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The Decision Maker's Role In the Post Regulatory Title IX Hearing

Darci Heroy | May 2022

Meet Your Facilitator

Darci Heroy is the Director of Strategic Partnerships and Client Relations at Grand River Solutions and works closely with clients throughout the Pacific NW, Western and Mountain regions. Prior to joining the Grand River team, Darci spent ten years serving in various roles in higher education and the private sector, including as an employment attorney, civil rights investigator, Title IX coordinator, and Chief Civil Rights Officer. Darci's vast expertise extends to navigating bias and decision-making throughout Title IX and sexual misconduct processes; performing thorough, fair, and compliant investigations and hearings; as well as conducting research on the construction of race and racism, international policy analysis, transitional justice mechanisms, and diplomacy in Europe and West Africa.

Darci Heroy, J.D.
Director of Strategic Partnerships
and Client Relations

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About Us

Vision

We exist to help create safe and equitable work and educational environments.

Mission

Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values

- Responsive Partnership
- Innovation
- Accountability
- Transformation
- Integrity

Agenda

1. Title IX Requirements for Hearings
2. Process Participants
3. Pre-Hearing Tasks
4. The Hearing
5. After The Hearing
6. Practical Application

Quick Review of the Title IX Requirements For Hearings

01

Procedural Requirements for Hearings

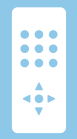
- Must be live, but can be conducted remotely
- Cannot compel participation of parties or witnesses
- Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters
- Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution
- Decision maker determines relevancy of questions and evidence offered
- Written decision must be issued that includes finding and sanction

The Requirement of Impartiality

Section 106.45(b)(1)(iii)

> Title IX Coordinator, investigator, **decision maker**, or facilitator of informal resolution must receive training on…how to serve impartially, including avoiding prejudgment of the facts at issue, conflict of interest, and bias. This training material may not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

Hearing Technology: Requirements and Considerations



If hearings cannot be in person, or if someone chooses to participate remotely, must have a remote participation platform available.

All hearings must be recorded.

Participants must be able to communicate during the hearing

- The parties with the decision maker(s)
- The parties with their advisors

Purpose of the Hearing

1. Review and Assess Evidence
2. Make Findings of Fact
3. Determine Responsibility/ Findings of Responsibility
4. Determine Sanction and Remedy

Quick Review: Process Participants

02

The participants

- Parties
- Advisors
- Witnesses
- Decision Maker(s)
- Hearing Facilitator
- Investigator?

Pre-Hearing Tasks: Hearing Panel & Chair

What should be done in advance of the hearing

03

Pre-Hearing Meetings

Review the Logistics for the Hearing

Set expectations

- Format
- Roles of the parties
- Participation
- Decorum
- Impact of not following rules

Cross Examination/Questioning Format & Expectations

Hearing Chair

- Review evidence and report
- Review applicable policy and procedures
- Preliminary analysis of the evidence
- Determine areas for further exploration
- Develop questions of your own

Hearing Chair

- May participate in a pre-hearing meetings
- Where applicable, review questions submitted by the parties
- Anticipate challenges or issues
- Prepare and become familiar with the script

Common Areas of Exploration

- Credibility?
- Clarification on timeline?
- Thought process?
- Inconsistencies?

The Hearing

04

Order of the Proceedings

01

Introductions and instructions by the Chair; Opening Statements

02

Presentation by Investigator

03

Presentation of information and questioning of the parties and witnesses

04

Closing Remarks by the Chair

05

Deliberation & Determination

Opening Introductions and Instructions by the Chair

- The College has a script for this portion of the proceedings, and it should be used.
- Introduction of the participants.
- Overview of the procedures.
- Overall goal: manage expectations.
- Be prepared to answer questions.

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Presentation of Information

Presentation of Information & Questioning of the Parties

01
The Hearing chair will question Complainant first

02
Cross examination of Complainant will occur next

03
Follow up by the Hearing Chair

04
The Hearing Chair will question Respondent second

05
Cross examination of Respondent will occur next

06
Follow up by the Hearing Chair

Questioning of the Witnesses

01

The Chair will determine the order of questioning of witnesses

02

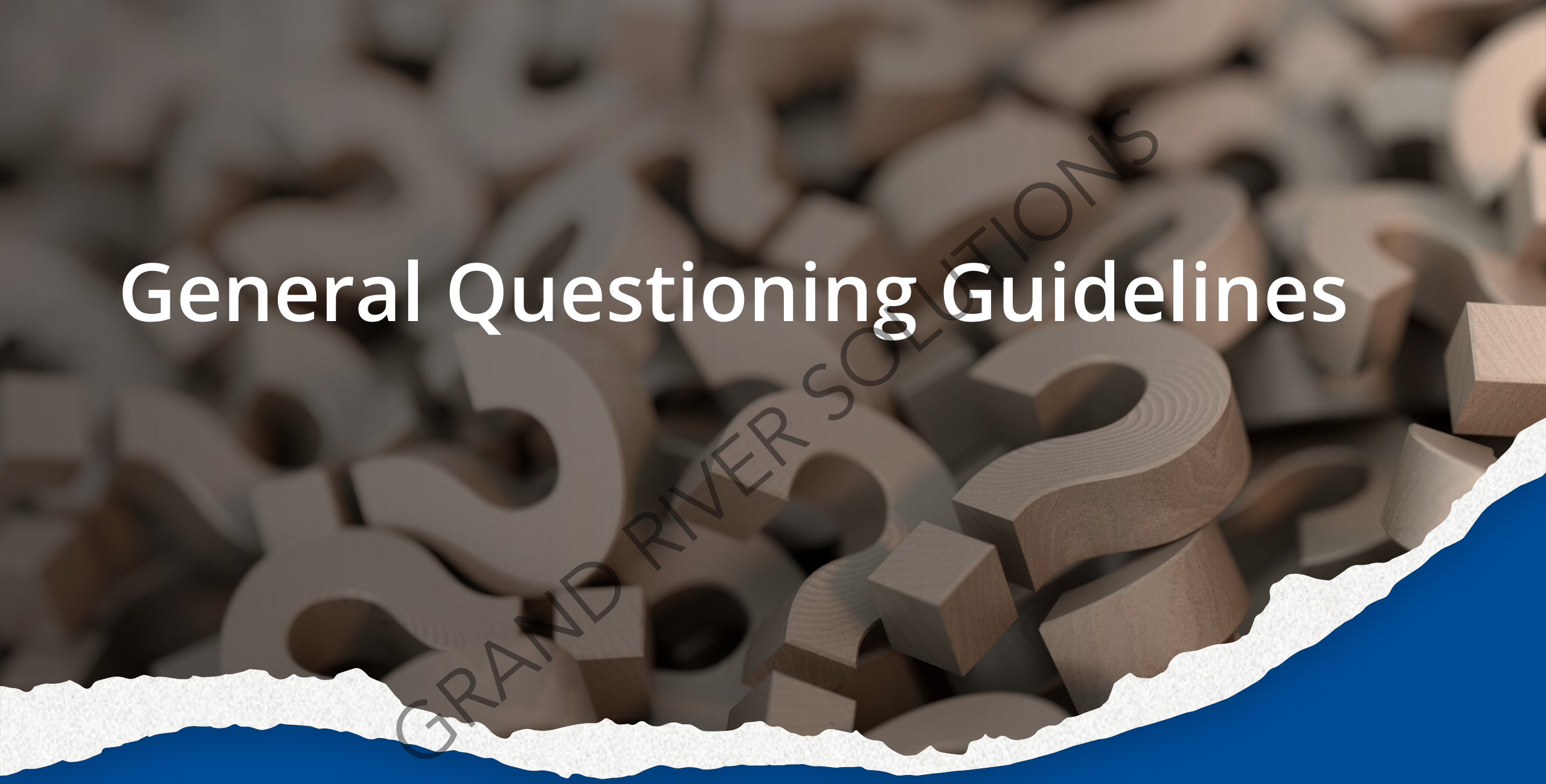
The Hearing Chair will question first

03

Advisor cross-examination will occur next (suggested: Complainant's advisor followed by Respondent's advisor)

04

Follow up by the Hearing Chair



General Questioning Guidelines

Format of Questioning by the Chair

The Chair will ask questions

Questions will be posed orally

Questions must be relevant

What constitutes a relevant question?

The Department declines to define "relevant", indicating that term "should be interpreted using [its] plain and ordinary meaning."

See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:

"Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
- (b) the fact is of consequence in determining the action."

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When is evidence relevant?

- Logical connection between the evidence and facts at issue
- Assists in coming to the conclusion – it is "of consequence"
- Tends to make a fact more or less probable than it would be without that evidence

Irrelevant and Impermissible Questions

- Information protected by an un-waived legal privilege
- Medical treatment and care
- Unduly repetitious or duplicative questions
- Information that otherwise irrelevant
- Complainant's prior sexual history, with limited exceptions.

When Questioning….

Be efficient.

Explore areas where additional information or clarity is needed.

Listen to the answers.

Be prepared to go down a road that you hadn't considered or anticipated exploring.

Take your time. Be thoughtful. Take breaks if you need it.

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Foundational Questions to Always Consider Asking

Were you interviewed?

Did you see the interview notes?

Did the notes reflect your recollection at the time?

As you sit here today, has anything changed?

Did you review your notes before coming to this hearing?

Did you speak with any one about your testimony today prior to this hearing?

Common Areas of Where Clarity or Additional Information is Needed

- Details about the alleged misconduct
- Facts related to the elements of the alleged policy violation
- Relevancy of Certain Items of Evidence
- Factual Basis for Opinions
- Credibility
- Reliability
- Timelines
- Inconsistencies

Questioning to Assess Reliability

- Inherent plausibility
- Logic
- Corroboration
- Other indicia of reliability

Questioning to Assess Credibility

No formula exists, but consider asking questions about the following:

- opportunity to view
- ability to recall
- motive to fabricate
- plausibility
- consistency
- character, background, experience, and training
- coaching

Credibility Versus Reliability

Reliablity

- I can trust the consistency of the person's account of their truth.
- It is probably true and I can rely on it.

Credibility

- I trust their account based on their tone and reliability.
- They are honest and believable.
- It might not be true, but it is worthy of belief.
- It is convincingly true.
- The witness is sincere and speaking their real truth.

Opinion Evidence

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?

Asking Questions to Assess Authenticity Investigating the Products of the Investigation

Never assume that an item of evidence is authentic.

Ask questions, request proof.

Request further investigation of the authenticity if necessary.

Is it authentic?

QUESTION THE PERSON WHO OFFERED THE EVIDENCE

REQUEST ORIGINALS

OBTAIN ORIGINALS FROM THE SOURCE

HAVE OTHERS REVIEW AND COMMENT ON AUTHENTICITY

ARE THERE OTHER RECORDS THAT WOULD CORROBORATE?

What are the "Hard" Questions

- Details about the sexual contact
- Seemingly inconsistent behaviors
- Inconsistent evidence/information
- What they were wearing
- Alcohol or drug consumption
- Probing into reports of lack of memory

How to Ask the Hard Questions

Lay a foundation for the questions

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

Be deliberate and mindful in your questions:

- Can you tell me what you were thinking when….
- Help me understand what you were feeling when…
- Are you able to tell me more about…

Special Considerations for Questioning the Investigator

- The Investigator's participation in the hearing is as a fact witness;
- Questions directed towards the Investigator shall be limited to facts collected by the Investigator pertinent to the Investigation;
- Neither the Advisors nor the Decision-maker(s) should ask the Investigator(s) their opinions on credibility, recommended findings, or determinations;
- The Investigators, Advisors, and parties will refrain from discussion of or questions about these assessments. If such information is introduced, the Chair will direct that it be disregarded.

Special Considerations for Questioning the Investigator

- Ask questions about how they conducted their investigation
- Explore the investigator's decision making
- Seek clarity about evidence collected
  - Where it came from
  - Authenticity of the evidence
- Ask factual questions that will assist in evaluation of the evidence
- If bias is not in issue at the hearing, the Chair should not permit irrelevant questions of the investigator that probe for bias.

The Decision Maker's Role in Advisor Questioning

05

Cross Examination

Who does it?

Must be conducted by the advisor

If party does not appear or does not participate, advisor can appear and cross

If party does not have an advisor, institution must provide one

Format of Cross Examination

- The Advisors will question
- Questions will be posed orally
- The Chair will make a determination of relevancy
- If relevant, the party/witness will answer
- If not relevant, the Chair will state their reason
- Advisor will ask next questions

The Role of the Decision Maker During Questioning by the Advisors

After the Advisor poses a question, the proceeding will pause to allow the Chair to consider it.

Chair will determine whether the question will be permitted, disallowed, or rephrased The Chair may explore arguments regarding relevance with the Advisors.

The Chair will limit or disallow questions on the basis that they are irrelevant, unduly repetitious (and thus irrelevant), or abusive.

The Chair will state their decision on the question for the record and advise the Party/Witness to whom the question was directed, accordingly. The Chair will explain any decision to exclude a question as not relevant, or to reframe it for relevance.

The Chair has final say on all questions and determinations of relevance. The parties and their advisors are not permitted to make objections during the hearing. If they feel that ruling is incorrect, the proper forum to raise that objection is on appeal.

When Assessing Relevance, the Decision Maker Can:

Ask the Advisor (Process A) or Party (Process B) why their question is relevant

Take a break

Ask their own questions of the party/witness

Review the hearing record

After the Hearing

06

Deliberations

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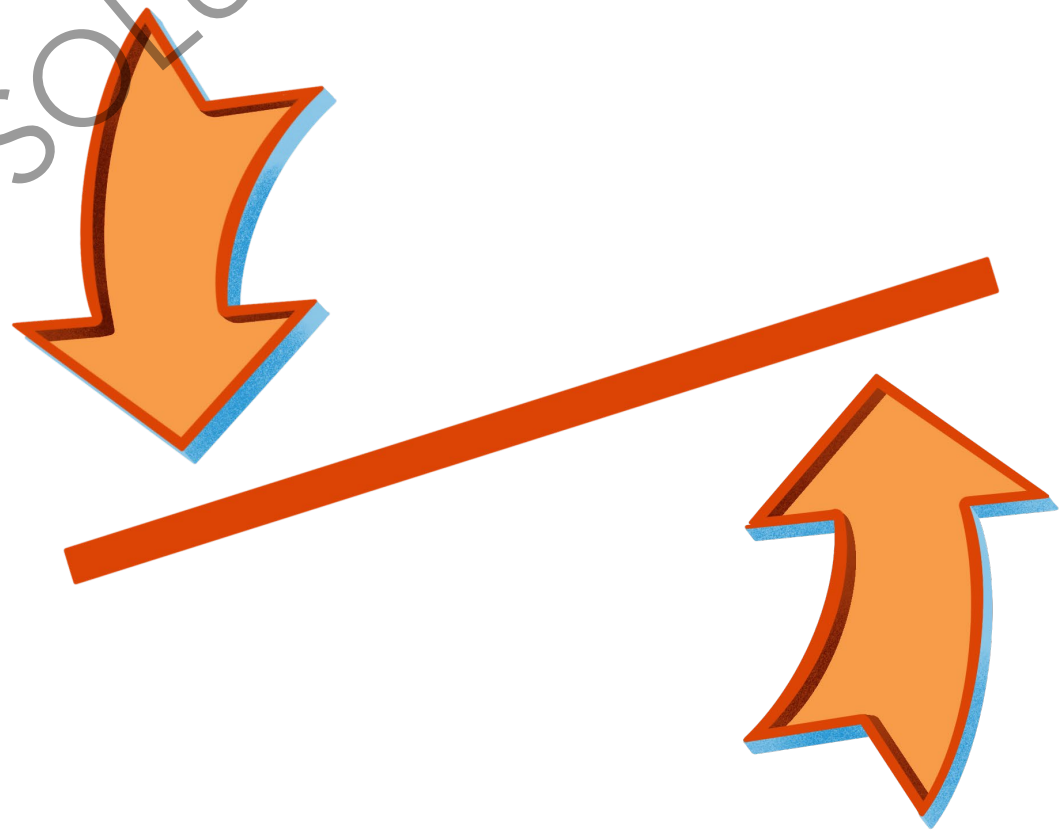
Weighing the Evidence & Making a Determination

1. Evaluate the relevant evidence collected to determine what weight, if any, you will afford that item of evidence in your final determination;
2. Apply the standard of proof and the evidence to each element of the alleged policy violation;
3. Make a determination as to whether or not there has been a policy violation.



Preponderance of the Evidence

More likely than not

Does not mean 100% true or accurate

A finding of responsibility = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated

A finding of not responsible = There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated

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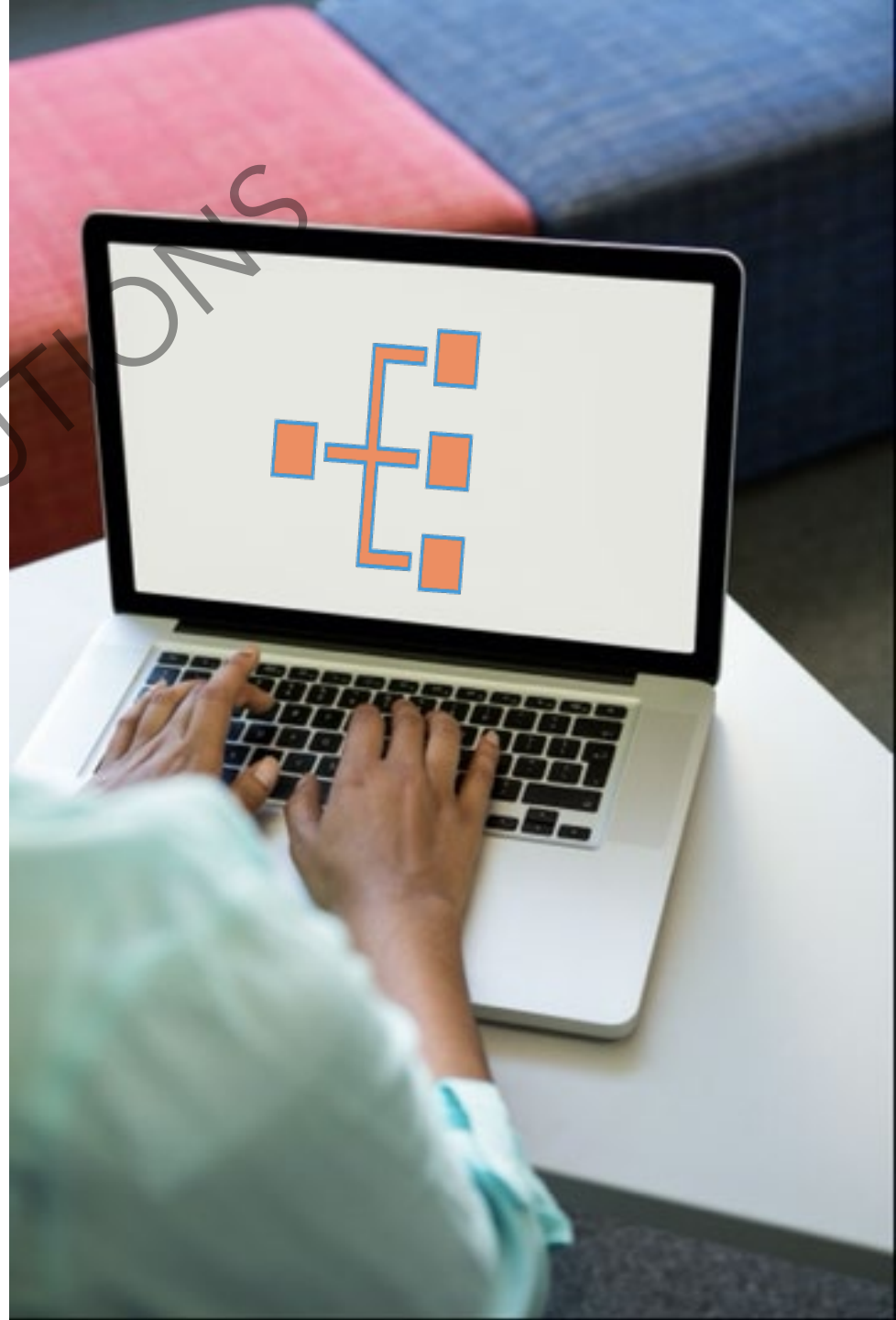
Findings of Fact

- **A "finding of fact"**
  - The decision whether events, actions, or conduct occurred, ***or*** a piece of evidence is what it purports to be
  - Based on available evidence and information
  - Determined by a preponderance of evidence standard
  - Determined by the fact finder(s)
- **For example…**
  - Complainant reports that they and Respondent ate ice cream prior to the incident
  - Respondent says that they did not eat ice cream
  - Witness 1 produces a timestamped photo of Respondent eating ice cream
- **Next steps?**

Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate



Allegation: Fondling

Fondling is the:

- touching of the private body parts of another person
- for the purpose of sexual gratification,
- Forcibly and/or without the consent of the Complainant,
  - including instances where the Complainant is incapable of giving consent because of their age or **because of their temporary or permanent mental or physical incapacity.**

Analysis Grid

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.	Respondent acknowledges and admits this element in their statement with investigators. "We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants…"	Complainant: drank more than 12 drinks, vomited, no recall Respondent: C was aware and participating Witness 1: observed C vomit Witness 2: C was playing beer pong and could barely stand Witness 3: C was drunk but seemed fine Witness 4: carried C to the basement couch and left her there to sleep it off.

Apply Preponderance Standard to Each Element

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Did You Also Analyze…?
(if required by policy)

- On campus?
- Program or Activity?
- In a building owned/controlled by a recognized student organization?
- Substantial control over respondent and context?
- Complainant was attempting to access program/activity?

When there is a finding of responsibility, final written determination must also include sanctions and remedies

Sanctioning Officer

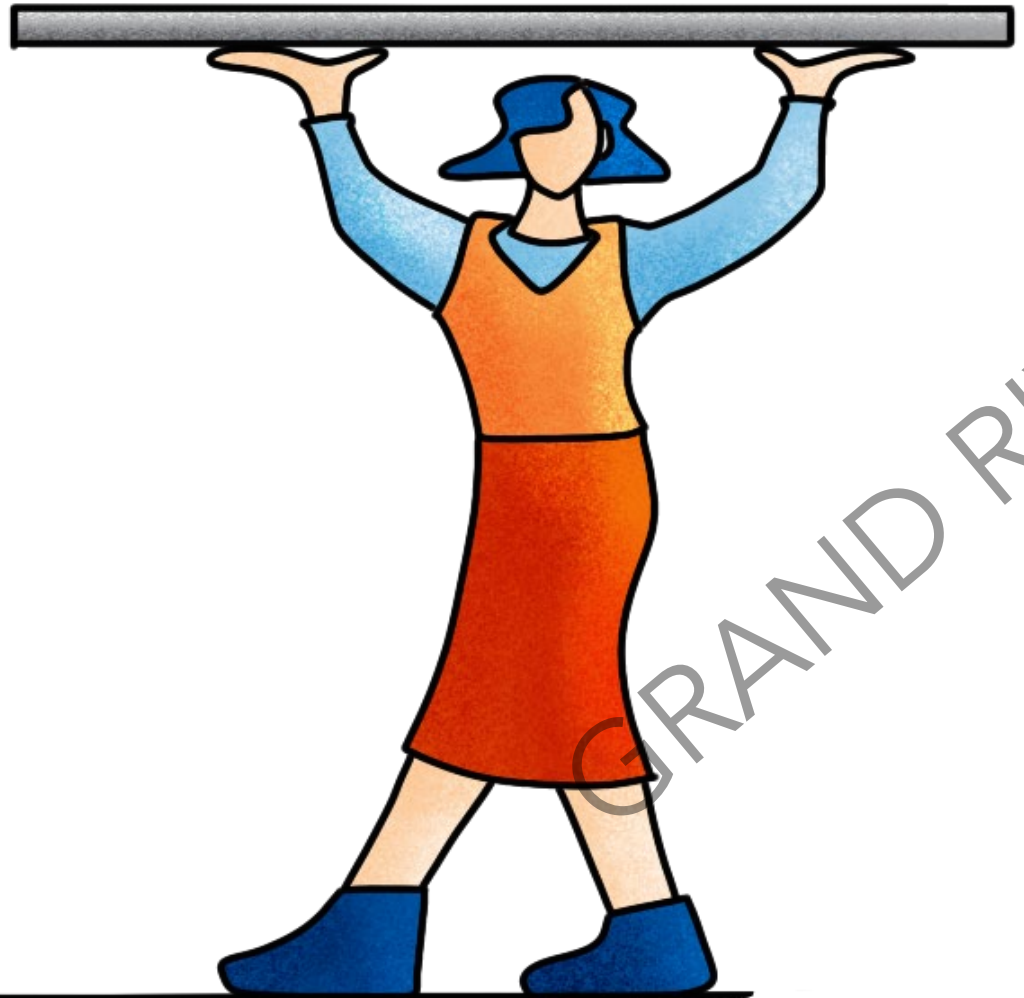
- For students: Student Conduct Administrator
- For Employees: Director of Human Resources

Goals of Sanctions/Discipline

End the harassment, prevent its recurrence, remedy the harm

What steps would be reasonably calculated to end harassment and prevent recurrence?

The Final Determination Should **STAND** On Its Own



- **S** Simple and Easy to Comprehend
- **T** Transparent/Clear
- **A** Accurate
- **N** Neutral/Unbiased
- **D** Draw Attention to Significant Evidence and Issues

Final Determination

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and remedies
- Procedure for appeal

Practical Application

07

Scenario 1

Respondent appears at the hearing with Witness 7. Respondent would like Witness 7 to provide information testimony about text messages between them and Complainant that indicate that Complainant has made the allegations up.

- **Can the HP hear from Witness 7 at the hearing?**

Scenario 2A

Respondent provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations.

- **The Investigator determines the report is irrelevant. Must the Investigator share the report with the decision maker?**

Scenario 2B

Respondent provides a polygraph report to Investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations. The polygrapher appears and answers all relevant questions on cross.

- **Must the Hearing Panel find Respondent not responsible because of the findings in the report?**

Case Study

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> The Formal Complaint charges Respondent with sexual assault for engaging in sexual contact with Complainant when she was incapacitated by alcohol. Specifically, Complainant alleges that she was at a party with friends when they met Respondent. Complainant reported that prior to the party she pre-gamed with Witness 1 and they split a bottle of prosecco. Complainant stated that while at the party, Respondent and Witness 2 approached her and her friend, Witness 3, and asked if they would be their partners in a round of beer pong. Complainant reported that she paired up with Respondent and they played several rounds. She further alleged that that Respondent was the one who filled their cups. Complainant stated that she "got drunk fast" and her last memory was of Respondent handing her a celebratory shot because they had won the tournament. Her next memory was waking up on a couch in a bedroom that was unfamiliar to her, naked from the waist down. Respondent was on the floor next to her, asleep. He was under a blanket but was also naked.

Witness 1

Witness 1 was interviewed by the investigator and reported that she and Complainant are roommates, but they are not close. Witness 1 is an athlete and tends to hang out with her teammates. She stated that for this reason, they rarely hang-out, but that the night of the alleged incident they did because they were planning on going to the same party. Witness 1 stated that they split a bottle of prosecco, but that Complainant drank most of it because Witness 1 had an early practice the next morning and didn't want to get "too messed up." Witness 1 said that they went to the party together, but then went their separate ways. Witness 1 stated that towards the end of the night, she saw Complainant and described her as "a disaster." She also reported that Respondent was "practically carrying her" and she approached them and offered to take Complainant home. According to Witness 1, Complainant said she was fine, but her words were slurred, and she could barely stand. Witness 1 told Respondent to take care of her and he said, "I'm just going to put her to bed." She didn't see either party again that night.

At the hearing, Witness 1 gave testimony that was substantially the same as what she told the investigator.

Witness 2

Witness 2 told the investigators that he is Respondent's best friend and teammate. Witness 2 stated that when looking for partners for the beer pong tournament, Respondent saw Complainant and Witness 3 and suggested that they approach them because Complainant "was hot" and Witness 3 "looked drunk enough to be a good time." Witness 2 said that Complainant was fine and didn't appear to be that drunk. He also stated that she made most of the winning shots after several rounds of the game so she couldn't have been too messed up. When asked who was filling the cups, he said that he wasn't sure who did it each round, but he definitely saw Complainant fill them on two occasions. After the tournament was over, he helped Witness 3 get home and so didn't see Complainant and Respondent again that night. He also mentioned that he and Witness 3 are now dating.

At the hearing, Witness 2 testified that Complainant was fine. He also stated that Respondent never filled Complainant's cup and that Complainant was all over Respondent the entire night.

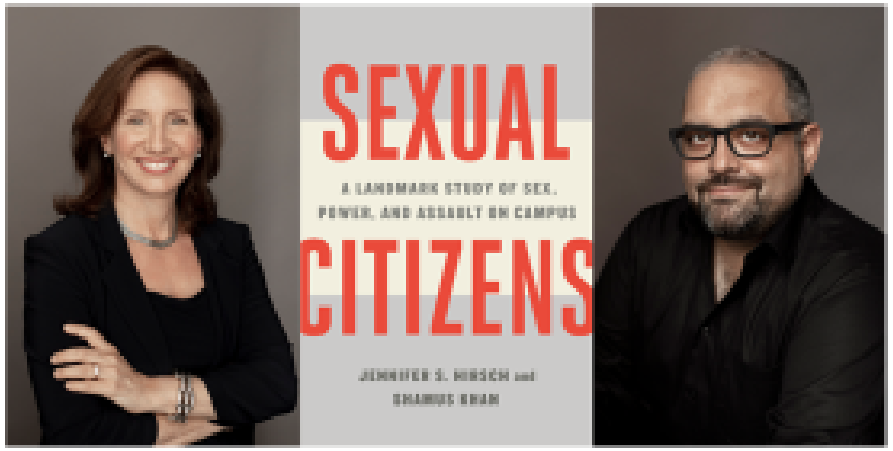
Witness 3

Witness 3 was Complainant's best friend at the time of the incident. They are no longer close and Witness 3 is now dating Witness 2.

Immediately following the alleged incident, Witness 3 told the investigators that Complainant was already drunk when she got to the party. She stated that Respondent and Witness 2 asked them to play beer pong and they agreed. She stated that the parties seemed to hit it off immediately. She stated that they won the tournament and so played at least five rounds and that by the end of the game Complainant was the "drunkest she had ever seen her." Witness 3 stated that Complainant was slurring her words, couldn't stand on her own, and was really loud, which is not like her. Witness 3 stated that that she was pretty drunk too, but not as bad as Complainant. Witness 3 stated that she left the party with Witness 2.

At the hearing, Witness 3 stated that she may have exaggerated her description of Complainant when she spoke to the investigators. She told the decision makers that although Complainant drank a lot, she wasn't that out of it, because she had a high tolerance and drank a lot all the time.

Save the Date!



Sexual Citizens SPACE Toolkit: A Discussion with the Authors

Hosted by Grand River

May 31, 2022, 2 PM Eastern

Register here!

Upcoming Trainings

Clery Act Training: Higher Education Act Campus Safety Obligations
May 10, 12, 17 & 19, 2022, noon eastern

June 8 & 9, 2022, noon eastern

From One Title IX Coordinator to Another
September 6 & 7, 2022, noon Eastern

Decision Makers: Conducting Fair, Equitable, and Compliant Title IX Hearings
October 25 & 26, 2022, noon Eastern

Title IX Investigative Report Writing Workshop
Classes in April, August, and November

Conducting Fair, Thorough, and Trauma-Informed Sexual Violence Investigations
Classes in August and October

Driving Down the 493: A Deep Dive into a California Law and Its Overlap with Title IX
June 24, 2022 noon Pacific

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