Sexual Misconduct Hearing Officer Training

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Agenda

I. Key Distinction Between Sexual Misconduct Cases
II. Background and Hearing Officer Role
III. Preparing for a Hearing and Pre-Hearing Issues
IV. At the Hearing (Basics, Mechanics, Special Issues, Implicit Bias)
V. After the Hearing



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Sexual Misconduct Cases

- Key distinction in policy—
  - "Sexual Harassment" v. not-Sexual Harassment
- The distinction matters because it tell us what the role of the advisor will be and the process before the hearing will differ.



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Sexual Harassment Definition

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

- Quid pro quo: An employee of the institution conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity; or
- "Sexual assault," "dating violence," "domestic violence," or "stalking" as defined in this Policy.



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Other conduct…

Other Inappropriate Sexual Conduct – Conduct on the basis of sex that does not meet the definition of "sexual harassment" under this Policy, but is

If verbal conduct (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so severe or pervasive that they created a Hostile Environment, as defined in this Policy. The type of verbal conduct (if all other elements are met) may include:

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual's sexual activities or speculation about an individual's sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials; or
- Deliberate, repeated humiliation or intimidation.



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Advisor Role at Hearing

- Advisors in "Sexual Harassment" cases will ask questions. Parties must have advisor.
- Advisors in non-Sexual Harassment cases will not ask questions. Parties may have advisor.
- In either case, advisors are not to do opening statements, closing statements, lodge objections, or talk at the hearing.



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When "Sexual Harassment"

- Main difference at hearing is advisors will ask questions.



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II. Background and Hearing Officer Role



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Outline of Process (if Sexual Harassment)

- Notice
- Investigation (**no determination**)
- All evidence related to allegation to both CP and RP
- Ability to comment on evidence
- **No Administrative Disposition**
- Hearing
- Appeal



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Outline of Process (if <u>not</u> Sexual Harassment)

- Notice
- Investigation (**determination**)
- All evidence related to allegation to both CP and RP
- Ability to comment on evidence
- **Administrative Disposition (can admit conduct)**
- Hearing
- Appeal



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Hearing Officer Responsibilities

1. Preside over the hearing.

2. Listen to the evidence presented (and read it, if documentary) to determine if by a preponderance of the credible evidence the RP violated institutional policy.

3. If yes, impose an appropriate sanction.



The Hearing Officer's Role

- <u>You</u> are the decision-maker



III. Preparing for a hearing and pre-hearing issues

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Before the Hearing…

- Review materials
- Review policy (institutional policies are often different from the model policy)

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Look at the Policy Provision(s) at Issue

Engaging in **a course of conduct directed at a specific person** that would **cause a reasonable person to fear for his or her safety or the safety of others**, **or suffer substantial emotional distress**. For the purposes of this definition—

- *Course of conduct* means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- *Reasonable person* means a reasonable person under similar circumstances and with similar identities to the victim.
- *Substantial emotional distress* means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.



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Look at the Policy Provision(s) at Issue

Engaging in (1) **a course of conduct** (2) **directed at a specific person** that would (3) **cause a reasonable person to fear for his or her safety or the safety of others**, **or suffer substantial emotional distress**. For the purposes of this definition—

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- *Reasonable person* means a reasonable person under similar circumstances and with similar identities to the victim.
- *Substantial emotional distress* means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.



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Before the hearing…Tips

- Get an advisor from OGC!
- Feel free to take breaks to talk with your advisor.
- We want the parties to be heard and felt heard. This may be a major life event.

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Notice of Hearing

- Must be given at least 10 days before hearing date.
- Must include the following:
  - Date, time, and place
  - Name of the Hearing Officer
  - List of participants
  - Purpose of the hearing
  - Statement of charges
  - Summary statement of the evidence

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What if you are asked to postpone?

- Always look at the policy. It has most of the answers.
  - Common requests: advisor cannot make it, new advisor, health issue, etc.



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Fairness

- Goal is fairness and perception of fairness.



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Pre-Hearing Responsibilities

- Be familiar with the Charge, policies identified in the charge, and the hearing procedure in the policy. If you have evidence, review it.



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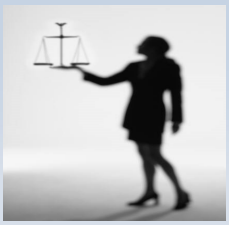
Pre-Hearing Responsibilities

- No *ex-parte* communications or investigations.
  - Ensure other party is aware of communications you receive from other party.
    - For example, if the accused student emails you directly without including the student conduct office, you should reply to the accused student and add the student conduct office representative handling the case and the Complainant.
  - Admonish the parties to not talk about facts of case to you.

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Pre-Hearing Issues

- Accused Student Challenges Impartiality of Hearing Officer
  - Hearing officer is the sole judge of whether he or she is capable of considering the evidence and determining the facts with fairness, impartiality, and objectivity.
  - Challenge must be by written request.
  - May be self-initiated.



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THE HEARING



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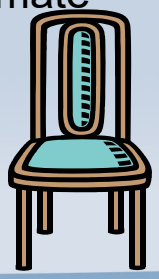
General Parameters of Hearing

- Ensures university complies with due process.
  - Notice and opportunity to respond
  - Confront and examine witnesses
  - Impartial decision-maker
- Policy provides right to adviser – who may be an attorney.
  - Due process does not require that the adviser be an attorney.
  - Advisor may be provided by institution.

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General Parameters of Hearing

- Record the proceedings.
  - Logistics arranged by student conduct office.
- Limit persons present at the hearing.
  - FERPA and Privacy Rights - Persons with legitimate educational interest in hearing
  - Testifying Witness
- If accused student is absent, proceed if proper notice provided.



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Commencing the Hearing

- Read Introductory Statement
- Permit Opening Statements
  - Dean presents first: Burden of Proof
- Presentation of Witnesses and Exhibits

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Remember:

This is NOT a legal proceeding!



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Presentation of Witnesses and Exhibits

- The formal rules of evidence do not apply.



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Relevance

Has a tendency to make a fact more or less probable than it would be otherwise without the evidence

and

the fact is of consequence in determining a material issue.



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Presentation of Witnesses and Exhibits



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Role of the Advisor at the Hearing (in "Sexual Harassment" cases)

- "At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally."

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Role of the Advisor at Hearing

- "If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the [institution's] choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party."



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Questioning at the Hearing—Our Model Policy

The hearing officer may, at the hearing officer's discretion, ask questions during the hearing of any party or witness and may be the first person to ask questions of any party or witness. Each party's advisor will have an opportunity to ask relevant questions and follow-up questions of the other party and of any witnesses that participate in the hearing, including questions that challenge credibility. Each advisor has the ability to ask questions directly, orally, and in real time at the hearing. The parties will not be permitted to personally ask questions of the other party or any witnesses that participate in the hearing. The advisors may ask questions under the following procedure:

The advisor will ask a question of the applicable participant.

Before the participant answers a question, the hearing officer will rule as to whether the advisor's question is relevant to the alleged conduct charges.

If the hearing officer rules the advisor's question as not relevant, then the hearing officer must explain any decision to exclude a question as not relevant. If the hearing officer allows the question as relevant, the participant will answer it.



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Hearing Officer Questioning at the Hearing

- Tips:
  - What do you need to know? Look at policy provisions at issue.
  - Ask open-ended questions.
    - Ex. Tell me what happened after you left the party?
    - What happened next?
- How are your questions going to be perceived by either party? Remember: Fairness and appearance that you are fair.



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Reminder

- If “Sexual Harassment”, advisors ask questions during testimony. If not “Sexual Harassment” advisors are there only to advise.
- If not “Sexual Harassment,” cross-examination questions to other party go through Hearing Officer. Allow for follow-up
- Take breaks liberally.



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Reminder

- Get a free OGC lawyer to advise you



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Special Issues at Hearing



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Exclusion of Privileged Information unless Waived

No person will be required to disclose information protected under a legally recognized privilege. The hearing officer must not allow into evidence or rely upon any questions or evidence that may require or seek disclosure of such information, unless the person holding the privilege has waived the privilege. This includes information protected by the attorney-client privilege.



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Relevance—CP's Prior Sexual History

- Prior Sexual History: A Complainant's sexual predisposition or prior sexual behavior are not relevant except where questions and evidence about a Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the alleged conduct charged by the Complainant or if the questions or evidence concern specific incidents of the Complainant's prior sexual behavior with the Respondent and are offered to prove the Complainant's consent of the alleged conduct.



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Sexual Harassment Definition

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

- Quid pro quo: An employee of the institution conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity; or
- "Sexual assault," "dating violence," "domestic violence," or "stalking" as defined in this Policy.



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"Education program or activity" Definition

- "locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs"
- All institutional buildings
- All official off-campus events
- Any building owned or controlled by a student organization that is officially recognized by the institution.



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Consent Definition

A voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity. Consent to one act does not imply consent to another. Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. Consent can be withdrawn at any time. Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

Consent is not effective if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, (e) incapacitation or (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.

A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.

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Incapacitation Definition

Incapacitation is the inability, temporarily or permanently, to give consent because the individual is mentally and/or physically helpless, either voluntarily or involuntarily, or the individual is unconscious, asleep, or otherwise unaware that the sexual activity is occurring. An individual may be incapacitated if they are unaware at the time of the incident of where they are, how they got there, or why or how they became engaged in a sexual interaction.

When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug. Alcohol and other drugs impact each individual differently, and determining whether an individual is incapacitated requires an individualized determination.

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Incapacitation Definition (continued)

After establishing that a person is in fact incapacitated, the University asks two questions:

- Did the person initiating sexual activity know that the other party was incapacitated? and if not,
- Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

If the answer to either of these questions is "YES," consent was absent and the conduct is likely a violation of this Policy.

A Respondent will be found to have violated policy only if the Respondent knew or should have known that the person was incapacitated.



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Implicit Bias

- Hearing Officer's role is to be neutral, impartial, and fair.
- Fair and the *appearance of fair*.



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Implicit Bias

[T]he Department [of Education] ..cautions that a training approach that encourages Title IX personnel to "believe" one party or the other would fail to comply with the requirement that Title IX personnel be trained to serve impartially, and violate § 106.45(b)(1)(ii) precluding credibility determinations based on a party's status as a complainant or respondent.



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Implicit Bias

The Department takes no position on whether "start by believing" should be an approach adopted by non-Title IX personnel affiliated with a recipient, such as counselors who provide services to complainants or respondents. The Department wishes to emphasize that parties should be treated with equal dignity and respect by Title IX personnel, but doing so does not mean that either party is automatically "believed." The credibility of any party, as well as ultimate conclusions about responsibility for sexual harassment, must not be prejudged and must be based on objective evaluation of the relevant evidence in a particular case; for this reason, the Department cautions against training materials that promote the application of "profiles" or "predictive behaviors" to particular cases. (Preamble, p. 836)



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Implicit Bias—Tips to Avoid Bias

- Test to address any potential implicit bias.
  - What is the essence (elements) of potential policy violation?
  - Create hypo that includes essence. Switch gender.
- When making your decision, list out the evidence favorable to both sides to ensure evidentiary support as opposed to bias.



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Implicit Bias

- No prejudgment of facts at issue,
- No conflicts of interest,
- No bias for either Complainant or Respondent. Neither side gets a “head start”



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Exclusion of Statements made by people not at hearing or not submitting to cross-examination

Not submitting to cross-examination: If a party or witness refuses to submit to any cross-examination questions during the hearing, the hearing officer will not rely on any statement of that party or witness, when reaching a responsibility determination. The hearing officer will not draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the hearing or refusal to answer questions.



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Possible Exclusion of:

- Statements against interest by RP
- Statements made by CP
- Statements made by nurse as author of SANE exam
- Statements made by any person who does not attend hearing
- Emails/Texts



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Possible Exclusion of…

- W1: Hey, how was the party last night?
- RP: I got too drunk. LOL.
- W1: Did you see CP?
- RP: Yeah, but I did something stupid. I pinched CP's butt.



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Possible Exclusion of…

- W1: Hey, how was the party last night?
- RP: ~~I got too drunk. LOL~~.
- W1: Did you see CP?
- RP: ~~Yeah, but I did something stupid. I pinched CP's butt.~~



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But…

"A respondent's alleged verbal conduct that itself constitutes the sexual harassment at issue is not the respondent's 'statement' as that word is used [in the regulations] because the verbal conduct does not constitute the making of a factual assertion to prove or disprove the allegations of sexual harassment; instead, the verbal conduct constitutes part or all of the underlying allegation of sexual harassment itself."

- -OCR Blog, May 22, 2020



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Example

- RP: If you go out with me, I'll give you an A in the course.

Because this is the underlying conduct and it is not a "factual assertion to prove or disprove the allegations," this remark may be considered by the hearing officer even if the RP does not submit to cross examination.



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No Inference based on absence or refusal

"[T]he decision-maker(s) cannot draw an inference about the determination 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."



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(Probably) No Surprises

- Institutions may have rules for disclosure of exhibits
- Parties will have access to all evidence related to the allegations
- But there may be rebuttal evidence



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Rebuttal Evidence

Evidence Presented at Hearing

During student's witness testimony, witness A testifies: "I've never seen accused student with an alcoholic beverage."

Rebuttal Evidence

Picture of witness A and accused student each drinking a bottle of champagne at a party.

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Controlling the Hearing



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Controlling the Hearing

- Establish and exercise authority early and consistently.
- Be familiar with policies/charge.
- Describe unacceptable behavior and warn. This usually corrects inappropriate behavior.
- A note about harassing/abusive questions.
- Establish time limits for presenting case.
- Take breaks
- Stop the hearing.



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Closing the Hearing (by party/not advisor)

Closing Arguments:

Student Conduct Office

Accused Student/Respondent

Student Conduct Office

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Post-Hearing Issues

Making a Decision:

- Based only on the Hearing Record.
  - NO *ex parte* discussions or investigation. Example: *Than* case.
- Determine whether Violation Occurred.
  - Did student engage in conduct that violates university policy?



Making a Decision

Burden of Proof on <u>Institution</u>

- **Preponderance of Evidence**. Whether the greater weight of the credible evidence establishes that the student engaged in the alleged policy violation.
- <u>By law, Respondent is presumed not responsible</u>.



Making a Decision

- Assess Witness Credibility
  - Demeanor (even CIA officers have trouble with this because people don't always act as we think they "should")
  - Personal Knowledge
  - Bias or interest
- Strength of Relevant Evidence



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Tips for Evaluating Witnesses

- Credibility.
  - Are there inconsistencies? Is an explanation plausible?
  - What did the witness do? What did they *not* do?
  - Are there motives for the witness to be less than truthful?
  - Are there motives for the witness to frame the event in a way more favorable to themselves? Are they lying to themselves?
  - Is there an opportunity for a good faith mistake?



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Potential Pitfalls

- You must let the evidence lead you to the conclusion, rather than making the evidence "fit" your pre-formed conclusion.
- Focus on the relevant evidence.
  - Hint: it's not all relevant.



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The Importance of a Good Decision Letter

- Demonstrates the care and attention given to the factual findings and weighing of the evidence.
- Shows that the institution reached a reasoned, good faith conclusion.
  - It's not enough to reach a conclusion – you must be able to "show your work."
- Serves as a framework for all future proceedings.



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Decision Letter

Hearing Officer Determination. The hearing officer will issue a written determination, which must include the following:

The allegations that potentially constitutes prohibited conduct under this Policy;

- A description of all of the procedural steps of the Grievance Process under this Policy (from receipt of a Formal Complaint to the determination regarding responsibility of the Respondent, including any notifications of the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held);
- The findings of fact supporting the hearing officer's determination;
- The conclusion(s) and a rationale as to whether the Respondent is responsible for each allegation;
- The disciplinary sanctions, if applicable;
- The remedies, if applicable, designed to restore the Complainant's access to the education program or activity; and
- The institution's procedures and permissible bases for the parties to appeal, if applicable

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Step One: Charge and Applicable Policies/Procedures

- List the charge and the applicable policies and procedures. You can attach documents as exhibits.
- "A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held"

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Step Two: Evidence Considered

- Remember the seriousness of these matters and the consequences that may come from them.
- You must be able to show that you were fair, impartial, and thorough.
- Include a summary of what you heard/saw and reviewed.
- Don't fill the letter with irrelevant facts. But when in doubt, **put it in there.**



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Step Three: Evidentiary Standard

- Greater weight of the credible evidence – **NOT** beyond a reasonable doubt.
  - More likely than not
  - 50% plus a feather
  - Think of the scales of justice
  - Student conduct needs to get beyond the 50-yard line
  - "Some evidence" doesn't do it. Side of the scale needs to be heavier.
  - No head starts.



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Step Four: Undisputed Facts

- What material and relevant facts are undisputed?
- How do we know these facts?
  - Who told us? How were the facts gathered (texts, emails, social media, etc.)?
- Why are we including these facts?
  - What point (regarding the charge) do they help us resolve?
- Are they really UNDISPUTED?



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Step Four: Undisputed Facts

- Use witness quotes as much as possible.
  - Don't take statements out of the vernacular.
- Easiest way to make an undisputed fact disputed is to mischaracterize it by trying to summarize.
- Examples:
  - Quote: Witness 3 stated that the parties "were friends but had been casually hooking up for a few weeks."
  - Summary: The parties were previously in a complicated "friend" relationship.



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Step Five: Factual Findings (Resolution of Disputed Facts)

- For disputed key facts, go point by point:
  - What do you think happened and why?
  - On what evidence do you base your conclusion?
  - If a witness, why was he or she more credible than someone else? You MUST make credibility determinations
    - Corroborating evidence?
    - Inconsistencies?
    - Witness' posture – but, careful – remember that people don't always act the way you'd expect.
    - Motives?
- If you have critical corroborating evidence, **cite it.**



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Step Six: Analysis/Conclusion

- Take factual findings and analyze them under the applicable policy.
  - Looking for violations of policy, **NOT** law and **NOT** morality judgments.
- Address every allegation, one by one.
- Explain your reasoning – HOW did you get "there."
- "I find Respondent Responsible/Not Responsible for X" (no use of words "guilty" or "not guilty"



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Step Seven: Sanctions/Remedies

- It is important to take an action sufficient to abate the behavior and improve the learning environment.
- Act consistently with other actions taken by the institution for similar conduct.
- Consider the wants/concerns of the Complainant, but that's not determinative.



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Assessing Sanctions

- The University looks, in part, to past punishment for similar violations when recommending sanctions
- Consider mitigating circumstances.
  - Accepting responsibility
  - Remorse



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Thinking Outside the Box: Sanctions

- Educational not criminal process
- Common sanctions – probation/suspension/expulsion
- "Other sanctions as deemed appropriate"
  - Counseling
  - Anger management
  - Reflective papers and projects



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Revision stage: Focus on Clarity

- Focus on *relevant facts* in your factual findings
- If it is part of the reasoning, say it. Don't omit it.
- Headers
- Pronouns: RP/CP or preferred pronouns. Making all pronouns plural creates ambiguity. If a person's preferred pronoun is "their," make that clear in the beginning of the report.



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Revision stage: Focus on Clarity

- Look at your draft with a critical eye. Pretend the person who will be most unhappy with your decision is in the room with you reading the draft with you. With each sentence or paragraph, think, “What would that person say?”
- Then revise.



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Helpful Reminders

- Deal with facts contrary to your decision.
  - If you don’t, it looks like you didn’t consider/hear them. Makes it look like you were not paying attention or the process isn’t fair because only *some* evidence will be considered.



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Questions & Comments?



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