

Ohio Five Training: Annual Clergy Training; Title IX Investigators and Decision- makers

July 29, 2024



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Agenda



- Introductions, brief discussion of 2024 Title IX Regulations status
- Clergy Training – everyone
 - Issues related to Dating Violence, Domestic Violence, Sexual Assault, and Stalking – Investigations and Adjudications
 - Overview of Policy/Process
- Investigator Training – *Stay in auditorium*
- DM/Advisors – *To Classroom*
- Mock Hearing with all participants
- Final Thoughts.

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Presentation Rules



- Questions are encouraged
- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed
- Yes – you must post these slides (still)

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Training Requirements 1 of 2

	Def. Sexual Harassment	Scope of Ed. Prog./Activity	Conducting grievance process	Serving impartially	Tech training	Drafting investigative report
Coordinator	X	X	X	x		
Investigator	X	X	X	X		X
Decision-Maker	X	X	X	X	*	
Appeals	X	X	X	X	*	
Informal Res. Facilitator	x	X	x	X		
Advisor						

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- ### Training Requirements 2 of 2
- Under Clery Act, must receive annual training on:
 - Issues related to sexual assault, domestic violence, dating violence, stalking
 - How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

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- ### 2024 Title IX Regs: Injunctions and Ohio-Specific Considerations
- Lawsuit filed by Tennessee, **Ohio**, Indiana, Kentucky, Virginia, and West Virginia available [here](#)
 - Challenges to ED's interpretation of "on the basis of sex"
 - Specific concerns regarding:
 - Student privacy
 - Women's sports
 - Conflicts with state laws
 - **Ohio** (and other states) subject of injunction prohibiting the Department of Education from enforcing the 2024 Title IX regulations.
 - **U.S. Dept. of Ed is appealing these rulings.**

For your consideration: ED Resource for Policy Drafting

- <https://www2.ed.gov/about/offices/list/ocr/docs/resource-nondiscrimination-policies.pdf>
- Includes sample Title IX Policy language
- Includes sample "Nondiscrimination Policy"
- Includes sample Notice of Nondiscrimination

Resource for Drafting Nondiscrimination Policies, Notices of Nondiscrimination, and Grievance Procedures under 2024 Amendments to the U.S. Department of Education's Title IX Regulations

The U.S. Department of Education's (Department) Office for Civil Rights (OCR) prepared this resource to help recipients of Department funds (recipient) comply with the 2024 amendments to the Department's regulations implementing Title IX of the Education Amendments of 1972 (2024 amendments). The 2024 amendments take effect on August 1, 2024, and obligate recipients to apply the requirements set forth therein to complaints of sex discrimination regarding alleged conduct that occurs on or after that date. This Resource creates no legal rights or responsibilities. It is intended only to help recipients draft Title IX policies that comply with some provisions of the 2024 amendments. Recipients are not obliged to consult this Resource in drafting their policies. The Department remains committed to supporting schools in implementing these regulations, including through additional technical assistance.


Title IX prohibits sex discrimination in education programs and activities that receive Federal financial assistance. Title IX obligates all recipients to comply with Title IX and the Department's Title IX regulations, with some limited exceptions set out in the statute and regulations. When "Title IX" is referenced in this Resource, the term refers to Title IX and the regulations.

The 2024 amendments require recipients to adopt and publish grievance procedures for the prompt and equitable resolution of complaints of sex-based harassment involving a student complainant or student responder at a postsecondary institution. This Resource addresses only the applicable regulatory requirements in §§ 106.80(a), 106.47, and 106.46. As described in more detail below:

- Sections 106.80(a) and (c) require all recipients to adopt, publish, and implement a nondiscrimination policy and publish a notice of nondiscrimination.
- Section 106.47 requires all recipients to adopt, publish, and implement grievance procedures for complaints of sex discrimination.
- Section 106.46 requires all postsecondary institutions that are recipients to adopt, publish, and implement grievance procedures for complaints of sex-based harassment involving student complainants or student responders at postsecondary institutions.


Under Title IX and its implementing regulations, recipients are not obligated to describe all applicable provisions of the Title IX regulations in the policies, notices, and procedures required by

Big Picture Changes (1 of 2)



- Definition of discrimination **on the basis of sex**,
- Definition of sex-based harassment, including hostile environment sex-based harassment
- Definition of **"actual knowledge,"**
- Broader jurisdiction (on/off campus distinction),
- Changes to the duties of the Title IX Coordinator,
- Definitions and procedures for supportive measures and emergency removal...

Big Picture Changes (2 of 2)

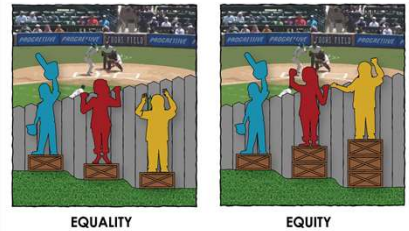


- Working with a student with a disability in your Title IX process,
- Updated information about informal resolution and when it can be used,
- More choices for your **grievance process (you will need to make a decision as to how your institution will use new grievance procedures)**,
- **New training requirements**,
- Definition of retaliation,
- **New reporting and resource requirements for pregnancy and parenting**, and
- New reporting requirements and definition of confidential employees.



Themes: Title IX and your institution's ethic of care

Title IX is an Equity Statute



EQUALITY







EQUITY

Ethic of Care




- What does this have to do with my policy?
 - Ex: Live hearings with cross-examination
- What do you think are the top values of your institution's community?
- Do you think institutional values align between administration, faculty, and staff?
- What about your students?
- What about the town or city around your institution?

Overview of Themes Bricker Graydon

 Access	 Protection	 Transparency
 Evidence	 Improvement	 No Bias


Access Bricker Graydon


- Title IX is meant to ensure ACCESS to your programs and activities, regardless of sex
- "What we do for one, we do for the other"
 - Or at least consider whether it is appropriate under the circumstances
- Why are you treating someone differently?
 - Can you put your rationale in writing
 - If you can't - reconsider
- Policy considerations related to ACCESS
 - Supportive Measures
 - Decision-making Process




Protection Bricker Graydon


- Institutions have an obligation to PROTECT their campus
- "They are all our students"
- Policy considerations related to PROTECTION
 - Training and Education
 - Supportive Measures
 - Decision-making Process




Transparency 


- TRANSPARENCY is key to your community trusting the process
- Know your process
- Help others understand your process
- Policy considerations related to TRANSPARENCY
 - Posting training materials
 - Providing the evidence in a case/providing a summary of the evidence




Evidence 

- Outcomes must be based on EVIDENCE
- "Don't weigh your gut"
- Make reasonable inferences and credibility determinations, but be mindful of implicit bias, stereotypes, and using our own behavior as a yardstick
- Policy considerations related to EVIDENCE
 - Providing the evidence in a case/providing a summary of the evidence
 - Decision-making Process



Improvement 

- Always be working to IMPROVE:
 - Yourself as a neutral
 - Your campus as a healthy and fair place to be
 - Your policy to provide a better process informed by case law, regulations, guidance, and experience
 - Your resources for all involved
- Policy considerations related to IMPROVEMENT
 - Training and Education
 - Recognizing processes that do and do not work for your community



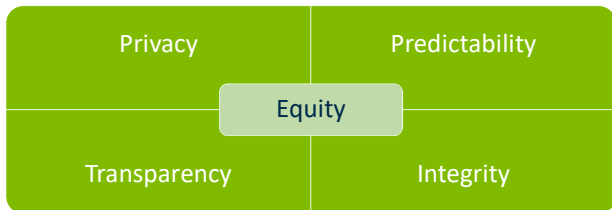
No Bias



- Always be working to avoid actual or perceived:
 - Conflicts of Interest
 - Bias
- Institutional duties and interest vs. Personal interests
 - Take periodic self-inventories
 - Be mindful of your activities, involvements, social media, etc.
 - Check your biases constantly – and talk with others
- Policy considerations related to NO BIAS
 - Training and Education
 - Providing the evidence in a case/providing a summary of the evidence
 - Decision-making Process



How Do You Build Trust?



Value: Equity

- Until we have reached the end of the process, we don't know whether anyone did anything wrong.
- Treat both parties equitably with regard to access to supportive measures, evidence, opportunities to provide information, and in every other respect that is appropriate.
- "What we do for one, we do for the other" (as appropriate)

Value: Privacy

- Explain privacy versus confidentiality
- Explain how information is shared
 - Within the investigation
 - With other school officials
 - With advisors
- Connect individuals with confidential resources as necessary
- Remember to collect FERPA forms for advisors when necessary
- "No one will tell you anything if they don't trust you."

Value: Predictability

- Give a copy of the policy at the outset.
- Constantly refer back to policy language to explain:
 - Where we are in the process;
 - What happens next;
 - What the expectations will be for the person.
- Follow your policy and follow your process.
- When you must deviate, fill in the gaps with your institutional ethic of care.

Value: Transparency

- Give regular updates to the parties and their advisors.
- Answer questions truthfully, to the extent permitted considering privacy.
- Be cautious before deciding to withhold anything that may be relevant. What is the concern? Does it serve the parties and the process?
- "If they hear nothing, they'll assume you're doing nothing or actively working against them."

Value: Integrity

- Watch for conflicts of interest and bias so as to be fair and maintain confidence in the process.
- Don't use or share information outside the process. All evidence should be "on the table" for all parties and advisors to see.



Definitions



Themes (1 of 2)

- Title IX meant to ensure equitable access, regardless of sex
- We have an obligation to protect our community – including both parties
- Transparency in the process encourages participation, reduces stress, and increases trust in the outcome

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Themes (2 of 2)

- Use language of the policy (complainant, respondent, report), not language of criminal law (victim/survivor, perpetrator, allegation)
- Be incredibly mindful not to prejudge the outcome of the case
- Base decisions on evidence, not your “gut”

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Sexual Harassment - IX

- **Sexual harassment** means conduct on the basis of sex that satisfies one or more of the following:
 - **[Quid pro quo]** An employee of the University conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct;
 - **[Unwelcome 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
 - **[Clery crimes]** Sexual assault, dating violence, domestic violence, or stalking

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SH – IX (continued)

- **Sexual Assault** (**Definitions from National Incident-Based Reporting System)
 - Rape (non-consensual penile/vaginal penetration)
 - Sodomy (non-consensual oral/anal penetration)
 - Sexual Assault with an Object (penetration with object or body part other than genitalia)
 - Fondling – Must be done “for the purpose of sexual gratification”
 - Incest
 - Statutory rape

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Sexual Harassment: Dating Violence



- “Dating Violence” means an act of violence committed on the basis of sex by a person who is or has been in a romantic or intimate relationship with the complainant. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

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Sexual Harassment: Domestic Violence



- “Domestic violence” is an act of violence committed on the basis of sex by:
 - A current or former spouse or intimate partner of the complainant;
 - A person with whom the complainant shares a child in common;
 - A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
 - A person similarly situated to a spouse of the victim under the domestic/family violence laws of the jurisdiction;
 - Any other person against an adult or youth victim who is protected from that person’s acts under the domestic/family violence laws of the jurisdiction


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Data: Intimate Partner Violence




- “Nearly 1 in 5 women and about 1 in 7 men report having experienced severe physical violence from an intimate partner in their lifetime.”
- “41% of female IPV survivors and 14% of male IPV survivors experience some form of physical injury related to IPV.”
- “1 in 6 homicide victims are killed by a current or former intimate partner.”
- Source: CDC.gov, “Preventing Intimate Partner Violence” fact sheet, accessed Sept. 20, 2020.

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Sexual Harassment: Stalking 


- “Stalking” is engaging in a **course of conduct** directed at a specific person on the basis of sex that would cause a **reasonable person with similar characteristics under similar circumstances** to:
 - Fear for the person’s safety or the safety of others; or
 - Suffer **substantial emotional distress**.
- As mentioned before, to qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)

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Stalking: Course of Conduct 

- “Course of Conduct”
 - Under VAWA regulations: 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.

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Stalking: Reasonable Person 

- “Reasonable person”
 - Under VAWA regulations: means a reasonable person under similar circumstances and with similar identities to the victim.

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Stalking: Substantial Emotional Distress



- “Substantial emotional distress”
- Under VAWA regulations: means **significant mental suffering or anguish** that may, but does not necessarily, require medical or other professional treatment or counseling.

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Impact of Stalking on Victims



- **46%** of stalking victims fear not knowing what will happen next.
• [Baum et al., (2009). "Stalking Victimization in the United States." BJS.]
- **29%** of stalking victims fear the stalking will never stop.
• [Baum et al.]

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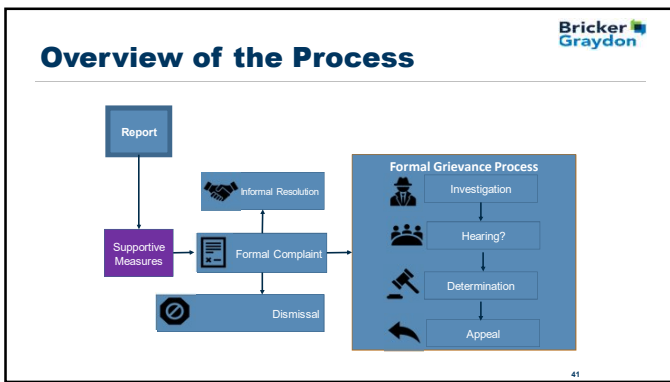
More Impact of Stalking



- **1 in 8** employed stalking victims **lose time from work** as a result of their victimization and **more than half** lose **5 days of work or more**.
- 1 in 7 stalking victims move as a result of their victimization.
• [Baum et al.]
- The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims.
• [Eric Blauuw et al. "The Toll of Stalking," Journal of Interpersonal Violence 17, no. 1(2002):50-63.]

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Overview of Your Policy/Process



- Overview of the Process: Supportive Measures (1 of 5)**
- Non-disciplinary and non-punitive
 - Individualized
 - “As reasonably available”
 - Without fee or charge to either party
 - Available at any time (regardless of whether a formal complaint is filed)

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**Overview of the Process:
Supportive Measures (2 of 5)**

- Designed to:
 - *restore or preserve access* to the University's education program or activity, without unreasonably burdening the other party;
 - protect the safety of all parties and the University's educational environment; and
 - deter sexual harassment

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**Overview of the Process:
Supportive Measures (3 of 5)**

- Counseling
- Extensions of deadlines (course-related adjustments)
- Modifications of work/class schedules
- Campus escort services
- Mutual contact restrictions
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- "and other similar measures"

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**Overview of the Process:
Supportive Measures (4 of 5)**

- Role of the TIXC upon receiving a report:
 - promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,
 - consider the complainant's wishes with respect to supportive measures,
 - inform the complainant of the availability of supportive measures with or without the filing of a formal complaint

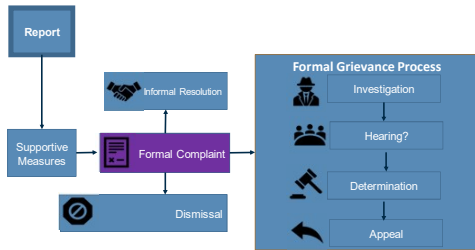
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**Overview of the Process:
Supportive Measures (5 of 5)**



- Must maintain confidentiality to the greatest extent possible
- Note: Title IX Coordinator may ask you to help with accommodations and may not be able to tell you all the details as to *why*.

Formal Complaints



**Overview of the Process:
Formal Complaint (1 of 2)**



- A document **filed by a complainant or signed by the Title IX Coordinator** alleging Prohibited Conduct against a respondent and requesting the University investigate the allegations
- In response to a formal complaint, University must follow a grievance process (set by 106.45)
- Title IX Coordinator must offer complainant supportive measures (regardless if files formal complaint – if complainant does not want to file a formal complaint)

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**Overview of the Process:
Formal Complaint (2 of 2)**

- Once a Formal Complaint is filed, there are four possibilities:
- Informal Resolution
- Formal Grievance Process (Hearing)
- Mandatory Dismissal from Hearing Process and Resolution through Investigative Process
- Formal Complaint is withdrawn

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Formal Process

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graph TD
    Report[Report] --> Supportive[Supportive Measures]
    Supportive --> Informal[Informal Resolution]
    Supportive --> Formal[Formal Complaint]
    Formal --> Dismissal[Dismissal]
    Formal --> Grievance[Formal Grievance Process]
    Grievance --> Investigation[Investigation]
    Investigation --> Hearing[Hearing?]
    Hearing --> Determination[Determination]
    Determination --> Appeal[Appeal]
  
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**Overview of the Process:
Formal Grievance Process**

- Basic requirements:
- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed

- Includes the presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process

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Overview of the Process: Written Notice Bricker Graydon

- University's grievance **process** and informal resolution process
- **Allegations** with sufficient time for review with sufficient detail, such as date, location if known
- Parties may have an **advisor of choice**

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Overview of the Process: Investigation Bricker Graydon

- Only of a formal complaint
- Burden of proof and evidence gathering rests with University
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert)
- Cannot restrict ability to discuss complaint or gather information
- Advisors of choice (But compare to Advisors in Title IX Hearing)
- Ability to review report and to provide written response (TIX)

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Dismissal Bricker Graydon

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graph TD
    Report[Report] --> Supportive[Supportive Measures]
    Report --> Informal[Informal Resolution]
    Supportive --> Formal[Formal Complaint]
    Formal --> Dismissal[Dismissal]
    Formal --> FormalGrievance[Formal Grievance Process]
    subgraph FormalGrievance [Formal Grievance Process]
        Investigation[Investigation] --> Hearing[Hearing?]
        Hearing --> Determination[Determination]
        Determination --> Appeal[Appeal]
    end
  
```

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Dismissal (1 of 3)

- University MUST investigate allegations in a formal complaint
- BUT University MUST dismiss from the hearing process is
 - if conduct alleged would **not** constitute Sexual Harassment – Title IX, even if proven, OR
 - Conduct did not occur within University’s education program or activity or in the United States

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Conducting a Hearing

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**Overview of the Title IX Process:
Hearings**

- Must provide a live, cross-examination hearing
- Parties must have an advisor and the University must provide an advisor for a party if the party does not have one
- Advisors ask only relevant cross-examination questions—no party-on-party questioning
- May be virtual, but must be recorded or transcribed

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Advisors

- 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 recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. (106.45(b)(6)(i) and preamble 30339)

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Live Cross-Examination: Regulations

- In this process:
- Decision-maker 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**
- Must be conducted directly, orally, and in real time by the party's advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

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Reminders

- **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

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More Reminders

- 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

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Overview of the Process: Written Determinations (1 of 2)


- Procedures
- Findings of fact
- Conclusions
- Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will provided to complainant

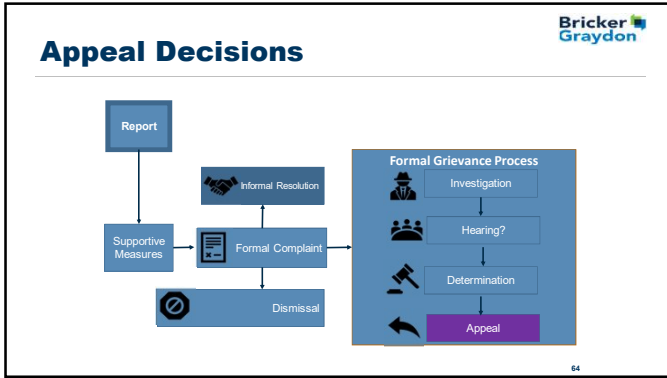
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Overview of the Process: Written Determinations (2 of 2)

- Procedures and bases for appeal by both parties
- Provide written determination to parties simultaneously

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Overview of the Process: Appeals (1 of 2)

- University must offer to both parties the following bases of appeal:
 - Procedural irregularity that affected outcome
 - New evidence not reasonably available at the time regarding responsibility or dismissal that could affect outcome
 - Conflict of interest or bias by the Title IX Coordinator, investigator, and/or decision-maker that affected the outcome

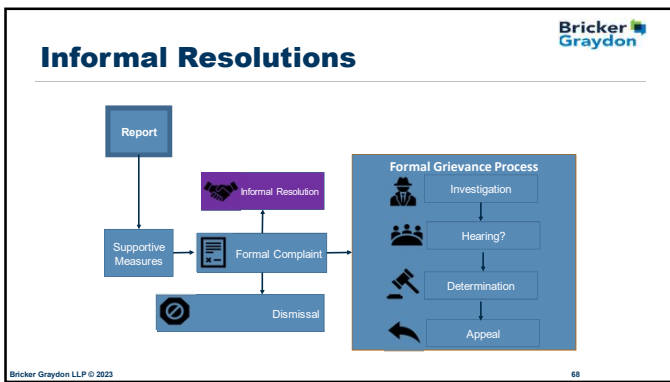
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Overview of the Process: Appeals (2 of 2)

- The decision-maker for the appeal cannot be the same decision-maker from the hearing, or the Title IX Coordinator or investigator
- Must provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the determination
- Must issue a written decision describing the result of the appeal and rationale and provide the decision simultaneously to the parties

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Informal Resolution




Overview of the Process: Informal Resolution (1 of 2)

- At any time prior to the determination regarding responsibility, the University may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- University cannot require this and also cannot offer unless a formal complaint is filed

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**Overview of the Process:
Informal Resolution (2 of 2)**


- University can offer informal resolution if:
 - Provides written notice to the parties
 - Obtains the parties' voluntary, written consent to the informal process
- University cannot offer this option in certain cases of employee sexual harassment of a student



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Questions?

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Reviewing Our Hypothetical

Initial Report

- On May 1, 2024, Complainant Tessa Tasker reported:

“On April 3, 2024, my then-boyfriend, Michael, sexually assaulted me in my apartment. We were in my bedroom and I was trying to sleep after a long night of going out with Michael and some friends. Michael knows I’m against premarital sex, but that night I was very intoxicated and he had sex with me, even though I was too incapacitated to consent and can’t remember everything.”

Consent

- For purposes of today’s hypothetical, your consent language is as follows:
- Consent is granted when a person **freely, actively and knowingly agrees by word or action at the time to participate in a particular sexual act** with a particular person. Consent exists when **mutually understandable words and/or actions demonstrate a willingness to participate in mutually agreed-upon activity at every stage of that sexual activity.** Reasonable reciprocation can be implied. Consent can be withdrawn once given, as long as the withdrawal is clearly communicated through words or actions. If consent is withdrawn, that sexual activity should cease within a reasonable time.

Incapacitation


- For purposes of today’s hypothetical, your Incapacitation language is as follows:
- A person cannot consent if they are unable to understand what is happening or they are disoriented, helpless, asleep, or unconscious, for any reason, including by alcohol or other drugs. As stated above, a Respondent violates this Policy if they engage in sexual activity with someone who is incapable of giving consent.

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Breakout Sessions

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Slides for Investigators



Investigation: First Steps

Investigators Lay the Foundation

- Starts the process
- Builds rapport to encourage engagement
- Gathers evidence
- Conducts interviews and prepares written summaries
- Requests records and evidence from other sources (e.g. police reports, security footage)
- Prepares a written report to summarize what you did and what you collected

Investigators Do NOT Make Decisions

- You do not make findings of fact
- You do not make decisions as to whether the policy was violated
- You do not make credibility determinations
- You do not offer your opinion to the decision-maker about whether Respondent "did it" or whether Complainant is not telling the truth (because your opinion is not evidence)
- You do not consult with the decision-maker as to what their finding should be

So... You're Free? (Uh, not exactly.)

- Free to engage with the parties in a way that lets them know you are there to help them record their side of the story.
- Free to compile the information and walk away without having to make the final decision.
- Free to form your own opinions in your head without sharing them – after you have finished your investigation (to avoid confirmation bias).

Email to Complainant (1 of 4)

- Dear [Complainant],
- My name is Investigator ___ and the Title IX Coordinator has assigned me to **investigate your case**. I would like to meet with you to discuss **what you remember** about your encounter. Do you have time to meet with me on **March 10th at 12:30 in the conference room**? You may bring an **advisor of choice** with you, so if that date and time is not convenient for both of you, please let me know a few times that would work better.

Email to Complainant (2 of 4)

- There is nothing you need to do to prepare for our interview, but if you wish, you may want to begin gathering any evidence you may have, such as text messages or videos from the night in question. You may also want to think about potential witnesses that may be helpful for me to talk to. However, this isn't required to complete before we meet.

Email to Complainant (3 of 4)

- If you are disabled and need **reasonable accommodations** to participate, or if you speak another language and would like an **interpreter** to be present, please let the Title IX Coordinator know and we can make those arrangements.

Email to Complainant (4 of 4)

- When we meet, we can talk through any questions you may have for me about the **process**, and we will discuss the **prohibition against retaliation** against anyone that participates in the process. I am also happy to address any questions beforehand if you'd like. In the meantime, if you need any **supportive measures**, please contact the Title IX Coordinator.

What About Respondent?

- Don't leave the Respondent hanging.
- Make contact when you make contact with the Complainant.
- Remember: "What we do for one, we do for the other."



Email to Respondent (1 of 4)

- Dear [Respondent],
- My name is Investigator ___ and the Title IX Coordinator has assigned me to **investigate your case**. My first step will be to meet with the other person to get more information about the formal complaint. I am in the process of setting that meeting up.
- Once I have conducted that interview, I will reach back out to you to set up a time to interview you. You will be permitted to bring an advisor of choice to that interview.

Email to Respondent (2 of 4)

- There is nothing you need to do to prepare for our interview, but if you wish, you may want to begin gathering any evidence you may have, such as text messages or videos from the night in question. You may also want to think about potential witnesses that may be helpful for me to talk to. However, this isn't required to complete before we meet.

Email to Respondent (3 of 4)

- If you are disabled and need **reasonable accommodations** to participate, or if you speak another language and would like an **interpreter** to be present, please let the Title IX Coordinator know and we can make those arrangements.

Email to Respondent (4 of 4)

- When we meet, we can talk through any questions you may have for me about the **process**, and we will discuss the **prohibition against retaliation** against anyone that participates in the process. I am also happy to address any questions beforehand if you'd like. In the meantime, if you need any **supportive measures**, please contact the Title IX Coordinator.

The Investigator Spiel

- Explain your role
- Explain how information will be shared in the process
- Explain the prohibition against retaliation
- Explain amnesty provision

Explain Your Role (1 of 2)

- “As the investigator, my job is to gather evidence, interview witnesses, and prepare summaries of those interviews.”
- “Today, I’ll be taking notes so that I can prepare a good summary of our conversation, but I want to make sure it’s accurate, so I’ll send you a copy for your review. You’ll get the opportunity to suggest changes to make sure that it’s complete and truthful, and that I’ve properly captured your side of the story.”

Explain Info Sharing

- “When the summary is finalized, it will go into the case file. Both parties are going to get a chance to look at the case file, so they will see what you tell me today. The summary will also be shared with the hearing officer, so if you get called as a witness to the hearing, it will be what people use to ask you questions. The more complete it is, hopefully the fewer questions they will need to ask you!”

Explain Your Role (2 of 2)

- “In addition to drafting interview summaries, I’ll also draft a report that summarizes what I’ve done to investigate, and the information I’ve collected. I do not make decisions about what happened or whether the policy was violated. A hearing officer has that job.”
- “The goal is for me to collect information to help the hearing officer understand what happened so that they can make a good decision in this case, which is why I’m very thankful that we’re speaking today.”

Retaliation Prohibition

- “Our policy prohibits retaliation, and there’s a technical definition for that. But listen – if anyone makes you uncomfortable because you’ve spoken with me or participated in this process, please tell me right away. It may not rise to the level of retaliation under the policy, but there are still things we can do to address it. And if you’re feeling uncomfortable, chances are good that other folks are, too, so you’ll be doing them a favor by reporting it.”

Retaliation – More Oomph

- “Please don’t do one of these two things:
 - 1) Re-read the policy and decide you don’t need to tell me because you don’t think it rises to the level of a policy violation; or
 - 2) Decide that you are strong enough to handle it and don’t tell me.
- You might be strong, but maybe other witnesses are experiencing the same thing and they might not be strong enough. I’d rather help address things before they get too complicated, so please let me know.”

Amnesty

- Check your policy for your language.
- “Our policy gives you amnesty for personal drug and alcohol use, and it gives amnesty for other witnesses and the parties also. So, if any part of your story involves people using drugs or alcohol, please know that we’re not going to bring student conduct charges in this situation. We want you to feel comfortable telling us the whole truth about the evening, and this is more important than underage drinking or drug use.”

To Record Or Not?

- Ohio is a “one party” state, which means as long as one party to the conversation is aware of the recording, you can record.
 - But failure to disclose this recording is likely not consistent with your institutional ethic of care.
- If you ask for consent and some witnesses refuse, what then?
- Your hearing officer will need either transcripts of the recordings, or they will need to review all of the videos. If you have a panel, they all will need to review this information.
- Recordings can be incredibly useful when a party or witness changes their story, and they can be helpful in lawsuits/OCR complaints.

Handling Difficult Advisors

- Must have FERPA release if students are involved and the advisor is not an employee
- Title IX Coordinator can help set expectations for advisors up front
- Communicate with the party and copy the advisor: “Your advisor asked _____, so I wanted to share my response directly with you.”
- If the advisor submits the party’s written statement, make sure the party adopts that statement as their own. Advisors don’t typically get to submit evidence unless they are witnesses.



Interviewing Skills

- Preparation, Attention to Detail, and Being Human

Start with your Scope

- This should be documented in the Notice of Allegations
- The NOA should also include information about which policies are at issue
 - Double-check – is the correct policy cited?
- Break down the provisions to elements.

Elementary, My Dear Watson

- For example:
 - ✓ Unwelcome conduct
 - ✓ On the basis of sex
 - ✓ That a reasonable person would determine to be:
 - ✓ So severe, pervasive, and objectively offensive that
 - ✓ It effectively denies a person equal access to the recipient’s education program or activity.

Elements as Questions: Brainstorm

- For example:
 - ✓ Unwelcome conduct
 - ✓ On the basis of sex
 - ✓ That a reasonable person would determine to be:
 - ✓ So severe, pervasive, and objectively offensive that
 - ✓ It effectively denies a person equal access to the recipient's education program or activity.

Outline Your Thoughts

- Prepare a bullet point list of things you want to explain at the outset
- Have your policy language at the ready
- Bring any evidence that you may want them to review and comment on
- Prepare an outline of questions
 - Don't forget to ask the complainant about impact if it's an element of your policy language!

Setting the Stage

- Private location – be cautious of windows, traffic in the area, distractions
- Comfortable seating that provides equal positioning for interviewee, interviewer, and advisor (if any)

Things I Always Cover

- What is my role?
- Who will read your information?
- No retaliation
- How to access supportive measures (always for parties – as needed for witnesses)
- “Do you know what I’ve called you to talk about today?”

Start with Relationships

- What year are you? Where are you from originally? What is your major? Where do you live on campus?
- What is your title/position here? How long have you worked here?
- Who did you meet first, C or R? How? When?
- Relationships with other key people in the case (to help assess potential bias)

Get a Timeline

- “What do you remember regarding this situation?”
 - Give them a starting point or let them choose
 - “And then what happened? And what happened next?”
 - Let them deliver a monologue
- Think in terms of a timeline for your report
 - What section headings will help you tell the story chronologically?
 - Are you clear as to which parts of their monologue fit under which section?

Ask Follow-Up Questions

- Go back to each incident on your timeline and flesh out the details.
- If the witness was alleged to have done or said something in particular, check to see if that's accurate
- Cover every element that the individual could have information about
 - Remember: is impact an element in my case?

Consent – Explicit?

- “They gave consent” → “What did you say to them, and what did they say to you?”
- Did you have any conversation about sexual activity?
- Did the other person say anything to you that suggested they were consenting?
- Did the other person do anything that suggested they were consenting?
- Who initiated the sexual activity?

Consent – Implicit?

- Who took off your clothes? Who took off the other person's clothes?
- Was there a condom? Who provided it? Was there any conversation about using protection?
- Did you touch the other person? If so, where?
- Did they touch you? If so, where?

Questions for Respondent

- What did the other person say to you to show consent?
- What actions did the other person do to show consent?
- Were they making any noises during the encounter?
- Did they help position their body during the encounter?
- Did they move your hands during the encounter?

Incapacitation

- Remember: amnesty.
- "I want to understand the role that drugs or alcohol may have played in this situation."
- "I want to understand whether you were capable of giving consent, or whether you were incapacitated due to drugs or alcohol."
- "I want to understand whether the other person was sober enough to understand and consent."
- "I am trying to get a sense of how intoxicated the person may have been when you saw them."

Incapacitation Questions (1 of 2)

- How much alcohol? Any drugs?
- Any medications that may have affected your ability to stay awake, or that might have interacted with alcohol?
- "They were drunk" → What did "drunk" look like?
 - Slurring? Clumsy? Uncoordinated?
 - Able to walk on their own? Need assistance to navigate or complete tasks?
 - Vomiting?
 - Able to carry on a conversation?
 - Oriented to who/what/where/when/why?

Incapacitation Questions (2 of 2)

- Was it a cup or a CUP?
- How many “fingers” of alcohol on the solo cup?
- What type of alcohol was consumed?
- What did they eat? When?

Respondent’s Awareness

- Was Respondent there?
- Did Respondent see when Complainant was [fill in symptom]?
- Did Respondent bring Complainant any alcohol/drugs?
- Did Respondent say anything about Complainant’s level of intoxication?
- Was any planning done to take care of Complainant? Was Respondent part of that conversation or plan?

Incapacitation: Timeline

- Drinks
- Drugs
- Food
- Complainant’s own recall
- Behavioral observations from other
- Electronic information – texts, videos, audio files
- Security footage
- Cards swipes

Sensory Questions

- What do you remember hearing, smelling, tasting, feeling?
- Where was the other person’s hand, leg, body weight, etc.?

Paraphrase Questions

- “So, what I heard you saying is...”
- “Let me make sure I understand...”
- “It sounds like... do I have that right?”

Strategic Questions

- “Would it surprise you to learn...”
- “Witness X said.... Do you agree?”
- “Here you said X, but today, you said Not X. Can you help me reconcile those things?”
- “Witness X said this and Witness Y said that. Can you help me understand why they might have different information?”
- “Let’s look at this [evidence] together so I can get a better understanding...”

Final Questions

- Is there anything you thought I would ask you about that we haven't discussed?
- Is there anything else you'd like to tell me?
- Is there anything else you think I should know?

Drafting Interview Summaries

- Virtually every sentence should start with, "Witness stated..." or "Witness recalled..."
- Use direct quotes whenever possible and appropriate.
- Don't use adjectives or adverbs unless they are direct quotes from the witness.
- Avoid pronouns, as they can make a sentence ambiguous.

Thoughts about Summaries

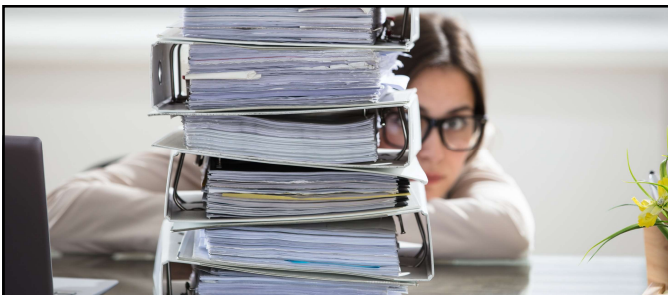
- Include procedural review at the outset (your "spiel")?
- Complete sentences vs. bullet points?
- Anonymize witness names?
- Use "Complainant" or "Respondent," or use the names as they are used by the witness?



Practice Interviewing

Charges

- What are the appropriate charges in this case, now that we've interviewed the Complainant?
- Does this qualify as Title IX Sexual Harassment?



Preparing the Case File

Redactions

- Sexual predisposition or prior sexual behavior of complainant
- Privileged information where privilege has not been waived
- Medical records where no consent has been granted

What do you include?

- Interview summaries
- Evidence gathered
- Do you prepare a draft report to go with the evidence for review?

How do you share it?

- Technology – can limit ability to print, share, download, screenshot?
- Use watermarks for Complainant/Respondent file?
- In-person review?
- Non-disclosure agreements for technological access?
- How can advisors access it?

Draft Report

- “Fairly summarizes relevant evidence”
- What you summarize is likely narrower than what you include in the file for review

Report Includes?

- Procedural History
- Summary of Allegations
- Relevant Policy Language
- Investigation Overview
 - Witnesses – Who you spoke with, who declined to participate, who never responded, who was requested wasn’t relevant (and why)
 - Evidence – What you gathered, what you tried to gather but couldn’t, what you were asked to gather but didn’t (and why)

Summary of Information

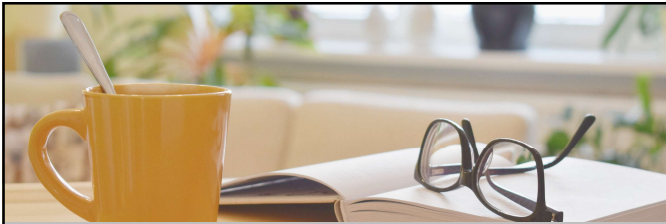
- Do you want to detail what each witness said?
- Do you want to synthesize and summarize undisputed facts?
- Do you want to do a combination, depending on whether a particular issue is disputed or undisputed?
- Do you want to intersperse evidence, or make it a separate section?
- Do you organize it chronologically or by source?
- Do you organize it chronologically by story or gathered date?
- Do you use complete sentences or bullet points?

Report Attachment

- Put it in a single PDF.
- Make a table of contents.
- Bonus: Make the table of contents clickable.
- Refer to relevant documents when you write your summary.
 - My ideal world: Every sentence has a citation to the attachments.

Party Responses

- Do you need to conduct follow up interviews or request additional evidence?
- (Do you need to then circle back and do another round of evidence review/response?)
- Integrate relevant portions of the responses into your summaries.
- Attach the responses.



Bonus: Read Your Notes Like A Decision-Maker

- Investigators don't do this.

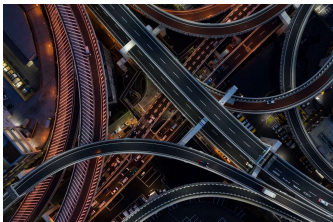
Let's Look At Your Evidence

- Let's walk through the process.
- Do you have enough information to make a decision?
- What questions do you wish you had asked?
- What evidence do you wish you had?
- If you had to make a decision based only on the evidence in front of you (without the benefit of a hearing), what decision would you make AND WHY?



Slides for Decision-makers

HIGHWAY TO THE HEARING ZONE





Checkpoint one: All of these

- Complainant: Complainant was participating or attempting to participate in your education program or activity when formal complaint was filed
- Definition: Reported conduct in formal complaint could constitute “sexual harassment” under Title IX definition if proved
- Setting: Reported conduct occurred in your education program or activity
- U.S.A.: Reported conduct occurred against a person in the United States

SCOPE OF YOUR EDUCATION PROGRAM AND ACTIVITY



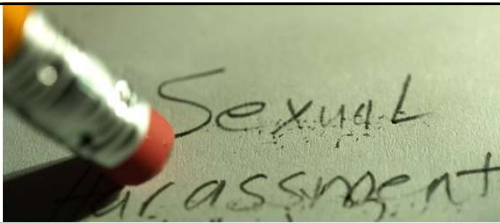
Education Program/Activity

- 106.2(h) – All the operations of a college or university
- 106.44(a) – Includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by an officially recognized student org



Within the Scope?

- Co-curricular trip to Cuba – ?
- Fraternity party in recognized house – ?
- Holiday party for students at prof’s house – ?
- Athletes traveling to game, but not with team – ?
- Holiday party at employee’s house, invites co-workers and others – ?
- Off-campus apartment – ?



A quick discussion on “Sexual Harassment”



Sexual Harassment

- **Sexual harassment** means conduct **on the basis of sex** that satisfies one or more of the following:
 - **[Quid pro quo]** An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
 - **[Unwelcome 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 recipient’s education program or activity; or
 - **[Clery crimes:]** Sexual assault, dating violence, domestic violence, or stalking

**Sexual Harassment:
Quid Pro Quo**



- Only applies to employee respondents (can be any complainant)
- DOE interprets this broadly to encompass implied *quid pro quo*
- No intent or severe or pervasive requirements, but must be unwelcome
 - DOE: “[A]buse of authority is the form of even a single instance...is inherently offensive and serious enough to jeopardize educational access.”

Sexual Harassment: Unwelcome Conduct



- The second definition: “severe, persistent, and objectively offensive” **and** deny equal access (which is not the same as under Title VII)
- Does not require bad intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant (30159)

Severe?



- Takes into account the circumstances facing a particular complainant
- Examples: age, disability status, sex, and other characteristics
- Preamble discussion states that this removes the burden on a complainant to prove severity (30165)

Pervasive?



- Preamble indicates pervasive must be **more than once** if it does not fall into the above (30165-66)
- Preamble reminds us that quid pro quo and Clery/VAWA (domestic violence, dating violence, stalking) terms do not require pervasiveness

Objectively Offensive?



- Reasonable person is very fact-specific (30167)
- Because so fact-specific, different people could reach different outcomes on similar conduct, but it would not be unreasonable to have these different outcomes
- Preamble notes that nothing in the Regulations prevents institutions from implicit bias training

Hypotheticals – Sexual Harassment



Let's put these definitions to the test...see your hypo packet

- Chuck and Mary Sue



Consent – Explicit?

These may be worded slightly differently depending on the party.

- “They gave consent” → “What did you say to them, and what did they say to you?”
- Did you have any conversation about sexual activity?
- Did the other person say anything to you that suggested they were consenting?
- Did the other person do anything that suggested they were consenting?
- Who initiated the sexual activity?

1
5
1



Consent – Implicit?

These may be worded slightly differently depending on the party.

- Who took off your clothes? Who took off the other person’s clothes?
- Was there a condom? Who provided it? Was there any conversation about using protection?
- Did you touch the other person? If so, where?
- Did they touch you? If so, where?

1
5
2



Questions for Respondent

If they say there was consent, these can help get more details.

- What did the other person say to you to show consent?
- What actions did the other person do to show consent?
- Were they making any noises during the encounter?
- Did they help position their body during the encounter?
- Did they move your hands during the encounter?

1
5
3



Incapacitation

First, explain why you need information on alcohol/drug use.

- "I want to understand the role that drugs or alcohol may have played in this situation."
- "I want to understand whether you were capable of giving consent, or whether you were incapacitated due to drugs or alcohol."
- "I want to understand whether the other person was sober enough to understand and consent."
- "I am trying to get a sense of how intoxicated the person may have been when you saw them."

5
4



Incapacitation Questions (1 of 2)

You need a good physical description of relevant symptoms

- How much alcohol? Any drugs?
- Any medications that may have affected your ability to stay awake, or that might have interacted with alcohol?
- "They were drunk" → What did "drunk" look like?
 - Slurring? Clumsy? Uncoordinated?
 - Able to walk on their own? Need assistance to navigate or complete tasks?
 - Vomiting?
 - Able to carry on a conversation?
 - Oriented to who/what/where/when/why?

1
5
5



Incapacitation Questions (2 of 2)

You need a good physical description of relevant symptoms

- Was it a cup or a CUP?
- How many "fingers" of alcohol on the solo cup?
- What type of alcohol was consumed?
- What did they eat? When?

1
5
6

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Respondent's Awareness

Did Respondent know or should have known of incapacitation?

- Was Respondent there?
- Did Respondent see when Complainant was [fill in symptom]?
- Did Respondent bring Complainant any alcohol/drugs?
- Did Respondent say anything about Complainant's level of intoxication?
- Was any planning done to take care of Complainant? Was Respondent part of that conversation or plan?

1
5
7

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Incapacitation: Timeline

This will be critical

- Drinks
- Drugs
- Food
- Complainant's own recall
- Behavioral observations from other
- Electronic information – texts, videos, audio files
- Security footage
- Cards swipes

1
5
8

What is Relevant?




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Review of Relevance
(1 of 7)

- Regulations do not define “relevant,” but tells us what is not relevant
- Per *Regulations* 34 C.F.R. 106. 45(b)(6)(i):
 - “Only relevant cross-examination and other questions may be asked of a party or witness.”
 - “Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”

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Review of Relevance
(2 of 7)

- Under the **preponderance of the evidence** standard:
- Does this help me in deciding if there was more likely than not a violation/highly probable to be a violation?
- Does it make it more or less likely/does it make it highly probable?
- Why or why not?
- If it doesn’t move this dial: likely not relevant.

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Review of Relevance
(3 of 7)

- *What is NOT relevant:*
- Questions and evidence about the **complainant’s sexual predisposition or prior sexual behavior are not relevant, UNLESS**
 - 1) Such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - 2) 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.
- [34 C.F.R. 106.45(b)(6)(i)]

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Review of Relevance
(4 of 7)

- What is NOT relevant:
- Information **protected by a legal privilege**
- [34 C.F.R. 106.45(b)(1)(x)]
- This will vary state-by-state, so check with your legal counsel. Most common in this context are:
 - a) Attorney-client privilege
 - b) Doctor-patient/counselor-patient
 - c) Fifth Amendment/right not to incriminate self (not really applicable in this venue, but sometimes raised and cannot force to answer questions)

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Review of Relevance
(6 of 7)

- What is NOT relevant:
- A party's **treatment records** (absent voluntary written waiver by the party)
- [34 C.F.R. 106.45(b)(5)(i)]
- PRACTICE TIP – LOOK for that written waiver in the materials provided to you

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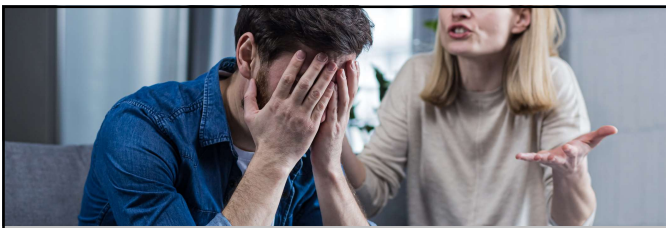
Review of Relevance
(7 of 7)

- What is NOT relevant:
- No improper inference from a party or witness **declining to participate** in cross-examination.
- [34 C.F.R. 106.45(b)(6)(i)]



Decorum During Hearings

- Relevant questions must not be abusive
- Enforcement of decorum must be applied evenhandedly
- "...where the substance of a question is relevant, but the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically 'leans in' to the witness's personal space), the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner." (Preamble, 30331)
- The decision maker may remove any advisor, party, or witness who does not comply with expectations of decorum. (Preamble 30320)



Scenario Overview

- Tessa and Michael – Incapacitation and Consent?



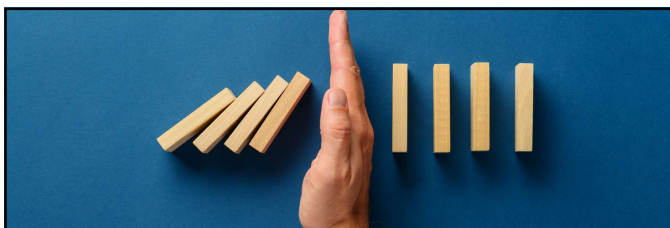
Outline of Evening

- What happened when?
- Alcohol Consumption
- Memory Impacts
- Impacts on Executive Function?
- What did Michael know or should have known?

Brainstorm Bricker Graydon

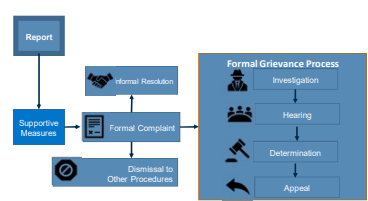
- What are the elements of sexual assault?
 - Are any agreed to by the parties?
- What are the key things that will need to be decided to determine if a policy violation occurred?
- What other things may help with a credibility assessment?

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Conducting a Process That Protects and Holds Accountable

Overview of the Process Bricker Graydon



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Split Roles

- Team Tessa
- Team Michael
- Panel & Volunteers

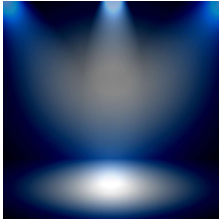
• Need volunteers for two parts:

- Complainant Tessa
- Respondent Michael

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Three Roles: Three Spotlights



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Role: Hearing Panel Member

- Reviews the evidence file, final investigation report, and responses of the parties
- Considers what is missing, what is unclear, and what elements are disputed
- Asks relevant questions at hearing, adjusting as other questions are asked
- Is neutral in both the manner they act and the questions they asked

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Hearing Panel Member: Your Goal

- Have enough information on every element of every charge so that you can render a decision by a preponderance of the evidence
- Have enough information to make decisions regarding the credibility of the parties and witnesses
- Make relevancy determinations after every question asked by the advisors
- Maintain decorum at all times, by all participants

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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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Advisors: Your Goal

- 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

**LIVE CROSS-EXAMINATION:
Theory and Practice**

Cross Tools: What are the goals of cross-examination? 

- Obtain **factual admissions** helpful to your party's case.
- **Corroborate the testimony** of your party's witnesses.
- Minimize the other party's case by **impeachment of witness** being questioned.
- Minimize the other party's case by **impeachment of other witnesses** through the witnesses being questioned.
- Reduce **confusion and seek truth**.

Cross Tools: Impeachment 1 of 5 

- What bias might a witness have?
- Do you understand the relationship between the witness and the parties?
- Experts: getting paid for testimony
 - You charge fees based on an hourly rate?
 - You were paid to produce a written report?
 - Based on this report, you're testifying today?
 - You're charging money for each hour you're here?

Cross Tools: Impeachment 2 of 5



- Perception and Recall
 - What is the witness's perception of the facts?
 - Has time impacted recall or ability to remember clearly?
 - How many times has the witness talked to a party about this case?
 - Was there anything that impacts the person's physical or mental ability to perceive or recall facts accurately?
 - Does the witness form a conclusion without knowing certain information?

Cross Tools: Impeachment 3 of 5



- Example: Intoxication level information from witness.
 - You did not see the consumption, or keep track of how long the party was consuming alcohol?
 - You did not measure the alcohol poured by ____ at the party?
 - Your statements are based on information provided by others? the other party?
 - Party's statements were made after they had been drinking alcohol (consuming other drugs, etc)?
- Remember: Determine whether the person is not speaking from personal knowledge.

Cross Tools: Impeachment 4 of 5



- Inconsistency in statements
 - If a fact was very important, why is the hearing the first time it has come up?
 - What possible reasons might the witness have for changing their testimony?
 - Did a witness receive coaching from the party or others between making one statement and another?
 - Has the witness's perspective or motive changed between statements?
 - Does changing this fact help the other party's case?

Cross Tools: Impeachment 5 of 5



- Lack of Corroborating Evidence
 - Examples?

Advisors: Thought Process

Advocating for your party in the Hearing 1 of 7



- Preparation
- Review the entire investigation hearing report
- Review all evidence (some may have non-relevant evidence also—know if you disagree with any relevancy determinations made by the investigator)
- Meet with your party to review what your party thinks and wants
- Discuss strategy

**Advocating for your party in the Hearing
2 of 7**



- Preparation
- Realize that your party may want to take a more aggressive approach – If you are not comfortable with the approach, discuss it with the party and check to see if you can advise your party
- Discuss the expectations of decorum vs. the expectations of questioning the other party and witness

**Advocating for your party in the Hearing
3 of 7**



- Preparation
- Determine who your witnesses are and whether your party thinks they will show up to the hearing
- Be careful of the line between asking a party to participate and explain the importance of their statements vs. coercing a party to participate who has the right not to participate

**Advocating for your party in the Hearing
4 of 7**



- Preparation
- Consider a script
 - List each allegation and policy definition/elements for the policy violation (e.g., sexual assault—know which definition and what must be met to show sexual assault under the policy)
 - Standard of review: this can be helpful to have written out so that you can support relevancy determinations for your questions to show why relevant

**Advocating for your party in the Hearing
5 of 7**



- The Hearing
- Ask one question at a time and wait for the Decision-Maker to determine if it is relevant
- If the Decision-Maker has a question about why the question is relevant, be prepared to answer that question (see preparation)
- Be respectful of the process so that you can effectively ask your party's questions – if you think you or someone else is becoming too heated, ask for a break to regroup

**Advocating for your party in the Hearing
6 of 7**



- The Hearing
- Be aware that the other advisor may not be as prepared as you are and the decision-maker has a duty to ask questions the advisor does not—this doesn't mean the decision-maker is biased or trying to help the other side – you may not like it, but it's a requirement for the decision-maker

**Advocating for your party in the
Hearing 7 of 7**



- Post-hearing
- The decision-maker will issue a decision to both parties at the same time.
- Under the regulations, the advisor is not required to have any further role in the process (this may be especially true if the advisor is appointed by the institution)
- Other advisors (attorney or parent), may choose to work with the party to appeal on the bases listed in the decision

How Do You Choose Questions?

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What Don't You Know?

- Decision-makers: 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.

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What Do You Know?

- Decision-makers: 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 decision-maker's mind.



Disputed Facts?

- Decision-makers: Question on disputed facts so that you can weigh credibility, make a determination, and explain your rationale.
- Advisors: Highlight areas for the decision-maker 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

- Decision-makers:
 - 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."
 - Decision-maker: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
 - Etc.



Break & Preparation for Practice Session



Decision-Maker Hearing Practice and Debrief

Hearing Toolbox

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Hearing Toolbox: Breaks

- Preamble discusses the use of breaks to allow parties to recover from panic attacks or emotional questioning
- Also helpful to reset tone and reduce emotion and tension
- Can use to review policy and procedures to address relevancy issues that arise

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Hearing Toolbox: Questions

- Do you have the information you need on each element to be able to evaluate the claims?
- Consider neutral phrasing of questions:
 - “In the report you said... Help me understand...”
 - “You stated... Tell me more about that.”
 - “Could you give more information about what happened before/after...”

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Objectively Evaluating Evidence and Resolving Credibility Disputes

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Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the decision-maker 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

Resolving Credibility Disputes



- 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



- 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

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Resolving Disputes

- 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

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Resolving Disputes

- 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**

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#1 Keep an Open Mind

- Keep an open mind until all statements have been tested at the live hearing
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the evidence that can remain (statements in the record might have to be removed from consideration if not tested in live-hearing)

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#2 Sound, Reasoned Decision

- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

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#3 Consider All/Only Evidence

- You must make a decision based solely on the relevant evidence obtained in this matter and only statements in the record that have been tested in cross-examination
- You may consider nothing but this evidence

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#4 Be Reasonable and Impartial

- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any actual or perceived conflict of interest

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#5 Weight of Evidence

- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

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#5 Weight of Evidence

- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)


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Weight of Evidence Example


- The preamble provides in the discussion:
- “[W]here a cross-examination question or piece of evidence is relevant, but concerns a party’s character or prior bad acts, under the final regulations **the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level weight or credibility**, so long as the decision-maker’s evaluation treats both parties equally **by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.**” (30337)

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#6 Evaluate Witness Credibility 


- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.

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#6 Evaluate Witness Credibility 

- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

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#6 Evaluate Witness Credibility 

- Credibility is determined fact by fact, not witness by witness
 - The most earnest and honest witness may share information that turns out not to be true

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#7 Draw Reasonable Inferences

- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning.



#8 Standard of Evidence

- Use the your standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.
- Preponderance of the evidence: a fact is more likely than not to be true (30373 fn. 1409)
- Clear and convincing: a fact is highly probable to be true (30373 fn. 1409)



#8 Standard of Evidence

- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

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#9 Don't Consider Impact

- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.
- **Do not consider the impact of your decision.**

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The Written Decision

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Resolving Disputes

Fact Finding Process:


- 1
 - List undisputed facts – what do parties agree on? = **findings of fact**
 - List disputed facts – what do parties disagree on?
- 2
 - What undisputed facts address each element?
 - What disputed facts must be resolved for each element?
- 3
 - Weigh the evidence for each **relevant** disputed fact
 - Resolve disputed facts = **findings of fact**

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Goals 


- Be consistent in terminology
- Be clear as to the source of information. Compare:
 - “Bob stated that this happened.”
 - “This happened.”

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Unambiguous 


- Could someone unfamiliar with the incident pick up the decision and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Review for clarity and consistency.

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Relevant 


- Include any decisions made that exclude information as not relevant and the explanation given in hearing
- Check to ensure that your report does not contain any information you are prohibited from including?

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Sensitive 


- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?
- Maintain neutral, evidence-driven tone.

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Empathetic 

- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
 - Clearly/obviously
 - Innocent/guilty
 - Victim/perpetrator
- Watch your adjectives and adverbs – unless they are in a quote
- Recognize the impact of your words

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Specific 

- Set the scene visually (will help identify inconsistencies in stories)
- Use quotation marks carefully
- Include details to the level that you can thoroughly understand what it looked like
- Be careful of pronoun usage so that we always know who is saying or doing what

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Questions?

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Thank You

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