

September 22, 2022

**Title IX Hearing Training
(Day 2)**

INCompliance

Disclaimer #1

- Change is constant in this field.
- Expect new guidance and case law to be issued regularly after this training.
- Check with legal counsel regarding specific situations in light of the dynamic nature of requirements.

Posting These Materials

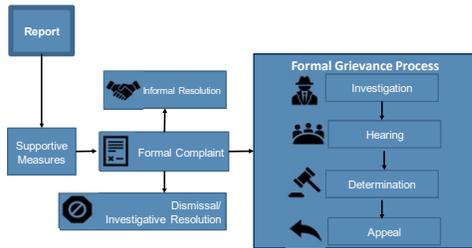
- Yes, you have permission to post these materials on your website as required by 34 C.F.R. 106.45(b)(10)(i)(D).

Today's Agenda

- Reminders to Help Structure Hearing
- Review of Scenario
- Planning Questions for Parties and Witnesses
- Questioning Parties and Witnesses
- Debrief
- Deciding the Case

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Overview of the Process



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Your Roles

- Team Tessa: Cheryl, Darryl, Llinee, and Alecia
- Team Michael: Lizzie, Mona, Tracy, and Bob

How can others participate with us?

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Role: Advisor

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

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Consent: University Definition

- See Policy, page 2

Consent: An affirmative agreement through clear actions or words to engage in intimate and/or sexual activity. Individuals giving the consent must act freely, voluntarily, and with understanding of their actions. Consent can be withdrawn at any time. A person cannot give consent if the person is mentally or physically incapacitated such that the person cannot understand the fact, nature or extent of the sexual situation. Similarly, a person cannot give consent if force (expressed or implied) duress, intimidation, threats or deception are used on the person. Silence or the absence of resistance does not necessarily imply consent. Consent to some sexual acts does not imply consent to other acts, nor does prior consent to sexual activities imply ongoing future consent with that person or consent to that same sexual activity with another person. Consent does not exist when one knew or should have known of the other's incapacitation. A factor in determining consent is whether an individual has taken advantage of a position of influence or authority. Proof of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on the University to determine whether this Policy has been violated.

Evidence of Consent?

What words or actions did complainant use to convey consent/non-consent?

- Must examine sexual contacts, acts in detail

Was complainant capable of consenting?
(Asleep? Passed out? Not understanding what was happening?)

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More Evidence of Consent?

Who took off what clothes?
 Who provided the condom?
 Who initiated physical contact?
 Who touched who where?
 "They gave consent" = What did you say to them,
 and what did they say to you?

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Incapacitation: University Definition

- See Policy, page 3

Incapacitated or incapacitation: A state in which rational decision-making or the ability to consent is rendered impossible because of a person's temporary or permanent physical or mental impairment including, but not limited to, physical or mental impairment resulting from drugs or alcohol, disability, sleep, unconsciousness, or illness. Incapacitation is determined based on the totality of the circumstances. Incapacitation is more than intoxication, but intoxication can cause incapacitation.

Factors to consider in determining incapacitation include, but are not limited to, the following:

- Lack of awareness of circumstances or surroundings (e.g., an inability to understand, either temporarily or permanently, the who, what, where, how and/or why of the circumstances; blackout state);
- Inability to physically or verbally communicate coherently, particularly with regard to consent (e.g., slurred or incoherent speech);
- Lack of full control over physical movements (e.g., difficulty walking or standing without stumbling or assistance); and/or
- Physical symptoms (e.g., vomiting or incontinence).

Incapacitation: Key Issues

- Timeline:
 - What did complainant ingest and when?
 - What did respondent know about what complainant ingested?
 - Who saw complainant and when, and what symptoms of incapacitation did complainant show at the time?
 - What did respondent have the opportunity to witness regarding symptoms of incapacitation shown by complainant?

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Productive Questioning on Gauging Intoxication

Difficult to gauge:

- How trashed were you?
- On a scale of 1-10, how drunk were you?
- Why did you get that drunk?

Preferable approach:

- Explain why you need the information
- Don't place blame
- "They were drunk." -> "What did drunk look like?"
- "Were you having any difficulties [insert activity]?"

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Any Drugs?

Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?

Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?

What, how much, and when?

Remember: UC offers amnesty. See Policy, page 9.

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Physical Effects

Some policies list physical effects that are not solely indicative of, but may indicate incapacitation:

Conscious or unconscious?

Vomiting?

Slurred speech?

Difficulty walking?

Difficulty holding a coherent conversation?

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Data for your Timeline

- Text messages unrelated to the incident itself, but that give time stamps and other valuable information
- Videos/pictures of parties with time stamps
- Card swipes for the parties and anyone with the parties on the evening of the incident
- Security footage

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Relevancy: Not Relevant

The Department has determined that recipients must consider relevant evidence with the following exceptions:

- (1) Complainant's prior sexual behavior (except for two narrow exceptions)
- (2) information protected by a legal privilege
- (3) party's treatment records (absent voluntary written waiver by the party) (30337)

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Relevancy: Regulations' Rape Shield Law-Complainants

- According to 34 C.F.R. 106.45(b)(6)(i), Cross-examination **must exclude** evidence of the Complainant's "sexual behavior or predisposition" **UNLESS**
 - its use is to prove that someone other than the Respondent committed the conduct, OR
 - it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

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Advisors: Role

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

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

How Do You Choose Questions?

What Don't You Know?

Hearing Officers: If you need to know it to make a determination, you have the obligation to ask the question.

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

What Do You Know?

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

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

Disputed Facts?

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

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

Make Your Plans

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

Pick a Goal

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

Mock Hearing

Reaching a Decision

Reminders (1 of 3)

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

Reminders (2 of 3)

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

Reminders (3 of 3)

- Burden of gathering the evidence on the recipient, not the parties (30333)
 - Don't penalize a party for the questions no one asked them.

Objectively Evaluating Relevant Evidence

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

Standard of Proof

- Standard of Evidence: Preponderance of the Evidence
 - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly “50-50,” the tie goes to the Respondent.

Making credibility decisions

- The preamble discussion includes the following additional information on credibility:
- “Studies demonstrate that inconsistency is correlated with deception” (30321)
 - Credibility decisions consider “plausibility and consistency” (30322)

Resolving Disputes (1 of 4)

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

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

Resolving Disputes (2 of 4)

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

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

Resolving Disputes (3 of 4)

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

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

Resolving Disputes (4 of 4)

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

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

Making OUR Decision

- Three questions:
 - Did sexual intercourse occur?
 - Did Tessa give consent?
 - Was Tessa's consent valid?
- For each question:
 - List the evidence for and against
 - Which evidence do you weigh more heavily?
 - Which way do you rule, and why?

If you are having trouble

- Consider making a list of what you are sure about that relates to the question you are considering.
 - Example: Michael brought Tessa a glass of punch and saw her drink it.
- Make a list of what facts are disputed.
 - Example: Michael says he did not see Tessa drink wine before the parties; Tessa said she was sipping it.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.
