

Sexual Misconduct Hearing Officer Training

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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



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Background and Context



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Purpose of Hearing

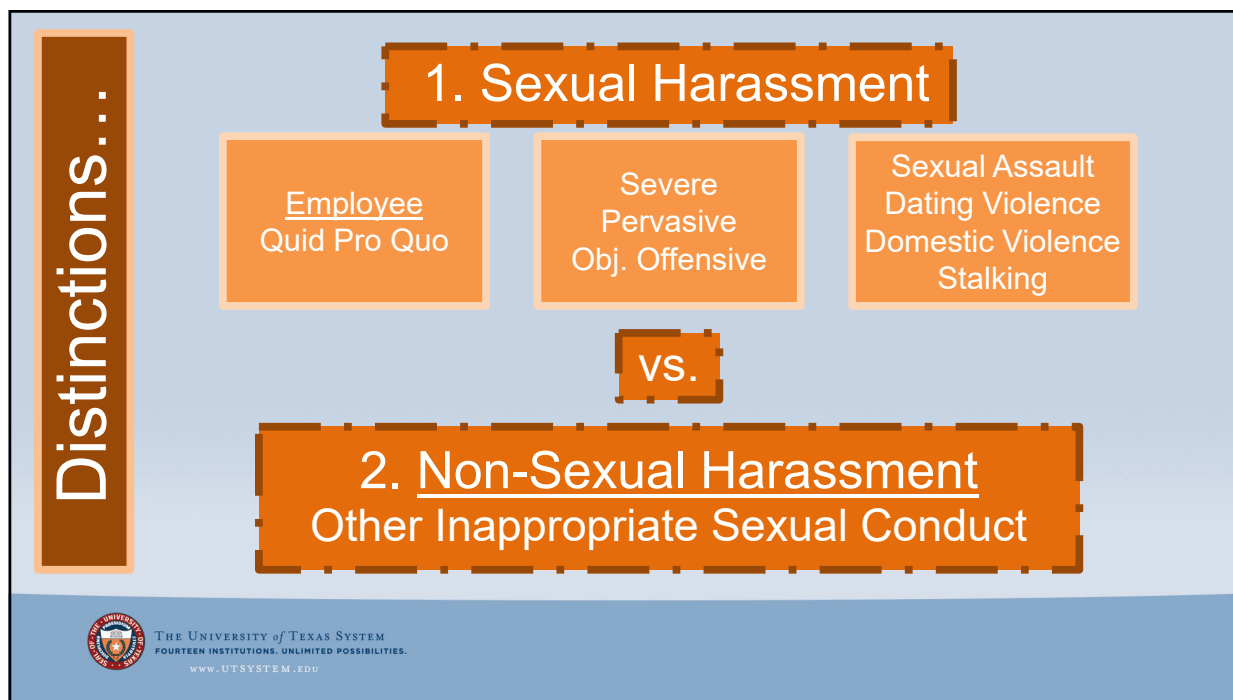
- It may be required by law
- Whether the RP committed a university policy violation.
- Due Process
 - Notice
 - Opportunity to be heard
- Determined by Impartial Hearing Officer



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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.


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*Source: Title IX Regulations (2020);
 UT System Model Policy for Sexual Misconduct (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.



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What is not “Sexual Harassment” but may be an issue at a hearing?



Example: Other Inappropriate Sexual Conduct



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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.



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

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Definition of “Other Inappropriate Sexual Conduct” (Cont.)

Potential Examples (depending on facts):

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



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

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Advisor Role at Hearing

Sexual Harassment Cases	Non-Sexual Harassment Cases
<ul style="list-style-type: none"> Advisors will ask questions. Parties must have advisor. 	<ul style="list-style-type: none"> Advisors will not ask questions. Parties may have advisor.

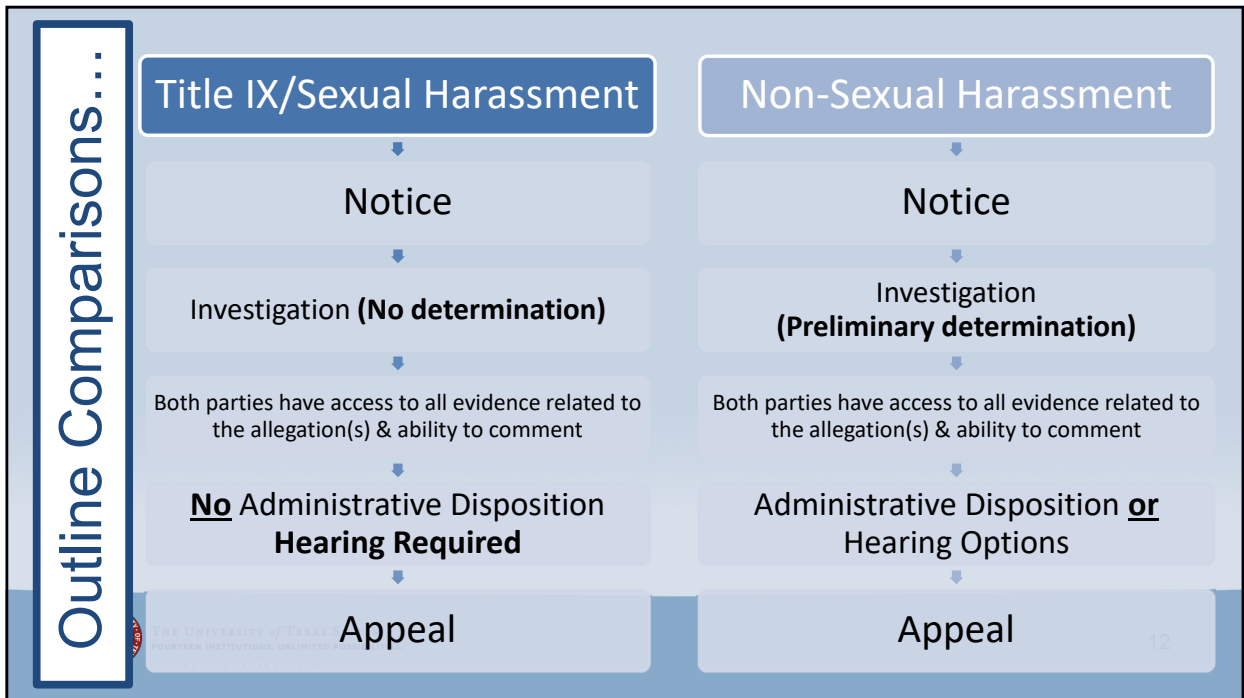
All cases: Advisors are **not** to do opening statements, closing statements, lodge objections, or talk at the hearing.



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Hearing Officer Role



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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).



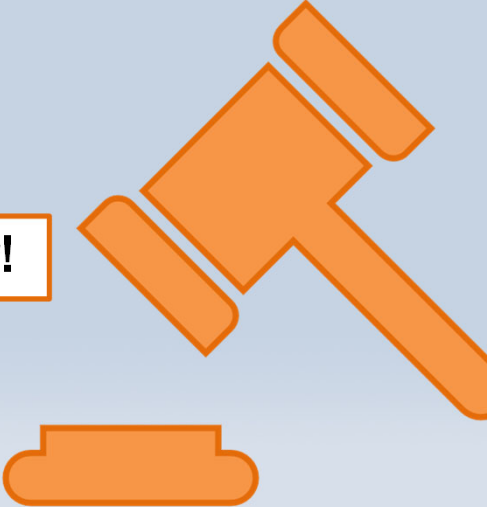
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Hearing Officer's Role

You are the Decision-Maker!



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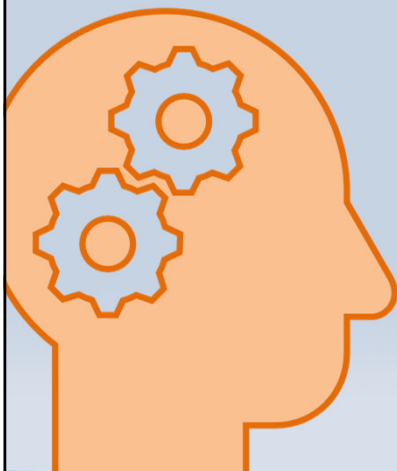
Pre-Hearing

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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.



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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!



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Look at the
Provision(s)
at Issue:



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

For the purposes of this definition:

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

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Look at the
Provision(s)
at Issue:



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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.

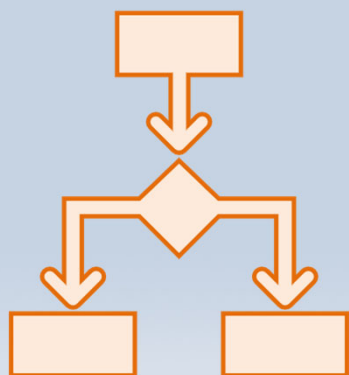
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- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require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

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Before the Hearing: 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



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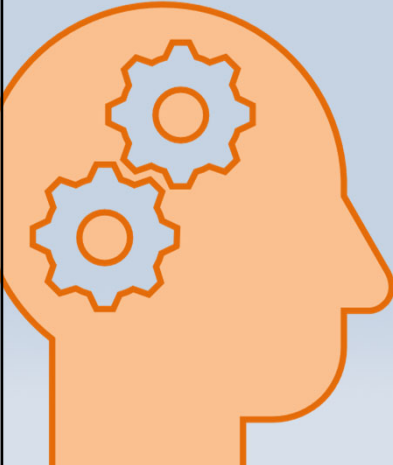
Before the Hearing: Request to Postpone?

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




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Fairness:



Goal: Fairness and perception of fairness




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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



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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.



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At the Hearing




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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




The image shows a white outline of a pair of scales of justice centered within a blue circle. The scales have two pans hanging from a central beam, and a base with a small pedestal.

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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.

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Burden of Proof on the Institution

Preponderance of the Evidence Standard

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



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Commencing the Hearing



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

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Remember: This is NOT a legal proceeding.





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Presentation of Witnesses and Exhibits

Formal rules of evidence do not apply.



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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.



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Presentation of Witnesses & Exhibits



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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.”



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Source: Title IX Regulations (2020)

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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.”



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Source: Title IX Regulations (2020)

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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.



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

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



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

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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?”**



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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



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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.



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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.



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Special Issues
at the Hearing





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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.”



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Exclusion of Privileged Information unless Waived



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



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Relevance: Prior Sexual History



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



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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.



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Source: Title IX Regulations (2020);
UT System Model Policy for Sexual Misconduct (2020)

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“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.



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Source: Title IX Regulations (2020)

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Consent Definition

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

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

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



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

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Incapacitation Definition

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

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



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

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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.



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Source: UT System Model Policy for Sexual Misconduct (2020)

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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.



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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.



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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*)



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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).



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Source: Title IX Preamble (2020)

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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.”



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Source: Title IX Regulations (2020)

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Exclusion of Statements

Not submitting to cross-examination:

If a **party or witness** refuses to submit to any cross-examination questions during the hearing, the **hearing officer** will **not** rely on any statement of that party or witness, when reaching a responsibility determination.



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Possible Exclusions:

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



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Possible Exclusion (Example)

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



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Possible Exclusion (Example)

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



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But, An Exception on Exclusions...

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

- OCR Blog, May 22, 2020



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Exclusion Exception (Example)

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

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



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No Inference Based on Absence or Refusal



“[T]he decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”



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Controlling the Hearing



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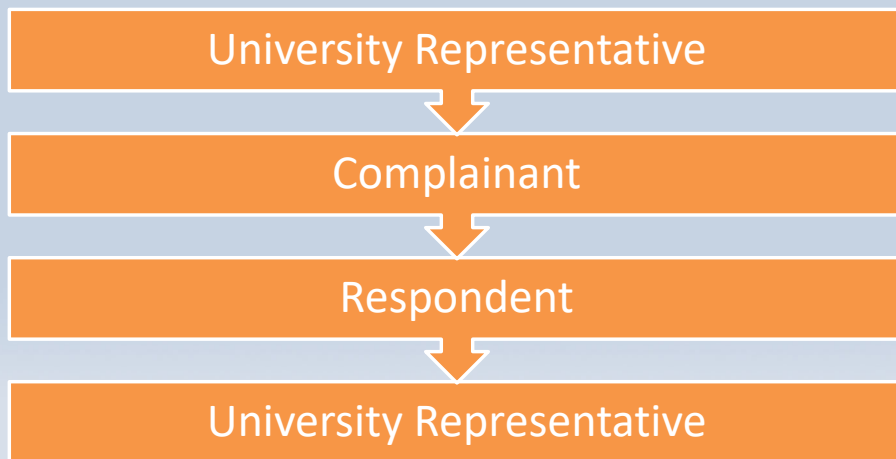
Controlling the Hearing

- 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.

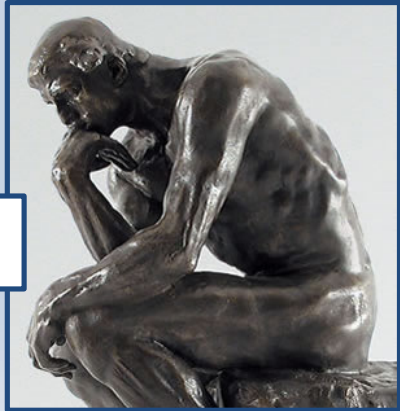


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Closing the Hearing: Closing Statements



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After the Hearing

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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?



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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**.



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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



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Tips for Evaluating Witnesses

Credibility:

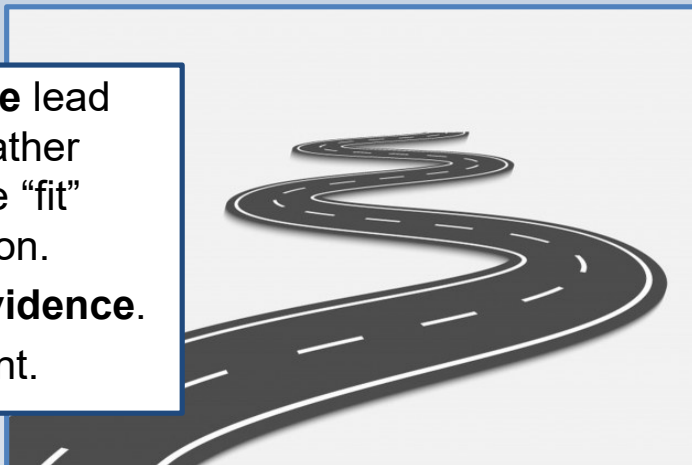
- Are there inconsistencies? Is an explanation plausible?
- What did the witness do? What did they *not* do?
- Are there motives for the witness to be less than truthful?
- Are there motives for the witness to frame the event in a way more favorable to themselves? Are they lying to themselves?
- Is there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



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Potential Pitfalls


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



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The Decision Letter


The hearing officer issues a written determination.


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Written Determination Required Components

- The **allegation(s)** that potentially constitutes prohibited conduct;
- A description of all of the **procedural steps** of the Grievance Process:
 - 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;


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Source: UT System Model Policy for Sexual Misconduct (2020)

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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.



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

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A Good Decision Letter:

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



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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.



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Revision Stage: Focus on Clarity

Look at your draft with a **critical eye**. Pretend the person who will be most *unhappy* with your decision is in the room with you reading the draft with you. With each sentence or paragraph, consider:

“What would that person say?”

Then revise.



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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.



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Breakdown of the Components



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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)



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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.**



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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.



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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**?



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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:

- 👍 **Quote:** Witness 3 stated that the parties “were friends but had been casually hooking up for a few weeks.”
- 👎 **Summary:** The parties were previously in a complicated “friend” relationship.



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?
 - a. Corroborating evidence?
 - b. Inconsistencies?
 - c. 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.”



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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.



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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



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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




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