

Part 2: Title IX Advisor/Hearing Board Workshop

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WINSTON-SALEM
STATE UNIVERSITY



Questions to
consider as you
decide to serve



Do you have time and bandwidth to prepare and serve?

- The process generally unfolds over a period of one month to possibly a few months.
- Simple cases that do not go to hearings may require 8-10 hours of time and 15-20 hours if the case is complex.
- With a hearing and appeal, 20-25 hours is not uncommon for a simple case, with complex cases requiring 30-40 hours or more.
- If you will be the advisor for the hearing only, expect 6-12 hours unless the case is particularly complex or lengthy.
- For cases in which the advisor advises for an informal resolution, we've seen as few as five hours.
- For hearing board members, 3-5 hours preparing for a hearing, 3-6 hours for a hearing, 3-5 hours for deliberation and writing an outcome letter. (9-15 hours)



Is the subject matter comfortable for you?

- Issues of sexual misconduct, domestic/dating violence, stalking, etc., can trigger strong reactions or a degree of discomfort
- Determine whether you will be able to discuss the allegations openly and rationally



Do you have personal biases, feelings, and/or opinions that may interfere with your role?

- Advisors and hearing board members are human.
- Prior to agreeing to serving, you should take time to evaluate whether you can put aside your biases and any personal feelings that may interfere with your ability to advise or adjudicate well.
- Beware of social media



DO NOT: Rely on sex stereotypes

- “Women are manipulative, and they lie.”
- “Real men are aggressive.”
- “A lady wouldn’t put herself in that position.”



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Hearing Board Avoiding Bias & Conflict of Interest

- Avoid **bias** (prejudice) for or against complainants or respondents generally or the individual complainant or respondent that would consider unfair
- A **conflict of interest** occurs when an individual is unreliable because of a clash between personal (or self serving) interests and professional duties or responsibilities
- Realize acts of sexual misconduct may be committed by any person upon any other person, regardless of the sex, sexual orientation, and/or gender identity of those involved.



Do you have any conflicts of interest?

Some examples of potential conflicts of interest include...

- having a current or former relationship (e.g., personal, familial, professional, business) with a party, witness, or a school official involved in the resolution process,
- being privy to confidential information related to the matter, or
- having a previous agreement to serve as an advisor to another party in the same matter or who has an interest in the matter.
- if you are a professor and either party is a current student in your class, that degree of interaction may pose a conflict that cannot be resolved.
- There may be more than one complainant or respondent involved in any case, and nothing prohibits multiple complainants/respondents from sharing the same advisor
 - Though this is not advisable as it could create issues of divided loyalty or conflicts of interest that would serve as a later basis for internal appeal, OCR investigation, and/or civil litigation.



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Do you have any conflicts of interest?

- Another form of conflict is an ethical conflict. Although your advisee will want you to be aligned with them, you are not expected to lie for them, encourage them to lie, or allow them to give testimony you know to be a lie without confronting them about the implications of doing so.
 - You can, of course, help them to frame the facts in the light most positive for their position, but that's different than misleading, omitting, and lying, which an ethical advisor should oppose.
- If you identify a potential conflict of interest, tell the Coordinator immediately.



Are you also a witness?

- It is not recommended that you also serve as an advisor given the potential for bias and conflict of interest.
- The decision-makers may discount your testimony when they see that you are also an advisor,
 - They may see your role as an advisor as a partisan role, and that may lead the decision-makers to conclude that you are also a partisan witness.
- What if the party is adamant?
 - Will you question yourself? Does the party you are advising need a temporary or second advisor to step in for questioning when you are giving testimony as a witness? If you are unsure, you may wish to consult the Title IX Coordinator for clarity.



Case Assignment

You receive a voicemail from the Title IX Coordinator that you've been selected as the hearing board member for a new case. A glance at the assignment email tells you that this is a student-on student case of offensive sexual touching. Your first move is to. . .



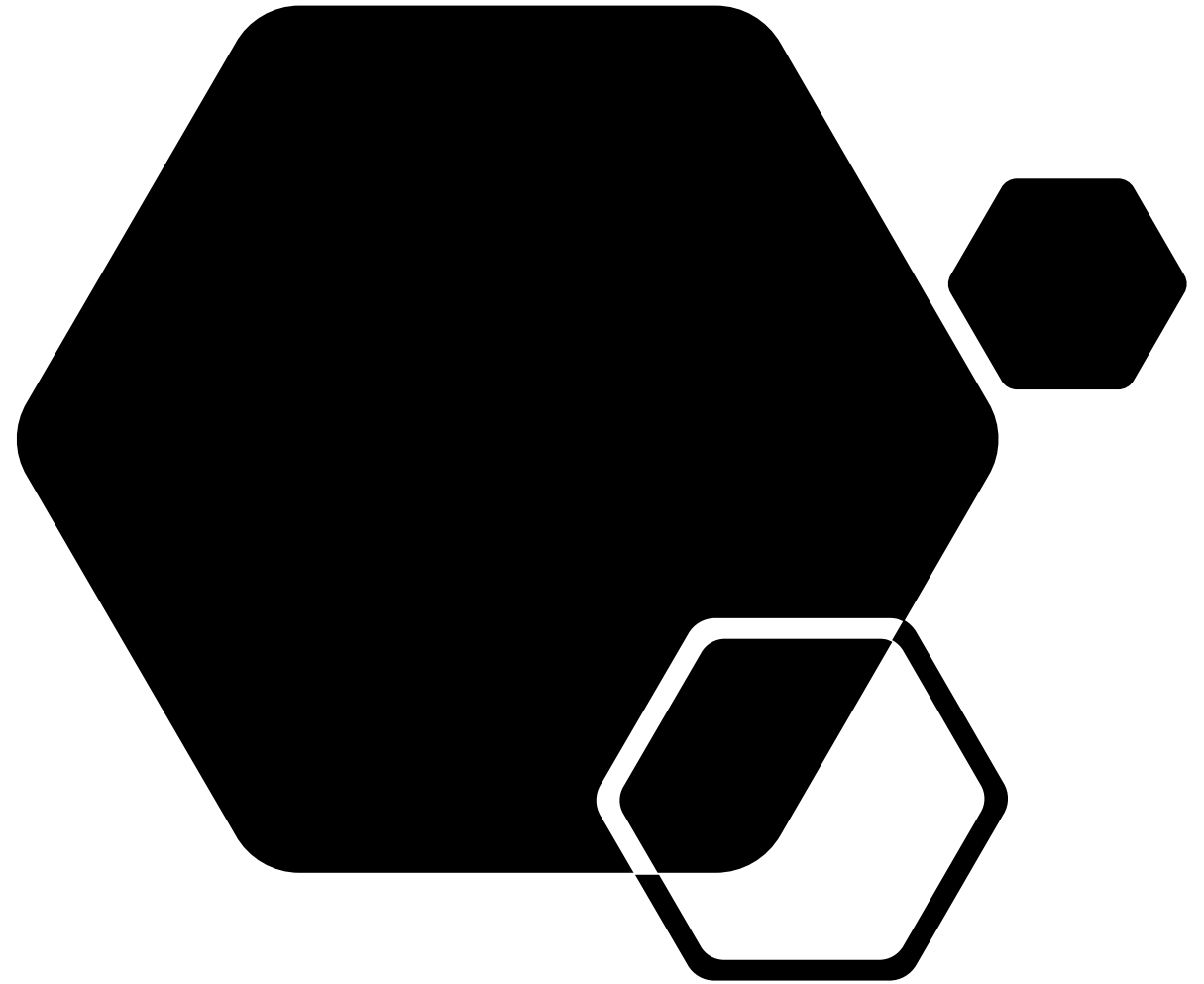
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- A. Send a scheduling notice of hearing to the parties– the clock is ticking.
- B. Check the names of the parties and witnesses to make sure you do not have a conflict of interest.
- C. Call Dr. Jackson, the lead investigator, to get his take on the case before you dive into the written material.



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Your Role As An Advisor



Responsibilities

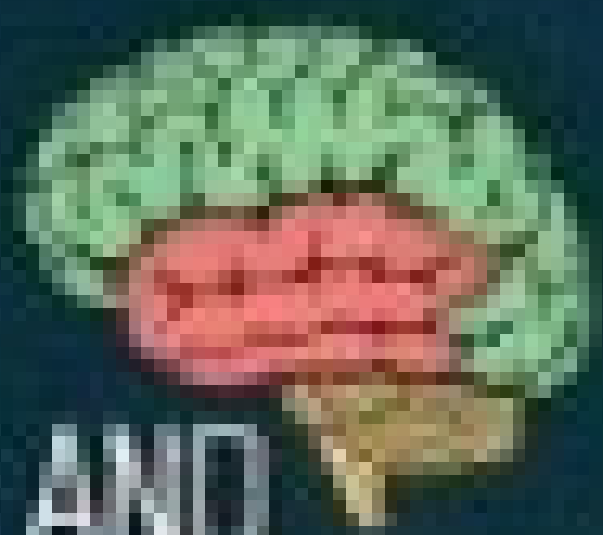


Hierarchy of Needs

- Mental health issues
 - Therapy, medical, psychiatric resources
- Accommodation emergencies
 - Housing
 - Academic
- Pending Criminal Investigations
- Sharing/telling family about what happened



TRAUMA AND
THE BRAIN



Hierarchy of Needs

- Be aware of referral sources for your advisee.
- Given your interaction with your advisee, you may be alerted to behaviors and/or comments that indicate that your advisee is in need of assistance beyond what you can provide.
- For instance, your advisee may express depressive and/or suicidal thoughts, you may suspect abuse is occurring at home, or you may become concerned about your advisee's use of drugs or alcohol, significant weight fluctuations, sleep disturbances, etc.
 - When this occurs, know that it is not your job to "fix" the problem. However, you should be aware of referral sources within the school and the community where your advisee can seek assistance.



Hierarchy of Needs

Be a listening ear when your advisee needs to talk or vent. It is likely that your advisee will have moments when they use you as a sounding board. This does not require you to become a counselor or psychologist. However, you should be willing to be present, show empathy, and listen.



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How could you help your advisee?

- Help your advisee to understand in general terms how a school's resolution process differs from criminal and judicial processes, and especially when law enforcement is investigating, too. Individuals who are not trained legal professionals should be careful not to offer legal advice.
- Be aware of any alternative/informal resolution options the school may offer and discuss these with your advisee.
- If a meeting is offered to review procedures with an administrator, both you and your advisee should accept the offer and go to this meeting



Presenting Evidence to Investigator

You can help your advisee to identify, review, organize, and present any evidence they may wish to submit.

- This could include photographs, screen shots, text messages, receipts, snapchats, recordings, etc.
- Parties should have them properly order any text threads and annotate (without alteration) anything that could cause confusion.
- Your advisee should be prepared to share the complete record.
- The investigators will want to see originals, when possible, not screenshots. Your advisee should bring to the interview any device(s) that contain evidence.
- Advisee should not alter or omit any evidence, as this will likely be quickly discovered and would be very harmful to their credibility.
- Note that your role is not to form a legal opinion on the sufficiency of any evidence. Rather, to assist your advisee in presenting information clearly during any interviews conducted as a part of the Title IX investigation.



Submitting Witnesses to Investigator

You can help your advisee to identify the names of witnesses and lines of questioning that are relevant to the issues at hand and present this information to the investigator or investigative team.

- Parties should have contact information for all witnesses already written down and list their witnesses in priority order based on the significance of what they may know.
- If parties are unsure whether to name someone as a witness, or unclear what they may know about the incident, you and your advisee can discuss this in advance of the interview.
- Be strategic in terms of who/what is discussed between your advisee and potential witnesses.
 - In some cases, there may be value in reaching out to the potential witness to see if they have information to share, but in other cases that approach may backfire, and school officials may get the impression that the witness was tainted/influenced by this conversation.



During the Interview

- You may have limited ability to directly assist during an interview, but you certainly can help to prepare your advisee prior to the meeting.
- Be clear what the protocol is for communication with your advisee during the interview.
- Do not record the interview unless you have explicit permission from the interviewers, and recording is permitted by policy.



Reviewing Draft Report

Advisee will be offered the opportunity to ...

- Review all of the materials provided them.
- Create a document with any comments they wish to submit about the report or provide comments directly on the pdf using the comment feature
- Indicate whether party think any of the evidence from the report is not relevant and whether any relevant evidence has been excluded from the report. Please provide rationales for their argument.
- Provide any additional information they are aware of including additional documents, additional witness names, or suggest any relevant questions for the Investigator to ask the other party or any potential witnesses before the Investigation Report is finalized and is referred for a hearing.



Advocating for your party in the Hearing

Preparation

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



Advocating for your party in the Hearing

Preparation

- List each allegation and policy definition/elements for the policy violation (e.g., sexual assault—know which definition and what must be met to show sexual assault under the policy)
- Advisee should determine who the witnesses are and whether they think the witness will show up to the hearing
- Be careful of the line between asking a witness to participate and explain the importance of their statements vs. coercing a witness to participate who has the right not to participate



Advocating for your party in the Hearing

Preparation

- Realize that your party may want to take a more aggressive approach – If you are not comfortable with the approach, discuss it with the party and check to see if you can advise your party
- Discuss the expectations of decorum vs. the expectations of questioning the other party and witness
- Assist party in listing questions you plan to ask for your party for each other party and witness AND be prepared to answer why each is relevant



Advocating for your party in the Hearing

The Hearing

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



Advocating for your party in the Hearing

- Outside of this questioning role, an advisor is typically not able to directly address the other party or the decision-maker. The school wants to hear from your advisee, not you.
- However, you should be actively listening to the statements of the parties and witnesses during the hearing



Advocating for your party in the Hearing

Just a reminder that if your advisee springs last-minute evidence or witnesses at the hearing, this will not curry favor with the decision-maker.

- The decision-maker will allow the evidence if all parties assent
- The decisionmaker has the authority to reset the process back (at least in part)
- The decision-maker could continue except for that last-minute evidence, which could be sent back to be subject to investigation.



Cross Examination

- Essential for truth seeking
- Provides opportunity of both parties to test “consistency, accuracy, memory, and credibility so that the decisionmaker can better assess whether a [party’s] narrative should be believed”
- Provides parties with the opportunity to “direct the decision-maker’s attention to implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility” in the other party’s statements.



Cross Examination

- Questions designed to elicit character evidence may not be relevant during the hearing and character witnesses may be offered, but again their testimony must be relevant to be relied upon.
- Questions regarding character may be more relevant to sanctioning, and you might make that argument for their relevance on that basis.
- Questions regarding the parties' or witnesses' mental health or disability will only be relied upon if relevant, and you should be careful about using this kind of evidence abusively.



Types of Questions to Ask During Cross Examination

The purpose of cross-examination is to highlight points that support your advisee's position and challenge points that do not support your advisee's position. You can solicit this type of information by the types of questions you ask.



Types of Questions to Ask During Cross Examination

Traditionally, cross examination questions are those that try to elicit “yes” or “no” answers, not explanations.

Examples:

- You were at the party that night, weren't you?
- You'd agree with me that you had three beers, wouldn't you?
- You didn't call an Uber, did you?



Types of Questions to Ask During Cross Examination

- When questioning a favorable witness, you may ask open-ended questions designed to elicit more of a narrative response.
- However, by doing so, you run the risk of the party or witness disclosing additional information that may or may not be favorable to your advisee.



Objection During Cross

All questions should be permitted by the decision-maker or chair unless they are:

- Abusive (thus irrelevant)
- Irrelevant
- Confusing (these are allowed, they just need to be rephrased for clarity)
- Multi-part or compound (these are allowed, they just need to be rephrased for clarity)
- Unduly repetitive (thus irrelevant)



Drafting Impact/Mitigation Statements

- Parties can submit an impact or mitigation statement to be used in determining any sanctions if the respondent is found responsible for a violation.
- An impact statement is prepared by the complainant and outlines the impact that the conduct had on them and any additional information they would like the decision-maker to consider in implementing the appropriate sanctions to remediate the impact and prevent recurrence.
- A mitigation statement can be prepared by a respondent that outlines their explanation for engaging in the prohibited conduct, notes any factors that led to the conduct and should mitigate the severity of the sanctions, and includes any additional information they would like the decisionmaker to consider in issuing sanctions.



Outcome and Appeal

- Assist your advisee in understanding any determinations made by the school's decision-makers.
- Assist your advisee in submitting a request for an appeal, if warranted.
- Assist your advisee in paying attention to deadlines throughout the process.



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**Regulation Applicable to Student Disciplinary or Conduct Procedures:
Right to an Attorney or Non-Attorney Advocate for Students and Student Organizations**

I. Purpose

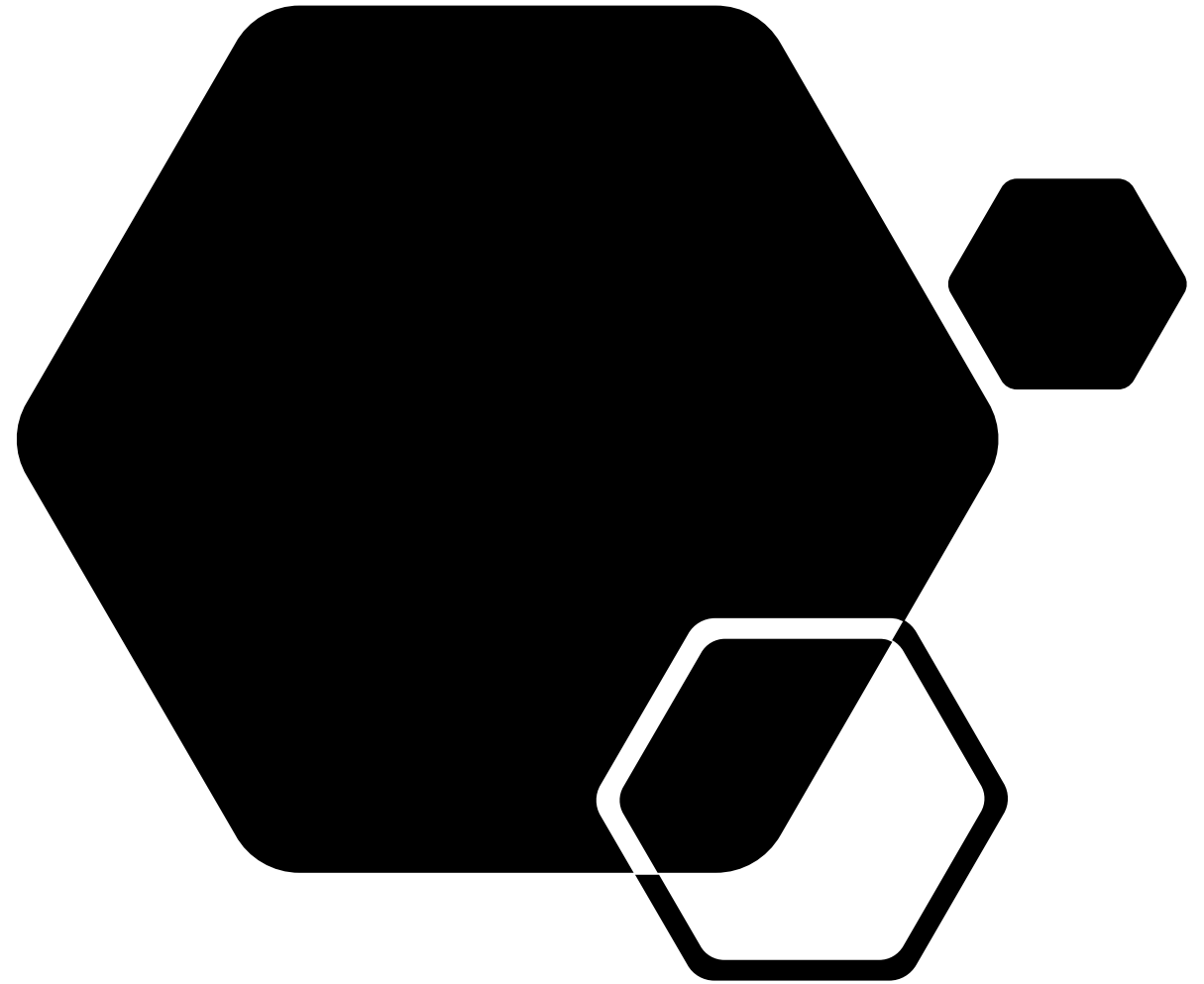
This regulation clarifies how the constituent institutions of The University of North Carolina (hereinafter, “UNC constituent institutions”) will interpret and administer the requirements of North Carolina General Statutes Section 116-40.11 (hereinafter, “Section 116-40.11”) regarding the participation of licensed attorneys and non-attorney advocates (collectively, “Advocates”) on behalf of students and Student Organizations in campus Disciplinary or Conduct Procedures, as defined herein.

[\[1\]](#)

Nothing in this regulation shall be construed to create a right for any student or Student Organization to be represented during a Disciplinary or Conduct Procedure at public expense.

UNC constituent institutions encourage character formation and development by asking students, as members of the University community, to uphold the highest standards of personal behavior and responsibility in all settings. Disciplinary or Conduct Procedures at UNC constituent

Strategy to Consider



Consider this...

- At times a respondent may consider withdrawing
- If withdrawal is being considered, the parties need to be very clear about what actions the school will take upon withdrawal.
 - Does that stop the process? Does the process continue?
 - Can your advisee withdraw but still participate?
 - What records are kept? Does the school notate transcripts? When and how? What will the school say in a disciplinary clearance request if your advisee makes a transfer application to another school?
 - If your advisee withdraws but the resolution process continues, what sanctions can/will the school impose if there is a finding that policy has been violated?



Consider this...

- If you are advising a respondent, remind your advisee that Title IX administrators may expect your advisee to reflect on their choices and demonstrate awareness of the impact their choices have on others, beyond just responding to the allegations. That doesn't mean they should admit something they didn't do, or apologize, but some administrators may be looking for the respondent's sense of contrition, acknowledgement of harm, learning from mistakes, etc.
- Accountability and/or acknowledging harm is important, depending on factual circumstances, and is different from admitting to misconduct, if your advisee is hoping to mitigate the severity of sanctions.



Consider this...

The school must allow you and your advisee to identify and provide any evidence that is relevant to the complaint, including expert testimony.

- Is an expert needed? If so, does the school identify experts and/or are the parties expected to do so?
- If your advisee would benefit from offering expert sources of information, you should help your advisee to identify campus-based or other experts who can inform the investigation and final determination.
- This may include polygraph evidence and the testimony of a polygraph expert or the administrator of the test, experts on incapacity, drugs, medical forensics, technology, etc.



Consider this...

You may find it valuable to counsel your advisee to not answer questions

- Make sure you are clear on the implications.
- Will your advisee answer some questions, but not all? If they won't answer a question, they should be prepared for that in advance, and coached on how they will invoke their right/decision not to respond.
- They should also know the answer to the question of why they are choosing not to answer. If they will not respond to any questions, they need to be ready for the question,

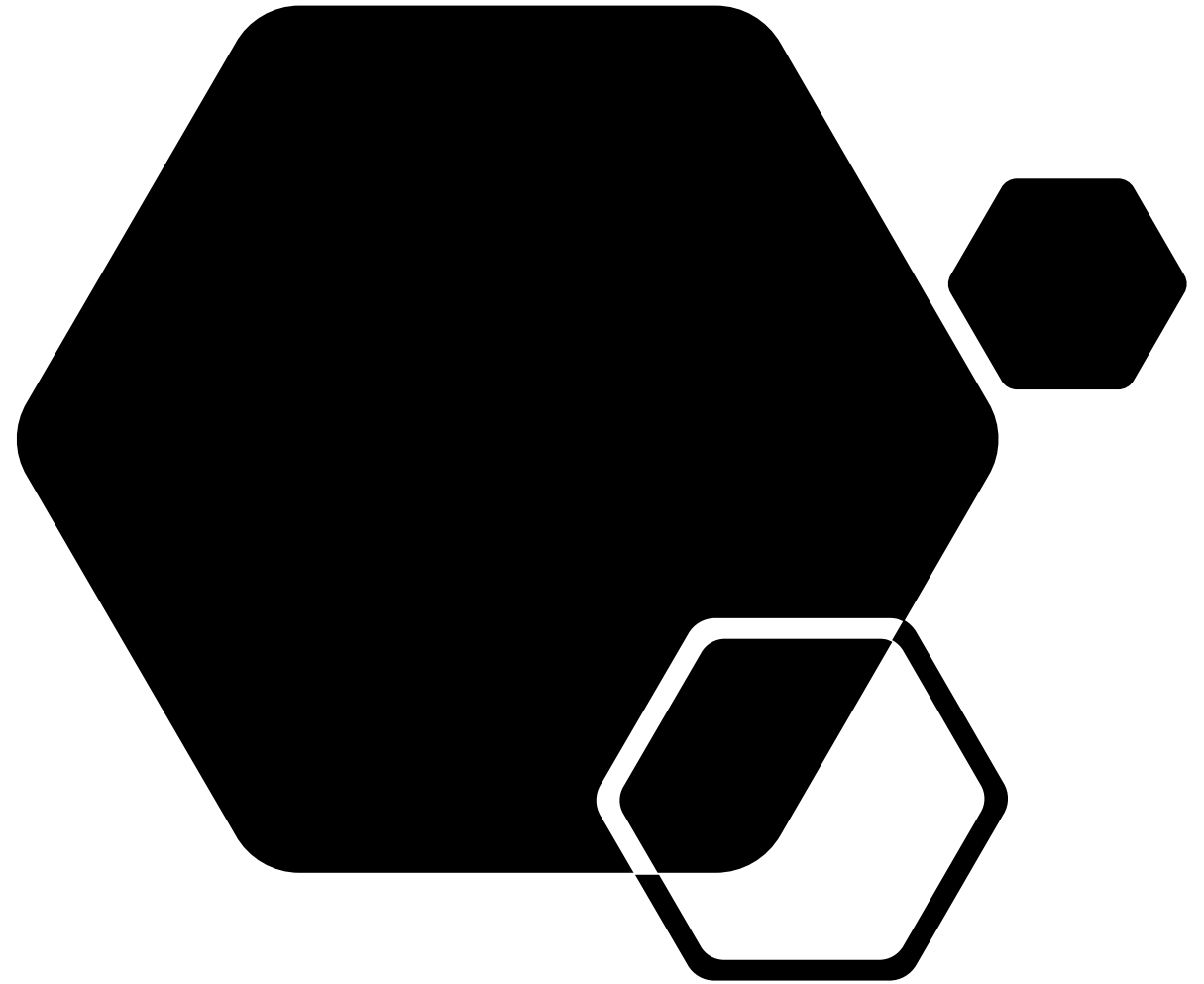


Consider this..

- Regardless of what type of advisor you are, we hope you will be able to create a positive dynamic with Title IX administrators while still effectively advising your advisee. Extend simple courtesies, strike a civil or collegial tone, and display a respectful manner.
- Be on time for meetings.
- Ask questions if procedures are unclear but take the time to read and try to understand them first.
- When your role requires you to push back on the school's procedures, do so in a manner that recognizes that the person implementing the procedures may not be the person who crafted them and may have no authority to deviate from them.



Role as a Hearing Board Member



Overview of the HBM Role

- Ask **ALL** relevant questions to the parties and witnesses
- Deliberate and evaluate all relevant evidence
- Determine responsibility, and sanctions, if applicable
- Issue a written determination



Pre-Hearing Preparation

- Review the relevant policy provision in the relevant handbook
- Review Investigation Report
- Develop questions to ask each party and each witness
- Pre-Hearing Meeting



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Asking Questions

- Essential for truth seeking
- Provides opportunity to test consistency, accuracy, memory, and credibility so that you can better assess whether a party's narrative should be believed
- Provides you the opportunity to follow up on implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility the other party's statements



Asking Questions

- Equitable questioning were applicable
- Ask for the information that you need
- Tone, mannerism, and phrasing matters
 - Why??
- Ask QUESTIONS!



Drafting Questions

As you read, some questions occur to you. Areas of ambiguity in the evidence about the parties' relationship before the offensive sexual touching allegedly occurred. You decide to . . .



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- A. Make a list of all the areas of ambiguity and draft questions for each. No such thing as being too thorough.
- B. Identify any areas of ambiguity that go directly to elements of the alleged wrongdoing and draft questions to resolve those areas only. No one wants the hearing to last six hours.
- C. Call the witness to get answers to your questions about the event. Then draft questions for the remaining areas of ambiguity so that the hearing can be both thorough and efficient.



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Rephrase

Why didn't
you just
leave?



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Standard of Evidence

When you look at the elements in your case, you see by a preponderance of the evidence that the Respondent intentionally touched the Complainant's breasts for the purpose of sexual gratification. The issue of consent is much murkier, though. The complainant argues that although she said yes to the touching, she was too drunk to legally consent. But the evidence does not strongly indicate that she was impaired. It is not more likely than not that she was impaired. You decide to . . .



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Fondling

- The touching of the private body parts of another person (buttocks, groin, breasts, inner thigh etc.)
- for the purpose of sexual gratification
- Without consent
 - Forcibly and/or
 - against that person's will (non-consensually),
 - or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.





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Credibility

What is credibility?

- “Credible” is not synonymous with “truthful”
- Accuracy and reliability of information

How do we weigh it?

- Corroboration
- Consistency
- Credibility assessment may not be based on a person’s status as a Complainant, Respondent, or Witness



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DO NOT: Make credibility determinations based solely on the gender or status of a party

“I’m going to believe the woman because women have been ignored for too long in other cases and we need to balance things.”

“He is an Alpha, so he is a man of honor, even though her version of events seems plausible.”

“Anyone who would file a complaint about something like this is crazy.”

“If this woman would go so far as to file a formal complaint, then he must have done it.”



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Deliberation and Determining Responsibility

- Avoid quickly coming to unanimous decisions without fully exploring all potential avenues/options
- Explore different facets of the situation and avoid coming to a quick decision because of time or political pressure
- Be alert to when a line of deliberation veers into bias or irrelevance
- Raise issues of concern, offer an alternative hypothesis, and review the facts thoroughly before reaching a decision
- Open, fair, and consistent communication is essential
- Biased or pressured communication hinders the process
- Utilizing a deliberation process free of groupthink and bias enables the individual to more thoroughly – and independent – explore the relevant facts to reach a more accurate decision



Sanctioning Considerations

Mitigating & Aggravating
Factors

Severity and
Egregiousness

Cumulative Violations

Sanctioning Considerations

- Prior History of Misconduct
- Complainant's Request for Enhanced/Lesser Sanctions
- Attitude
- Conditions for Return
- Was direct or implied force present?
- Was direct or implied threat present?
- Was fear of threat or force present?
- Was incapacitation present?
- Was coercion and/or intimidation present?
- Is there a presence of pattern and/or a practice of behavior?
- Was there a weapon involved?
- Was there a presence of predation?
- Were there injuries?
- Did the responding party play a minor/major role in the violation?
- Number violations?
- Intent of the responding party?
- Relevant past conduct record?
- Gravity of party's actions?



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Draft Outcome Letter

- Identification of the allegations potentially constituting sexual offense
- A description of the procedural steps taken
- Findings of fact supporting the determination
 - Conclusions regarding the application of WSSU's code of conduct to the facts
 - A statement of, and rationale for, the result as to each allegation, including determination regarding responsibility, any disciplinary sanctions and whether remedies designed to restore or preserve equal access to the WSSU's education program or activity will be provided by the recipient to the complainant; and
 - WSSU's procedures and permissible bases for the complainant and respondent to appeal.





ADDITIONAL QUESTIONS?

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