



TITLE IX

Session 7 & 8: Advisors, Investigations, Reports, Impartiality, BIAS, &
Decision Makers

Presented by: Liz Lavoie

Agenda & Learning Outcomes

- Key terms recap
- Role of an advisor
- Supporting your advisee
- Advisor role in the hearing
- How to conduct an impartial investigation, avoiding prejudgment and bias
- Format of investigative reports
- How to address conflicts of interest
- What is in the investigation file
- How & who review the investigation file
- Viewing & sharing of the investigative file in a secure manner
- Decorum of the hearing
- How to manage and conduct cross examination
- Determine relevance of questions

Key Terms Recap

- *Complainant* means an individual who is alleged to be the victim of conduct that could constitute sexual harassment
- *Formal complaint* means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.
- *Respondent* means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Key Terms Recap Cont'd

- *Sexual harassment* means conduct on the basis of sex that satisfies one or more of the following:
- An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- 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 recipient's education program or activity; or
- "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

Key Terms Recap Cont'd

- *Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.
- Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.

Key Terms Recap Cont'd

- The recipient must maintain confidential - any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.
 - This could also be the Deputy Coordinator or EO Officer
- *Postsecondary institution* means an institution of graduate higher education as defined in § 106.2(l), an institution of undergraduate higher education as defined in § 106.2(m), an institution of professional education as defined in § 106.2(n), or an institution of vocational education as defined in § 106.2(o).

Advisor

- *Advisor* means a person chosen by a party or appointed by the institution to accompany the party to meetings related to the complaint process, to advise the party on that process, and to conduct cross-examination for the party at the hearing, if any.
 - Right now, this role, on behalf of the institution is limited to you all.....once we move forward and have a few cases that have gone through the process we will look to widen this pool
 - We will be conducting a non-title ix Advisor training for others on your campus who would like to help students navigate the Student Conduct Process and we can conduct a special training for HR or Union Reps who are interested as well

Mitigating Risk in the Advisor Role

- Encourage parties to choose their own Advisor (even recommending Attorney's)
- Don't limit to just being there for cross-examination if you are the Advisor, be there for the whole student
- Arrange for an Advisor to be "on-call" just in case
- At the pre-hearing meeting ensure the Advisor is prepared to "question"
- Vet all UMS Advisors for conflicts
- Train UMS Advisors well (first training of many)
- Ensure they know the process
- Train them on the regulations and evidence rules
- Develop guidance materials (coming soon)
- Ensure UMS Advisors are covered under UMS insurance (double checking on this – the members trained in this group should be)

Mitigating Risk in the Advisor Role

- Clear role description (coming soon)
- Teach when to decline an invitation to advise
- Be aligned with the interest of your advisee
- Develop an ethics statement (coming soon)
- Ensure you have enough time and “energy” to be devoted to the role
- Reach out to supervisor to release some other duties during the time you are acting as an Advisor (happy to help/reach out on your behalf)
- Shield from the rest of the Title IX Team while acting as the Advisor or while “on-call”

Defining Who You Are

- Who defines you
- Who lifts you up
- Who's opinion matters most to you
- How do you feel when others label you
 - Pretty/Handsome/Stately/Cleans up Nice/Beautiful
 - Smart/Intelligent/Clever/Eager
 - Caring/Kind/Compassionate
 - Giving/Helpful/



Answer this:

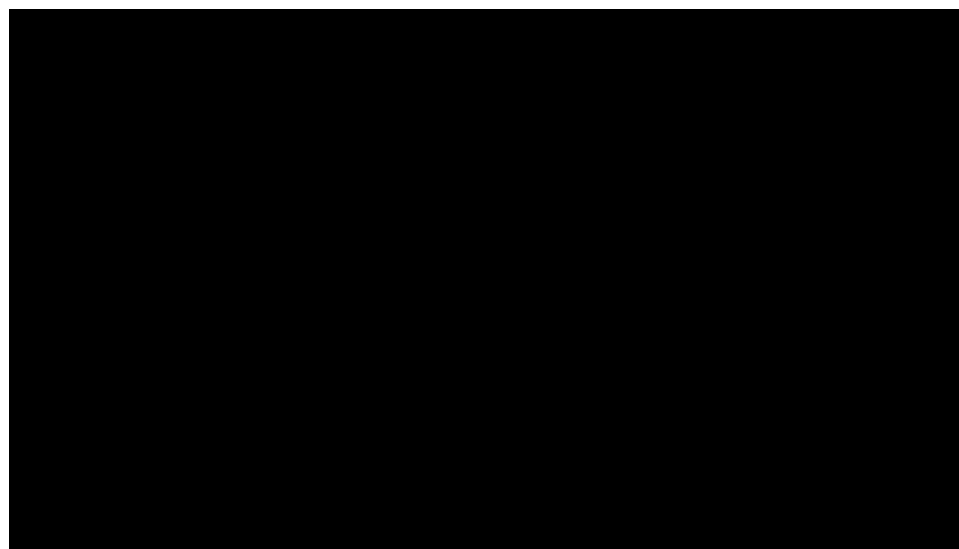
Your 19 & these labels come from your peer(s)

- What type of labels do alleged respondents get
- What type of labels do complainants get

Your 44 & these labels come from your colleague(s)

- What type of labels do alleged respondents get
- What type of labels do complainants get

Advising them that they are more than a Label!



Role of an Advisor in the Hearing

- “...the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties;”

Advising Your Person

- How do you gain their trust
- What types of open-ended questions can you ask to establish a relationship
 - What is your major/job? What made you interested in that? What do you do to relax?
 - What are some signs that will help me know when you are frustrated or need a moment to yourself
- What are your plans to ask them about how they are feeling – do you feel comfortable asking them if they feel like they are going to hurt themselves or someone else; Do they have a plan; Have they ever felt like this before, etc
- How do you support them through telling their parents, partner, etc
- How do you become “emotionally” available but still take care of yourself



It's Time for a Comfort Break



Role of Advisor in Process

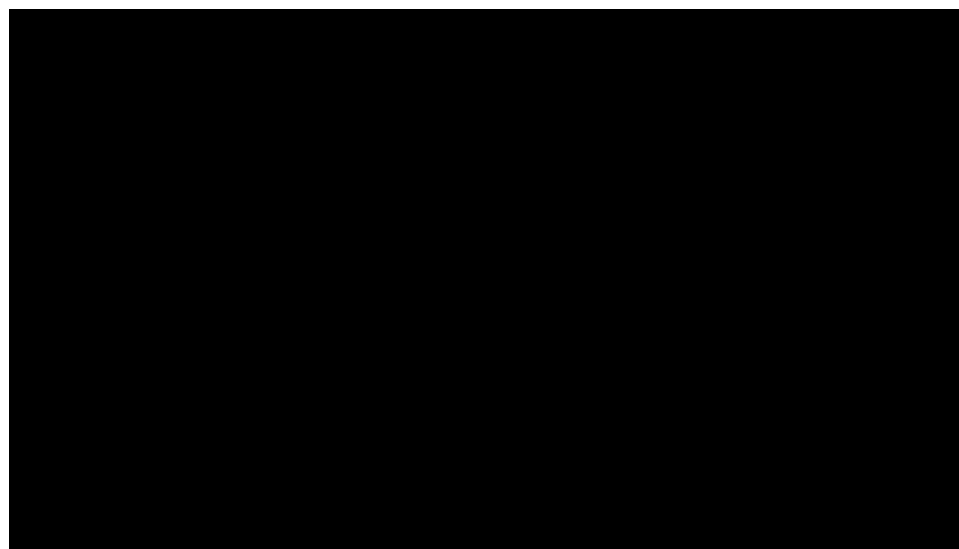
- Prep for pre-hearing meetings
- Debrief after meetings
- Prep for Interviews
- Ask clarifying questions to the UMS Title IX Team about the process
- Write notes to advisee during meetings, interviews, and hearings associated with the resolution process or informal process
- Receive electronic investigation report and evidence (with appropriate signed disclosure agreement) and be able to review it for 10 business days
- Help Advisee process the investigation report and how the advisee wishes to respond, if any

Role of Advisor in Process

- Craft questions to ask of the other party and witnesses (even if your Advisee does not attend or does not submit to cross-examination)*
- Ability to help process the formal complaint process verses informal resolution
- Help craft appeal
- Attend any appeal hearing(s)
- Ability to discuss how this is affecting their life as a whole
- Ability to flush out any needed supportive measures and suggest or assist them in letting the UMS Coordinator, Deputy Title IX Coordinator, or Equal Opportunity Officer know

*Further discussion of when cross-examination occurs will be discussed
in later in the presentation

Straight from the DOE – OCR Conducting & Adjudicating Title IX Hearings



Formal Complaint - Investigations

- “Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties”
- “provided that the recipient cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process under this section (if a party is not an “eligible student,” as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a “parent,” as defined in 34 CFR 99.3);”

Formal Complaint - Investigations

- “Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence;”
- “Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence;”
- “Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding;”

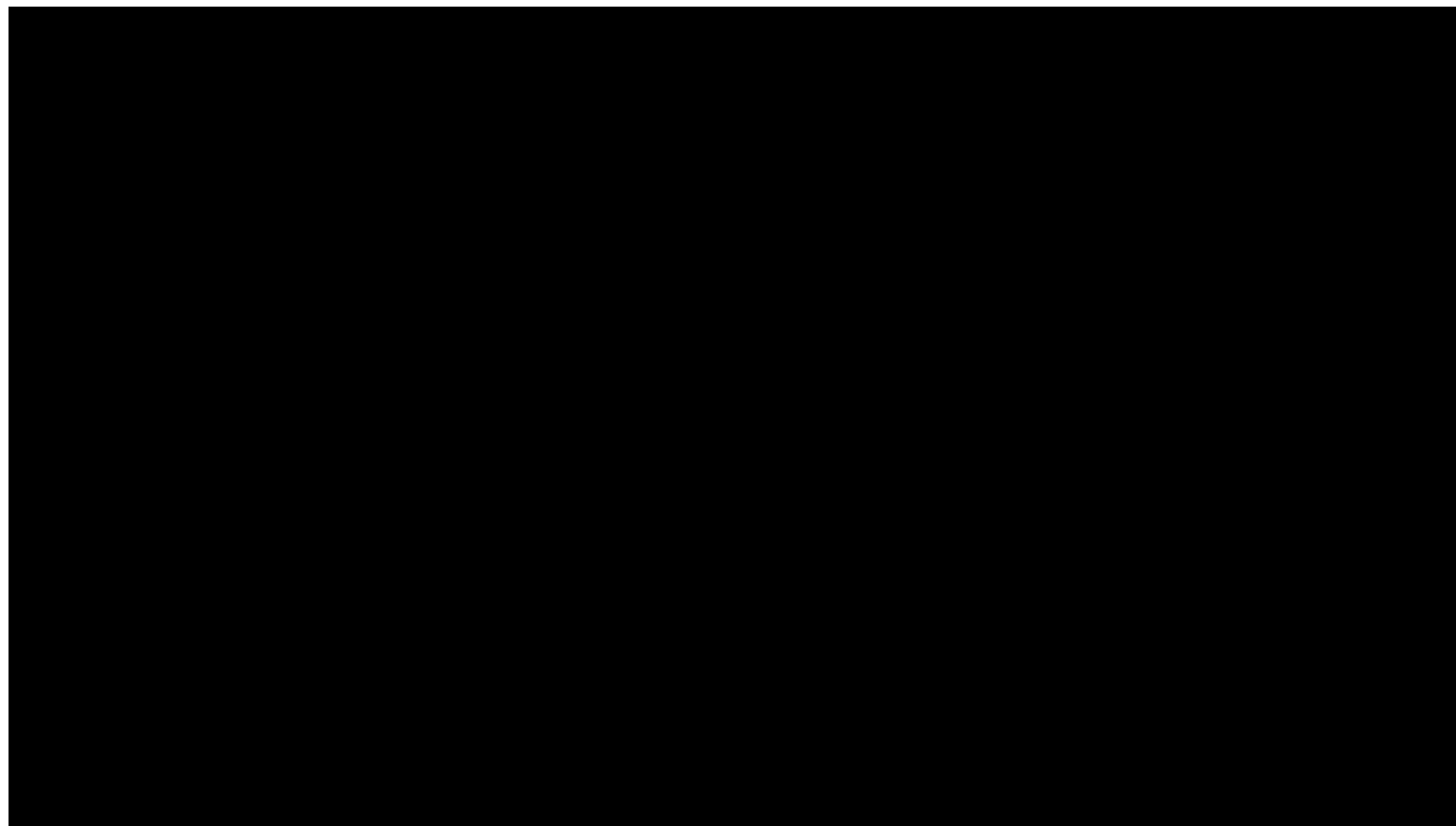
Formal Complaint - Investigations

- “Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;”
- “Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.”

Formal Complaint - Investigations

- The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination; and
- Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

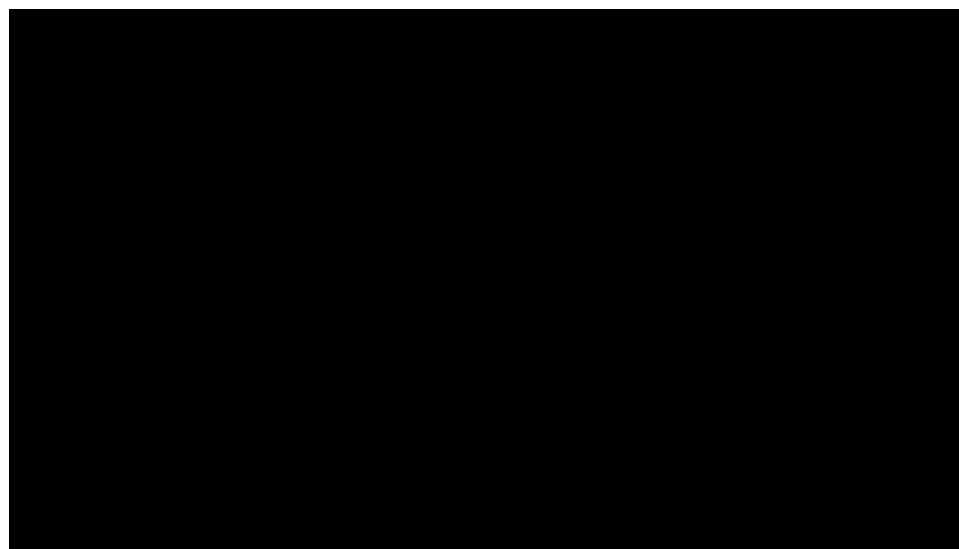
Check Our Bias to Wreck Our Bias



Impartiality

- Don't go into the investigation with an already determined outcome
- Think of it as collecting data
- Utilize information to analyze information in an objective manner (don't personalize your feelings or opinions)

Being Self Aware and Addressing Conflicts of Interest



It's Time for a Comfort Break



Investigations

- Interviews of both parties, witnesses, etc
- Record & transcribe interviews
- Stay on track with timing
- Be thorough and equitable
- Collection of any evidence
 - Relevant Evidence
 - Directly Related Evidence
 - Evidence that is neither relevant or directly related



Investigations Cont'd

- Once everything is collected it must be provided to the parties for 10 business days
- Should be shared with parties and their advisors
- Parties can submit further arguments, supplemental questions, witnesses, etc to the Investigator
- Investigator then reevaluates evidence for: relevancy, directly-related, or neither
- Investigator may need to gather more data or ask follow up questions/interviews
- On day 10 or 11 Investigator then provides each party and advisor's with the other party and response
- Parties can then respond to each others response

Investigation Draft Report

- Allegations summary
- Overview of procedures
- Procedural History of the case
- Statement on Title IX Sexual Harassment Jurisdiction
- List of Parties, Witnesses, documents, relevant evidence, directly related evidence, and evidence that is neither relevant nor directly related
- Interview transcripts and documents provided by each party/witness
- Standard of Evidence
- The fact of the case, timeline

Next Steps

- Now that the investigative report is in a consecutive and readable format
- Should be sent to the UMS Title IX Coordinator for review
- May also be shared with UMS Legal Counsel if needed
- Once the UMS Title IX Coordinator and/or Legal Counsel has reviewed the report any feedback is incorporated or clarified
- UMS Title IX Coordinator, Deputy Title IX Coordinator, or Equal Opportunity Officer is provided on who the Decision Maker(s) will be and the report is shared with them (this will likely be pre-identified in most cases, especially in EO/HR)
- Hearing host is identified

Hearing Decorum

- No yelling
- No interrupting, one person speaks at a time
- Respecting University Officials and everyone in the process
- No non-verbal confrontational indicators
- How everyone wants to be addressed: name, pronoun, Advisor, etc
- No physicality, must remain seated during informal resolution
- Will be scripted

Preparing for the Hearing

- Decision Maker (Chair if a panel) then reads through the report and reviews all evidence.
- Pre-hearing meetings are planned with the parties and advisors to go over the Decorum of the hearing.
- Any lingering Pre-hearing questions or concerns are addressed with the parties
- Expectations of the Advisor is laid out
- Questions about access to internet and Zoom accessed and answered
- Hearing is the scheduled via Zoom
- Notices sent simultaneously

The Hearing

- (i) For postsecondary institutions, the recipient's grievance process must provide for a live 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, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.

The Hearing Cont'd

- Only relevant cross- examination and other questions may be asked of a party or witness.
- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- If a party does not have an advisor present at the live hearing, the recipient must provide one without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

The Hearing Cont'd

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the 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.

The Hearing Cont'd

- Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
- Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

It's Time for a Comfort Break



Tips for Cross-examination (Questioning)

- Ask leading questions (fish out the answers you are looking for from the party or witness)
 - For Example: While you were with Baylow at the party Beta Kapp Siga sorority house you only had one beer? That beer was from your own backpack? Baylow did not see you drink anything other than a single beer, from your backpack that night?
- For Example: When you got to Beta Kapp Siga sorority house Baylow showed you the marks on their arms, indicating how many shots they had done in the dorm? At a previous party, the weekend prior Baylow asked you for a marker and proceeded to mark their arm to count their drinks that night too? So you knew that Baylow had 6 shots that night, because they had 6 lines on their arm.

Tips for Cross-examination (Questioning)

- Refrain from asking narrative questions
 - For Example: Baylow can you walk me through what you ate that day?
 - Instead be direct: Baylow can you tell me what you ate prior to consuming those 6 shots?
- Don't ask opinions:
 - For Example: Witness A, in your opinion was Baylow too intoxicated to consent that night?
 - Instead be direct: Witness A, can you describe how Baylow was acting that night? Were they slurring their words? Did they vomit in the bathroom before leaving the party?

Tips for Challenging Statements /Documents

- Here are some examples of questions you could use to challenge a witness's statement.
- You told the Investigator that you left your lab at 5:30pm that night and you never returned until the next morning? Why does your card swipe say that you used your access card to get into the lab at 9:30pm?
- You said that you walked to your car and said hello to a passing student? Why did the student just tell us that they were at home that night and weren't even on campus?

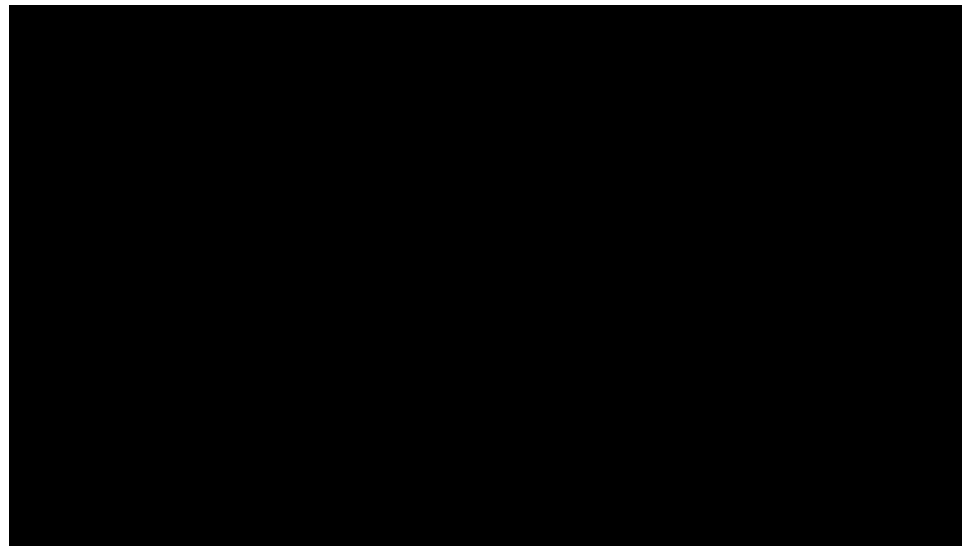
Tips for Challenging Statements/ Document

- You stated that you did not know your TA's phone number? Is your phone number 867-5309? Why were there three calls to their phone from your phone number on the night of May 6th?
- You stated that you have never had any other contact with them prior to that night? Why did you send them a Facebook request two week prior to the party?

How to Determine Relevance

- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.
- Will the answer to this question have a tendency to a finding of fact(s)
- Will the answer to this question have a tendency to a finding of not responsible
- Is the question repetitive
- Is the question going to open the door for more questions that will help determine the facts of the case or a finding
- Does the question bring up past sexual behavior that is not relevant to the consent of this case or to the prove that the respondent is not the alleged person

Relevance



Determination of Responsibility

- (i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.
- Must use preponderance of the evidence standard



Written Determination Must Include

- Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
- 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;
- Findings of fact supporting the determination;
- Conclusions regarding the application of the recipient's code of conduct to the facts;

Written Determination Must Include

Cont'd

- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant; and
- The recipient's procedures and permissible bases for the complainant and respondent to appeal.
- The recipient must provide the written determination to the parties simultaneously.
- The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.

It's Time for a Comfort Break



Appeals

- *Appeals.* (i) A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and

Appeals Cont'd.

- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
- A recipient may offer an appeal equally to both parties on additional bases.
- As to all appeals, the recipient must:
 - Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
 - Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;

Appeals Cont'd

- Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section;
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
- Issue a written decision describing the result of the appeal and the rationale for the result; and
- Provide the written decision simultaneously to both parties.
- The Appeal Committee cannot include any of the previous Decision Makers or the Investigator

Recordkeeping

- *Recordkeeping.* (i) A recipient must maintain for a period of seven years records of
- Each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section, any disciplinary sanctions imposed on the respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity;
- Any appeal and the result therefrom;
- Any informal resolution and the result therefrom; and

Recordkeeping Cont'd

- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.
- (ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.