

Title IX Hearing Panel Refresher Training

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Refresher Training: Walking Through the Hearing Manual

- Types of Prohibited Conduct
 - What are the allegations to be adjudicated?
- Applying the standard of proof
- Special Evidentiary Issues
 - Prior Sexual History
 - Information protected under a legally recognized privilege
 - Refusal to submit to cross-examination
- Determining relevance
- Evaluating credibility
- Evaluating consent
 - Role of alcohol/drugs in determining consent



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Refresher Training: Walking Through the Hearing Manual

- Types of Supporting Facts
 - Direct Evidence
 - Circumstantial Evidence
 - Documentary Evidence
 - Expert Witness Testimony
 - Hearsay Evidence
- Evaluating Information Presented
- Weighing Information Presented
- Trauma Informed Practices
 - Evidentiary Issues
 - Prior Sexual History (continuation of above)
 - Pattern Evidence
 - Establish factual finding



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Refresher Training: Walking Through the Hearing Script

- Confidentiality of the Process
- Rules of Decorum/Objections to Relevance
- Limiting the scope of the opening statement
- Witness introduction and testimony
- Closing Statements by the parties
- Introduction of additional information/documents by parties
- Deliberations and Decision
 - Elements of charge must be met
 - Severe and pervasive defined
 - Letter of Finding
 - Considered testimony and documentation
 - Decision
 - Responsible or not responsible
 - Rationale
 - Must be clear
 - Do not use “we feel”, “we think



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Types of Prohibited Conduct

- Sexual Harassment
 - Severe and pervasive
- Sexual Assault
 - Defined by Federal, Tribal or State Law
- Dating Violence
 - **(A)** who is or has been in a social relationship of a romantic or intimate nature with the victim; and,
 - **(B)** where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - **(i)** the length of the relationship;
 - **(ii)** the type of relationship; and,
 - **(iii)** the frequency of interaction between the persons involved in the relationship.



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Types of Prohibited Conduct

- Domestic Violence
- Stalking
 - A course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for their safety or the safety of others; or
 - Suffer substantial emotional distress
- What is the “reasonable person” standard?
 - Amount of care that an ordinary person would use in a given situation
 - Objective, uniform evaluation of behavior that applies to people in society



Standard of Proof

- Grievance procedures must use the *preponderance of evidence* standard to resolve complaints.
 - Must be more than 50% sure (51% or 50.1%)
- If sufficient doubt remains after considering all information, you should give the Respondent the benefit of the doubt



Requirement for Findings

- To establish a violation has occurred, the University must provide information which :
 - Constitutes a violation of AD85 or the Student Code of Conduct
 - Corroborates the alleged behavior charged, and
 - Determines the accused student's responsibility for the behavior reported.



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Requirement for Findings (Cont.)

- If above 3 criteria met by preponderance, then:
 - Must find that a violation has occurred, and
 - Must find Respondent responsible for the violation
- Board members **MAY NOT** consider:
 - Whether or not a student knew that they were violating a policy. Ignorance is not an excuse.
 - If a student makes a claim of diminished capacity due to alcohol or other drugs.
 - A claim that behavior was motivated by the unsubstantiated behavior of another as a legitimate defense.



Special Evidentiary Issues – Prior Sexual History

- Questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent



Special Evidentiary Issues – Legally Recognized Privilege

- Information protected under a legally recognized privilege (e.g., privileged communications between a party and their physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in a treatment capacity, or privileged communications between a party and their attorney)
 - are not considered unless the information is relevant and the person holding the privilege has waived the privilege



Special Evidentiary Issues – Refusal to submit to cross-examination

- Hearing panel members will not draw an inference about the determination regarding responsibility based solely on a party or witness's absence from the live hearing or refusal to answer cross-examination or other questions



Determining Relevance

- Information is *relevant* when, if true, it supports/proves, or undermines/disproves, any disputed fact that is of consequence to the determination of the case



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Determining Relevance (Cont.)

- Information can be:
 - Relevant to an actual issue or action
 - Relevant to credibility of a witness or information
- Important considerations:
 - Efficiency
 - Fairness



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Determining Relevance (Cont.)

- Test for relevance
 - A) What facts are you trying to prove/determine?
 - B) Does the information help prove or disprove a fact?
 - C) Is the fact important in deciding a case?



Determining Relevance (Cont.)

- Useful information in a hearing to help separate relevant from irrelevant information:
 - Motivation
 - Ability
 - Malice
 - Threats, expressions, or earlier similar acts implying or denoting intent
 - Other behavior that tends to shake your belief in a person's testimony



Evaluating Credibility

- “Credibility determination is neither an exact science nor a purely rational process.”
- Even in a situation where it appears to be one person’s word against another’s, it is very rarely a “draw,” as one person usually comes across as more credible than the other, or there is some kind of corroborative information.
 - If it IS a complete draw, then need to fall back on the fact that the student is presumed not responsible unless proven “in violation,” and that the University has the burden of proof.



Evaluating Credibility (Cont).

- Don't jump to conclusions based on your expectations. The decision is not based on your experiences.
- Remember, the credibility of both parties is at issue, not just the reporting party.
 - Review the behavior and statements of the respondent as well as those of the reporting party.



Evaluating Credibility (Cont).

- Inconsistency may or may not be important, depending on several factors:
 - is there is a reasonable explanation?
 - is the point significant or trivial
- Just because a witness's statement may vary over time, that does not compel a conclusion that the witness is lying
 - The variation might have resulted from memory lapse
- Too much consistency could mean the story is rehearsed or memorized.



Evaluating Credibility (Cont).

- There are no “perfect’ victims (or witnesses)
 - Who says all the right things
 - Knows all the right answers
 - Fulfills the stereotype of what a “victim” should be
- There are no “perfect” perpetrators
 - Who fulfill every stereotype of what a rapist/predator is



Evaluating Credibility (Cont).

(General Guidelines)

- Weighing one person's word against another
 - Barring other forms of evidence, the testimony of the unbiased person is given more weight.
- When the student claims to have not known he/she was breaking a rule
 - An attempt to get the Panel to accept the student's failure to assume responsibility for his/her role in the alleged violation
 - Only in rare cases should this type of testimony be given any value
- Multiple witnesses corroborating the same set of facts
 - it is only in a very rare situation that the number of witnesses be considered as a factor in determining responsibility.
- When the student introduces character witnesses
 - The testimony of these witnesses will be of minimal value in determining responsibility
 - Only exception would be if witness has information which suggests the student was physically unable to commit the violation



Evaluating Consent

- Be familiar with the University's definition of Consent
- Avoid misconceptions about responses to assault
 - Why did they wait to report the assault?
 - Why did they first say they did not want us to take action but now they do?
 - Why do they describe events in a piecemeal fashion, rather than in a neat chronology?
 - Why did they come forward and state that they now remembers more about an event that they didn't tell in their first interview?
 - it is only in a very rare situation that the number of witnesses be considered as a factor in determining responsibility.
- Reactions of those who experience sexual assault may appear counter-intuitive but in fact are quite common
 - Reaction to trauma should not be misinterpreted as reflecting a lack of credibility about consent



Evaluating Consent (Cont.)

(Role of alcohol/drugs)

- Evaluating intoxication vs. incapacitation and avoiding bias related to alcohol consumption
 - Gauge the impact of alcohol consumption by asking questions such as:
 - What type of alcohol did you consume?
 - Over what period of time did you consume the alcohol?
 - How quickly was the alcohol consumed?
 - Did you consume any food? How much? When?
 - Were you taking any medication that has any restrictions regarding consumption with alcohol?
 - Can you describe the impact that the consumption of alcohol had on you?



Evaluating Consent (Cont.)

(Role of alcohol/drugs)

- Was individual incapacitated by use of alcohol? Important to help distinguish sexual assault from a consensual (albeit intoxicated) sexual encounter. Possible factors to consider :
 - Was the complainant conscious or unconscious? Did they regain consciousness during the incident? If so, what did the respondent do?
 - Did the complainant black out at any point?
 - Did the complainant vomit at any point?
 - What was the complainant's condition when last seen by reliable third-party witnesses?
 - Did the complainant seem to understand where they were and where they might be going?
 - Could the complainant walk, or did someone have to assist or carry the complainant?
 - Could the complainant speak or communicate clearly? Were they slurring?



Evaluating Consent (Cont.)

(Role of alcohol/drugs)

- What physical tasks did the complainant perform, and how well did they perform them?
 - For example, was the complainant using a Smartphone, and did their coordination seem impaired? If the complainant was smoking, could they light their own cigarette?
- Could the complainant make and maintain eye contact with others?
- Was the complainant able to remove their own clothes?
- Is there anything to suggest that a complainant may have been less inclined to participate in consensual intercourse at the time of the incident?
 - Was the complainant undergoing treatment for a vaginal infection or other uncomfortable condition?
- These questions may seem invasive but are important in evaluating consent and incapacitation to help reach and support the ultimate conclusion about consent



Evaluating Consent (Cont.)

- In many sexual assaults, only the complainant and respondent were present. Pursue and evaluate other evidence to make an informed judgment call on the question of consent:
 - Witness accounts
 - Social Media postings
 - Student ID card swipes
 - Surveillance videos



Kinds of Information

- Oral Statements
 - Eyewitness, other witnesses, experts, investigators, character witnesses
- Written statements
- Physical objects and other kinds of records
 - Text messages, voicemails, results of a medical exam
- Documents
 - Court or medical records, diagrams



Kinds of Information (Cont.)

(Types of Supporting Facts)

- Direct Evidence (based on personal observation or experience)
 - Eyewitness testimony, photograph, other “direct” proof
 - If credible, establishes the fact one is trying to prove
- Circumstantial Evidence
 - Requires an inference; one must infer the fact one is trying to prove
- Documentary Evidence
 - Any supportive writings or documents including statements, reports, etc. that support or deny a fact at issue
- Hearsay or “secondhand” Evidence
 - Permitted in student conduct hearings
 - Statements made by one person about statements they heard from someone else



Kinds of Information (Cont.)

- Expert Witness Testimony – Qualified by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
 - (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
 - (b) the testimony is based on sufficient facts or data;
 - (c) the testimony is the product of reliable principles and methods;
 - (d) the expert has reliably applied the principles and methods to the facts of the case.



Kinds of Information (Cont.)

- Pattern Evidence
 - Prior bad acts/pattern evidence
 - May be relevant and probative
 - Use at fact-finding
 - Consider relevance to determine:
 - Intent/state of mind/motive
 - Absence of mistake
 - Pattern
 - Identity



Kinds of Information – Evaluating the Information Presented

- To evaluate information, ask three questions:
 - Is the information relevant?
 - Is it related to the matter at issue and to what the party is trying to prove?
 - Is the information credible?
 - How believable is it?
 - Is the information convincing?
 - How strongly does it convince you of what the party is trying to prove?



Kinds of Information – Weighing the Information Presented

- Weighing one person's word against another's
 - Unbiased party given more weight
- When the party claims to have not known they were breaking a rule
 - Should rarely be given value
 - Act occurred before it was prohibited
- Multiple witnesses corroborating the same set of facts
 - Should rarely be considered
 - Single, unbiased, disinterested witness is worth more than biased testimonies



Kinds of Information – Weighing the Information Presented

- When a person admits responsibility during the hearing
 - Less need for questioning unless panel needs clarification on what happened
- When the party introduces character witnesses
 - Of minimal value in determining responsibility
 - Exception:
 - Witness has information which suggests the respondent was physically unable to commit the violation



Trauma-Informed Practices

- Impacts of Trauma

- Can result in a disorganization of the person's mind;
- Can cause one to lose the ability to process information if not addressed;
- Can affect every aspect of one's life;
- Is linked to depression, anxiety, poor health....and more victimization;
- Can lead to negative coping behavior

- Difficulties of Processing Trauma

- Response may vary as a result of accumulating incidents or other personal stress
- Consider the victim's age at the time of assault



Trauma-Informed Practices

- Impacts on Memory

- Stress affects how a brain establishes, stores and retrieves memories;
- Major trauma may lead to fragmented recall;
- Differences in account over time may reflect memory processes rather than inattentiveness or deceit



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Trauma-Informed Practices

- During the hearing:
 - Recognize the impact of trauma on memory
 - Allow the witness to give a narrative
 - Use open-ended free recall questions
 - Build in an opportunity for follow-up
 - Be transparent about how information will be used
 - Develop rapport and allow for closure
 - Allow sufficient time for thorough exploration of the issues



Trauma-Informed Practices (Evidentiary Issues)

- Always consider relevance
- Admission of medical information
 - Consider need for expert guidance in understanding and interpreting information
 - If provided voluntarily by the complainant, should be shared with the respondent
- Admission of mental health records
 - Not considered unless considered relevant; and
 - person holding privilege has waived the privilege (prior written consent)
- Character evidence



Trauma-Informed Practices (Cont.)

(Evidentiary Issues)

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are barred as **not relevant**, unless such questions and evidence about the complainant's prior sexual behavior are offered to *prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.*
- Questioning about the complainant's sexual history is not permitted if consent is not at issue.
 - This applies only to Complainants, unless the Respondent has made a counterclaim against the Complainant, such that the Respondent is also a complainant.



Trauma-Informed Practices (Cont.)

(Evidentiary Issues)

- Pattern Evidence
 - Prior bad acts/pattern evidence
 - May be relevant and probative
 - Use at fact-finding
 - Consider relevance to:
 - Intent/state of mind/motive
 - Absence of mistake
 - Pattern
 - Identify



Open Discussion - Hearing Script

- Confidentiality of the Process
- Rules of Decorum/Objections to Relevance
- Limiting the scope of the opening statement
- Witness introduction and testimony
- Closing Statements by the parties
- Introduction of additional information/documents by parties



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Open Discussion – Hearing Script

- Deliberations and Decision
 - Elements of charge must be met
 - Severe and pervasive defined
 - Letter of Finding
 - Considered testimony and documentation
 - Decision
 - Responsible or not responsible
 - Rationale
 - Must be clear
 - Do not use “we feel”, “we think”



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Refresher Training: Case Study

Title IX Allegations: Sexual Assault, Dating Violence,
Stalking

Non-Title IX Allegation: Unauthorized Use

- Did Jason violate the policy on sexual assault by a preponderance of evidence standard?
- Did Jason violate the policy on dating violence by a preponderance of evidence standard?
- Did Jason violate policies on stalking by a preponderance of evidence standard?
- How should the University address the non-Title IX charge?



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Questioning Techniques

- Use Open-ended Questions
 - Who, what, how, etc.
 - Will allow the student to answer as long as he/she desires, yielding more information than requested
- Closed-ended questions often result in a “yes/no” response, not offering much information
 - Did you? Were you?



Questioning Techniques

- Avoid Multiple Choice Questions!
 - This type of question provides the charged student with the answer the hearing panel members wish to hear
 - Does not bring out the most relevant information
- Example:
 - Q: “What were your feelings when you broke the window? Were you angry, elated, frustrated, or just letting off steam? This was right around finals time.”
 - A: “Oh, I was just letting off steam, exams weren’t going well...”
 - The student will always choose the one that he or she thinks is least incriminating!
- Ask the question and stop!



Questioning Techniques

- Silence is Golden
 - Do not be alarmed when a question is asked and the person does not respond immediately.
 - Allow the person ample time to think without undue pressure to respond quickly.
 - If the person needs clarification, let him or her ask for it; don't assume that she or he does not understand the question.



Questioning Techniques

(5 Essential Questions)

- **Who** was involved in the incident?
 - If alcohol was involved, were they of legal drinking age? What was each person's level of involvement?
- **What** was the violation?
 - **What** were you doing when the police approached you? **What** would you do differently if you could do this again? **What** amount of alcohol had you consumed in how much time?
- **Where** were you when this happened? **Where** were you walking/driving to?
- **When** did this happen?
- **Why** were you approached by the police? **Why** were you engaging in the behavior



Questioning Techniques

- Sample questions with restorative action basis
 - What effect did your actions (or behavior) have on others?
On the community? On yourself?
 - Explain what you hoped to accomplish through your actions.
 - Who is responsible for your behavior?
 - What other options were there for you in this situation?
 - What was the purpose of your behavior?
 - How would you feel if others were engaged in similar behavior?
 - If you could do something differently that night/day, what would it be?



Questioning Techniques

- Sample questions with restorative action basis (Cont.)
 - Have you talked with your family about this situation, how did they react?
 - What would be the consequences to the community if everyone engaged in similar behavior?
 - How is your relationship with your roommate? With other students on the floor? With staff members?
 - How does your responsibility for living with community standards apply to your actions in this situation?
 - How might you react if such this situation were to come up again?



Things to Remember

- Carefully listen to everything that is said.
- Watch for non-verbal behaviors which may indicate attitudes, true feelings, or emotions.
- Be sure you clarify any conflicting information before you enter into deliberation. Continue to ask questions until you have all of the necessary facts regarding the incident. Do not wait until you are in deliberation and then start guessing at reasons why the information presented was conflicting.
- Carefully examine the time/date sequence of the incident. Follow-up on contradictions when questioning.



Things to Remember

- Avoid jumping from one line of questioning to another; attempt to examine an area completely before moving on. Hearing board members should learn to look to the other hearing board members before changing lines of questioning.
- Avoid unnecessary writing during the hearing. You should be concentrating on the content while developing lines of questioning. The digital recorder will provide a complete record of the hearing.
- Note passing or whispering should not occur in the hearing unless absolutely necessary. You would not be showing the respect to the speaker that you would expect if you were speaking.



Things to Remember

- Maintain your concentration throughout the hearing and remain attentive. Good posture and eye contact should be demonstrated anytime the hearing is in session.
- Never accuse a student or participate in heated arguments. Maintain your composure even if others do not.
- Carefully prepare your questions in advance. Avoid questions that are not relevant to the hearing.



Decision-Making Process

- During deliberation, it is the responsibility of all Panel members to:
 - Encourage every other member's contributions without embarrassing the other members or putting them on the spot.
 - Help the group make full use of everyone's contributions.
 - Express your own opinions.
 - Listen to everyone else's opinions.
 - Recognize and practice the qualities of effective *consensus-seeking groups*.



Decision-Making Process

- Qualities of Effective Consensus Seeking Groups
 - Use synergistic thinking as opposed to either/or thinking.
 - Generate more ideas than individuals generate independently.
 - Have a high level of participation.
 - Develop a climate in which members can be relaxed, open and direct, and are task oriented.



Decision-Making Process

- Attitudes that Support Consensus During Deliberation
 - Cooperation (NOT competition)
 - Common ownership of ideas (NOT individually owning ideas)
 - Valuing feelings (NOT emphasizing facts at the expense of feelings)
 - Valuing conflict as a cooperative effort to bring out all perspectives (NOT suppressing feelings and avoiding conflict.)
 - Valuing the contributions of all members (NOT allowing social prejudices to reflect in the group's dynamics).
 - Making an effort to equalize power (NOT relying on authority status.)

