to communicate needs
 - c) Discuss any concerns, panel member needs, or time restrictions prior to beginning the hearing



Role of the Hearing Chair

2. Hearing Protocols
 - a) Hearing outline
 - b) Hearings are **always** closed to the public.
 - c) Member **must** make an audio or video recording of the hearing; **must** make recording/transcript available for review for an appeal – copies and transcripts are not provided.
 - d) Complainant and respondent **must** have an advisor with them at the hearing, or the member will appoint one on the spot for the hearing, with no delay granted at that time.
 - e) Questioning of parties and witnesses by a party **must** be asked by the advisor; otherwise the advisor takes no active role in the hearing and may not answer on behalf of their party.
 - f) Questions **are to be directed** to the hearing officer or hearing panel chair, who will determine whether or not each question will be admitted into the hearing. If a question is **deemed repetitious or not relevant**, the decisionmaker(s) **must** explain the decision to exclude it. The hearing panel chair makes final determinations on the relevance of evidence and questions.



Role of the Hearing Chair

2. Hearing Protocols

- g) Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are **not** relevant, **unless** such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the alleged conduct, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- h) Attendance at a hearing may be in person or may be conducted through remote means, **provided that** all parties and the hearing officer or hearing panel can see and hear one another in real time during the course of the hearing.



Role of the Hearing Chair

2. Hearing Protocols

- j) Hearing officers/hearing panels **cannot** draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
- k) No hearing officer or hearing panel member can also serve as an investigative authority or appellate authority in the same complaint. Students (who are otherwise not full-time employees) **may not serve** in the role of investigative authority, hearing officer, hearing panel member, or appellate authority.
- l) When a hearing panel is being utilized to resolve a complaint, either a voting chairperson or non-voting administrative advisor who does not serve on the panel shall oversee the live hearing and deliberations, and assist in the development of a finding of fact, decision rationale, and, when appropriate, a sanction rationale in consultation with the panel members.



Role of the Hearing Chair

2. Hearing Protocols

- m) Following the hearing, the hearing officer or hearing panel will develop a draft decision and submit the draft to SECO within two (2) business days. SECO will have a maximum of three (3) business days to provide feedback to the hearing officer/hearing panel. Thereafter, the designated administrator will have a maximum of three (3) additional business days to issue a decision letter. The decision letter **must** be sent simultaneously to both/all parties.



Role of the Hearing Chair

2. Hearing Protocols

- n) Decision letters **must** include: 1. The identification of the allegations; 2. A description of the procedural steps taken from the receipt of a formal complaint through determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held if any; 3. Findings of fact supporting the determination; 4. Conclusion regarding the application of the member's conduct standards to the facts; 5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the member imposes on the respondent, and whether remedies designed to restore or preserve equal access to the member's education program or activity will be provided by the member to the complainant, and; 6. The member's procedures and permissible bases for the complainant and respondent to appeal.
- o) If for any reason there is reasonable cause for a member to delay the issuance of the decision letter, this **will** be communicated to the parties by the designated administrator or designee.




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Role of the Hearing Chair

2. Hearing Protocols

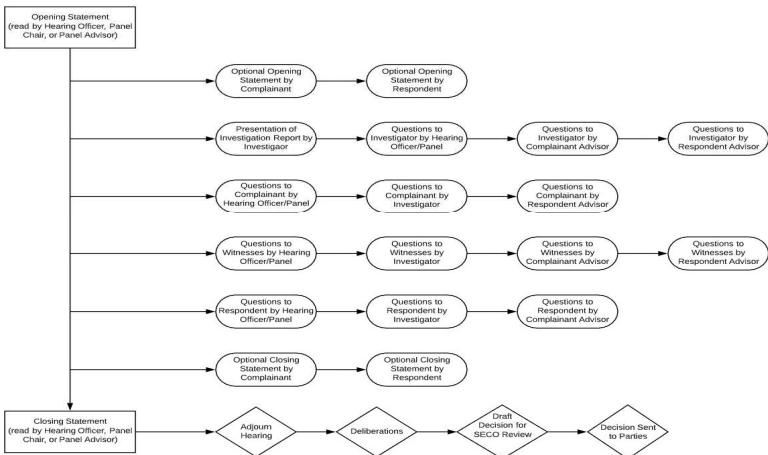
- p) If a student respondent withdraws or graduates from a member university pending the resolution of a complaint, the process will continue and, the member university will not issue a transcript on behalf of the student until the conclusion of the process.
- q) Member universities, upon request by another postsecondary educational institution, must provide to the requesting institution any determination that a student violated the member university's code of conduct by committing sexual harassment, sexual assault, sex-based misconduct, and/or dating violence, domestic violence, and/or stalking based on sex.



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FORMAL LIVE HEARING



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      OS[Opening Statement  
(read by Hearing Officer, Panel Chair, or Panel Advisor)]
      OOS1[Optional Opening Statement by Complainant]
      OOS2[Optional Opening Statement by Respondent]
      IR[Investigation Report by Investigator]
      QIP[Questions to Investigator by Hearing Officer/Panel]
      QCA[Questions to Complainant by Hearing Officer/Panel]
      QW[Questions to Witnesses by Hearing Officer/Panel]
      QR[Questions to Respondent by Hearing Officer/Panel]
      OCS1[Optional Closing Statement by Complainant]
      OCS2[Optional Closing Statement by Respondent]
      CS[Closing Statement  
(read by Hearing Officer, Panel Chair, or Panel Advisor)]
      AH{Adjourn Hearing}
      D[Deliberations]
      DR{Draft Decision for SECO Review}
      DS{Decision Sent to Parties}

      OS --> OOS1
      OS --> OOS2
      OS --> IR
      OS --> QIP
      OS --> QCA
      OS --> QW
      OS --> QR
      OS --> OCS1
      OS --> OCS2
      OS --> CS
      OOS1 --> OOS2
      IR --> QIP
      QIP --> QCA
      QCA --> QW
      QW --> QR
      OCS1 --> OCS2
      CS --> AH
      AH --> D
      D --> DR
      DR --> DS
  
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Role of the Hearing Chair

3. Evidence and Admissibility

- a) The Chair is responsible for making all determinations regarding admissibility and relevance; we have already covered admissibility as it relates to questioning and previous statements
- b) The formal rules of evidence (federal, state) do not apply to our proceedings, but rules crafted by OCR do apply
- c) If credible, it should be considered:
 - i. Evidence is any kind of information presented with the intent to prove what took place
 - ii. Certain evidence may be relevant to the credibility of the witness, but not to the alleged violation directly
 - iii. No limit on the amount/types of evidence provided it is relevant
- d) There is no restriction on parties discussing case or gathering evidence, except that supportive measures (such as no contact orders) must be followed and a party's attempt to gain information may not interfere with our attempt to gain information



Role of the Hearing Chair

3. Evidence and Admissibility

- e) The parties must have access to all evidence that directly relates to the allegations for reference and use at the hearing, but they must make a case for the relevance of the information
- f) While some initial relevance and credibility determinations have been made by the investigator in the investigative report, the final decision regarding relevance and credibility at the hearing rests with the Chair. This applies to all evidence, both inculpatory and exculpatory.
- g) Character statements and impact statements are generally not admissible at a hearing. Both are intended to aid decision-makers in determining a sanction in the event that a violation is found. These materials should be stored separately at the hearing and not opened unless a violation is determined.
- h) Statements and evidence regarding complainant's prior sexual history is not relevant unless it is provided to prove that someone other than the respondent committed the alleged violation or if it concerns previous incidents of the complainant's behavior with respect to the respondent that would tend to prove consent



Role of the Hearing Chair

3. Evidence and Admissibility

- i) Complainant's sexual history is not relevant even if they are the one to introduce it in the investigation or at the hearing
- j) This restriction on sexual history does not apply to the respondent's sexual history or any predisposition
- k) Regarding Advisor questioning (cross):
 - i. If an advisor's question has been addressed in the investigative report but not in the hearing, it should be permitted if it is relevant
 - ii. If an advisor's question has already been asked and answered in the hearing, the Chair should rule that the question is repetitive. If necessary, the Chair can reiterate the previously asked question and answer with the party receiving the question to verify the earlier answer; if an advisor is insistent, they must make a compelling argument to the Chair as to why re-asking a question is likely to yield a different response



Role of the Hearing Chair

4. Working with Party Advisors

- a) Take a direct but nonconfrontational approach with all party advisors; never take the situation personally
- b) The role of the Advisor has been described to the party and the advisor prior to the hearing; they will be reminded of this in the script
- c) In the event that an advisor acts outside of their prescribed role (interjecting, interrupting, answering on behalf of the party, or otherwise being serving as an active participant or being disruptive, the following responses should be used in order:
 - i. Reminder of the ground rules established for the Advisor; warning that further violations of ground rules may result in the advisor being removed from the hearing
 - ii. Short (10-minute) break; Chair explains during break that this is a final warning
 - iii. Suspension of hearing: Party may proceed through the hearing process with a new appointed advisor (assuming they do not have another present); party may seek a delay in the proceedings (Chair's decision)



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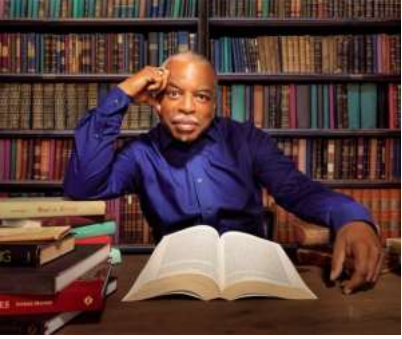
The Hearing Process – Questions?




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Reading



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Reading

- Read all reports and exhibits at least two days before the scheduled live hearing
- Take notes on what you read and:
 - Create a timeline of the event(s) if not specifically included in the report
 - Where do the parties/witness statements align? Does this suggest something about the event or timeline, and do you need to challenge any assumptions that you might be making?
 - Where do the parties/witness statements diverge? This aids in you in identifying areas of inquiry for the parties and witnesses
 - Is language used in the report by the investigator lacking clarity or specificity in any way? This aids you in asking questions of the investigator
 - Did the parties or witnesses make statements in the report that lack clarity or specificity in any way? This helps you identify questions for the parties
 - Examine the specific allegations made against the respondent; what questions do you need to ask the parties that would help you understand every relevant detail of the allegation – presume for this that you would be entering the hearing without any specific knowledge of what took place between the parties
 - Finally, did either party disclose information to others following the event(s)? What was said to whom, and what questions might you have of those witnesses?




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Active Listening

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Active Listening

- Physically attend to the party (body posture, eye contact, nonverbal behaviors)
- Watch for your own nervous/distracting behaviors
- Provide uninterrupted time for a party to speak
- Offer verbal and nonverbal cues to encourage speaking without interrupting
- When appropriate, summarize and re-state what you have been told
- Mirroring verbal and nonverbal behaviors without mimicking
- When questioning, remember to actively listen to the responses
- Focus on the person and their responses; do not let your mind wander or be distracted by what you want to ask next

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Questions about Reading and Active Listening?




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Questioning



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Questioning

Remember that in order for us to be able to reach a determination about any violations, we must first determine what happened... this requires us to have a complete understanding of the event(s) that took place.

For our purposes, you should imagine the event(s) as a blank canvas... your job is to fill this canvas with evidence so that you can accurately estimate what took place.

Remember that the investigative report gives you a head start on your understanding of the events (~70-90%); but only by asking questions can you gain a complete understanding of what occurred.



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Questioning**Open-ended questions provide:**

- Overall outline of the events
- The party's perspective
- "What happened...?" or "Please describe the event..."

Closed-ended questions provide:

- Important details (who, what when, where, how)
- Items for us to seek corroboration
- "How many..." or "Please describe the room..."

Open-ended questions provide:

- Motivation and intentions (why)
- Effect
- "What did you do when..." or "Please describe the thoughts you were having when..."



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Questioning Method**Draw a "picture" of the event(s)**

- Open/Closed/Open
- Listen to the answers!
- Don't ask leading questions (answers implied)
- Don't allow your questions to betray your opinion
- Beware multiple choice questions
- Avoid multiple part questions – ask in succession (but not "rapid fire")
- Use probing questions to seek "holes" in the story when they appear
- Use silence as a tool





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Questioning Method

Draw a "picture" of the event(s)

- Don't create answers (either in the hearing or in subsequent deliberations)
- Be aware of their verbal/nonverbal behavior
- Be aware of your own verbal/nonverbal behavior
- For Panels, all panels members should be involved in questioning, and questions/lines of questioning should be reviewed and even assigned prior to the hearing
- For Panels, all panel members should note the responsibility of the Chair to allow or refuse questions



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Questions about Questioning?




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Credibility Determinations

CREDIBLE SOURCE

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Credibility Determinations

How can you determine if someone is a credible/truthful source of information?

Many rely on their "gut" (sometimes referred to as a "BS Meter"); but what does this mean?

Credibility comes down to:

- Persuasiveness
- Relevance
- Reliability
- Bias

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Persuasiveness

A person is persuasive if:

- their story is believable
- their story is not countered by more persuasive accounts
- their story is able to sustain challenges

Persuasiveness is not about the number of witnesses corroborating information, but rather the quality of the witnesses corroborating information

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Relevance

A person is considered relevant if:

- their story related to the substance of the allegations (party to, witness of, knowledge before or after the fact, or patterns of behavior)
- it is of sufficient value to matter in the determination of a finding of fact
- be offered by an individual with actual knowledge of the substance of the allegations and is not hearsay

Relevance relates to the specific incident in question and not "like" incidents; we are not interested in comparing apples to oranges, nor even apples to other apples; we only have an interest in a single apple.

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Reliability

A person is considered relevant if:

- their story is consistent (or complementary) over multiple tellings
- it is of sufficient value to matter in the determination of a finding of fact
- be offered by an individual with actual knowledge of the substance of the allegations and is not hearsay

Relevance relates to the specific incident in question and not “like” incidents; we are not interested in comparing apples to oranges, nor even apples to other apples; we only have an interest in a single apple.

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Bias

All people are biased. In providing information, it is important to own the bias that is present and to minimize its impact on the relaying of information.

For our purposes, we are concerned about three types of bias

- Bias towards or against people involved in the incident by a reporter of information
- Bias towards or against subject matter involved in the incident by a reporter of information
- Bias brought into a hearing by an adjudicator


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Bias

Bias towards or against people involved in the incident by a reporter of information:

- What is the relationship between the reporter of information and the parties involved?
- What is the relationship between the reporter of information and the institution?
- While having a relationship with parties involved in an incident does not suggest that the person will be deceitful to aid or hurt the person's case, it may well "color" the person's recollection of the incident. Adjudicators can and should inquire about the strength of the relationship and seek to ask questions about portions of the incident that people may be less likely to prepare in advance.

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Bias


Bias towards or against subject matter involved in the incident by a reporter of information:

In some instances, people's perceptions may be impacted by a bias regarding the conditions of the incident. Rather than trying to mislead an investigator, some reporters of information simply rely on assumptions about the people or circumstances involved in an incident, based on their own biases. When investigators hear people speaking in general terms about a situation, they should test the person's re-telling with more specific questions.

It is important to seek definitions on terms such as:

"Hooked up"	Stalking
"Creepy"	Dating
"Had sex"	Abusive

Whenever reporters of information express strong feelings about a topic, it is important to seek to differentiate their feelings from their observations and/or involvement.

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Bias

Bias brought into an investigation by an investigator:

Adjudicators are supposed to be “impartial”, yet there is no such thing as pure objectivity in human beings. As an adjudicator, it is important to be aware of the issues that serve as “hot buttons” for you and provoke emotional responses. Be cognizant of your bias as you hear the case, or in exceptional circumstances ask to be removed from the case.

Additionally, one common short-coming of adjudicators and appellate officers is their manufacturing of possible alternatives when attempting to arrive at a conclusion. Instead of listening to the information presented and weighing it appropriately, a common temptation is to begin “supposing” about what took place by introducing facts not offered by the parties or witnesses. It is critical that adjudicators only utilize the information provided to them in reaching a conclusion.

When we refer to “facts in evidence,” we mean those provided by the parties, the witnesses, or by the physical evidence.

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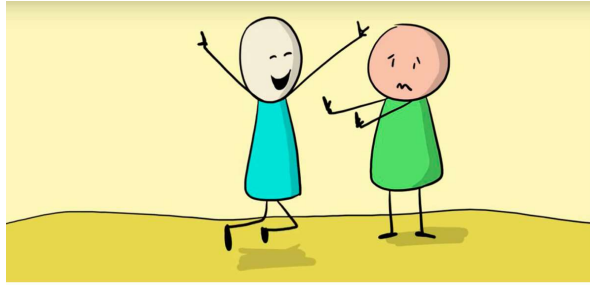
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Questions about Credibility Determinations?



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Consent and Predation



This section includes materials adapted from materials provided by the Association of Title IX Administrators (ATIXA)

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Consent and Predation

What is consent?

Under System Regulation 08.01.01...

Consent – **clear, voluntary and ongoing agreement** to engage in a **specific sexual act**. Persons **need not verbalize their consent** to engage in a sexual act for there to be permission. Permission to engage in a sexual act may be indicated through physical actions rather than words. A person who is asleep or mentally or physically **incapacitated**, either through the effect of drugs or alcohol or for any other reason, or whose agreement was made by threat, coercion, or force, cannot give consent. Consent may be **revoked** by any party at any time.

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Consent and Predation

Three types of sexual interactions

1. Wanted and consensual sex
2. Unwanted but consensual sex
3. Unwanted and nonconsensual sex

Of these, only the **last** represents a violation of regulations/rules



Civil Rights Adjudication Training

Consent and Predation

The Consent Construct (ATIXA) – Three consent questions

1. Force – was force use by the respondent to obtain sexual access?
2. Incapacity – did the respondent know, or should the respondent have known, that the complainant was incapacitated?
3. Consent – what clear words or actions by the complainant gave the respondent permission for the specific sexual activity that took place (how did you know that you had consent)?



Consent and Predation

The Consent Construct (ATIXA) – Three consent questions

1. Force – 4 types

- a) Physical Violence (hitting, restraining, pushing, etc.)
- b) Threats (anything that gets person to do something they would not absent the threat)
- c) Intimidation (implied threat that causes reasonable fear)
- d) Coercion (act, process, or power of compelling a person to take an action, make a choice, or allow an act to happen that they would otherwise not choose or give consent to)

For Coercion, consider unreasonable actions that seek to deprive someone of the ability to withhold consent (consider Isolation, Frequency, Intensity, Duration, Ability to control environment, Ability to clearly state one's choices); Small "c" versus capital "C"

Consent and Predation

The Consent Construct (ATIXA) – Three consent questions

2. Incapacity

a state in which a person, due to a disability, the use of alcohol or drugs, being asleep, or for any other reason, is not capable of making rational decisions about consent to sexual activity and recognizing the consequences of their decision.

Incapacity is fact dependent. When dealing with potential incapacity due to the consumption of alcohol, we compare an approximated blood alcohol level (when available) with the behaviors presented as described by all of the parties and witnesses. Blackouts (no memory of who, what, when, where, why, or how for a designated time) and partial blackouts (brownouts, "spotty" or fragmented memories) are frequently indicators of a lack of capacity.



Consent and Predation

The Consent Construct (ATIXA) – Three consent questions

2. Incapacity

Forms of incapacity:

- Alcohol or other drugs
- Mental/Cognitive impairment
- Asleep or unconscious
- Injury

Consent and Predation

The Consent Construct (ATIXA) – Three consent questions

2. Incapacity

Questions:

- Was the person incapacitated at the time of sex?
 - Could they make rational choices?
 - Could they appreciate the consequences of their actions?
 - Could they know who, what, when, where, how, and why?
- Did the respondent know of the incapacity?
- Or – Should the respondent have known of the incapacity based on all the circumstances (reasonable person)?



Consent and Predation

The Consent Construct (ATIXA) – Three consent questions

2. Incapacity

Evidence of Incapacity:

- Slurred speech
- Impaired motor functions
- Shaky equilibrium, stumbling
- Passing out
- Throwing up
- Appearing disoriented
- Unconscious
- Known Blackout

Consent and Predation

The Consent Construct (ATIXA) – Three consent questions

2. Incapacity

"Should have known" – Did the respondent:

- Use alcohol and/or drugs with the complainant?
- Provide alcohol and/or drugs to the complainant?
- Have awareness of a complainant's incapacity?
- Have a familiarity with the complainant from previous interactions? If so, how was this event similar or different from previous events?



Consent and Predation

The Consent Construct (ATIXA) – Three consent questions

3. Consent

- a) What clear words or actions by the complainant gave the respondent permission for each sexual act that took place? If words and actions are established, the interaction was consensual. If there are no words or actions established, the interaction was nonconsensual.
- b) Yes means yes. No means no. Nothing means no. Silence or inactivity does not equal consent.
- c) Consent cannot be inferred from the manner in which a complainant dresses, from purchasing items, for conducting favors, or from using alcohol and/or drugs.

Consent and Predation

The Consent Construct (ATIXA) – Three consent questions

3. Consent

- d) Consent must be given immediately prior to or contemporaneously with the sexual or intimate activity.
- e) Consent can be withdrawn at any time, as long as the withdrawal is clearly communicated – verbally or nonverbally – by the person withdrawing it.
- f) The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.



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Consent and Predation

Consent Complications

- Lack of relationships and understood norms of behavior
- Past interactions with one another that may be transposed onto the current encounter
- Past interactions with others that get transposed onto a new partner
- Influence of alcohol and/or drugs
- Alternative Lifestyles and Power Exchanges (BDSM, con/noncon, etc.)



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Consent and Predation

Predation: an intent to engage in acts of misconduct prior to their occurrence demonstrating premeditation, planning or forethought, and is reflected in communicated intent (physical, verbal, visual, or written), threats directed at a party, attempts to incapacitate a party, attempts to isolate a party, utilizing physical force or violence, or other actions that a reasonable person would construe as a pre-meditation to engage in actions that are unwanted by/against the recipient. Committing any of these actions with an individual under the age of consent is also considered predatory.

Typically, predation is identified through the use of force, threats, coercion, and behaviors designed to isolate a party. Consider any evidence of planning, the use of pressure, creating an environment encouraging the over-consumption of alcohol, and other factors indicating that the respondent created an environment where consent could not be meaningfully withheld (see previous section on Force).



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Questions about Consent and Predation?



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Deliberations and the Finding of Fact




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Deliberations

Order of deliberations:

- What happened? Develop a narrative of what you believe took place, based solely on facts in evidence, and accounting for all inculpatory and exculpatory information presented
- Make credibility determinations where conflicting information is present
- Develop a finding of fact (a summary of what happened that includes specific conclusions about behavior)
- Based on the finding of fact, is there a violation of published rules and regulations?
- If a violation is found, proceed to sanctioning. Note: Sanctioning is never to be discussed prior to the establishment of a finding of fact.


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Deliberations

Writing an effective finding of fact:

- Should be reasonably brief (in most cases) yet also highly specific as to what took place (one to two paragraphs, based on allegations)
- Should provide sufficient information to allow either party to appeal, as well as assist an appeals administrator/panel in understanding your conclusions
- Should be written towards both/all parties; do not personalize
- Remember your potential audiences...
 - Complainant
 - Respondent
 - Appellate Officer(s)
 - OGC/SECO
 - Lawyers/advisors
 - Parents
 - Media/Social Media
 - Judge
 - Department of Education

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Sample Finding (Fake)

After reviewing all of the information available, I have determined that Ms. Smith is in violation of the following University Rules and Regulations: Acts of Dishonesty, Threatening and Intimidation.

Findings of Fact

My specific findings are as follows:

1. You engaged in the harassment of Mr. Jones via electronic means despite being told to leave him alone, causing him to fear for his safety.
2. Your communications with Mr. Jones were of a hostile and threatening nature.
3. Your story was not credible.



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Sample Finding (Actual)

After reviewing all of the information available, I have determined that Ms. Smith is in violation of the following University Rules and Regulations: Acts of Dishonesty, Threatening and Intimidation.

Findings of Fact

My specific findings are as follows:

1. Ms. Smith engaged in intentional communication with Mr. Jones via electronic means despite numerous verbal and text requests on the part of Mr. Jones for this communication to cease. After being blocked by Mr. Jones, Ms. Smith used the devices of other individuals to continue communicating with Mr. Jones. Ms. Smith's continual refusal to abide by Mr. Jones' wishes created an ongoing disruption to his daily life and provoked a reasonable fear for his own well-being.
2. Ms. Smith's written communications with Mr. Jones were of a hostile and threatening nature, repeatedly referring to Mr. Jones in disparaging terms (i.e., "asshole," "rapist," and "faggot."). Further, the written communications included threats to Mr. Jones' property (car) and suggestive that something physically "unfortunate" might happen to him.
3. Ms. Smith's initial account to police was not fully accurate, and her story continued to "evolve" over time in the telling. Ms. Smith's statements to police, investigators, and this hearing officer were inconsistent, contradictory, and sought to minimize both the frequency and nature of her ongoing contact with Mr. Jones, as well as denying the existence of any threats..



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Questions about Deliberations or the Finding of Fact?



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Sanctioning



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Sanctioning

1. Sanctioning Goals
2. Sanctioning Formula
3. Sanctioning Mechanics
4. Sex-Based Sanctioning under 08.01.01
5. Case Vignettes



Sanctioning Goals

1. Education and Development
2. Restoration (reparation of harm to individual and the academic community)
3. Balance between individual being sanctioned and the academic community

Our stated goals for sanctioning do not include punishment, nor do we explicitly reference deterrence. This is not to say that sanctions we impose are not perceived as punishments or serve as deterrents, but simply that these are never the explicit drivers of our sanctions. ALL sanctions should ALWAYS be attached to intended learning outcomes.




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Sanctioning Formula

1. Nature of the behavior +
2. Prior disciplinary history of respondent +
3. Aggravating factors +
4. Mitigating Factors

= Sanction

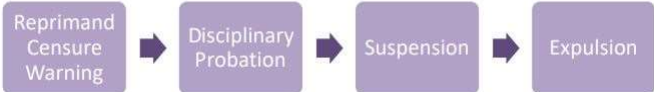
Sanctions are the creation of learning outcomes intended for the situation and the behavior; “active” and “inactive” sanctions are then selected to achieve the intended outcomes. These intended outcomes should be communicated via the decision letter as a rationale for the sanction.

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Inactive Sanctions

Inactive sanctions are official, written university responses to misconduct that generally do not require any action by the respondent. These sanctions (with the exception of suspension and expulsion) generally do not explicitly serve as teaching tools, but instead provide a baseline for sanctions for any future conduct violations.



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graph LR; A[Reprimand  
Censure  
Warning] --> B[Disciplinary  
Probation]; B --> C[Suspension]; C --> D[Expulsion]
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It is important to emphasize that disciplinary suspensions should always be conditional on, and reinstatement only allowed upon, successful completion of all assigned active sanctions.

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Active Sanctions

Active sanctions are generally those designed to achieve learning outcomes by the respondent by providing them with information and/or experiences that help them deepen their understanding of community expectations and cause them to reflect (in writing) on the implications of their own actions.

Examples of active sanctions include:

- Assessment, treatment, and/or education for alcohol and other drug issues
- Workshops (e.g., healthy relationships, conflict management, anger management)
- Counseling assessment
- Interviews and educational essays
- Guided reflection papers



Sanctioning Mechanics

1. Inactive Sanction creates the context of the relationship
2. Active sanctions are developed to address each desired learning outcome
3. The practical application of your sanction matters; utilize sanctions already in existence as much as possible, and work with appropriate personnel prior to communicating a sanction
4. The language of your sanction matters; be clear and specific, and leave nothing to chance
5. Write a sanction rationale that clearly communicates the intended outcomes of the sanction



Sample Language – No Contact (as a sanction)

Party A is restricted from having any contact with (Party B) through (date). This includes contact initiated through any means (telephone, correspondence, personal visits, e-mail, social media, etc.) as well as contact initiated by any third parties on your behalf or at your request. This restriction applies both on and off campus. Party A is prohibited from speaking with Party B at any time and must make accommodation in academic and social pursuits to avoid being in the same room or within fifty feet of this person. Failure to abide by this restriction will result in immediate and serious disciplinary action.



Sample Language – Research Paper

Party A is required to write a research paper on (cite specific topic, providing research questions). This paper must be no less than 1,000 words in length (typed, double-spaced) and must be submitted to (practitioner) by no later than (date). Party A must include their name and case number in a top right corner header of the paper. Be advised that completion of the paper includes citations from no fewer than three published sources. If utilizing journal articles or information from the internet, copies of the articles must be included with the paper. All sources must be appropriately cited. Be advised that Party A may not utilize this to justify their own actions or evaluate the actions of others. The paper should utilize appropriate language, grammar, and spelling.



Sample Language – Reflection Paper

Party A is required to write a paper reflecting on their actions leading to this sanction. This paper must be no less than 500 words in length (typed, double-spaced in paragraph form) and must be submitted to (practitioner) by (date). Party A must include their name and case number in a top right corner header of the paper.

This paper should address the following questions/issues:

- A. Reflect on the policies you were found in violation of: why do they exist? What purpose do they serve?
- B. How was your behavior inconsistent with the University's expectations?
- C. If placed in the same situation again, how would your actions be similar or different?
- D. Why would your actions be similar or different?
- E. What is the most important thing you have learned from this experience?

Be advised that Party A may not utilize this to justify their own actions or evaluate the actions of others. The paper should utilize appropriate language, grammar, and spelling.



Sample Language – Policy Review


Party A is required to write a written review of the (name) policy as outlined in (source). The review must be typed, double-spaced, and submitted to (practitioner) by no later than (date). Party A must include their name and case number in a top right corner header of the paper. The review must be no less than 500 words in length. In the review, Party A must summarize the policy and explore how it relates to the violations in question. State the rationale behind the policy and elaborate on the consequences for members of the (institution) community if the policy did not exist. Party A may not utilize this to justify their own actions or evaluate the actions of others, nor may this paper promote a philosophy which is in direct conflict with the law or with University regulations. The paper should utilize appropriate language, grammar, and spelling. All sources must be appropriately cited.



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Sample Language – Letter of Apology


Party A is required to write a letter of apology to (Party B). This letter should be no less than 250 words in length (typed, double spaced) and must be submitted to (practitioner) by no later than (date). In this letter, Party A must reflect an understanding of the inappropriateness of their actions and the effect it had on the letter’s recipient. Be advised that this letter will be screened by staff prior to being forwarded to the recipient. A copy will also be maintained in Student A’s conduct records. Be further advised that Party A may not utilize this to justify their own actions or evaluate the actions of others. The paper should utilize appropriate language, grammar, and spelling.

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Sex-Based Sanctioning

1. See appendix to System Regulation 08.01.01

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Case Vignette A

Student A is found to have fondled Student B without their consent (sex-based misconduct). The touching was skin to skin, but did not involve penetration. No force was used, but Student B was determined to be incapacitated (from alcohol) while Student A was mildly intoxicated.

Student A is a junior, and had two alcohol violations during their freshman year but no violations since.

Student B cites being fearful of possible Student A retaliation (for reporting the incident) and seeks a contact restriction.



Case Vignette B

Employee A is found to have sent explicit self photos of a sexual nature to Employee B (colleague in another department). Two photos were texted on a Wednesday night and the following morning Employee B expressed displeasure via text message. Employee A initially played it off as an accident, explaining the photos were intended for someone else. But the following weekend another explicit image was sent, along with the text "You sure you don't want to hook up?"

When questioned by investigators, Employee A asserted that all three photos and the text were sent at the same time, but there must have been a network glitch that delayed the last image and text. A could offer no evidence in support of this claim, and in the hearing acknowledged being drunk on two occasions and sending the images. This is determined to be sex-based misconduct (persistent and objectively offensive).



Case Vignette C

Student C is determined to have engaged in harassment of Student D. Student C knowingly shared false rumors via social media about Student D's disability (they have a documented disability but the rumored allegations are untrue, related to preferential treatment) and was determined to have posted "anonymous" comments on a public site about Student C's sexuality, outing them as bisexual. There is a history of hostility between the two parties, though this is the first complaint that has emerged. Student C has no disciplinary history.

Student D is outraged that Student C has publicly "outed" their sexuality, as their family was unaware prior to the postings but has since become aware. Student D has also expressed frustration that rumors of preferential treatment persist even though they are unfounded. Student C denies wrongdoing, but a police investigation determined that the messages were all posted under the Student C's credentials. Student C claims their password must have been stolen.



Case Vignette D

Employee C is determined to have repeatedly and routinely made disparaging comments about Employee D, whom is supervised by Employee C. Employee C acknowledges making the comments to other employees (also under Employee C's supervision), all related to Employee D's race and ethnicity. The behavior is determined to be persistent, pervasive, and objectively offensive. Employee C claims that these comments were all said privately and in jest, and that Employee C has always been fair with Employee D in terms of supervision. Employee D feels that Employee C has publicly humiliated by Employee C by their making these comments privately to others across the department on an ongoing basis. Two different staff members who had heard the comments let Employee C know that these things were being said. Employee C has no disciplinary history and receives positive evaluations, but has a reputation among the department staff for being professionally inappropriate.



Civil Rights Adjudication Training

Questions about Sanctioning?




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Appeals



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Appeals

Role of Appeals Process:

Appeals processes exist to review whether or not the original hearing/review was conducted fairly. They do not serve as new (de novo) hearings, nor do they consider any information outside of the scope of the appeal.

As a result, deference is always given to the original decision, which is why the burden of proof shifts to the appealing party. Appeals boards (and administrators) are not authorized to supplant their judgment over the original decision maker(s) without cause, as defined in the grounds for appeal.

In Title IX appeals, best practice is to grant one appeal proceeding for all parties. The reporting party and the responding party are to be granted equitable appeal rights.



Appeals

Grounds for Appeal:

- (a) a procedural irregularity that affected the outcome;
- (b) new evidence, not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome. The new evidence must be provided at the time of appeal with the appropriate member appeals form;
- (c) the Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome;
- (d) the appropriateness or severity of the sanctions.




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Appeals

Procedural Irregularity:

- the appellant is contending that a substantive error was committed as a part of the student conduct process that deprived the appellant of a fair hearing of the case. This would include but not be limited to a substantiated bias, an arbitrary and capricious finding, a material deviation from established procedures, etc.

There is a difference between an error and a substantive error.

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Appeals

Procedural Irregularity Example #1:

- The appellant argues that they were provided four days notice for a hearing when the regulation guarantees five days notice. The appellant does not indicate that this made any difference in the case, but argues that any error is substantive enough to void the decision.

This is not a case of a substantive error.

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Appeals

Procedural Irregularity Example #2:

- The appellant argues that evidence was allowed that should not have been at the hearing. The appellant states that a witness who was the only person to raise a specific fact did not attend the hearing and allow for questioning. Yet the panel included this information as a basis for its decision.

If corroborated, this may be a case of a substantive error.

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Appeals

New Evidence:

- the appellant is contending that there is new information that was unavailable to the appellant at the time of the original proceeding, and that this information would have substantially impacted the outcome of the proceeding. The appellant must include the new information with the appeal. Note that this criteria is extremely challenging for individuals who choose or fail to attend or participate in the original proceeding they are appealing.

The key word of this definition is “unavailable”; if the appellant was aware of the information prior to the hearing and able to gain access to the information through reasonable effort, this condition would not apply.

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Civil Rights Adjudication Training

Appeals

New Evidence Example #1:

- The appellant argues that they chose not to participate in the civil rights investigation and live hearing because of an ongoing criminal investigation. After the hearing they were notified that the criminal matter has been dismissed, so they file an appeal stating they are now willing to submit their new information.

Their information is not "new." This is not a case of new evidence.

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Appeals

New Evidence Example #2:

- The appellant states that following the hearing they were approached by a friend who stated that they witnessed the incident but were not aware that any disciplinary proceedings were going on. Their testimony would be supportive of the appellant's case. The new witness writes and signs a statement with the new information and submits it with the appeal.

Provided the identity of the witness can be validated and that the information would be of sufficient weight to affect the outcome, this would be considered new evidence.

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Appeals

Conflict of Interest/Bias:

– the appellant is contending that the Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome;

This cannot be a generalized claim of bias but must demonstrate cause that indicates a lack of impartiality on the part of the official.



Appeals

Conflict of Interest/Bias Example #1:

– The appellant states that one of the panel members appeared at a campus “take Back the Night” march and disclosed their own sexual assault experience to other survivors several months prior to the hearing; the goal of the brief commentary was to urge survivors to get support and to report what took place. According to the appellant, this type of public advocacy makes it clear that the panel could not hear the case in an unbiased manner.

Assuming this is the entirety of the argument for bias, the ground is unfounded. Simply sharing a personal story does not establish an inability to remain sufficiently impartial to be able to hear facts and render a decision. This does not establish a conflict of interest or bias.



Appeals

Conflict of Interest/Bias Example #2:

– The appellant states that the investigator told them during two separate interviews that the facts seemed to support the idea was lying, and the investigator encouraged the appellant to “come clean” in order to receive better consideration in the adjudicatory process. The investigator confirms that they made this comment twice hoping to secure a confession.

Although the information does not specifically address the events under review, it raises significant questions as to the neutrality of the investigator. An appeals administrator/panel may remand the case back to the adjudicatory authority, who may in turn request a new investigation.



Appeals

Appropriateness/Severity of Sanction:

– the appellant is contending that the sanction is not appropriate to the findings of the case.

Sanctions are dependent upon the nature of the offense, the previous conduct history of the student, and any mitigating and/or aggravating factors. Sanctions may vary widely, even for similar offenses. Sanction rationales are to be included in decision letters to aid both student understanding and to educate the appeals officer or board. Remember that the A&M System has established minimum inactive sanctions in sex-based discrimination cases that are always to be followed except in cases with significant mitigating factors; mitigating factors must be established in the finding of fact or on basis of appeal.



Appeals

Appropriateness/Severity of Sanction Example #1:

– The appellant argues that a one-year suspension from the university is disproportionate because they did not commit the offense for which they are being sanctioned.

The finding of the case is a violation, so no appellant can re-argue the finding by appealing the sanction. This is not a case on an overly severe sanction.



Appeals

Appropriateness/Severity of Sanction Example #2:

– The appellant argues that assigning the respondent the sanction of volunteering at a local shelter for domestic violence victims is inappropriate, given that the respondent was held responsible for dating violence, thus placing the respondent into contact with other victims of dating and domestic violence, and because the complainant regularly uses the services of the shelter, thus raising the potential of a violation of a no-contact order issued by the same hearing panel.

Placing a respondent and complainant from a dating violence case together is both not recommended practice and potentially dangerous. Placing the respondent into mandated contact with other survivors is also strongly discouraged. Assuming the cited facts are correct, this would be considered an inappropriate sanction.



Questions about Appeals?

