


**Civil Rights
Adjudication Training
for the
Texas A&M University System**




Pre-2024 Federal Regulatory Changes
December 2023 for WTAMU

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Civil Rights Adjudication Training

NOTICE:

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For this training...

1. Assumes no previous knowledge on content areas
2. Presentation is text heavy and intended to serve as a reference document after the training
3. The presenter is not providing legal advice; the presenter is a compliance officer and is offering compliance guidance
4. Training intended to be complemented by local training provided by the Title IX Coordinator and/or student conduct officers
5. Please note that the material being addressed in this program may involve explicit descriptions or details that some may find offensive, while others may find these materials triggering. Nothing is being done today simply for “shock value” but will be consistent with the real-world language and details that we are confronted with in this work. If you find yourself triggered, please step away to the degree that you need to, and please seek appropriate assistance if necessary.

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System Regulation 08.01.01 and the Adjudicatory Process

08.01.01 Civil Rights Compliance

Revised [July 7, 2020](#) (Effective August 14, 2020)
 Next Scheduled Review: July 7, 2025
 Click to view [Revision History](#).



Regulation Summary

The Texas A&M University System (system) will provide equal opportunity to all employees, students, applicants for employment and admission, and the public. This regulation provides guidance to each member in complying with local, state and federal civil rights laws and regulations (laws) and related system policy.

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System Regulation 08.01.01

Section 4.2.9 – Types (“Pools”) of Cases

- Title IX (4.2.10)
- Sex-based Misconduct (4.2.11)
- Other Civil Rights (4.2.12)



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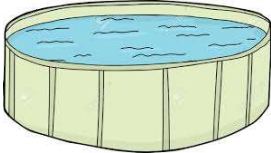
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System Regulation 08.01.01

Section 4.2.9 – Types (“Pools”) of Cases

1. Title IX (4.2.10)
2. Sex-based Misconduct (4.2.11)
3. Other Civil Rights (4.2.12)



(a) When a complaint involves allegations of misconduct that involve both sex-based allegations (1 and/or 2 above) and allegations of other civil rights violations (3 above), the process shall be conducted under the requirements established for sex-based offenses (1 or 2 above). Sex-based complaints include those complaints based on sex, sexual orientation, and/ or gender identity.

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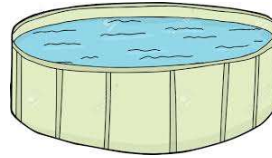
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System Regulation 08.01.01

Section 4.2.9 – Types (“Pools”) of Cases

1. Title IX (4.2.10)
2. Sex-based Misconduct (4.2.11)
3. Other Civil Rights (4.2.12)



(b) In addition to reviewing complaints against students for civil rights violations, members are expected to review allegations for possible violations of codes of student conduct and professional expectations of employees.

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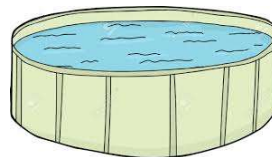
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System Regulation 08.01.01

Section 4.2.9 – Types (“Pools”) of Cases

1. Title IX (4.2.10)
2. Sex-based Misconduct (4.2.11)
3. Other Civil Rights (4.2.12)



(c) When unprofessional behavior by an employee that does not rise to the level of a violation of this regulation is discovered during the civil rights investigation and adjudication process, the information will be forwarded to the employee’s supervisor.

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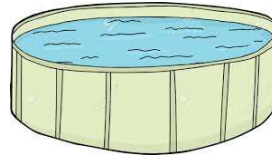
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Section 4.2.9 – Types (“Pools”) of Cases

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3. Other Civil Rights (4.2.12)



(d) When possible violations of the code of student conduct by a student that do not rise to the level of a civil rights violation are discovered during the civil rights investigation process, and where there are no civil rights charges brought forward as a result of the investigation, the information will be forwarded for review to the student conduct process.

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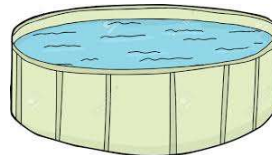
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System Regulation 08.01.01

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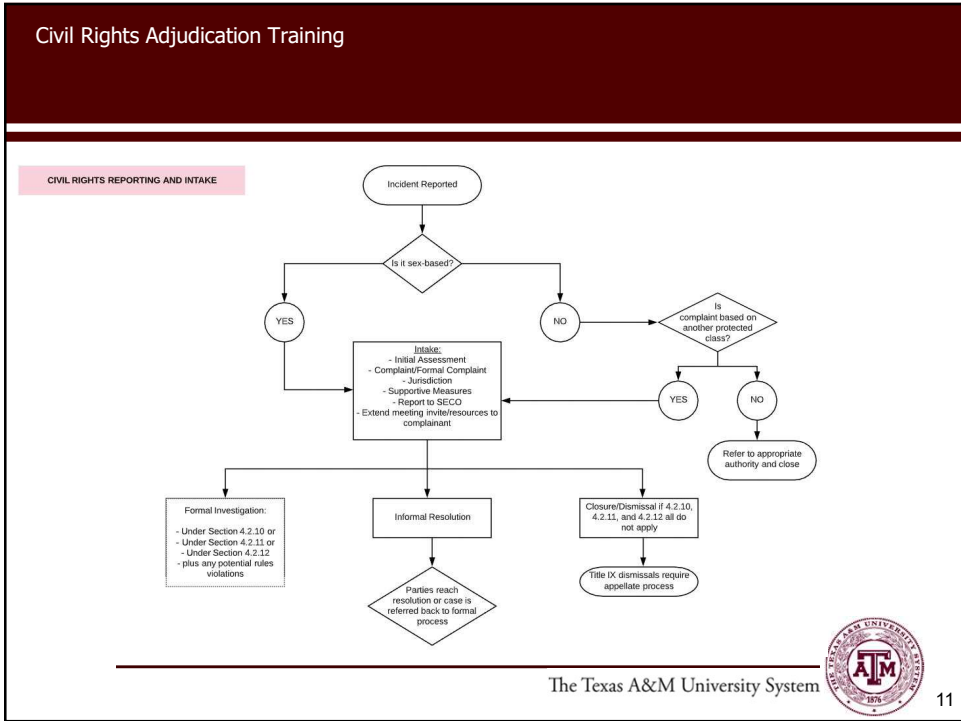
(e) When possible violations of the code of student conduct by a student that do not rise to the level of a civil rights violation are discovered during the civil rights investigation process, and where there is also going to be an adjudication of the civil rights violation (through a formal hearing, or through informal resolution methods that result in a finding and sanction), the case will be consolidated into one adjudication conducted under the processes described in 4.2.9(a).

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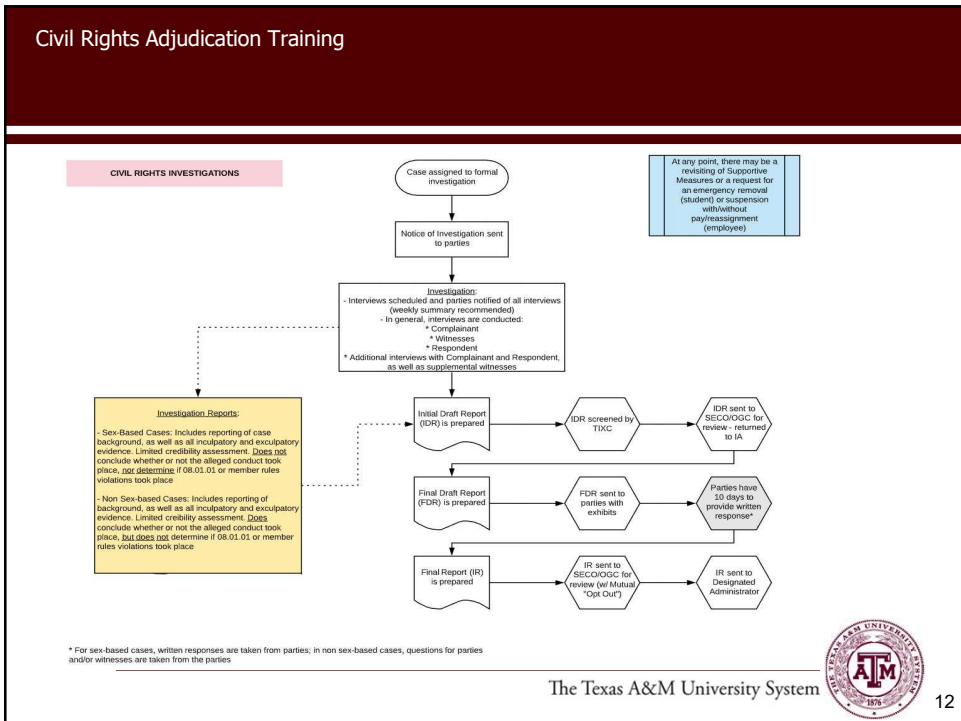


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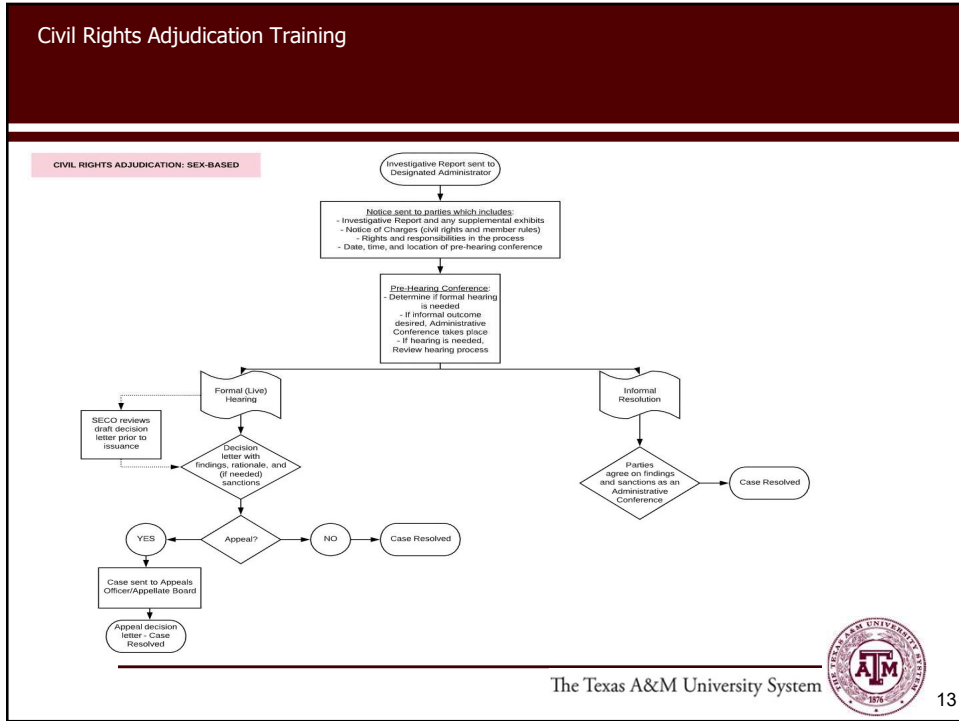
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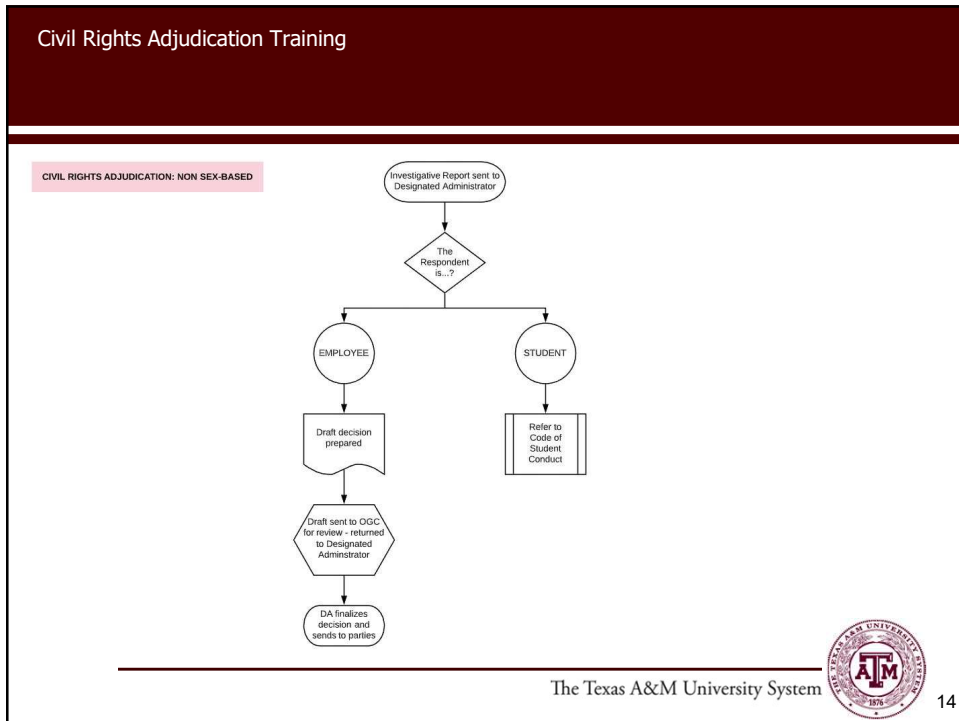
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	TITLE IX (4.2.10)	SEX-BASED MISCONDUCT (4.2.11)	OTHER CIVIL RIGHTS (4.2.12)	STUDENT CONDUCT / EMPLOYEE PROFESSIONALISM
Supportive Measures	Yes	Yes	Yes	Yes
Requires	Formal Complaint	Report/Complaint	Report/Complaint	Awareness and Evidence
Standard of Evidence	Preponderance	Preponderance	Preponderance	Preponderance
Informal Resolution Allowed?	Yes – with SECO approval	Yes – with SECO approval	Yes – with SECO approval	Yes
Role of Investigative Authority	Collect and report inculpatory and exculpatory evidence	Collect and report inculpatory and exculpatory evidence	Collect and report inculpatory and exculpatory evidence; conclude if allegations are substantiated but not if 08.01.01 or member rules were violated	Refer to Member Rules and appropriate System Regulation
Adjudication	Formal (Live) Hearing	Formal (Live) Hearing	Written Review	Refer to Member Rules and appropriate System Regulation
Adjudicator	Hearing Officer or Hearing Panel (in role of DA)	Hearing Officer or Hearing Panel (in role of DA)	Designated Administrator	Refer to Member Rules and appropriate System Regulation
Allowed an Advisor?	Yes – provided by Member for formal hearing if no advisor is present	Yes – provided by member for formal hearing if no advisor is present	Yes	Yes
Role of Advisor	Cross-examination and Support	Cross-examination and Support	Support	Support
For a Finding...	Severe and Pervasive and Objectively Offensive (SPOO) OR Quid Pro Quo (employee respondents only)	Severe or Persistent or Pervasive and Objectively Offensive (hostile environment) OR Quid Pro Quo	Severe or Persistent or Pervasive and Objectively Offensive	Did it take place? Does it violate the published rule/expectation?
Appeal?	Yes	Yes	No	Refer to Member Rules and appropriate System Regulation


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The Role of the Adjudicatory Process / The Hearing Officer

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The Role of the Adjudicatory Process (Hearings and Deliberations)

The role of the adjudicatory (hearing) process is:

- to review all the inculpatory and exculpatory evidence that is available,
- to see and hear the information presented, and
- to allow the parties to present information and to challenge information

The role of the deliberations process is:

- to reflect on both the information provided and your assessment of the credibility of the parties in determining what took place,
- to utilize your determination of what took place to assess whether the civil rights regulation and/or member rules were violated, and
- when determining that violations have taken place, to develop and impose sanctions that promote growth and development, repair harm caused, and protect the broader safety interests of the community.

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"Hear the case before you decide it."

- Judge Alfred P. Murrah, (b1904-d1975, U.S. Court of Appeals for the Tenth Circuit and Director of the Federal Judicial Center)

The Role of the Adjudicatory Process (Hearings and Deliberations)

The successful hearing official:

- reviews all written information at least two days in advance of the hearing and notes areas for exploration and questioning,
- understands that their primary initial focus is to determine what happened,
- understands they can only determine what happened by considering all of the available evidence,
- relies only on the facts and information in evidence, and does not allow information outside of the hearing to factor into a determination,
- reaches credibility determinations based on observable facts and not on hunches or suspicions,
- never considers sanctioning or the implications of sanctions until a finding has been rendered, and
- creates sanctions that are intentional, designed for education and development, seek to repair harm, and to protect the members of the broader institutional community.



The Hearing Officer

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The Hearing Officer**Six Critical Qualities of the Hearing Officer/Panelist**

- Detached/Objective with respect to subject matter
- Impartial/Unbiased when it comes to the parties involved
- Only considers facts that are in evidence; recognizing that what is considered "in evidence" may change up through the end of the hearing
- Understands issues of relevance with respect to questions and evidence
- Reaches a finding of fact before considering potential sanctions
- Imposes sanctions proportionate to the violation that are designed to educate, repair harm, and protect the community



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The Hearing Officer**Critical Skills / Knowledge Base of the Hearing Officer/Panelist**

- Reading
- Listening
- Questioning
- How to conduct a pre-hearing conference
- How to conduct a live hearing
- Standards of evidence
- Types of evidence
- Credibility determinations
- Deliberations
- The finding of fact
- Sanctioning
- Appeals

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The Hearing Officer**Special Topics Relevant to Sex-Based Cases**

- Sexual Harassment, Sex-Based Misconduct, and Rules Violations
- Consent and Predation
- Alcohol and Other Drugs
- Trauma and its Potential Affects on the Process

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Due Process



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Due Process

Who has authority over you... how many jurisdictions do you live in? (POLL)

- International Law
- Federal Law
- State Law
- County/Municipalities
- Professional
- Personal



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Due Process

Do all of these jurisdictions provide the same due process elements if there is a conflict? (POLL)

NO --- they do not, but why not?



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Due Process

Due process is the process that is due to us based on:

- The nature of the relationship
- The rights or privileges at stake

The greater the potential loss of rights, the higher amount of process that is due.



Due Process

- President James Madison (Dem-Rep., 4th President)
 - Authored the 5th Amendment to the U.S. Constitution; ratified in 1791
 - 5th Amendment requires due process of law in order for the government to deprive an individual of **life, liberty, or property**
 - 5th Am. prohibits self-incrimination and double jeopardy in criminal proceedings
 - 5th Amendment protections date back to the Magna Carta (1215)
- Senator Jacob Howard (Rep., Michigan)
 - Worked closely with President Lincoln on passage of 13th Amendment to abolish slavery
 - Served on Joint Committee on Reconstruction
 - Drafted the 14th Amendment, which requires equal protection under the law for all persons born or naturalized in the United States; ratified in 1868
 - Reversed (USSC) Dred Scott decision that black persons were not citizens
 - **Due process clause guarantees substantive and procedural process in state legal proceedings (14th Amendment is primary source of due process in higher education)**
 - Privileges or Immunities Clause protects individual state citizenship from interference by other states



Due Process in Higher Education (students)Dixon v. Alabama (1961, 5th Circuit)

- School expelled six students for unspecified reasons without a hearing after those students participated in a civil rights demonstration
- Circuit Court held that **minimal due process (notice and hearing)** was required or the expulsion of a student
- Ended legal relationship of *in loco parentis* (THE landmark case)



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Due Process in Higher Education (students)Esteban v. Central Missouri State College (1969, 8th Circuit)

- School suspended two students for participation in civil rights demonstrations
- Both students in attendance, but claimed to be spectators
- Esteban refused order to return to his room
- Students sued in 8th Circuit
- Court required a second hearing with adequate procedural due process, including: written notice of charges; students permitted to review all materials to be used at the hearing in advance; allowed advisement; students allowed to present own stories, exhibits, and witnesses; decision to be based only on facts in evidence; and recording of the hearing could be made by either side
- After second hearing resulted in suspensions, court refused to intervene since procedural due process had been provided



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Due Process in Higher Education (students)

Goss v. Lopez (1975, USSC)

- Nine students suspended from a public high school for ten days for destruction of property
- Ohio law allowed this sanction without a hearing
- USSC determined that a suspension without a hearing violated 14th Amendment Due Process Clause



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Due Process in Higher Education (students)

1968 General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education

- Issued by a local group of judges in the Western District of Missouri and included Harry Blackmun, who served as an Associate Justice on the USSC from 1970 to 1994
- Group of judges issued strong statements about distinctions in due process between criminal justice system and higher education; their observations have stood the test of time



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Due Process in Higher Education (students)

1968 General Order – key quotes:

“[S]chool regulations are not to be measured by the standards which prevail for criminal law and for criminal procedure.”

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Due Process in Higher Education (students)

General Order – key quotes:

“The discipline of students in the educational community is, in all but the case of irrevocable expulsion, a part of the teaching process. In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community. Even then, the disciplinary processes not equivalent to the criminal law processes of federal and state criminal law. For, while the expelled student may suffer damaging effects, sometimes irreparable, to his educational, social, and economic future, he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision. **The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound.**”

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Due Process in Higher Education (students)

1968 General Order – key quotes:

“In the lesser disciplinary procedures, including but not limited to guidance counseling, reprimand, suspension of social or academic privileges, probation, restriction to campus and dismissal with leave to apply for readmission, the lawful aim of discipline may be teaching in performance of a lawful mission of the institution. The nature and procedures of the disciplinary process in such cases should not be required to conform to federal processes of criminal law, which are far from perfect, and designed for circumstances and ends unrelated to the academic community. **By judicial mandate to impose upon the academic community in student discipline the intricate, time consuming, sophisticated procedures, rules and safeguards of criminal law would frustrate the teaching process and render the institutional control impotent.**”



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Due Process in Higher Education (students)

Can we impose the death penalty on our community members? NO

Can we imprison our community members? NO

Can we deprive our community members of substantial property???

Is there a right to a higher education? (Implicit – Yes, Explicit – No)

Separate rights from privileges...

Once we extend a privilege, revoking it may require due process, most especially when we are altering the relationship between the individual and the institution



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Due Process in Higher Education (students)

In general, minimum due process includes:

- Notice of Allegations/Charges
- Right to a hearing prior to suspension/expulsion
- Opportunity to see and respond (challenge) to information/evidence
- Attendance of an Advisor (VAWA, Title IX)
- Students allowed to make their own statements, as well as submit evidence and witnesses

Due process does not include:

- Representation by advisor; advisor limited to role established by the institution (except to ask questions in Title IX live hearings)
- Use of "beyond a reasonable doubt" standard; about 90% of colleges and universities have been using a preponderance test for all student cases dating back to the 1960s
- Deferral to criminal process where there is a concurrent criminal investigation or where concurrent criminal charges are pending
- "Presumption of Innocence" (Title IX only – responsibility)
- Right of Appeal (Title IX only)

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Due Process in Higher Education (students)Takeaways

- There is no explicit right to a higher education, but once accepted, a student is owed due process to have the privilege of attendance taken away
- Due process (in our administrative legal setting) does not and should not reflect the due process expectations of the criminal process; our process runs independent of the criminal or civil court systems
- Behaviors may be both criminal in nature and violations of institutional regulations; educational institutions are no more qualified to say a crime has occurred than a court is qualified to say that a school's regulation have been violated
- In general, court challenges to institutions has been in the areas of substantive and procedural due process, and not an interpretation of an institution's regulations (1st Amendment being the exception)

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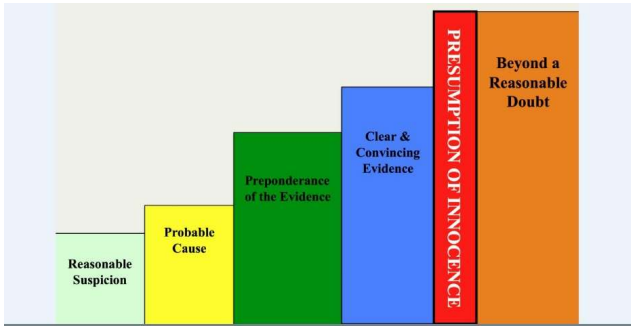


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Standards of Evidence



Standard of Evidence
Reasonable Suspicion
Probable Cause
Preponderance of the Evidence
Clear & Convincing Evidence
PRESUMPTION OF INNOCENCE
Beyond a Reasonable Doubt

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Standards of Evidence


Beyond a Reasonable Doubt...


Meaning: No other logical explanation can be derived from the facts except that the defendant committed the crime for which they are charged, thereby overcoming the presumption that a person is innocent until proven guilty.

~ 90-99% certainty

Where do we use this in society, and why?

Do we use this in the 08.01.01 process? If so, where?



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Standards of Evidence


Clear and Convincing Evidence...


Meaning: The party must present evidence that leaves you with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true.

~ 67-75% certainty

Where do we use this in society, and why?

Do we use this in the 08.01.01 process? If so, where?



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Standards of Evidence


Preponderance of the Evidence...


Meaning: What is more likely than not to be true, based on probable truth or accuracy. There is neither a presumption of guilt, nor a presumption of innocence.

50.1% + certainty

Where do we use this in society, and why?

Do we use this in the 08.01.01 process? If so, where?



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Standards of Evidence


Substantial Evidence (Probable Cause)...


Meaning: Reasonable grounds for making a search, making an arrest, or pressing a charge.

~ 40% + certainty

Where do we use this in society, and why?

Do we use this in the 08.01.01 process? If so, where?



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Standards of Evidence


Reasonable Suspicion (Notice)...


Meaning: Specific facts (more than a “hunch” or a “scintilla” of evidence) that justify further investigation.

~ 25% + certainty

Where do we use this in society, and why?

Do we use this in the 08.01.01 process? If so, where?



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Standards of Evidence

Uses of Evidentiary Standards (conduct and civil rights)

1. Notice and Gate-keeping (Reasonable Suspicion)
2. Bringing a charge (Substantial Evidence)
3. Finding a violation (Preponderance of the Evidence)
4. Determining appeals (Preponderance of the Evidence, with presumption that original decision is correct)



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Standards of Evidence


Uses of Evidentiary Standards (conduct and civil rights)

It is not uncommon that people express a concern that someone might be terminated from employment or suspended or expelled from a university while using "only" a preponderance of the evidence as a basis for this decision.

Do you share this concern?

Allow me to help dispel this understandable fear for those that may have it.



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Standards of Evidence

Uses of Evidentiary Standards (conduct and civil rights)


Is it possible that we can make a mistake when employing a preponderance of the evidence test?


Does the criminal justice system ever make mistakes employing a "beyond a reasonable doubt" standard?

All human decision-making involves the possibility of making mistakes.

Our goal is to make the best decision possible, based on the best available information that exists in evidence.

The better you **do your job**, the lower the risk of a mistake. This training is designed to teach each of us what our roles are in this process, and what we need to do to reduce our risk of making a mistake.



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Standards of Evidence**Why do we utilize the preponderance standard?**

- It is the only equitable standard, applying no undue burden on either the complainant or the respondent
- We utilize a preponderance test because it is most reflective of the educational nature of our System
- We utilize a preponderance test because it is provided for by the federal government, and used by the federal government for the purposes of civil rights enforcement
- Finally, a preponderance test is far easier to teach and train with than the clear and convincing standard, which can be a variable standard



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Standards of Evidence**What does applying a preponderance test look like? Let's apply a fact pattern -**

- RA Smells Marijuana
- 2nd RA Independently Confirms Smell
- Initial Confrontation and Delay
- Open Door and Smoke in Room; towel rolled up behind door
- Bloodshot Eyes for all 4 people in room
- Claiming they were watching a movie and fell asleep; confusion on what movie
- Cold outside; fan in window blowing out
- Incense burning; can of air freshener on dresser
- Blow tube under the bed that smells of cannabis



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Day Two Agenda

1. The Pre-Hearing Conference
2. The Live Hearing Process
3. Reading an Investigation Report
4. Questioning and Listening
5. Types of Evidence



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The Pre-Hearing Conference

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The Pre-Hearing Conference

There are two potential objectives of the pre-hearing conference.

In most cases, the conference will simply prepare the parties for the formal live hearing. This will keep the focus on the procedures of the hearing and the due process rights of those involved.

In some cases, the conference will result in the parties determining that an informal resolution is mutually desired and considered appropriate by the complainant, the respondent, and the institution/agency. This will transform the meeting into an Administrative Conference, with the meeting facilitator then empowered to issue a finding with or without sanctions, provided that sanctions are consistent with System Regulation 08.01.01. In this event, once the parties sign the agreement the formal process is closed unless there is a violation of the terms of the agreement.



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The Pre-Hearing Conference

What to know about the pre-hearing conference:

1. Pre-hearing conferences will be joint conferences involving the complainant, respondent, and their respective advisors
2. Attendance at a pre-hearing conference is optional, but failure to attend a pre-hearing conference can not be later used as a grounds for appeal
3. Attendance at a pre-hearing conference may be in person or by video technology
4. Pre-hearing conference facilitators will not serve as the administrative hearing officer or member of a hearing panel for a formal hearing of the same case
5. Pre-hearing conferences will be scripted; the scripts will be sent to System members early next week
6. The parties must communicate on their own behalf at all times; advisors will be provided an opportunity to ask questions when prompted

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The Pre-Hearing Conference

Order of Events (Recommended Practice)

1. Introductions of those in attendance
2. Brief opening statement by pre-hearing conference facilitator
3. Inquiry into Informal Resolution option
 - a) First with Complainant, then with Respondent
 - b) If both signal desire for informal resolution, a second statement is read, briefly outlining the process; the discussion would begin with findings (complainant, then respondent) and then (if necessary) to sanctions (complainant, then respondent, then facilitated dialogue)
 - i. Review of agreement and signatures
4. Review of Formal Hearing Process
 - a) Review of hearing process in brief (including sharing of script)
 - b) Review of due process rights for the hearing
 - c) Review of decision and appellate processes
 - d) Questions from Complainant, then Complainant Advisor (if in attendance)
 - e) Questions from Respondent, then Respondent Advisor (if in attendance)
5. Conclusion

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The Pre-Hearing Conference – Questions?



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The Hearing Process



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The Hearing Process

Section 4.2.10 (p)

(p) If a formal complaint cannot be resolved through an informal process or if either the complainant or the respondent requests a hearing, a formal live hearing will be conducted by the designated administrator (a hearing officer or hearing panel). Under this option, the following rules apply:

Under this option, the following rules apply:

i. Unless waived by the parties, following the pre-hearing conference the parties will be given a minimum of five (5) business days notice of any formal hearing. The notice must include the date, time, and location of the hearing, as well as instructions for those participating in hearings through online means.



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The Hearing Process

ii. Hearings will be closed to the public. Members must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review. Physical access to the recording or transcript must be provided upon request for the purpose of preparing an appeal following the hearing.

iii. A complainant and a respondent at a hearing must have an advisor with them. In cases in which a party does not have an advisor, the university will provide a trained advisor to assist them in the hearing process. Training requirements for university advisors are outlined in the Training Requirements (see 1.9).

iv. Cross-examination of the complainant, respondent, and any witnesses may not be conducted by the opposing party but must be conducted by their advisor. Questions are to be directed to the hearing officer or hearing panel chair, who will determine whether or not each question will be admitted into the hearing. If a question is deemed repetitious or not relevant, the decision-maker(s) must explain the decision to exclude it. When parties are being subject to cross-examination, the advisor may not answer on behalf of the party.



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The Hearing Process

v. 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 alleged conduct, 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. The hearing panel chair or hearing officer makes final determinations on the relevance of questions and evidence.

vi. Attendance at a hearing may be in person or may be conducted through remote means, provided that all parties and the hearing officer or hearing panel can see and hear one another in real time during the course of the hearing.

vii. Hearing officers/hearing panels cannot draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

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The Hearing Process

ix. No hearing officer or hearing panel member can also serve as an investigative authority or appellate authority in the same complaint. Students (who are otherwise not full-time employees) may not serve in the role of investigative authority, hearing officer, hearing panel member, or appellate authority.

x. When a hearing panel is being utilized to resolve a complaint, either a voting chairperson or non-voting administrative advisor who does not serve on the panel shall oversee the live hearing and deliberations, and assist in the development of a finding of fact, decision rationale, and, when appropriate, a sanction rationale in consultation with the panel members.

xi. Following the hearing, the hearing officer or hearing panel will develop a draft decision and submit the draft to SECO within two (2) business days. SECO will have a maximum of three (3) business days to provide feedback to the hearing officer/hearing panel. Thereafter, the designated administrator will have a maximum of three (3) additional business days to issue a decision letter. The decision letter must be sent simultaneously to both/all parties.

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Civil Rights Adjudication Training

The Hearing Process

xii. Decision letters must include:

1. The identification of the allegations;
2. A description of the procedural steps taken from the receipt of a formal complaint through determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held if any;
3. Findings of fact supporting the determination;
4. Conclusion regarding the application of the member's conduct standards to the facts;
5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the member imposes on the respondent, and whether remedies designed to restore or preserve equal access to the member's education program or activity will be provided by the member to the complainant, and;
6. The member's procedures and permissible bases for the complainant and respondent to appeal.

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Civil Rights Adjudication Training

The Hearing Process

xiii. If for any reason there is reasonable cause for a member to delay the issuance of the decision letter, this will be communicated to the parties by the designated administrator or designee.

xiv. If a student respondent withdraws or graduates from a member university pending the resolution of a complaint, the process will continue and, the member university will not issue a transcript on behalf of the student until the conclusion of the process.

xv. Member universities, upon request by another postsecondary educational institution, must provide to the requesting institution any determination that a student violated the member university's code of conduct by committing sexual harassment, sexual assault, sex-based misconduct, and/or dating violence, domestic violence, and/or stalking based on sex.

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Civil Rights Adjudication Training

The Hearing Process

Best Practices in Hearings (will be included in Hearing Script):

- The Investigator (or lead investigator writing the report) should be called to every formal hearing and should be expected to sit through the entire live hearing (not deliberations) to outline the investigatory process, address any challenges to the report, and for the investigator to question all inconsistencies from the report that might be stated at the hearing
- The order of questioning for all parties should be:
 - Hearing Officer/Hearing Panel (coordinated by the Chair in case of a panel)
 - Investigator (for questions related to consistency with the report)
 - Opposing Party
 - For Witnesses, Complainants should have an opportunity to conduct cross examination ahead of the respondent, unless the witness has been presented by the respondent

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Civil Rights Adjudication Training

The Hearing Process

There are a number of administrative steps that must be assigned and completed prior to and following a hearing. These include:

1. Scheduling of Pre-Hearing Conference for Parties and Advisors
2. Notification of Pre-Hearing/Charge Letter (with final report)
3. Conduct Pre-Hearing Conference
 - A. If informal resolution, development and signing of written agreement, as well as submission of case for post-resolution follow-up (Outtake)
 - B. If no informal resolution, parties provided five (5) business days notice of hearing
4. Hearing Scheduled – notification to parties, investigator, witnesses, Title IX Coordinator, and Hearing Officer/Panel
5. At least two days prior to hearing, Hearing Officer/Panel reviews final report and exhibits
6. At least thirty minutes prior to hearing (for hearing panel), panel convenes to discuss areas and lines of questions (see next slide)
7. Following the hearing, a draft decision is sent to SECO for review. Once feedback is provided, the final decision is created and communicated to the parties, with a deadline date for appeal included in the letter.

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Civil Rights Adjudication Training

The Hearing Process

Pre-hearing Protocol:

1. Attend to physical environment
 - a) Clean and protected spaces for Complainant/Advisor, Respondent/Advisor, Investigator, Witnesses
 - b) If one or more will be attending virtually, ensure technology is working
 - c) Ensure that recording technology is working
 - d) For those in physical space; water, tissues, paper, pen
2. For Panels, pre-hearing strategy
 - a) Determine areas of questioning
 - b) Assign areas of questioning and develop communication cues
3. Attend to Parties (Pre-Hearing, During Hearing, and Post-Hearing)
 - a) Waiting areas for parties
 - b) Bringing parties into the room
 - c) Handling breaks
 - d) Escorting parties out at the end of the hearing


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FORMAL LIVE HEARING

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    graph TD
      A[Opening Statement  
(read by Hearing Officer, Panel Chair, or Panel Advisor)] --> B[Optional Opening Statement by Complainant]
      A --> C[Optional Opening Statement by Respondent]
      B --> D[Presentation of Investigation Report by Investigator]
      C --> D
      D --> E[Questions to Investigator by Hearing Officer/Panel]
      E --> F[Questions to Complainant by Complainant Advisor]
      E --> G[Questions to Complainant by Investigator]
      E --> H[Questions to Complainant by Respondent Advisor]
      F --> I[Questions to Respondent by Respondent Advisor]
      G --> J[Questions to Respondent by Investigator]
      H --> K[Questions to Respondent by Complainant Advisor]
      I --> L[Questions to Witnesses by Respondent Advisor]
      J --> M[Questions to Witnesses by Complainant Advisor]
      K --> N[Questions to Respondent by Complainant Advisor]
      L --> O[Optional Closing Statement by Complainant]
      M --> O
      N --> P[Optional Closing Statement by Respondent]
      O --> Q[Closing Statement  
(read by Hearing Officer, Panel Chair, or Panel Advisor)]
      P --> Q
      Q --> R{Adjourn Hearing}
      R --> S{Deliberations}
      S --> T{Draft Decision for SECCO Review}
      T --> U{Decision Sent to Parties}
    
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Civil Rights Adjudication Training





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Civil Rights Adjudication Training

Reading an Investigation Report



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Civil Rights Adjudication Training

Reading an Investigation Report

- A. Read report no less than two days prior to hearing
- B. Review for:
- i. Understanding the nature of the complaint
 - ii. Understanding the timeline of the event(s)
 - iii. Understanding the specific allegations made against the respondent(s)
 - iv. Understanding the inculpatory evidence collected in the investigation
 - v. Understanding the exculpatory evidence collected in the investigation
 - vi. Understanding the investigator's interpretation of:
 - a) Credibility of parties/witnesses
 - b) The Consent Construct (Force/Capacity/Consent)
 - c) Predation elements
 - vii. Identifying areas of questioning
 - a) Gaps in timelines/stories
 - b) Terms/words/practices in need of definition or clarity
 - c) Inconsistencies and/or contradictions that may affect decision-making (substantive)



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Civil Rights Adjudication Training

Reading an Investigation Report

Let's look at the investigative report template...



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INVESTIGATOR TRAINING (BASIC) 

Investigation Report Template (draft)


CIVIL RIGHTS INVESTIGATION REPORT TEMPLATE
FOR SYSTEM REGULATION 08.01.01

TITLE OF REPORT
ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

To: [Designated Administrator/Office/Hearing Officer/Hearing Panel]
From: [Investigator(s) Name]
Date: [Date]
MEMBER NAME:
Case #

Source: A&M System Regulation 08.01.01 The Texas A&M University System  75

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INVESTIGATOR TRAINING (BASIC) 

Investigation Report Template (draft)


On (Date), (name and title) assigned me/us to investigate a complaint by (Complainant).

Complainant(s):
Respondent(s):

Summary of Complaint
On (date of complaint filing) (Complainant) files a complaint of (protected class discrimination/harassment/retaliation) against (Respondent). Specifically, (Complainant) alleges that (Respondent) engaged in the following behaviors: (1-3 paragraph summary here)

Source: A&M System Regulation 08.01.01 The Texas A&M University System  76


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INVESTIGATOR TRAINING (BASIC) 


Investigation Report Template (draft)

Based on the allegations made, the following System Regulations and Member Rules may be implicated:

1. System Regulation Citation and add link
2. System Regulation Citation and add link
3. Member Rule Citation and add link

Source: A&M System Regulation 08.01.01 The Texas A&M University System  77

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INVESTIGATOR TRAINING (BASIC) 

Investigation Report Template (draft)

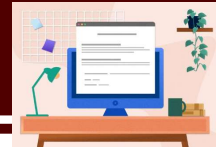
Investigation Process

As a part of this investigation, the following individuals were interviewed regarding this complaint:

Date	Interview	
-----		Name and Status

Source: A&M System Regulation 08.01.01 The Texas A&M University System  78

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Investigation Report Template (draft)

As a part of this investigation, the following documents were reviewed and considered, and are included for the adjudicatory authority as exhibits.

- Exhibit #1: System Policy 08.01, Civil Rights Protections and Compliance
- Exhibit #2: System Regulation 08.01.01, Civil Rights Compliance
- Exhibit #3: Applicable Member Rule
- Exhibit #4: [Complaint]
- Exhibit #3: [Interview Summary]
- Etc.

Source: A&M System Regulation 08.01.01

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Investigation Report Template (draft)

Questions for Investigation

Based on the initial complaint and the evidence collected, this investigation focused on questions surrounding the following allegations:

A. Did Respondent (cite behavior)?

Summarize the inculpatory (argues in favor of involvement/violation) and exculpatory (argues in favor of no violation) evidence. Generally, this begins with a review of the allegations made by the complainant, what evidence supports those allegations, and what evidence does not support those allegations). This section should only include information directly relevant to the allegations.

Source: A&M System Regulation 08.01.01


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INVESTIGATOR TRAINING (BASIC)




Investigation Report Template (draft)

Examination of Evidence

This section should now assess the material from the previous section in order to determine whether or not the alleged behavior took place (not whether or not it constitutes a violation). No evidence should be cited here that has not already been introduced in the previous section. A part of this analysis should include an analysis of the credibility of the party's providing information. Credibility assesses the plausibility, consistency, relevance, and bias of both the information being provided and the people providing it.

Source: A&M System Regulation 08.01.01


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INVESTIGATOR TRAINING (BASIC)



Investigation Report Template (draft)

Conclusion

Based on the information above, it is the conclusion of this investigation that the allegation of (cite behavior)...

... is supported by a preponderance of the evidence.

... is unsupported by a preponderance of the evidence.


... lacks sufficient evidence to justify additional review.

THIS PROCESS IS REPEATED FOR EACH ALLEGATION

(Allegations B, C, D, etc.)

Source: A&M System Regulation 08.01.01

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Investigation Report Template (draft)

Final Comments

As needed – no introduction of new information related to the current investigation; this section is to highlight additional areas of concern that are separate and apart from the current complaint (cite relevant facts only and do not include personal observations).



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Active Listening



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THE CASH REGISTER EXERCISE...

Since we are about to review our reading and listening skills, let's test our own skills....



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THE CASH REGISTER EXERCISE...

I am going to read you a story and allow you to see it on this slide deck. I will repeat the story and then the story will disappear from the screen. You will then be asked seven (7) questions about the story. Your answers to each question can be "Yes," "No," or "Unknown based on the information provided."



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THE CASH REGISTER EXERCISE...

THE STORY...

A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.

THE CASH REGISTER EXERCISE...

THE QUESTIONS...

- 1: Did the man appear after the owner had turned off his store lights?
- 2: Did the man who appeared demand money?
- 3: Did the cash register contain money?
- 4: Did someone open a cash register?
- 5: After the man who demanded money scooped up the contents of the cash register, did he run away?
- 6: Did the owner of the store scoop up the contents of the cash register and run away?
- 7: Was the robber a man?



THE CASH REGISTER EXERCISE...

Question #1: Did the man appear after the owner had turned off his store lights?

Answer: Unknown based on the information provided. We do not know the sex of the owner.

Story: A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.

THE CASH REGISTER EXERCISE...

Question #2: Did the man who appeared demand money?

Answer: Yes. It is clearly stated that the man who appeared demanded money.

Story: A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.



THE CASH REGISTER EXERCISE...

Question #3: Did the cash register contain money?

Answer: Unknown based on the information provided. The story refers to the register's contents without describing what was inside.

Story: A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.

THE CASH REGISTER EXERCISE...

Question #4: Did someone open a cash register?

Answer: Yes. The story specifically states that the owner opened a cash register.

Story: A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.



THE CASH REGISTER EXERCISE...

Question #5: After the man who demanded money scooped up the contents of the cash register, did he run away?

Answer: Unknown based on the information provided. The story does not state who scooped up the contents of the cash register, nor do we know if “run” and “sped” signify the same thing.

Story: A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.

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THE CASH REGISTER EXERCISE...

Question #6: Did the owner of the store scoop up the contents of the cash register and run away?

Answer: Unknown based on the information provided. The story does not preclude this possibility.

Story: A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.

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THE CASH REGISTER EXERCISE...

Question #7: Was the robber a man?

Answer: Unknown based on the information provided. The story does not specifically state that this was a robbery.

Story: A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.

THE CASH REGISTER EXERCISE...

What is the lesson of this exercise?

Answer: Our brains do not like missing pieces ("thought holes") and will instinctively rush to fill gaps in a story with what would seem to be reasonable assumptions.

While assumptions are a natural and daily part of our lives, making assumptions in an adjudicatory setting can create mistakes. Rather than filling in missing pieces, it is incumbent upon us to 1) identify any portions of a story that are missing, and 2) ask the people who were a part of the situation to provide us with those missing details.



THE CASH REGISTER EXERCISE...

What is the lesson of this exercise?

Answer: Another takeaway from this exercise is to recognize that in general terms, we retain:

10% of information from oral presentations

35% of information from visual presentations

65% of information from visual and oral presentations

By closely reading the reports, carefully listening to the parties and witnesses, taking accurate notes, and resisting the temptation to make assumptions about what missing information might be, you are better equipped to synthesize the information you hear and see, and make accurate decisions based on the available facts.



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Active Listening

- Physically attend to the party (body posture, eye contact, nonverbal behaviors)
- Watch for your own nervous/distracting behaviors
- Provide uninterrupted time for a party to speak
- Offer verbal and nonverbal cues to encourage speaking without interrupting
- When appropriate, summarize and re-state what you have been told
- Mirroring verbal and nonverbal behaviors without mimicking
- When questioning, remember to actively listen to the responses
- Focus on the person and their responses; do not let your mind wander or be distracted by what you want to ask next



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Civil Rights Adjudication Training

Questioning



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Civil Rights Adjudication Training

Questioning

Remember that in order for us to be able to reach a determination about any violations, we must first determine what happened... this requires us to have a complete understanding of the event(s) that took place.

For our purposes, you should imagine the event(s) as a blank canvas... your job is to fill this canvas with evidence so that you can accurately estimate what took place.

Remember that the investigative report gives you a head start on your understanding of the events (~70-90%); but only by asking questions can you gain a complete understanding of what occurred.



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Civil Rights Adjudication Training

Questioning

Open-ended questions provide:

- Overall outline of the events
- The party's perspective
- "What happened...?" or "Please describe the event..."

Closed-ended questions provide:

- Important details (who, what when, where, how)
- Items for us to seek corroboration
- "How many..." or "Please describe the room..."

Open-ended questions provide:

- Motivation and intentions (why)
- Effect
- "What did you do when..." or "Please describe the thoughts you were having when..."



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Civil Rights Adjudication Training

Questioning Method

Draw a "picture" of the event(s)

- Open/Closed/Open
- Listen to the answers!
- Don't ask leading questions (answers implied)
- Don't allow your questions to betray your opinion
- Beware multiple choice questions
- Avoid multiple part questions – ask in succession (but not "rapid fire")
- Use probing questions to seek "holes" in the story when they appear
- Use silence as a tool



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Civil Rights Adjudication Training

Questioning Method

Draw a "picture" of the event(s)

- Don't create answers (either in the hearing or in subsequent deliberations)
- Be aware of their verbal/nonverbal behavior
- Be aware of your own verbal/nonverbal behavior
- For Panels, all panels members should be involved in questioning, and questions/lines of questioning should be reviewed and even assigned prior to the hearing
- For Panels, all panel members should note the responsibility of the Chair to allow or refuse questions



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Day Three Agenda

1. Types of Evidence
2. Deliberations and the Finding of Fact
3. Credibility Determinations
4. Consent and Predation
5. Alcohol and other Drugs
6. Trauma
7. Sanctioning
8. Appeals

Day Four Agenda (next week)

1. Mock Hearing

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Types of Evidence

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Types of Evidence

1. Direct* (first-hand, physical evidence)
2. Circumstantial* (physical evidence with inferences)
3. Documentary (reports, texts, etc.)
4. Hearsay
5. Expert
6. Character

*The U.S. Supreme Court has stated that "circumstantial evidence is intrinsically no different from testimonial [direct] evidence"(Holland v. United States, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 [1954]). Thus, the distinction between direct and circumstantial evidence has little practical effect in the presentation or admissibility of evidence.



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Deliberations and the Finding of Fact



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Deliberations

Order of deliberations:

- What happened? Develop a narrative of what you believe took place, based solely on facts in evidence, and accounting for all inculpatory and exculpatory information presented
- Make credibility determinations where conflicting information is present
- Develop a finding of fact (a summary of what happened that includes specific conclusions about behavior)
- Based on the finding of fact, is there a violation of published rules and regulations?
- If a violation is found, proceed to sanctioning. Note: Sanctioning is never to be discussed prior to the establishment of a finding of fact.

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Deliberations

Writing an effective finding of fact:

- Should be reasonably brief (in most cases) yet also highly specific as to what took place (one to two paragraphs, based on allegations)
- Should provide sufficient information to allow either party to appeal, as well as assist an appeals administrator/panel in understanding your conclusions
- Should be written towards both/all parties; do not personalize
- Remember your potential audiences...
 - Complainant
 - Respondent
 - Appellate Officer(s)
 - OGC/SECO
 - Lawyers/advisors
 - Parents
 - Media/Social Media
 - Judge
 - Department of Education

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Deliberations

Writing an effective finding of fact:

- Should be reasonably brief (in most cases) yet also highly specific as to what took place (one to two paragraphs, based on allegations)
- Should provide sufficient information to allow either party to appeal, as well as assist an appeals administrator/panel in understanding your conclusions
- Should be written towards both/all parties; do not personalize
- Remember your potential audiences...
 - Complainant
 - Respondent
 - Appellate Officer(s)
 - OGC/SECO
 - Lawyers/advisors
 - Parents
 - Media/Social Media
 - Judge
 - Department of Education

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Sample Finding (Fake)

After reviewing all of the information available, I have determined that Ms. Smith is in violation of the following University Rules and Regulations: Acts of Dishonesty, Threatening and Intimidation.

Findings of Fact

My specific findings are as follows:

1. You engaged in the harassment of Mr. Jones via electronic means despite being told to leave him alone, causing him to fear for his safety.
2. Your communications with Mr. Jones were of a hostile and threatening nature.
3. Your story was not credible.

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Sample Finding (Actual)

After reviewing all of the information available, I have determined that Ms. Smith is in violation of the following University Rules and Regulations: Acts of Dishonesty, Threatening and Intimidation.

Findings of Fact

My specific findings are as follows:

1. Ms. Smith engaged in intentional communication with Mr. Jones via electronic means despite numerous verbal and text requests on the part of Mr. Jones for this communication to cease. After being blocked by Mr. Jones, Ms. Smith used the devices of other individuals to continue communicating with Mr. Jones. Ms. Smith's continual refusal to abide by Mr. Jones' wishes created an ongoing disruption to his daily life and provoked a reasonable fear for his own well-being.
2. Ms. Smith's written communications with Mr. Jones were of a hostile and threatening nature, repeatedly referring to Mr. Jones in disparaging terms (i.e., "asshole," "rapist," and "faggot."). Further, the written communications included threats to Mr. Jones' property (car) and suggestive that something physically "unfortunate" might happen to him.
3. Ms. Smith's initial account to police was not fully accurate, and her story continued to "evolve" over time in the telling. Ms. Smith's statements to police, investigators, and this hearing officer were inconsistent, contradictory, and sought to minimize both the frequency and nature of her ongoing contact with Mr. Jones, as well as denying the existence of any threats..

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Credibility Determinations

**CREDIBLE
SOURCE**



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Credibility Determinations

How can you determine if someone is a credible/truthful source of information?

Many rely on their "gut" (sometimes referred to as a "BS Meter"); but what does this mean?

Credibility comes down to:

- Persuasiveness
- Relevance
- Reliability
- Bias



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Persuasiveness

A person is persuasive if:

- their story is believable
- their story is not countered by more persuasive accounts
- their story is able to sustain challenges

Persuasiveness is not about the number of witnesses corroborating information, but rather the quality of the witnesses corroborating information



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Relevance

A person is considered relevant if:

- their story related to the substance of the allegations (party to, witness of, knowledge before or after the fact, or patterns of behavior)
- it is of sufficient value to matter in the determination of a finding of fact
- be offered by an individual with actual knowledge of the substance of the allegations and is not hearsay

Relevance relates to the specific incident in question and not "like" incidents; we are not interested in comparing apples to oranges, nor even apples to other apples; we only have an interest in a single apple.



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Reliability

A person is considered relevant if:

- their story is consistent (or complementary) over multiple tellings
- it is of sufficient value to matter in the determination of a finding of fact
- be offered by an individual with actual knowledge of the substance of the allegations and is not hearsay

Relevance relates to the specific incident in question and not "like" incidents; we are not interested in comparing apples to oranges, nor even apples to other apples; we only have an interest in a single apple.

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Bias

All people are biased. In providing information, it is important to own the bias that is present and to minimize its impact on the relaying of information.

For our purposes, we are concerned about three types of bias

- Bias towards or against people involved in the incident by a reporter of information
- Bias towards or against subject matter involved in the incident by a reporter of information
- Bias brought into a hearing by an adjudicator

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Bias**Bias towards or against people involved in the incident by a reporter of information:**

- What is the relationship between the reporter of information and the parties involved?
- What is the relationship between the reporter of information and the institution?
- While having a relationship with parties involved in an incident does not suggest that the person will be deceitful to aid or hurt the person's case, it may well "color" the person's recollection of the incident. Adjudicators can and should inquire about the strength of the relationship and seek to ask questions about portions of the incident that people may be less likely to prepare in advance.

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Bias**Bias towards or against subject matter involved in the incident by a reporter of information:**

In some instances, people's perceptions may be impacted by a bias regarding the conditions of the incident. Rather than trying to mislead an investigator, some reporters of information simply rely on assumptions about the people or circumstances involved in an incident, based on their own biases. When investigators hear people speaking in general terms about a situation, they should test the person's re-telling with more specific questions.

It is important to seek definitions on terms such as:

"Hooked up"	Stalking
"Creepy"	Dating
"Had sex"	Abusive

Whenever reporters of information express strong feelings about a topic, it is important to seek to differentiate their feelings from their observations and/or involvement.

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Bias**Bias brought into an investigation by an investigator:**

Adjudicators are supposed to be “impartial”, yet there is no such thing as pure objectivity in human beings. As an adjudicator, it is important to be aware of the issues that serve as “hot buttons” for you and provoke emotional responses. Be cognizant of your bias as you hear the case, or in exceptional circumstances ask to be removed from the case.

Additionally, one common short-coming of adjudicators and appellate officers is their manufacturing of possible alternatives when attempting to arrive at a conclusion. Instead of listening to the information presented and weighing it appropriately, a common temptation is to begin “supposing” about what took place by introducing facts not offered by the parties or witnesses. It is critical that adjudicators only utilize the information provided to them in reaching a conclusion.

When we refer to “facts in evidence,” we mean those provided by the parties, the witnesses, or by the physical evidence.

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Credibility Assessments



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**Credibility Assessments**

The credibility of parties and witnesses can greatly influence the outcome of our complaint resolution processes, and the federal government expects us to assess the credibility of parties and witnesses in sex-based processes. But credibility is not often well-understood. Just how can someone be deemed to be credible and another person be considered not credible, or how can a person maintain credibility in one area of the investigation and lose it in another?



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Credibility Factors

- Plausibility
- Relevance
- Consistency
- Bias
- False Information
- Admissions



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Credibility Factors

Plausibility

Plausibility is a measure of believability and likelihood:

- o Is conceivable and/or supported by corroborating evidence
- o The less likely something is to be true, the greater the evidence required to establish a likely outcome
- o In general (Occam's Razor, Probability Theory, etc.), when all things are equal the simpler option is the more likely, barring sufficient evidence to the contrary
- o Plausibility is more affected by the quality of the evidence rather than the quantity of it



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Credibility Factors

Relevance

Relevance is a measure of whether or not the evidence is germane to the allegation(s) under review

- Is offered by someone who could reasonably have such knowledge
- Is inculpatory or exculpatory by itself, or reinforces the conditions under which inculpatory or exculpatory evidence is being evaluated
- Relates substantively to the specific allegations and/or specific pattern of behavior rather than to “like” incidents, circumstances, or people



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Credibility Factors

Consistency

Consistency is a measure of the reliability of the information and the people providing it

- Does not contradict itself over multiple tellings (major inconsistencies versus minor inconsistencies)
- Comes from a source that cannot be substantively discredited



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Credibility Factors

Bias

Bias is a measure of the degree to which people's stories may be influenced by the people involved, the subject matter involved, and/or their own experiences

- Bias of parties/witnesses for or against individuals
- Bias of parties/witnesses based on the subject matter
- Bias of parties/witnesses based on their own experiences
- Bias brought into an investigation by the investigator(s)



Credibility Factors

False Information

If someone is demonstrated to have provided the investigator with false information, it presents a challenge to their credibility in the overall process

- What did they provide false information about?
- Did they acknowledge providing false information?
- Why were they providing false information?
- Does this carry over into portions of their participation or can it be seen as more limited?





Credibility Factors

Admissions

If someone admits to wrongdoing, does that add to or detract from their credibility overall?

- What are they admitting to?
- Why are they admitting to it?
- Is their admission supported by the available evidence?
- Is the admission seeking to mitigate damage and consequence or does it present as a true acceptance of responsibility?



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Credibility Activity

Scale of Credibility

Based solely on the information provided, please rank the following people from most credible (1) to least credible (5).

1. An underage respondent who lies about an alcohol violation during an investigation over a sexual assault allegation.
2. A complainant making an allegation about something that happened between the complainant and respondent without any evidence or witnesses.
3. A witness unrelated to both parties who observed the incident in question.
4. A respondent who lies about their alibi for the day of the incident in question.
5. A witness for the respondent who provides evidence on their behalf



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Credibility Assessments

Initial Draft Report

- Preferred Credibility Statements:

- The investigator found no cause to question the credibility of statements made by Doe.
- The investigator found that Smith's credibility was challenged by...
 - Cite Persuasiveness, Relevance, Consistency, Bias, False Information, or Admission factor(s)
- The investigator found that Ortega's credibility was reinforced by...
 - Cite Persuasiveness, Relevance, Consistency, Lack of Bias, Corroboration, or Admission factor(s)



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Credibility Assessments



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The Consent Construct



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The Consent Construct

Three types of sexual interactions:

1. Wanted, Consensual Sex
2. Unwanted, Consensual Sex
3. Unwanted, Nonconsensual Sex

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The Consent Construct

Three types of sexual interactions:

1. Wanted, Consensual Sex
2. Unwanted, Consensual Sex
3. Unwanted, Nonconsensual Sex

Only the last category represents a violation of System Regulation 08.01.01 or member rules.

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The Consent Construct

The (adapted) Consent Construct for evaluating the consensuality of sexual interactions:

1. Force
2. Capacity
3. Consent
4. Predation

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The Consent Construct

Force

1. Was force used to obtain sexual access?
2. Because consent must be voluntary, any use of unwanted force invalidates any argument that the sexual access was consensual.
3. Types of Force:

Physical violence (hitting, restraining, pushing, kicking, etc.).

Threats (Coercive acts designed to make another person provide sexual access based on a reasonable fear of physical or serious non-physical harm); consider frequency, intensity, duration, and/or isolation.

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The Consent Construct

Capacity

1. Forms of Incapacity:
 - Alcohol or Other Dugs (see previous section)
 - Mental/Cognitive Impairment
 - Injury
 - Asleep or Unconscious
 - Age (under 17)

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The Consent Construct

Capacity

2. Determining Incapacity:

"Part A"

Was the Complainant incapacitated at the time of sexual access?

Could the Complainant comprehend and articulate Who, What, When, Where, and Why?

Could the Complainant make a rational decision and appreciate the potential consequences of their choices?

"Part B"

Did the Respondent know of the incapacity, OR

Should the Respondent have known of the incapacity given the information available to them?

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The Consent Construct

Capacity

3. Evidence of Incapacity:

- Witnesses who may know the type and amount of substances used by the Complainant

- Witnesses who can attest to the state of body/mind of the Complainant

- Physical cues, such as:

Slurred Speech

Shaky Equilibrium

Bloodshot Eyes

Smell of Alcohol, Marijuana

Unconscious

Outrageous/Unusual Behavior

Vomiting, Urinating, Defecating

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The Consent Construct

Consent

3. Consent - clear, voluntary, and ongoing agreement to engage in a specific sexual act. Persons need not verbalize their consent to engage in a sexual act for there to be permission. Permission to engage in a sexual act may be indicated through physical actions rather than words. A person who is asleep or mentally or physically incapacitated, either through the effect of drugs or alcohol or for any other reason, or whose agreement was made by threat, coercion, or force, cannot give consent. Consent may be revoked by any party at any time.

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The Consent Construct

Predation

1. Was the behavior predatory?
 - demonstrated premeditation, planning, forethought, and/or the use of force
 - generally applied to physical or attempted physical acts; do not confuse with pervasiveness as it relates to harassment and/or stalking
 - predation is an aggravating factor for sanctioning if a violation is found, so it is important for the investigator to meticulously detail any predatory behaviors discovered during the course of an investigation

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The Consent Construct

Understanding Consent

- Silence and/or a lack of protest or resistance \neq Consent
- Consent cannot be assumed
- Someone claiming to have received consent must be able to articulate the factors that led them to this conclusion
- Consent can be influenced by previous sexual interactions between the same parties
- Consent is complicated by use of alcohol and/or other drugs, lack of understood norms and expectations between the parties, past interactions with other partners, “kink” encounters/relationships

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Civil Rights Adjudication Training

Alcohol and other Drugs



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Civil Rights Adjudication Training

Alcohol and other Drugs

Can two adults who are both “drunk” engage in consensual sex with one another? (poll)

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Civil Rights Adjudication Training

Alcohol and other Drugs

Can two adults who are both “drunk” engage in consensual sex with one another?

YES – our standard for lack of consent is not “drunk” (otherwise defined as inebriated/intoxicated), but incapacitated.

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Civil Rights Adjudication Training

Alcohol and other Drugs

Tolerance is established by biology – can be raised lowered over time by drinking beyond the point of impairment (lowered by not doing so)

What is a drink? (niaa.nih.gov)

12 oz. of beer (5% alcohol)

5 oz. of wine (12% alcohol)

1.5 oz. distilled spirits (40% alcohol)

One drink often equates to a .025 BAL

Metabolism rate is generally .015 per hour (average, depending on age, sex, height, weight, medications, genetics, experience with drinking, etc.)

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Civil Rights Adjudication Training

Alcohol and other Drugs

Factors that effect our body's reaction to alcohol

sex	age
body mass	tolerance
illness	race
stomach contents	method of drinking
water consumption	duration of drinking
type of alcohol consumed	carbonation
amount of alcohol consumed	menstrual cycle
prescription medications	non-prescription medications
allergies	

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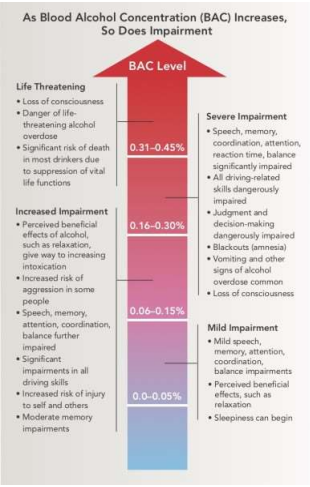
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Civil Rights Adjudication Training


Alcohol

- .31-up Coma / Risk of Death
- .25-.30 Stupor (Incapacitation certain)
Mental, physical, and sensory functions shutting down
- .20-.24 Severe Intoxication (Incapacitation likely)
Severe Disorientation, Blackouts, Vomiting, Shutdown of motor skills
- .16-.19 Heavily Intoxicated (Incapacitation possible)
Depression, Nausea, Disorientation, Blackouts
- .11-.15 Intoxication/Inebriation
Heightened impairment, Risk of aggression, Risk of injury
- .05 -.10 Impairment
Speech, Coordination, Balance, Reactions, Memory
- .02-.05 Influence
Mild relaxation, lightheadedness, warmth

As Blood Alcohol Concentration (BAC) Increases, So Does Impairment



Sources: NIH.gov and UWEC.edu

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Civil Rights Adjudication Training

Alcohol and other Drugs

What about Mutual Incapacity?

POLL: If an investigator discovers that mutual incapacity exists, and that this is confirmed by the hearing officer/panel which of the following statements is most likely to be true?

- A. Neither party is in violation
- B. Both parties are in violation
- C. Only the original respondent is in violation

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Civil Rights Adjudication Training

Alcohol and other Drugs

What about Mutual Incapacity?

If an investigator discovers that mutual incapacity exists, and that this is confirmed by the hearing officer/panel which of the following statements is most likely to be true?

- A. Neither party is in violation
- B. Both parties are in violation
- C. Only the original respondent is in violation

ANSWER: B

The investigator would bring this to the attention of the Title IX Coordinator, who would then visit with the parties to determine the future direction of the complaint.

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Civil Rights Adjudication Training

Alcohol and other Drugs

Marijuana –

THC creates a dopamine “high” that serves as a stimulant, depression, and sometimes triggers hallucinogenic effects

Short-term: alters senses and experiences; triggers emotions such as happiness, relaxation, anxiety relief, creativity and euphoria; alters sense of time, creates difficulty thinking and problem solving, impairs memory, impedes motivation

Physically: reddening of the eyes, fast heartbeat, increased blood pressure, dry mouth, dizziness, increased appetite, calming sensations, relief from pain, “feathery” feelings of relaxation throughout the body, increased sensitivity, and other potential remedies to physical ailments



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Civil Rights Adjudication Training

Alcohol and other Drugs

Marijuana –

Standard recreational use generally equates to that of .08 level of impairment; this is cumulative when coupled with alcohol or other substances

In general for all illicit drugs –

- By design, illicit drugs cause impairment
- Quality control for illicit drugs is problematic
- When combined with alcohol, effects are cumulative



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Civil Rights Adjudication Training

Trauma




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INVESTIGATOR TRAINING (BASIC)




Trauma

“Lizard Brain” controls:

- Fight (approach)
- Flight (avoidance)
- Freeze (submission/“Tonic Immobility”)




Whether someone fights, flees, freezes, is a response to the hormonal flood; it is a neuro-biological response, and not a reasoned choice.

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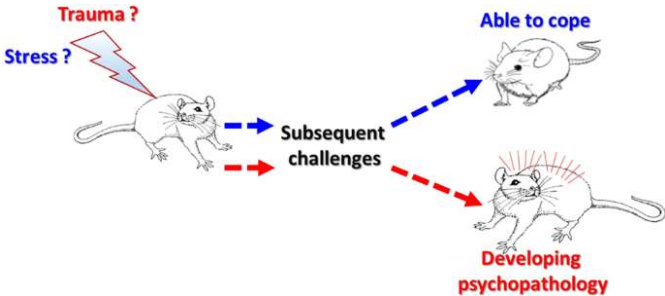
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INVESTIGATOR TRAINING (BASIC)




Trauma

What is trauma?



Not all people who experience trauma-inducing events will experience trauma.
 Many individual factors are involved.

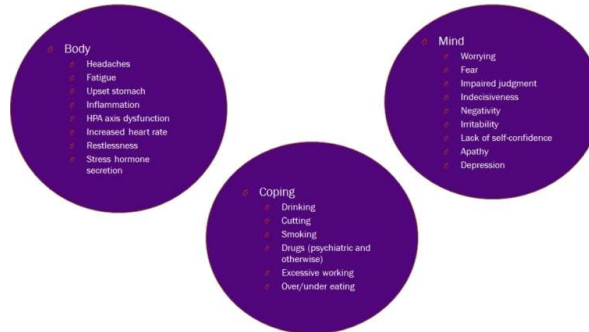
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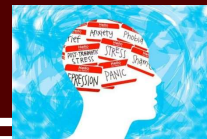


Trauma

EFFECTS OF TRAUMA



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Trauma

Trauma and Memory:

Hippocampus (Memory Maker) can still accept sensory data and encode it, but cannot consolidate memories and store (think of a card catalog); memory recall tends to be fragmented and recall can be slow and difficult




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INVESTIGATOR TRAINING (BASIC)

Rape Trauma

Stages of Rape Trauma Syndrome

- Acute**
 - Occurs soon after a sexual assault
 - Categorized as expressed, controlled or shocked disbelief
- Outward Adjustment**
 - Occurs after the acute phase
 - Can last weeks to months or longer
 - Victim doesn't appear to be traumatized anymore, but definitely still is
- Resolution or Integration**
 - Final stage of rape trauma syndrome
 - Victim comes to terms with assault and works to move on



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INVESTIGATOR TRAINING (BASIC)

Rape Trauma

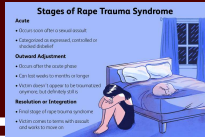
Acute Phase – 3 Categories of Reactions:

1. Expressed (openly emotional, agitated, anxious)
2. Controlled (without emotion, flat affect, “everything is fine”)
3. Shocked Disbelief (strong sense of disorientation, difficulty concentrating or handling everyday tasks, poor recall of the assault)

Source: RAINN (via Department of Justice)

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Rape Trauma

Outward Adjustment Phase – 5 Primary Coping Techniques:

1. Minimization (“could have been worse”)
2. Dramatization (highly focused on assault and very verbal, dominates life and identity)
3. Suppression (refuse to discuss)
4. Explanation (analyzes what happened)
5. Flight (seeks to escape pain by moving, changing jobs, leaving school, changing appearance, etc.)

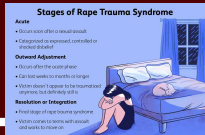
Source: RAINN (via Department of Justice)

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Rape Trauma

Resolution Phase:

1. Assault is no longer a central focus of their life
2. Recognition that they will never forget the assault or its affects, but that the pain and negative consequences lessen over time
3. Begins to accept the rape as a part of their life and is able to move on

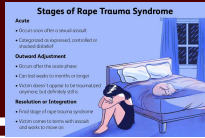
Source: RAINN (via Department of Justice)

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Trauma, Rape Trauma, and Investigations

Critical Takeaways:

1. Do not diagnose whether someone has been subjected to a traumatic event or is experiencing trauma or rape trauma. Simply be open to the possibility that it may be the case.
2. Do not project what you think someone's reaction to a traumatic event should be. There is no one or right way to respond.
3. Emphasize transparency and predictability in the process.
4. Use non-judgmental and non-blaming language; don't ask the person to evaluate their reaction to being assaulted.
5. Allow someone plenty of time to respond to questions; be patient.



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Trauma and Rape Trauma



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Civil Rights Adjudication Training

Sanctioning




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Civil Rights Adjudication Training

Sanctioning

1. Sanctioning Goals
2. Sanctioning Formula
3. Sanctioning Grid for Sex-Based Cases



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Civil Rights Adjudication Training

Sanctioning Goals

1. Education and Development
2. Restoration (reparation of harm to individual and the academic community)
3. Balance between individual being sanctioned and the academic community

Our stated goals for sanctioning never include punishment, nor do we explicitly reference deterrence. This is not to say that sanctions we impose are not perceived as punishments, but simply that it is never our explicit intent.



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Civil Rights Adjudication Training

Sanctioning Formula

1. Nature of the behavior +
2. Prior disciplinary history of respondent +
3. Aggravating factors +
4. Mitigating Factors = Sanction

Sanctions are the creation of learning outcomes intended for the situation and the behavior; “**active**” and “**inactive**” sanctions are then selected to achieve the intended outcomes. These intended outcomes should be communicated via the decision letter as a rationale for the sanction.

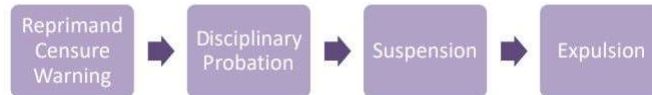


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Civil Rights Adjudication Training

Inactive Sanctions

Inactive sanctions are official, written university responses to misconduct that generally do not require any action by the respondent. These sanctions (with the exception of suspension and expulsion) generally do not explicitly serve as teaching tools, but instead provide a baseline for sanctions for any future conduct violations.



It is important to emphasize that disciplinary suspensions should be conditional on, and reinstatement only allowed upon, successful completion of all assigned active sanctions.



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Civil Rights Adjudication Training

Active Sanctions

Active sanctions are generally those designed to achieve learning outcomes by the student respondent by providing them with information and/or experiences that help them deepen their understanding of university expectations and cause them to reflect on the implications of their own actions.

Examples of active sanctions include:

- Assessment, treatment, and/or education for alcohol and other drug issues
- Workshops (e.g., healthy relationships, conflict management, anger management)
- Counseling assessment
- Interviews and educational essays
- Guided reflection papers



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Civil Rights Adjudication Training

Active Sanctions

Active sanctions in sex-based cases should generally not place the student respondent in a setting with either the complaining party or other vulnerable parties (such as a shelter or support group).

Additionally, other active sanctions can solidify interim measures and/or deter further contact between the parties, such as contact restrictions and restrictions from specific campus areas or activities (remedies).

In general, there should be (except in cases of permanent expulsion) a pairing of inactive and active sanctions that address all desired learning outcomes. All active sanctions should have written reflection components assigned to them that are then included in the student's conduct record.

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Civil Rights Adjudication Training

Sanctioning Grid for Sex-Based Cases**Minimum Inactive Sanctions for:**

Sex-Based Violence and/or Nonconsensual Penetration (with predation)

Permanent Expulsion

Sex-Based Violence and/or Nonconsensual Penetration (without predation)

One-year (two consecutive major semesters) Suspension

Nonconsensual Sexual Contact

Disciplinary Probation

Sexual Exploitation

Disciplinary Probation

Stalking

Warning/Reprimand/Censure

Harassment or Misconduct Based on Sex

Warning/Reprimand/Censure

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Appeals



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Appeals



Role of Appeals Process:

Appeals processes exist to review whether or not the original hearing/review was conducted fairly. They do not serve as new (de novo) hearings, nor do they consider any information outside of the scope of the appeal.

As a result, deference is always given to the original decision, which is why the burden of proof shifts to the appealing party. Appeals boards (and administrators) are not authorized to supplant their judgment over the original decision maker(s) without cause, as defined in the grounds for appeal.

In Title IX appeals, best practice is to grant one appeal proceeding for all parties. The reporting party and the responding party are to be granted equitable appeal rights.



Appeals



Grounds for Appeal:

- (a) a procedural irregularity that affected the outcome;
- (b) new evidence, not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome. The new evidence must be provided at the time of appeal with the appropriate member appeals form;
- (c) 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;
- (d) the appropriateness or severity of the sanctions.



Appeals

Procedural Irregularity:

– the appellant is contending that a substantive error was committed as a part of the student conduct process that deprived the appellant of a fair hearing of the case. This would include but not be limited to a substantiated bias, an arbitrary and capricious finding, a material deviation from established procedures, etc.

There is a difference between an error and a substantive error.



Appeals

Procedural Irregularity Example #1:

– The appellant argues that they were provided four days notice for a hearing when the regulation guarantees five days notice. The appellant does not indicate that this made any difference in the case, but argues that any error is substantive enough to void the decision.

This is not a case of a substantive error.



Appeals

Procedural Irregularity Example #2:

– The appellant argues that evidence was allowed that should not have been at the hearing. The appellant states that a witness who was the only person to raise a specific fact did not attend the hearing and allow for questioning. Yet the panel included this information as a basis for its decision.

If corroborated, this may be a case of a substantive error.



Appeals

New Evidence:

– the appellant is contending that there is new information that was unavailable to the appellant at the time of the original proceeding, and that this information would have substantially impacted the outcome of the proceeding. The appellant must include the new information with the appeal. Note that this criteria is extremely challenging for individuals who choose or fail to attend or participate in the original proceeding they are appealing.

The key word of this definition is “unavailable”; if the appellant was aware of the information prior to the hearing and able to gain access to the information through reasonable effort, this condition would not apply.



Appeals

New Evidence Example #1:

– The appellant argues that they chose not to participate in the civil rights investigation and live hearing because of an ongoing criminal investigation. After the hearing they were notified that the criminal matter has been dismissed, so they file an appeal stating they are now willing to submit their new information.

Their information is not “new.” This is not a case of new evidence.



Appeals

New Evidence Example #2:

– The appellant states that following the hearing they were approached by a friend who stated that they witnessed the incident but were not aware that any disciplinary proceedings were going on. Their testimony would be supportive of the appellant’s case. The new witness writes and signs a statement with the new information and submits it with the appeal.

Provided the identity of the witness can be validated and that the information would be of sufficient weight to affect the outcome, this would be considered new evidence.



Appeals

Conflict of Interest/Bias:

– the appellant is contending that 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;

This cannot be a generalized claim of bias but must demonstrate cause that indicates a lack of impartiality on the part of the official.



Appeals

Conflict of Interest/Bias Example #1:

– The appellant states that one of the panel members appeared at a campus “take Back the Night” march and disclosed their own sexual assault experience to other survivors several months prior to the hearing; the goal of the brief commentary was to urge survivors to get support and to report what took place. According to the appellant, this type of public advocacy makes it clear that the panel could not hear the case in an unbiased manner.

Assuming this is the entirety of the argument for bias, the ground is unfounded. Simply sharing a personal story does not establish an inability to remain sufficiently impartial to be able to hear facts and render a decision. This does not establish a conflict of interest or bias.



Appeals

Conflict of Interest/Bias Example #2:

– The appellant states that the investigator told them during two separate interviews that the facts seemed to support the idea was lying, and the investigator encouraged the appellant to “come clean” in order to receive better consideration in the adjudicatory process. The investigator confirms that they made this comment twice hoping to secure a confession.

Although the information does not specifically address the events under review, it raises significant questions as to the neutrality of the investigator. An appeals administrator/panel may remand the case back to the adjudicatory authority, who may in turn request a new investigation.



Appeals

Appropriateness/Severity of Sanction:

– the appellant is contending that the sanction is not appropriate to the findings of the case.

Sanctions are dependent upon the nature of the offense, the previous conduct history of the student, and any mitigating and/or aggravating factors. Sanctions may vary widely, even for similar offenses. Sanction rationales are to be included in decision letters to aid both student understanding and to educate the appeals officer or board. Remember that the A&M System has established minimum inactive sanctions in sex-based discrimination cases that are always to be followed except in cases with significant mitigating factors; mitigating factors must be established in the finding of fact or on basis of appeal.



Appeals

Appropriateness/Severity of Sanction Example #1:

– The appellant argues that a one-year suspension from the university is disproportionate because they did not commit the offense for which they are being sanctioned.

The finding of the case is a violation, so no appellant can re-argue the finding by appealing the sanction. This is not a case on an overly severe sanction.



Appeals

Appropriateness/Severity of Sanction Example #2:

– The appellant argues that assigning the respondent the sanction of volunteering at a local shelter for domestic violence victims is inappropriate, given that the respondent was held responsible for dating violence, thus placing the respondent into contact with other victims of dating and domestic violence, and because the complainant regularly uses the services of the shelter, thus raising the potential of a violation of a no-contact order issued by the same hearing panel.

Placing a respondent and complainant from a dating violence case together is both not recommended practice and potentially dangerous. Placing the respondent into mandated contact with other survivors is also strongly discouraged. Assuming the cited facts are correct, this would be considered an inappropriate sanction.



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Civil Rights Adjudication Training

If you have any questions after the conclusion of this program, please contact Rick Olshak at rolshak@tamus.edu.



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