



November 1, 2022

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

Disclaimer #1

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

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Posting These Materials

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

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Today's Agenda

- Annual Clery Review
- Review of Scenario
- Review of Roles
- Planning Questions for Parties and Witnesses
- Questioning Parties and Witnesses
- Debrief
- Making a Good Decision
- Writing the Decision
- Deciding Our Case!

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Annual Clery Training Review

Sexual Assault, Dating Violence, Domestic Violence, Stalking

Data and Statistics



- Should not influence your decision in any particular Title IX case
- Included in the Preamble, but with caveats
- We didn't do the research ourselves – surveys and data collection techniques are available for each cited work.
- Okay but really, this SHOULD NOT influence your decision in any particular Title IX case

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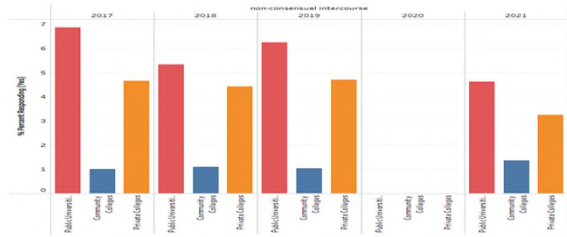
Sexual Assault Data Women and Men



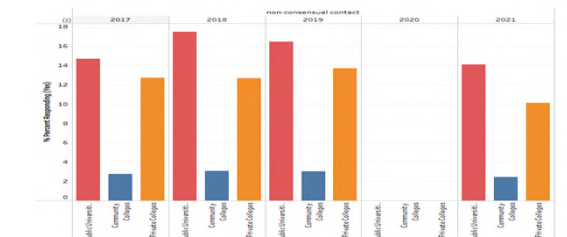
More than **1 in 2 women** and **1 in 3 men** have experienced sexual violence involving physical contact during their lifetimes.
1 in 4 women and about **1 in 26 men** will experience completed or attempted rape during their lifetimes.
 Nearly **1 in 9 men** was made to penetrate someone (completed or attempted) during his lifetime.

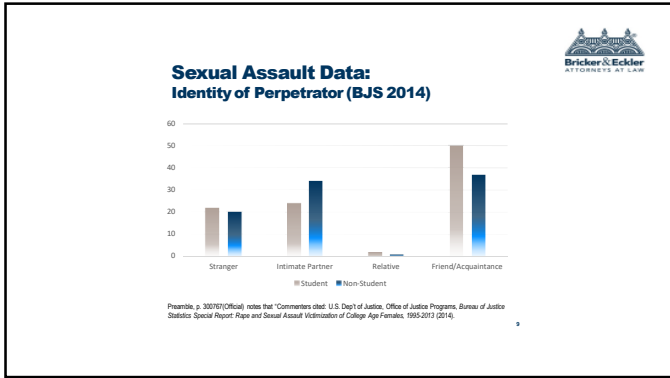
Statistics from CDC.gov/odcprevention/sexualviolence/fact.html (last accessed October 28, 2022)

Sexual Assault Data ODHE Survey – Non-Consensual Intercourse



Sexual Assault Data ODHE Survey – Non-Consensual Contact





Sexual Assault Data: Timing
Prevalence Data for Postsecondary Institutions

- More than **50 percent** of college sexual assaults occur in **August, September, October, or November**, and students are at an increased risk during the first few months of their first and second semesters in college.

Pramble, p. 30076 (Official) notes that "Commenters cited: Rape, Abuse & Incest National Network (RAINN), Campus Sexual Violence: Statistics, <https://www.rainn.org/statistics/campus-sexual-violence>."

Sexual Assault Data: Alcohol/Drug Use

"About half of sexual assaults involve survivors drinking alcohol before the assault."

"Survivors impaired by alcohol are more likely to disclose to informal, but not formal support sources than are non-impaired victims."

Lorenz, Katherine, and Sarah E. Ullman. "Exploring Correlates of Alcohol-Specific Social Reactions in Alcohol-Involved Sexual Assaults." *Journal of Aggression, Maltreatment & Trauma* vol. 25, 10 (2019): 1058-1078. doi:10.1080/10926771.2016.1219501.

**Data and Statistics:
Reporting Data**



About **65 percent** of surveyed rape victims reported the incident to a friend, a family member, or roommate but only **ten percent** reported to police or campus officials.

Preamble, p. 30082 (Official) notes that "Commenters cited: U.S. Dept of Justice, Office of Justice Programs, Office for Victims of Crime, 2017 National Crime Victims' Rights Week Resource Guide: Crime and Victimization Fact Sheets (2017).

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**Data and Statistics:
Impact Data (1 of 2)**



Approximately **70 percent** of rape or sexual assault victims experience moderate to severe distress, a larger percentage than for any other violent crime.

Preamble, p. 30080 (Official) notes that "Commenters cited: U.S. Dept of Justice, Bureau of Justice Statistics, Special Report: Socio-emotional impact of violent crime (2014).

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**Data and Statistics:
Impact Data (2 of 2)**



81% percent of women and **35% percent** of men report significant short- or long-term impacts of sexual assault, such as post-traumatic stress disorder (PTSD).

Preamble, p. 30080 (Official) notes that "Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, The National Intimate Partner and Sexual Violence Survey (NISVS); 2010 Summary Report (Nov 2011).

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Sexual Assault: Common Concerns



- Be cautious of questions that appear to blame the party for what happened or they will shut down and stop engaging.
- Better options:
 - Explain why you need information on alcohol/drug use, what the party was wearing, etc. before you ask the questions.
 - Explain the concept of consent to the parties so that they can understand why you need detailed information on the sexual encounter.
 - Check your tone constantly so as to encourage continued sharing of information.

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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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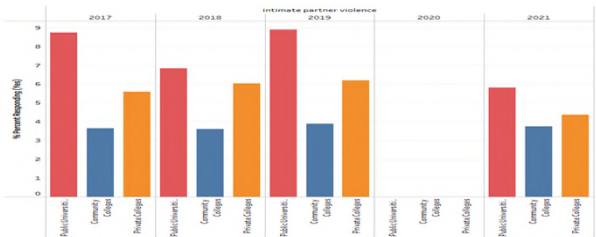
IPV vs. Healthy Relationships



- Counseling individuals on healthy and unhealthy relationships will teach them about warning signs and how to handle problematic behavior.
- The line between healthy and unhealthy is not typically where your policy draws the line for disciplinary purposes.
- How do you partner with your counseling center and domestic violence shelter to ensure consistent messaging with regard to the policy?

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ODHE Data



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Washington County Statistics, 2021



- Total Domestic Violence Incidents, Washington County, 2021: 112
 - Resulting in DVI Charge: 92
 - Resulting in Other Charge: 11
 - Resulting in No Charge: 9

**Attorney General notes that several law enforcement agencies in Washington County did not submit all monthly reports, so numbers are incomplete.

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Common Concerns in IPV Situations



- Supportive measures are important to ensure the parties can be separate and feel safe
- Retaliation is often a critical concern – parties may still have a relationship
- Consider whether parties need contingency plans as part of their supportive measures if safety concerns arise
- Balancing third-party reports of violence and safety concerns with complainant's refusal to participate in the process
- No contact order violations as continued evidence of underlying policy violation allegation
- It is not uncommon for both parties to be complainants and respondents. Watch for this scenario and ensure you provide appropriate intake for both.

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IPV: Questions



- What is the relationship between the parties? Do they agree?
- What is the act of violence described?
- Under what circumstances did the act of violence occur?
- If the situation involved mutual combat:
 - Was one person the initiator and the other acting in self defense?
 - Should an investigation be opened against the complainant as well?

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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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Stalking Data



3.4 million individuals aged 16 or older (1.3%) were stalked during 2019. This represents a slight drop from 2016 (1.5%). Females were stalked more than twice as often as males.

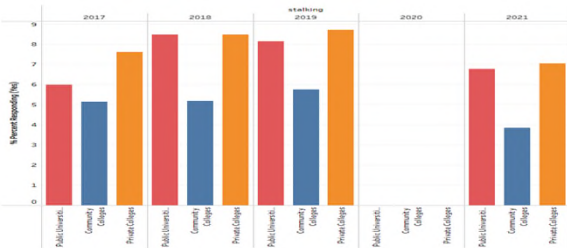
1 in 6 women and **1 in 17** men have been stalked at some point in their lives.

Nearly **54%** of female victims and **41%** of male victims experienced stalking before the age of 25.

- First statistic: U.S. Department of Justice, Bureau of Justice Statistics, "Stalking Victimization, 2019" published February 2022.
- Second and third statistics: CDC "Preventing Stalking" fact sheet, accessed October 29, 2022.

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ODHE Stalking Data



Impact of Stalking on Victims (1 of 2)



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.]

67% of stalking victims in 2019 were fearful of being killed or physically harmed.

U.S. Department of Justice, Bureau of Justice Statistics, "Stalking Victimization, 2019" published February 2022.

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Impact of Stalking on Victims (2 of 2)



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 Blaauw et al. "The Toll of Stalking," Journal of Interpersonal Violence 17, no. 1(2002):50-63.]

Stalking: Common Concerns



- Clearly defined no-contact orders can be helpful to keep the parties apart and help calm the situation.
- Complainants are often concerned that the respondent may not respect no-contact orders, especially if they have already asked the respondent to stand down. Think of ways to help address this concern through supportive measures.
- Stalking after a no contact order may constitute additional instances of the underlying alleged policy violation, which may mean you need to run it through your Title IX process.

Stalking: Considerations



- Outline a timeline of the "course of conduct"
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered



Scenario Overview

Charlie and Jesse – Intimate Partner Violence?
Credibility Assessment Scenario

Outline of Evening



- Dinner
- Walk – Argument?
- In the car – Violence?
- Aftermath

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Definition of Dating Violence



- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

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Brainstorm



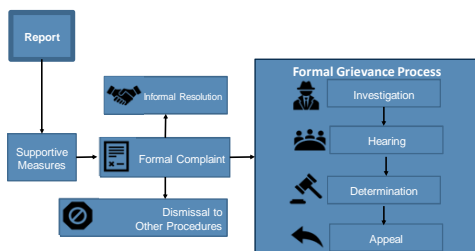
- What are the elements of dating violence?
- What are the key things that will need to be decided to determine if a policy violation occurred?
- What other things may help with a credibility assessment?

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Conducting a Process That Protects and Holds Accountable

Overview of the Process



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Split Roles

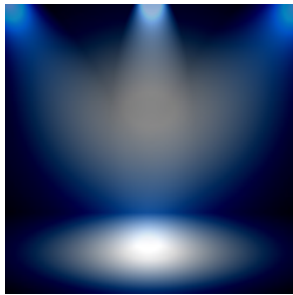
Team Charlie
Team Jesse
Panel & Volunteers

Need volunteers for three parts:

- Complainant Charlie Chaste
- Respondent Jesse Jacobs
- Witness Whitney Wildcat

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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

How Do You Choose Questions?

What Don't You Know?

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

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

What Do You Know?

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

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

Disputed Facts?

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

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

Make Your Plans

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

Pick a Goal

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

Remember: Credibility Factors



- Credibility is determined based on a "totality of the circumstances."
Factors to consider:
 - Witness statements
 - Detail and consistency of accounts
 - Corroborating evidence or the lack thereof, if it should logically exist
 - Information about how the reporting person acted following the incident, both immediately and over time
 - Information about whether the complainant told others about the incident soon after it occurred
 - Other contemporaneous evidence of accounts
 - Credible reports of similar incidents by the respondent (careful here!)
 - Whether the reporting person has been shown to make false reports (again, careful here!)

Plan Your Strategy

- Pick a goal for the questions you will ask
 - Example: I will try to get Charlie to admit that the bruise could have been from something else.
- Coordinate among team members to ensure goals cover the key points in the case

Mock Hearing



How to Make a Good Decision

Use your Policy and Follow your Process

Reminders (1 of 3)

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

Reminders (2 of 3)

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

Reminders (3 of 3)

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

Objectively Evaluating Relevant Evidence

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

Standard of Proof

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

Making credibility decisions

The preamble discussion includes the following additional information on credibility:

- “Studies demonstrate that inconsistency is correlated with deception” (30321)
- Credibility decisions consider “plausibility and consistency” (30322)

Resolving Disputes (1 of 4)

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

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

Resolving Disputes (2 of 4)

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

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

Resolving Disputes (3 of 4)

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

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

Resolving Disputes (4 of 4)

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

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

#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)

#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

#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

#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

#5 Weight of Evidence
(1 of 2)



- 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.

#5 Weight of Evidence
(2 of 2)



- 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)

#6 Evaluate Witness Credibility
(1 of 3)



- 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.

**#6 Evaluate Witness Credibility
(2 of 3)**



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

**#6 Evaluate Witness Credibility
(3 of 3)**



- 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

#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
(1 of 2)



Use 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 (2 of 2)

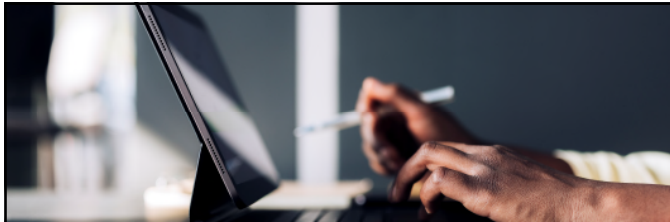


- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

#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.**



Writing the Decision

Show your work, and get credit for your good thinking!

Written Determination in 106.45(b)(7)(ii)

(1 of 9)



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii)

(2 of 9)



Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

Written Determination in 106.45(b)(7)(ii) (3 of 9)



Purpose of key elements of procedural steps “so the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions.” (30389)

Written Determination in 106.45(b)(7)(ii) (4 of 9)



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

Written Determination in 106.45(b)(7)(ii) (5 of 9)



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii)
(6 of 9)



- Institution's procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii)
(7 of 9)



- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii)
(8 of 9)



Reference to code of conduct not prohibited:

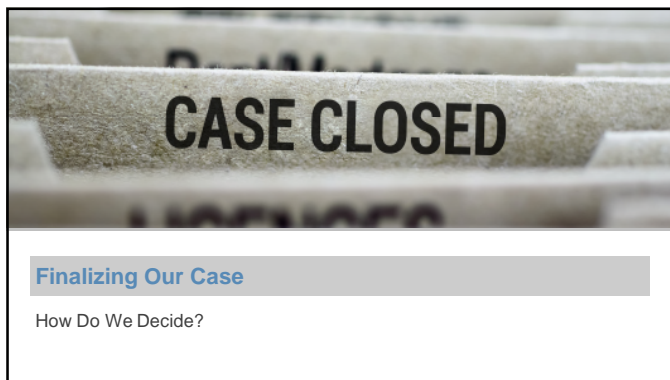
"Recipients **retain discretion to also refer to in the written determination to any provision of the recipient's own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however" the final regulations apply to recipient's response to Title IX portion only. (30389)

Written Determination in 106.45(b)(7)(ii)
(9 of 9)



The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.



Making OUR Decision

- Questions to consider:
 - Were they dating at the time of the incident?
 - Did Jesse grab Charlie's arms?
 - If so, was this "violence"?
 - Did Jesse slap Charlie's face?
 - If so, was this "violence"?

If you are having trouble

- Consider making a list of what you are sure about that relates to the question you are considering.
- Make a list of what facts are disputed.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.

Additional information available at:

Title IX Resource Center at www.bricker.com/titleix

Free upcoming webinars at www.bricker.com/events

Find us on Twitter at [@BrickerHigherEd](https://twitter.com/BrickerHigherEd)
