Sexual Misconduct Hearing Officer Training

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Fall 2021

Agenda

1. Background & Context
2. Distinction between Sexual Harassment Cases & Non-Sexual Harassment Cases
3. Hearing Officer Role
4. Pre-Hearing
5. At the Hearing
6. Special Issues
7. After the Hearing
Background and Context

Purpose of Hearing

• It may be required by law
• Whether the RP committed a university policy violation.
• Due Process
  o Notice
  o Opportunity to be heard
• Determined by Impartial Hearing Officer
Definition of “Sexual Harassment”

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

1. An employee of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);
2. 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 institution’s education program or activity; or
3. “Sexual assault,” “dating violence,” “domestic violence,” or “stalking” as defined under Clery/VAWA.

Source: Title IX Regulations (2020);
UT System Model Policy for Sexual Misconduct (2021)
“Education program or activity” under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes **any building owned or controlled by a student organization** that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: Fraternity or sorority house that is occupied by students of the organization, and the student organization is a recognized organization with the institution.

*Source: Title IX Regulations (2020)*

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Important Distinction for Sexual Harassment Cases

If the conduct alleged is **“sexual harassment,”** then the advisors will ask questions at the hearing.
What is not “Sexual Harassment” but may be an issue at a hearing?

Example: Other Inappropriate Sexual Conduct

Definition of “Other Inappropriate Sexual Conduct”

Conduct on the basis of sex that does not meet the definition of “sexual harassment” (under the Model Policy), but is

1. Verbal conduct (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so severe or pervasive that they created a Hostile Environment, as defined in the Model Policy.

2. Physical conduct.

Source:

UT System Model Policy for Sexual Misconduct (2021)
**Definition of “Other Inappropriate Sexual Conduct” (Cont.)**

<table>
<thead>
<tr>
<th>Potential Examples (depending on facts):</th>
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<tr>
<td>o Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);</td>
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<td>o Requests for sexual favors (including overt or subtle pressure);</td>
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<td>o Gratuitous comments about an individual’s sexual activities or speculation about an individual’s sexual experiences;</td>
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<td>o Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;</td>
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<td>o Persistent, unwanted sexual or romantic attention;</td>
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<td>o Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;</td>
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<td>o Deliberate, repeated humiliation or intimidation;</td>
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<td>o Sexual exploitation;</td>
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<td>o Unwelcome intentional touching of a sexual nature; or</td>
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<td>o Deliberate physical interference with or restriction of movement.</td>
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**Source:**

UT System Model Policy for Sexual Misconduct (2021)

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**Advisors at the Hearing**

<table>
<thead>
<tr>
<th>Sexual Harassment Cases</th>
<th>Non-Sexual Harassment Cases</th>
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<td>• Advisors will ask questions.</td>
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<td></td>
<td>• Cross-examination questions go through the Hearing Officer.</td>
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**All cases:** Advisors are not to do opening statements, closing statements, lodge objections, or talk at the hearing.
### Title IX/Sexual Harassment
- **Notice**
- **Investigation** *(No determination)*
  - Both parties have access to all evidence related to the allegation(s) & ability to comment
- **No** Administrative Disposition
- **Hearing Required**
- **Appeal**

### Non-Sexual Harassment
- **Notice**
- **Investigation** *(Preliminary determination)*
  - Both parties have access to all evidence related to the allegation(s) & ability to comment
- **Administrative Disposition or Hearing Options**
- **Appeal**

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**Hearing Officer Role**
Hearing Officer’s Responsibilities

1. Preside over the hearing.
2. Listen to the evidence presented at the hearing, (read documentary evidence) to determine if by the preponderance of the credible evidence the Respondent violated institutional policy.
3. Impose remedies & sanctions (if applicable).

Hearing Officer’s Role

You are the Decision-Maker!
Before the Hearing:

Mindset:
- Fairness and appearance of fair.
- Parties to be heard and feel heard.

Remember: This is likely a major life event for both the Complainant & Respondent.
Before the Hearing:

- Review materials.
- Review your institution’s policy.
- Review & be familiar with the allegations, & what constitutes a policy violation.
- If you have evidence, review it!

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

Look at the Provision(s) at Issue:

For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.
Engaging in a (1) course of conduct (2) directed at a specific person that would (3) cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

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

Before the Hearing: Notice of the Hearing

- Must give notice of the hearing at least 10 days before hearing date.
- Must include the following:
  - Date, time, and place
  - Name of the Hearing Officer
  - List of participants
  - Purpose of the hearing
  - Statement of charges
  - Summary statement of the evidence
Before the Hearing: Request to Postpone?

• Always review the policy first! The policy will have most of the answers.
• Common reasons for postponing:
  o An advisor is unavailable at the scheduled hearing time
  o A party acquired a new advisor.
  o Health issues.

Fairness:

Goal: Fairness and perception of fairness
Communications:

No Ex Parte Communications

- CC all parties (& advisors), including Uni. Representative, on all communications (even if emailed by one party)
- Admonish any communications from the parties (& advisors) regarding facts of the case

Challenge of Hearing Officer’s Impartiality

- The Hearing Officer is the sole judge of whether he/she/they is capable of considering the evidence and determining the facts with fairness, impartiality, and objectivity.
- Challenge must be by written request.
- May be self-initiated.
At the Hearing

Overview of Hearing

- Opening remarks by Hearing Officer
- Opening Statements
- Questioning of Witnesses
- Closing Statements
Hearing Parameters

• **Our Process:**
  - Notice
  - Opportunity to be heard
  - Confront & examine witnesses
  - Impartial decision-maker

• **Advisors:**
  - Right to an advisor of choice (& may be an attorney, though **not** required)
  - May be provided by the institution

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Hearing Parameters (Cont.)

• **Recording the Proceeding:**
  - Audio or audiovisual format
  - May be transcribed at institution’s discretion
  - Logistics typically coordinating through the Student Conduct Office

• **Attendance:**
  - Limit person(s) present at the hearing: Educational interest or right to be present for entirety of hearing (FERPA & Privacy Rights)
  - Testifying witnesses
  - If accused person (RP) is absent, proceed if proper notice of hearing has been issued.
Starting the Hearing

• Read **Introductory Statement**
• **Opening Statements** are permitted
  1. University Representative (Burden of Proof)
  2. Complainant
  3. Respondent
• Presentation of **Witnesses & Exhibits**

**Remember:**
This is **NOT** a legal proceeding.
Presentation of Witnesses and Exhibits

Formal rules of evidence do **not** apply.

Burden of Proof on the Institution

**Preponderance of the Evidence Standard**

**Note:** The Respondent is presumed **not responsible**.
Relevant Evidence

Evidence is relevant if:
- The evidence has any tendency to make a fact more or less probable than it would be without the evidence; and
- The fact is of consequence in determining the action.

Relevance: Prior Sexual History

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

The hearing officer may, at the hearing officer’s discretion, ask questions during the hearing of any party or witness and may be the first person to ask questions of any party or witness.

Each party’s advisor will have an opportunity to ask relevant questions and follow-up questions of the other party and of any witnesses that participate in the hearing, including questions that challenge credibility.

• Each advisor has the ability to ask questions directly, orally, and in real time at the hearing.
• The parties will not be permitted to personally ask questions of the other party or any witnesses that participate in the hearing.

Source:
UT System Model Policy for Sexual Misconduct (2021)

Procedure for Asking Questions

The advisors may ask questions under the following procedure:

1. The advisor will ask a question of the applicable participant.
2. Before the participant answers a question, the hearing officer will rule as to whether the advisor’s question is relevant to the alleged conduct charges.
   o If the hearing officer rules the advisor’s question as not relevant, then the hearing officer must explain any decision to exclude a question as not relevant.
   o If the hearing officer allows the question as relevant, the participant will answer the question.

Source:
UT System Model Policy for Sexual Misconduct (2021)
Advisor Role at Hearing

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

Source: Title IX Regulations (2020)

Advisor Role at Hearing

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

Source: Title IX Regulations (2020)
Tips at the Hearing: Questioning Witnesses

- Ask open-ended questions.
- Seek clarity with “Tell me more about that…” or “Help me understand…”
  - Attempt to clarify inconsistencies from all parties.
- “What was your thought process…
  - …During the experience?”
  - …Before the experience?”
  - …After the experience?”
  - “What happened next?”
Tips for the Hearing Officer:

- **Respectful demeanor:**
  - Tone, Volume, Facial Expressions
- **Impartial:** Treat both parties equally
  - Ex: Give same time allotments for opening & closing statements.

Remember the goal:
Fairness and perception of fairness

Bottom Line for Advisors at the Hearing

**Sexual Harassment Cases**
- Advisors will ask questions.
- Parties must have advisor.

**Non-Sexual Harassment Cases**
- Advisors will not ask questions.
- Parties may have advisor.
- Cross-examination questions go through the Hearing Officer.

**All cases:** Advisors are not to do opening statements, closing statements, lodge objections, or talk at the hearing.
Reminder: OGC Advisor

- Get a *(free)* advisor from UT System’s Office of General Counsel
  - To request an OGC advisor, contact: Tamra English *(tenglish@utsystem.edu)*
- Feel free to **take breaks** during the hearing to talk with your OGC advisor as needed.
Live Hearing: Logistics Flowchart

Assign Hearing Officer, Advisor(s), Uni. Rep, & Appellate Officer → Copies of Investigation Report & Access to All Evidence → Schedule Hearing Date & Send Notice of Hearing → Request from Both Parties:
- List of Exhibits & Witnesses?
- Special Accommodations?
- Need an Advisor?

Hold the Live Hearing
- Opening Statements
- Witness Testimony
- Cross-Examination
- Exhibits
- Closing Statements

Hearing Officer: Considers ALL relevant evidence impartially

Hearing Officer: Renders Written Determination
- Include Appellate Officer name & contact information
- Issue copy to CP and RP; cc: TIXC, cc: RP's file (Adjudication Office)

Both Parties have option to Appeal
- Procedural Irregularity
- New Evidence
- Bias/Conflict of Interest

Specific deadlines may be published in the institution’s policy and/or procedures.

Logistics

“At the request of either party, the [institution] must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see & hear the party or the witness answering questions.”
Exclusion of Privileged Information unless Waived

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

Consent Definition

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

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

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

Source:
UT System Model Policy for Sexual Misconduct (2021)
Incapacitation Definition

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

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

*Source:* UT System Model Policy for Sexual Misconduct (2021)

Incapacitation Definition (Cont.)

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

1. Did the person initiating sexual activity know that the other party was incapacitated? And if not…
2. Should a sober, reasonable person in the same situation have known that the other party was incapacitated?

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

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

*Source:* UT System Model Policy for Sexual Misconduct (2021)
Implicit Bias:

- Your **role** as a hearing officer is:
  - Neutral, impartial, & fair
- Fairness & the **appearance of fair**.

**Goal:** To **listen** to both parties equally and that they both leave **feeling heard** by the hearing officer.

Implicit Bias (Cont.)

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

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

Tips to Avoid Bias

- Test to address any potential implicit bias.
  - What is the **essence** of potential policy violation?
  - Create **hypothetical** that includes those elements. Then flip or change the genders.
  - You must have **fair & consistent considerations**, regardless of gender.
- When making your decision: List out the evidence favorable to both sides to ensure **evidentiary support** (as opposed to bias).

*Source: Title IX Preamble (2020)*
Serving Impartially in Your Role

- Must avoid prejudgment of the facts at issue
- Must avoid conflicts of interest
- Must avoid bias for CP & RP

Nobody gets a “head start.”

Source: Title IX Regulations (2020)

Hearsay Rule Updates
Controlling the Hearing

- Establish & exercise **authority** early & consistently.
- Be familiar with **policies** & the **allegations**.
- Describe **unacceptable** behavior and **warn** accordingly. Warnings usually correct inappropriate behavior.
- A note about **harassing** or **abusive** questions.
- Establish **time limits** for presenting case.
- **Take breaks**.
- **Stop** the hearing.
Closing the Hearing: Closing Statements

University Representative

Complainant

Respondent

University Representative

After the Hearing
Making A Decision…

• Based solely on the **hearing record**: No *ex parte* discussions or investigations.

• Determine whether a **policy violation** occurred:
  Did the RP engage in conduct that violated university policy?

Burden of Proof on the Institution

**Preponderance of the Evidence Standard:**
Whether the greater weight of the credible evidence establishes that the Respondent engaged in the alleged policy violation.

**Note:** The Respondent is presumed **not responsible**.
In Making Your Decision:

- **You** are the decision maker.
- Review the hearing transcript.
- Review the institution’s policy.
- Assess witness credibility:
  - Ex: Demeanor, personal knowledge, bias
- Strength of relevant evidence:
  - Credibility of the relevant evidence
  - Weight of each exhibit
  - Persuasiveness of the evidence

Tips for Evaluating Witnesses

**Credibility:**

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

- You must let the evidence lead you to the conclusion, rather than making the evidence “fit” your pre-formed conclusion.
- Focus on the relevant evidence.
  - Hint: It’s not all relevant.

The Decision Letter

The hearing officer issues a written determination.
Written Determination Required Components

• The allegation(s) that potentially constitutes prohibited conduct;
• A description of all of the procedural steps of the Grievance Process:
  o From receipt of a Formal Complaint to the determination regarding responsibility of the Respondent, including any notifications of the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.
• The findings of fact supporting the hearing officer’s determination;

Source:
UT System Model Policy for Sexual Misconduct (2021)

Written Determination Required Components (Cont.)

• The conclusion(s) and a rationale as to whether the Respondent is responsible for each allegation;
• The disciplinary sanctions, if applicable;
• The remedies, if applicable, designed to restore the Complainant’s access to the education program or activity; and
• The institution’s procedures and permissible bases for the parties to appeal, if applicable.

Source:
UT System Model Policy for Sexual Misconduct (2021)
A Good Decision Letter:

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

Revision Stage: Focus on Clarity

- Focus on **relevant facts** in your factual findings. If it is part of the reasoning, say it. Don’t omit it.
- Use headers.
Revision Stage: Focus on Clarity

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

Revision Stage: Reminder

Deal with facts contrary to your decision:
- If you don’t, it looks like you didn’t consider or hear the argument, that you weren’t paying attention, or that the process is unfair.
1. Allegation(s) & Applicable Policies & Procedures

- List the **allegation(s)** and the applicable policies & procedures. You can attach documents as exhibits.
- “A description of the **procedural steps** taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held” (Title IX Regulations, 2020)
2. Evidence Considered

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

3. Evidentiary Standard

- **Preponderance Standard:**
  - Greater weight of the credible evidence:
    - “More likely than not”
    - 50% “plus a feather”
    - Think of the scales of justice: You need to get **beyond** the 50-yard-line
    - “Some evidence” doesn’t do it. **One side** of the scale needs to be **heavier**.
    - No head starts.
4. Undisputed Facts

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

4. Undisputed Facts

- Use witness quotes as much as possible. Don’t take statements out of the vernacular.
- Easiest way to make an undisputed fact disputed is to mischaracterize it by trying to summarize.

Examples:

umann: Witness 3 stated that the parties “were friends but had been casually hooking up for a few weeks.”

Summary: The parties were previously in a complicated “friend” relationship.
5. Factual Findings: Resolution of Disputed Facts

- Go point by point on the disputed facts:
  - What do you think happened and why?
  - On what evidence do you base your conclusion?
  - You MUST make credibility determinations of witnesses. Basis for someone being more credible than someone else?
    - Corroborating evidence?
    - Inconsistencies?
    - Motives?
- If you have critical corroborating evidence: **Cite the evidence** in your findings.

6. Fact Analysis & Conclusions

- Take factual findings & analyze using the applicable policy. Looking for violations of policy.
- Address all allegation(s), one by one.
- Explain your reasoning: **How** did you get to each of your conclusions?
- Use the terms “responsible” or “not responsible”.

**Do not** use the words “innocent,” “guilty,” or “not guilty.”
7. Sanctions & Remedies

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

7. Assessing Sanctions (Cont.)

- The institution looks, in part, to past punishment for similar conduct & violations when recommending sanctions
- Consider mitigating circumstances:
  - Accepting responsibility
  - Remorse
7. Thinking Outside the Box with Sanctions

- **Educational**, not criminal process
- Common disciplinary sanctions:
  - Probation
  - Suspension
  - Expulsion
- “Other sanctions as deemed appropriate”
  - Counseling
  - Anger management
  - Reflective papers & projects
Question 1

What are some examples of types of evidence that a respondent might consider relevant at the hearing that may draw an objection?

Part A: Who sends the “Notice of Hearing”? Who coordinates receiving and distributing witness lists and exhibits provided by the CP and RP?

Part B: When and to whom do the parties have an opportunity to respond to the completed investigation report?
The institution’s document sharing platform allows certain permission-levels to the documents, such as “view-only” access, “print” access, etc.

What permission level should be granted to the parties (and party advisors) for access to the evidence prior to the hearing?

In situations where two or more people were involved in potentially violating a policy and only one is before a hearing officer for a given case, is it relevant what happened to the other potential respondent? For example, is it relevant for the current hearing officer to consider whether the other respondent in the case was found responsible for a policy violation? And what were the sanctions and remedies issued?
# Contact Information

<table>
<thead>
<tr>
<th>Krista Anderson</th>
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<tbody>
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