

#aiHearingPanels



A Beginner's Look: Launching Your Title IX Student Hearing Panel

June 30 - July 1, 2020



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WELCOME & INTRODUCTIONS

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Academic Impressions



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A Beginner's Look: Launching Your Title IX Student Hearing Panel

The Big Why!



LEARNING OUTCOME

After participating...

... you will be able to launch a new hearing panel on your campus to effectively resolve your student sex and gender discrimination cases.

MAKING THE MOST OF OUR TIME TOGETHER...



- Make this experience count 😊
- Use the Questions & Chat feature! *Let's practice...*
 - *What is the best way you like to decompress your day?*
- Collective wisdom in this virtual learning space
- Agenda and schedule (including breaks)
- Q&A and “Questions Oasis”
- Stepping away (let us know) with an emoji
- Tech Support
- Tweet! Follow **@AcademicImpress** on Twitter and share what you’re learning using **#aiHearingPanels**

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RESOURCE

If you're new to Adobe Connect and missed the Tech Check, check out your technical resources:

CONNECTING YOUR MICROPHONE

To connect your microphone, identify the Microphone Icon at the top of the screen and click on the drop-down menu. Once you connected, the icon should turn green. Please keep your mic muted at all times, unless you are speaking.



CONNECTING YOUR WEBCAM

To connect your webcam, identify the Camera Icon at the top of the screen and click on the drop-down menu. Once you connected, the icon should turn green. Please keep your webcam turned off at all times, unless you wish to have it on while speaking.

RAISING YOUR HAND TO BE CALLED UPON

To raise your hand, identify the icon at the top of the screen that looks like someone raising their hand. You can click on this same icon to lower your hand. In the same drop-down box, you can “agree,” “disagree,” “step away” anytime during the conference.

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MEET YOUR EXPERT FACULTY



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Meet Your Faculty

**Jill Thomas,
J.D.**
*National
Educator/Consultant*

- Former Title IX Coordinator and Director of Equity Investigations at Stanford University
- Former Federal Prosecutor with Department of Justice
- U.S. Air Force Reserves Military Judge



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HEARING PANEL MODELS & NEW LAW REQUIREMENTS

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ACTIVITY

Explore Strengths and Weaknesses of Various Hearing Models

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■ 3-PERSON MODEL

- Made up of a diverse group of faculty, staff, and/or students
- Selected by senior leadership - NOT Title IX
- Rotating schedules for hearings or ad hoc scheduling

■ TRAINING

- Quarterly outside training or in-house training
- Modules set up - start from the beginning
- Build tools over time
- Debrief after the hearing with panelists to give on-the-spot feedback
- Implicit bias training

REQUIRED TRAINING - NO FREQUENCY MANDATE

106.45(b)(1)(iii)

- Publish the materials on website or make available, but remember proprietary information 106.45(b)(10)(i)(D)
- Relevance including the rape shield question exceptions and technology at live hearings. See 106.45 (b)(6). Definitions incl. 106.30 SH
- “...the scope of the recipient’s education program or activity.”
- “...how to serve impartially, including by avoiding prejudice of the facts at issue, conflicts of interest, and bias.” **No sex stereotypes.**



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ACTIVITY

Discussion of Various Trainings for Hearing Panels

- Explore training styles/types/length/frequency
- Explore strengths and weaknesses



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HEARING COORDINATOR

- Essential to setting up trainings, smooth hearings, and logistics of hearing (e.g., conference room, paper/pens, water, chair set-up, **recording**, etc.)
- Sends hearing notices/charging decision letters to parties, puts hearing files together for panelists, schedules hearings, and coordinates parties and witnesses to testify
- Reads instructions to panel - documents it
- Post-hearing: notifies parties of decision, sets up sanctions hearing if “responsibility finding,” and runs appeal process



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LET'S TALK NEW REGS



- Published: May 6, 2020
- Due: August 14, 2020



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STANDARD OF EVIDENCE

- “State whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.”
- **Pick between the two optional standards and stick with that one***
- **Apply same standard - faculty, staff, and students**
- **Applies in Sexual Harassment (and not – e.g., research misconduct cases)**

LIVE HEARINGS

- Colleges must have a live hearing to reach determinations regarding responsibility for sexual harassment
- IF a live hearing occurs ... in separate rooms, then must conduct with technology enabling participants to see and hear each other
- Specifically allows technology platforms for virtual live hearings where a party can participate remotely
- Must be trained on the tech platforms

CROSS-EXAMINATION

- Either party has the right to undergo a live hearing and cross-examination in a separate room
- Questions or evidence regarding a complainant's sexual behavior not relevant except in two areas
- CROSS must be done: "directly, orally, and in real time"
- CROSS must be done by an advisor (parties must **never personally question** each other), and if a party does not have their own advisor of choice at the live hearing, school provides (at no fee or charge) an advisor of the school's choice, for [this purpose]
- No need to be an attorney

CROSS-EXAMINATION

- 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 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...**

■ ROLE OF ADVISOR

- Same opportunities to have advisors present...and participate in Title IX proceedings, subject to equal restrictions on advisors' participation, in recipients' discretion
- MAY place restrictions on active participation by party advisors (except for cross)
- 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

■ ROLE OF ADVISOR

A party cannot “fire” an assigned advisor during the hearing, but if the party correctly asserts that the assigned advisor is **refusing** to “conduct cross-examination on the party’s behalf,” then the recipient is *obligated* to provide the party an advisor to perform that function, whether that means **counseling** the assigned advisor to perform that role or **stopping** the hearing to assign a different advisor.

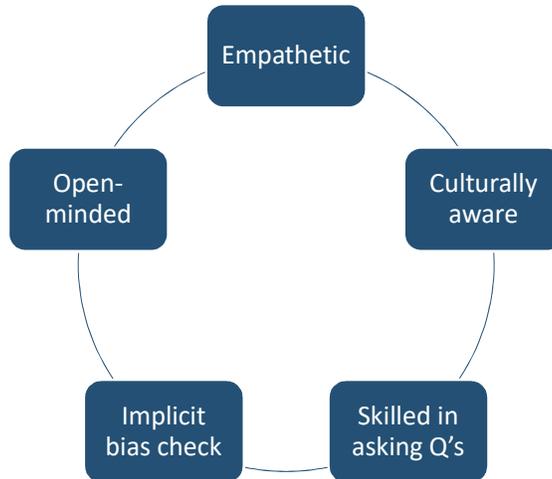
FUNDAMENTALS OF HEARINGS

- Panel members SANS bias - implicit/explicit - research them
- Diverse make-up – think “jury of my peers”
- Ideally, panelists will have skills to conduct the hearing based on their training
- Panelists reviewed post-investigation hearing file and conducted pre-hearing meeting with each other

ROLE OF A PANELIST

- Ask open-ended questions – who, what, where, when, why, how, describe – ideally, the same for both parties
- Review evidence/listen to testimony
- Decide credibility of evidence and testimony
- Apply policy to facts; deliberate
- Write a thoughtful and thorough “written determination”

QUALITIES OF A GOOD PANELIST



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Uncommon Commonality

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PREPARING FOR A HEARING

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■ PRE-HEARING ROUTINE

- Review the hearing file – twice or more. Take notes.
- Think about what questions you have. Draft outline or questions ahead of time. Phrasing?
- Reference page numbers in the report; note exact placement of statements you want follow up on and inconsistencies you noticed.
- Pre-meet with other panelists to organize flow.

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DEVELOPING QUESTIONS

- Outline it by topic
 - Write out areas to cover. – Drill down for details using the who, what, where, when, why, how, and describe method.
- Outline by chronology
 - Ask questions in order of the event. – Drill down.
- Confront inconsistencies when they come up as you ask questions; confront as a neutral fact gatherer – tone, language, and diplomacy (not like Perry Mason or A Few Good Men).
- Think of question asking like an organized conversation. – You control the organization. – The witness controls the answer.
- 7-12 words per question – No more.

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BEGINNING OF PANEL HEARING

- Pick someone to be the initial greeter – disarm each witness; introductions
- Establish rapport with introductory questions
- Slow tempo – diffuses anxiety
- Formality v. informality
- Take breaks – everyone needs them
- Recorded? Listened to? Be mindful
- Control the questioning – no narratives
- No preambles or monologues of apologies

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Mock Rapport Building with Hearing Panelist, Jill

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GATHERING ESSENTIAL FACTS

- Who?
- What?
- When?
- Where?
- Why?
- How?
- Describe.
- Ask follow up questions; therefore, you must listen to each answer carefully.
- Avoid “did” and “do” questions.

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■ SKILLED QUESTIONING

- Go from broad to narrow.
- Do not move from the topic until you explored all necessary detail.
- Do not move from a question until it's been answered – actively listen.
- No apologies for hard questions – keep the flow moving.
- Don't judge – be careful with Why? questions.

■ SOME “DO NOT’S”

- Do not ask speculative questions.
- Do not ask leading questions.
- Do not ask compound questions: “Were you at the party and at the football game?”
- Do not ask conclusory questions: “Do you think this was sexual assault?”
- No preambles of: “You don't have to answer this, but..”

■ SOME “DO NOT’S”

- Do not repeat the answer after it’s answered – this is likely a tic.
- Do not ask hypotheticals.
- Keep your questions relevant – no curiosity questions.
- Character-related questions

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■ SOME “DO’S”

- Do confront gently on contradictory evidence.
- Do confront gently regarding inconsistencies in prior statements or to other witnesses.
- Do suss out information to determine credibility – bias, motive, and perception.
- Do ask questions that may corroborate other facts.
- Always ask questions regarding the elements of the policy.

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QUESTIONS

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DECISION-MAKERS' ROLES AND CROSS- EXAMINATION

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CROSS-EXAMINATION

- BEFORE YOU CONFRONT
 - Know the rules - RELEVANT information both inculpatory and exculpatory
 - Nail down all surrounding details
 - S/he should commit to the details of the “story”
 - Hard to maintain a lie with a lot of details

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CLEARLY LYING

Confronting - Style

- Start from a place of confusion
- “I’m struggling with [X piece of evidence], can you help me understand how it fits with what you’ve said?”
- “I think most people looking at this would think it showed Y, would you agree? Why/why not?”
- “Can you give me your perspective on why you wrote this?”

*Reasonable Person
Alert!!!*

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CAREFUL CONFRONTATION

- Make him/her commit to details of narrative.
 - So, this happened first?
 - This never happened?
 - George was(n't) there at all that night.
 - Lisa was there.
 - No one had anything to drink.
 - No one touched anyone.

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CLEARLY LYING

Confronting – Substance

- Have you ever said X to someone?
 - Yes? GREAT! Dig in.
 - No? Maybe confront.
- If someone said Y about that, how would you respond?
- Break it down: “You told me #1. Then you told me #3. Right? Doesn’t it seem like there’s something missing in the middle?”

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CLEARLY LYING

Confronting – Substance

- Video/audio/photo contradiction
 - Review his/her version of events.
 - “I’ve reviewed this video, and it appears to me that [George was right there]. Can you help me understand why the video shows that, but your statement contradicts it?”

CLEARLY LYING

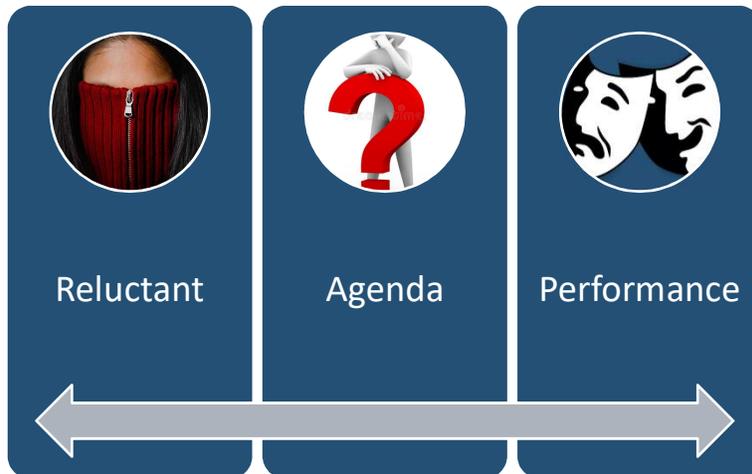
- Can remind them of the importance of the process and being truthful
- Lies uncovered go to credibility

SOME “DO’S”

- Take a break before you or another decision-maker end the hearing.
- Find out if you/decision-maker need more information on a particular topic/element.

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WITNESS TYPES



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Difficult Witness

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■ CLOSING A HEARING

- Take a break near the end or at the end of each witness.
- Meet to discuss whether each panelist obtained the information they needed.
- Bring the witness back in and let them know that you have a few follow up questions OR that the panel has no further questions. If they're the last witness, you are done.
- Thank and excuse them in a polite way (hearing coordinator hand-off?).
- Do NOT answer questions.**

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VOLUNTEER DECISION-MAKERS

Mock panel - Julie, Zack, Molly

STRUCTURE:

Pre-meet/organize - Volunteers take 15 minutes

Call the witness; introductions

Establish rapport

Ask questions including cross

Close



ACTIVITY

Preparing for a Mock Hearing: Case Study (Julie and Zack)

Q&A AND VIRTUAL RECEPTION

Please join us for a casual virtual social with fellow attendees, Jill, and Rabia!



REFRESH & RESET

What was your key takeaway from yesterday's training?



Mock Hearing



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DEBRIEF: MOCK HEARING

- General Observations
- Critique
- Positive Feedback

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DELIBERATION AND CREDIBILITY ASSESSMENT

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■ ANALYZING EVIDENCE

- List important, undisputed facts.
- What facts are in dispute?
- On which points are witnesses credible or not credible and why?
- What do you think probably happened?
- If that conduct happened, was there a policy violation?
 - Take a vote.
- How should you organize your decision?

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EVALUATE CREDIBILITY

- Reputation for truthfulness/untruthfulness
- Memory
- Perception - Were they drunk? Couldn't see well?
- Motive to lie - relationships
- Bias
- Demeanor

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EVALUATE CREDIBILITY

- Other facts corroborate their version of events
- Inconsistencies and explanations to those inconsistencies
- Circumstantial evidence

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■ EVERY COURT SYSTEM HAS A CREDIBILITY INSTRUCTION

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify about it. What is important is how believable the witnesses are and how much weight you think their testimony deserves.

■ CREDIBILITY OF OTHER EVIDENCE

- Primary evidence
 - Authentic, relevant tangible evidence
 - Firsthand, uninvolved, unimpaired witness reports
- Secondary or tertiary
 - Secondhand reports (rumors)
 - Relevant, tangible evidence that can't be authenticated
- “Anti-evidence”
 - Fabricated or tainted evidence

BIASES

- General biases need to be left at the door.
- Do the Harvard Implicit Bias Test with your panel members to give them a sense.
- No sex stereotypes.

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POLL

**Is Circumstantial Evidence
Less Credible than Direct
Evidence?**

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■ CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did. Circumstantial evidence is indirect evidence; that is, it is proof of one or more facts from which one can find another fact.

You are to consider both direct and circumstantial evidence. Either can be used to prove any fact. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

■ PRACTICAL TIPS

- Use a matrix tool - proof analysis, IRAC, use a wipe board
- Pick a scribe to fill in matrix
 - Same scribe to write the "determination"
- Every voice is heard - no bullies
 - Timer; hold stick - gets to talk; organize your thoughts
 - Seek to understand point of view

IRAC MODEL

- Identify the legal **issues** to be resolved (the I of IRAC);
- Interpret statutes and other **rules** (the R of IRAC);
- Provide reasons (**analysis**) why the rules do or do not apply to the facts (the A of IRAC); and
- **Conclude** by answering the legal issues through holdings and a disposition (the C of IRAC).



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MOCK PANEL DELIBERATION



QUESTIONS

Please enjoy a 30-minute
lunch break from
1:45 - 2:15 pm EDT.



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APPLYING CREDIBILITY ASSESSMENT TOOLS IN RATIONALE



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■ PUTTING IT TOGETHER

1. Assess the person's testimony standing alone.
2. Assess the person's testimony with evidence received from that person over time.
3. Assess the person's testimony with testimony from others (consistent/inconsistent?).
4. Assess the person's testimony with evidence received from others (e.g., video, documents, etc.).

■ CREDIBILITY VERSUS LYING

- It's human nature to have imperfect or inconsistent recall.
- Just because it doesn't make sense to you does not mean the person saying it is lying.
- Just because someone is inconsistent (or flat wrong) doesn't mean s/he's a liar.



RESOURCE

Tool for Analyzing Credibility

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POLL

What Corroborates a Witness?

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WRITTEN DETERMINATIONS

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CHAT

**Based on the new regs,
what do you need to
change in your policy?**

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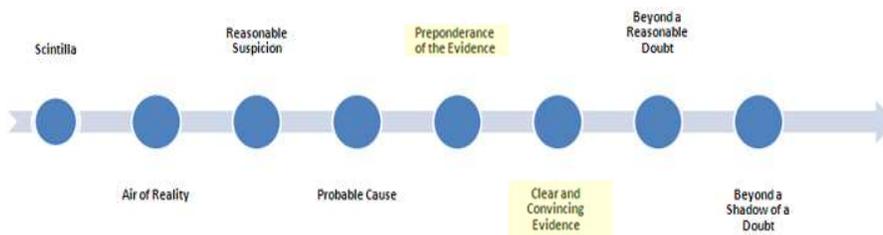
POLL

What standard of proof do you use at your institution for sexual harassment cases?

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COMMON STANDARDS

- Preponderance
- Clear & Convincing



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NEW REGS - WRITTEN DETERMINATION

STEP ONE: APPLY STANDARD OF EVIDENCE

STEP TWO: FOLLOW THE NEW REGS on what must be included in the written determination

STEP THREE: SEND TO PARTIES SIMULTANEOUSLY

WHAT'S REQUIRED IN THE WRITTEN DETERMINATION? SIX AREAS MUST BE INCLUDED

- (A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
- (B) 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;
- (C) Findings of fact supporting the determination;

WHAT'S REQUIRED IN THE WRITTEN DETERMINATION? SIX AREAS MUST BE INCLUDED

- (D) Conclusions regarding the application of the recipient's code of conduct to the facts;
- (E) 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
- (F) The recipient's procedures and permissible bases for the complainant and respondent to appeal.



ACTIVITY

WRITTEN DETERMINATION WRITING EXERCISE

Write for Julie and Zack case.

EXAMPLE STRUCTURE

- Start with the **vote?**
- Then the **standard**
- 1. ALLEGATIONS
- 2. PROCEDURAL STEPS
- 3. FACTS FOUND
- 4. CONCLUSIONS MADE BASED ON POLICY
- 5. **RATIONALE AND DETERMINATION AND SANCTIONS AND REMEDIES TO COMPLAINANT**
- 6. APPEAL RIGHTS

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SANCTIONS

- Same panel deliberates – maybe same day; recommend 2-7 days later to have time/space
- Use sanctions in your policy
- Vote on them
 - Can start by voting on the lightest
 - Can each secretly write out a sanction, then group votes on each one
- What is appropriate and consistent for this policy violation?

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RESOURCE

Examples/Samples:

1. Instructions to Decision-Makers
2. Proof Analysis & IRAC Model - Sexual Misconduct example
3. IAT website: <https://implicit.harvard.edu>
4. Outline development worksheet

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TAKEAWAYS

- Establish rapport, gather facts slowly, gently and in an organized way – discern among all facts; resolve disputed facts.
- Assess credibility.
- Apply facts to policy – deliberate and use a matrix tool to assist.
- Write a thoughtful and thorough written determination applying the correct burden of proof.

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RESOURCE

Office for Civil Rights

<https://www2.ed.gov/about/offices/list/ocr/newsroom.html>

- [Title IX Regulations Addressing Sexual Harassment](#) (unofficial copy)
- [Title IX Regulations Addressing Sexual Harassment](#) (Federal Register)
- [Title IX: Fact Sheet: Final Title IX Regulations](#)
- [Title IX: U.S. Department of Education Title IX Final Rule Overview](#)
- [Title IX: Summary of Major Provisions of the Department of Education's Title IX Final Rule](#)
- [OCR Blog](#)



QUESTIONS



EVALUATION

Thank you!

Please remember to complete the event evaluation.
Your comments will help us continually improve the
quality of our programs.

