



The Role of Decision-Makers in Sexual Misconduct Complaints

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Definitions

§ 106.44(a) – General Response to Sexual Harassment: *Sexual Harassment*

3 categories of misconduct that meet the regulatory definition of “sexual harassment”

- 1) “**An employee** of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in **unwelcome** sexual conduct;” [*quid pro quo*]
- 2) “**Sexual assault**” as defined in 20 U.S.C. § 1092(f)(6)(A)(v), “**dating violence**” as defined in 34 U.S.C. § 12291(a)(10), “**domestic violence**” as defined in 34 U.S.C. § 12291(a)(8), or “**stalking**” as defined in 34 U.S.C. § 12291(a)(30); or
- 3) “Unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the recipient’s education program or activity.”

34 C.F.R. 106.30(a).



§ 106.45(b) –Grievance Process

“For the purpose of addressing formal complaints of sexual harassment, a recipient’s grievance process must comply with the requirements of this section.”

“Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaint of sexual harassment . . . must apply equally to both parties.”



§ 106.30(a) – Definitions

“Complainant means an individual who is alleged to be the victim of conduct that **could** constitute sexual harassment.”

“Respondent means an individual who has been reported to be the perpetrator of conduct that **could** constitute sexual harassment.”



Title IX Formal Grievance Procedure Requirements



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

The respondent is **presumed not responsible** until a determination regarding responsibility is made at the conclusion of the grievance process.

A person's status as a Complainant, Respondent, or witness will not determine whether that person is deemed credible.

34 C.F.R. 106.45(b)(1)(iv).



§ 106.45(b) – Grievance Process: *Basic Requirements*

“A recipient’s grievance process must—

“Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures . . . against a respondent.”

34 C.F.R. 106.45(b)(1)(i).



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

“Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory – and provide that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.”

34 C.F.R. 106.45(b)(1)(ii).



§ 106.45(b) – Grievance Process: *Hearings*

“For postsecondary institutions, the recipient’s grievance process must provide for a live hearing.”

34 C.F.R. 106.45(b)(6)(i).



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

The Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate informal resolution process may not have a conflict of interest or bias—either for or against complainants, respondents, or individual parties.

34 C.F.R. 106.45(b)(1)(iii).



§ 106.45(b) – Grievance Process: *Hearings*

- **Hearing panelists:**

- Title IX Regulations provide that the live hearing may be adjudicated by one or more decision-makers.
- The decision-makers, however, “cannot be the same person(s) as the Title IX Coordinator or the investigator(s). . . .”

34 C.F.R. 106.45(b)(7)(i).



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

- **Uniform standard of evidence:**
 - Must choose between 1 of 2 permissible standards of evidence: (1) preponderance of the evidence; and (2) clear and convincing evidence.
 - Must apply that standard to all formal complaints, including against both students and employees.

34 C.F.R. 106.45(b)(1)(vii).



Preponderance of the Evidence

- Is it “more likely than not” that the Respondent is responsible for having violated the Policy?
- “In a he-said-she-said situation ... finding one party to be more credible than the other satisfies [the preponderance of the evidence] standard.”
- One party’s presenting more evidence than the other party does not alone mean that it is “more likely than not” that a violation occurred.
- When an issue boils down to conflicting or inconsistent testimony, “the touchstone for the factfinder ... is a determination of credibility.”
- Determinations of credibility are “wholly within the discretion of the panel.”



“50% and a feather”

Clear and Convincing Evidence



- Evidence is highly and substantially more likely to be true than untrue.
- Fact finder (decision-maker) must be convinced that the contention is highly probable.
- Intermediate standard of proof, beyond a preponderance of the evidence and proof beyond a reasonable doubt.

Colorado v. New Mexico, 467 U.S. 310 (1984)



§ 106.45(b) – Grievance Process: *Basic Requirements (cont.)*

May not allow any evidence or questions that would invade a **legally recognized privilege**, unless the privilege holder waives it.

34 C.F.R. 106.45(b)(1)(x).

§ 106.45(b) – Grievance Process: *Hearings (cont.)*

- **Cross-examination must be allowed** – Decision-makers “must permit each party’s advisor to ask the other party and any other witnesses all relevant questions and follow-up questions, including those challenging credibility.”
 - **Cross-examination only by the advisor** – “Such cross-examination . . . must be conducted **directly, orally, and in real time** by the party’s advisor of choice and never by a party personally. . . .”
 - **School-appointed advisors** – “If a party does not have an advisor present at the live hearing, the recipient ***must*** provide **without fee or charge to that party**, an advisor **of the *recipient’s* choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.”

34 C.F.R. 106.45(b)(6)(i).

§ 106.45(b) – Grievance Process: *Hearings (cont.)*

- **Relevance required** – “Only relevant cross-examination and other questions may be asked of a party or witness.”
 - **Decision-makers must screen for relevance in real-time** – “Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”
 - **Rape shield protections** – “Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that **someone other than the respondent committed the conduct** alleged by the complainant, or if the questions and evidence concern **specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.**”

34 C.F.R. 106.45(b)(6)(i).



§ 106.45(b) – Grievance Process: *Hearings (cont.)*

“If a party or witness does not submit to cross-examination at the live hearing, the decision maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility provided, however, the decision-maker(s) **cannot draw an inference** about the determination regarding responsibility based solely on a party’s or a witness’s absence from the live hearing or refusal to answer cross-examination or other questions.”

Note: Recent legal developments

34 C.F.R. 106.45(b)(6)(i).



§ 106.45(b) – Grievance Process: *Hearings (cont.)*

- **Virtual hearings:**

- “At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions.”
- “Live hearings . . . may be conducted with all parties physically present in the same geographic location or, at the recipient’s discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.”

34 C.F.R. 106.45(b)(6)(i).



§ 106.45(b) – Grievance Process: *Hearings (cont.)*

- **Hearing record** – “Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.”

34 C.F.R. 106.45(b)(6)(i).



§ 106.45(b) – Grievance Process: *Determination of Responsibility*

- The decision-makers must issue a written determination regarding responsibility, which must include:
 - The allegations constituting sexual harassment;
 - A description of the matter’s procedural history;
 - Findings of fact supporting the determination;
 - Conclusions reached by applying the school’s code of conduct to the facts;
 - An explanation of the rationale for the conclusions, including a determination of responsibility, disciplinary sanctions, and remedies; and
 - The school’s appellate procedures.



§ 106.45(b) – Grievance Process: *Determination of Responsibility* (cont.)

- **Simultaneous publication** – “The recipient must provide the written documentation to the parties simultaneously.”
- **Finality** – “The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would not longer be considered timely.”

34 C.F.R. 106.45(b)(7)(iii).



§ 106.45(b) – Grievance Process: *Appeals*

- Recipient must offer both parties an appeal from:
 - a determination regarding responsibility; and
 - the dismissal of a formal complaint or any allegation therein.

34 C.F.R. 106.45(b)(8).



§ 106.45(b) – Grievance Process: *Informal Resolution*

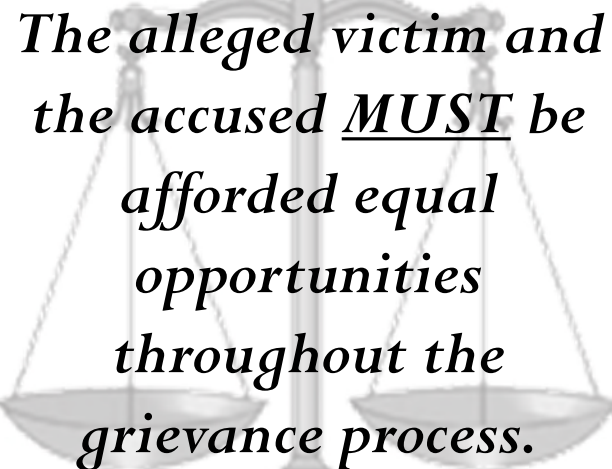
A recipient may facilitate an informal resolution process, such as mediation, in lieu of a formal grievance process.

Before doing so, however, the recipient must provide written notice to the parties of their rights, including the right to withdraw from the process at any time, and it must obtain both “parties’ voluntary, written consent” to informal measures.

Informal resolution processes are not allowed for formal complaints involved employee-respondents.

34 C.F.R. 106.45(b)(9).

Students' Rights: A Balancing Act



*The alleged victim and the accused **MUST** be afforded equal opportunities throughout the grievance process.*

- The parties have an equal opportunity to present relevant witnesses (including third-party expert testimony) and other evidence.
- Advisors/lawyers are allowed to be present for both parties, but they are not allowed to participate in the proceedings (unless the resolution hearing takes place pursuant to the Title IX Regulations).
- Both parties have a right to appeal the results of the hearing.
- Both parties will be notified, in writing, of the outcome of both the hearing and any appeal.



Decision-Makers



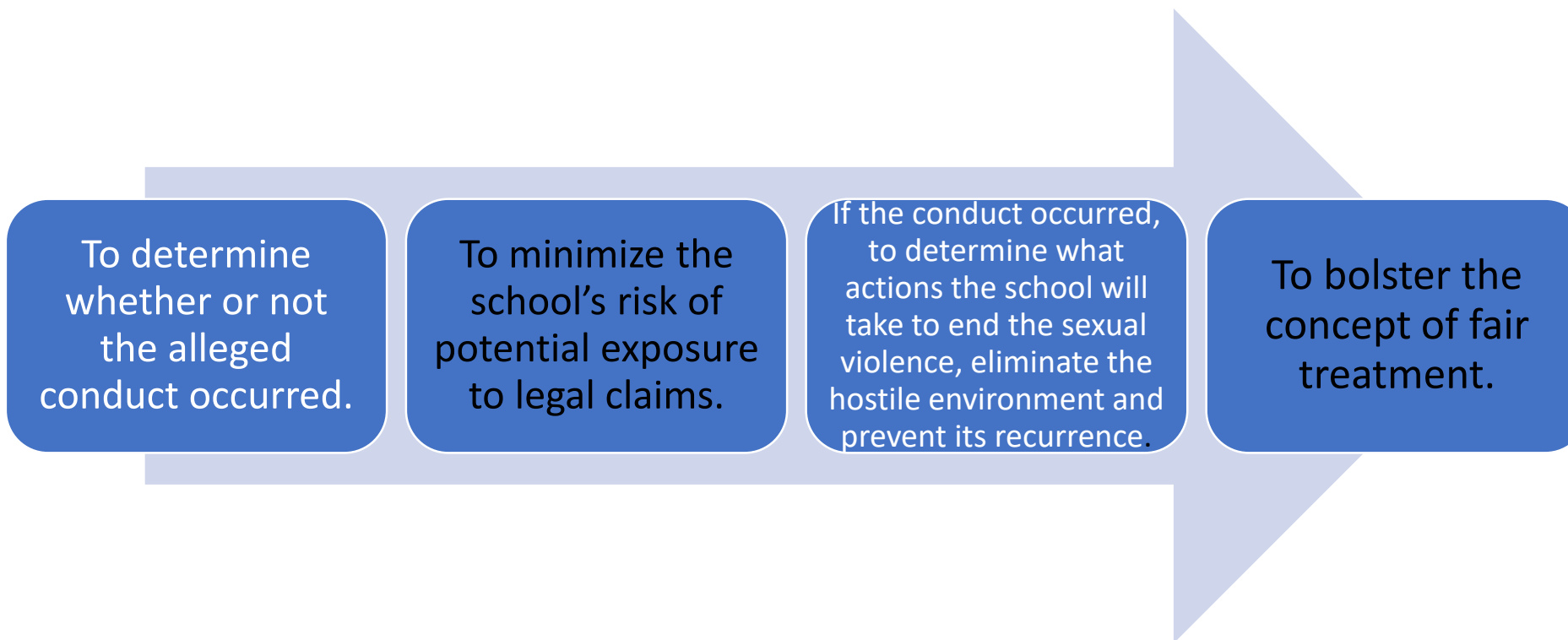
Hearing Board/Adjudicator Panel

- The BOR Uniform Policy does not mandate any specific formulation of formal adjudication such as a hearing panel, adjudicatory board, etc.
- Best practices include instituting a hearing process to ensure due process and allow students an opportunity to be heard.



Hearings: Overview

Why Do We Conduct Hearings For Incidents of Sex Discrimination?





Primary Function of the Hearing Panel

- Hear the facts and circumstances of an alleged policy violation as presented by the investigator, an alleged victim, the accused and/or any witnesses.
- Determine if a policy violation has occurred.
- Decide whether/what sanctions and remedial measures are appropriate.

Preparing for the Hearing: The Game Plan

- Plan to determine what facts are in dispute. What are the key issues to resolve this case?
- What's relevant? What information would you like to know? Anything that could make a fact at issue more or less likely is usually worth a look.
- What witnesses may possess key or relevant information? Are they on the witness list?
- Prepare specific questions as needed to clarify items that are unclear and follow up on leads
- Clarify slang or unfamiliar terms



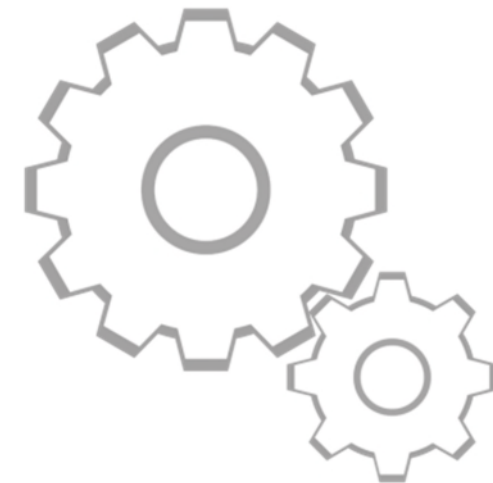
The Sexual Misconduct Hearing Board: Virtues of a Hearing Board Member

- Be patient.
- Listen.
- Don't cut off questions prematurely.
- Don't draw any conclusions until all evidence and testimony is presented.
- Be thorough and thoughtful.
- Be fair.
- Be mindful of the seriousness of the situation.



Formal Resolution Hearings

1. Introductions and Opening Statements
2. Questioning of the Investigator
3. Facilitated Q&A
4. Calling and Questioning of Witnesses (Pursuant to the Title IX Regulations, cross-examination to be conducted only by a Party's Advisor).
5. Closing Statements
6. Deliberations



Hearing Procedure

1. INTRODUCTIONS AND OPENING STATEMENTS:

- From the Investigator: The Investigator may give a statement containing a summary of his or her factual findings
- From the Complainant and the Respondent: Each party will have the option to provide an introduction and an opening statement, summarizing his or her position.

2. QUESTIONING OF THE INVESTIGATOR:

- By the Hearing Board: Following the Investigator's summary statement the Sexual Misconduct Hearing Board will have an opportunity to question the Investigator.
- By the Complainant and the Respondent: Following the Investigator's summary statement, the Complainant and Respondent will have an opportunity to question the Investigator.

Hearing Procedure

3. FACILITATED Q&A BETWEEN THE PARTIES:

- Questions between the Complainant and the Respondent should be directed to the Board Chair, who will facilitate such questioning.
- The Board Chair will be responsible for ensuring the questioning is fair and complies with the terms of the policy.
- The Board Chair will not substantively limit the scope of the parties' questions.
- Note: Title IX Regulations dictate that, in instances adjudicated under the Title IX Formal Grievance Procedure, cross-examination must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally.

4. WITNESSES:

- **Calling Witnesses:** Each party is allowed to call and is responsible for the attendance of his or her own witnesses. Board has discretion as to order of called witnesses, although typically Complainant's witnesses will precede Respondent's witnesses.
- **Obtain Witnesses' Affirmations:** Ask all witnesses to affirm adherence to the Honor Code.
- **Exclusion of Prospective Witnesses:** Prospective witnesses, other than the Complainant and the Respondent, may be excluded from the hearing room during the statements of the Investigator and all other witnesses.

4. WITNESSES (continued):

- Prohibition on “Character Witnesses”: Do not consider information from witnesses who have no factual evidence or testimony but who are called solely as character witnesses. Character evidence from fact witnesses is also prohibited.
- Questioning Witnesses: The Board, the Complainant and the Respondent will have an opportunity to question witnesses who make a statement at the hearing. The Board asks the questions first, followed by the party who called the witness, then the other party.
- New information: The Board may, in its discretion, exclude or grant lesser weight to last-minute information or evidence introduced at the hearing that was not previously presented for investigation by the Investigator.

5. CLOSING STATEMENTS:

- From the Investigator: At the conclusion of the hearing, the Investigator may give a closing statement.
- From the Complainant and the Respondent: Give each party the option and chance to provide a closing statement at his or her option.

6. DELIBERATIONS

- All parties, the witnesses and the public will be excluded during Board deliberations, which **will not** be recorded or transcribed.
- Do not write down substance of discussions.
- In all cases, the Hearing Board must consider evidence presented by the Complainant, the Respondent, the Investigator and/or others and determine by a **preponderance of the evidence or by clear and convincing evidence** whether a violation of the Policy occurred, i.e., whether it is more likely than not that a Respondent violated the Policy, and impose sanctions, if any.
- The Title IX Coordinator will collect all hearing packets and your notes at the conclusion of the hearing because they typically contain students' sensitive, confidential and FERPA-protected information.



Obtaining and Reviewing Various Forms of Evidence: Dos and Don'ts

- **Do NOT** allow questions about the alleged victim's sexual history with anyone other than the Respondent.
- **Do NOT** allow testimony about a person's character at the hearing stage. Testimony should pertain only to the allegations related to the hearing.
- **DO** be patient in allowing questioning that may appear irrelevant or duplicative. However, at a certain point, the panel facilitator (i.e. the Title IX Coordinator) can decline to continue irrelevant or duplicative questioning.



Obtaining and Reviewing Various Forms of Evidence: Dos and Don'ts

- **DO** permit parties to testify in separate rooms, when necessary. However, a party must still give testimony in the presence of the panel. In such cases, the opposing party will be given an opportunity to view the testimony remotely and to submit follow-up questions. Where such a determination is made, special measures must be put in place to ensure no party is unfairly disadvantaged.
- **DO** clarify ambiguous responses.
- **DO** observe and note non-verbal behavior.

Common Pitfalls to Avoid

- Prejudging the evidence.
- Not reviewing and questioning /clarifying all evidence when you had the chance.
- Failing to let each witness “be heard.”
- Perception of taking sides.
- Be conscious of your body language at the hearing.
- Going too far... crossing the line into invasion of privacy, intimidation, etc.
- Failing to adequately document your conclusions.
- Failing to protect/preserve confidentiality.



Evidentiary Considerations

Evaluating the Evidence

- Know the definitions of “consent,” “incapacitation,” and any other relevant terms defined in the policy.
- Focus on the facts.
- Do not consider irrelevant information or allow it to impact your deliberations.
- Determine the credibility of witnesses by considering:
 - Sensibility/reasonableness
 - Demeanor
 - Motive to Falsify
 - Corroborating Evidence (especially in cases involving incapacitation)
 - Contradictory evidence
 - Common Sense
- Facts > gut instincts or beliefs.

Evaluating Evidence

- The investigator should not filter information that may be necessary to the panel's review but, instead, gather facts and present them for its consideration.
- The panel decides:
 - disputes of facts;
 - weight of evidence; and
 - relevance.
- The panel serves as the fact-finder.
- Consider trauma reactions.



Using Trauma-Informed Techniques to Evaluate Evidence

- At the beginning, say something like “I’m going to ask a lot of questions to clarify”
- If possible, allow the party to give an uninterrupted narrative. Later, go back and ask questions
- Avoid “why” questions
- Asking about sensory information may lead to the details you need: “when ____ happened, what did you see?” “If you did, how did you communicate that you didn’t want to do that?” “are there any images, sounds, or smells that keep coming back to you?”
- Listen for course of conduct, power and control



Using Trauma-Informed Techniques to Evaluate Evidence





Evaluating Consent

- **Consent:** Consent to engage in sexual activity must exist from beginning to end of each instance of sexual activity.
 - Consent is demonstrated through **mutually understandable words and/or actions** that clearly indicate a willingness to engage in a specific sexual activity.
 - **Silence alone, without actions evidencing permission, does not demonstrate Consent.** Consent must be **knowing and voluntary**.
 - To give Consent, a person must be of legal age.
 - Assent does not constitute Consent if obtained through coercion or from an individual whom the Alleged Offender knows or reasonably should know is **Incapacitated**.
 - The responsibility of obtaining Consent rests with the person initiating sexual activity.
 - Use of alcohol or drugs does not diminish one's responsibility to obtain Consent.
 - **Consent to engage in sexual activity may be withdrawn by any person at any time.**
 - Once withdrawal of Consent has been expressed, the sexual activity must cease.
 - Consent is automatically withdrawn by a person who is no longer capable of giving Consent.
 - A current or previous consensual dating or sexual relationship between the parties does not itself imply Consent or preclude a finding of responsibility.

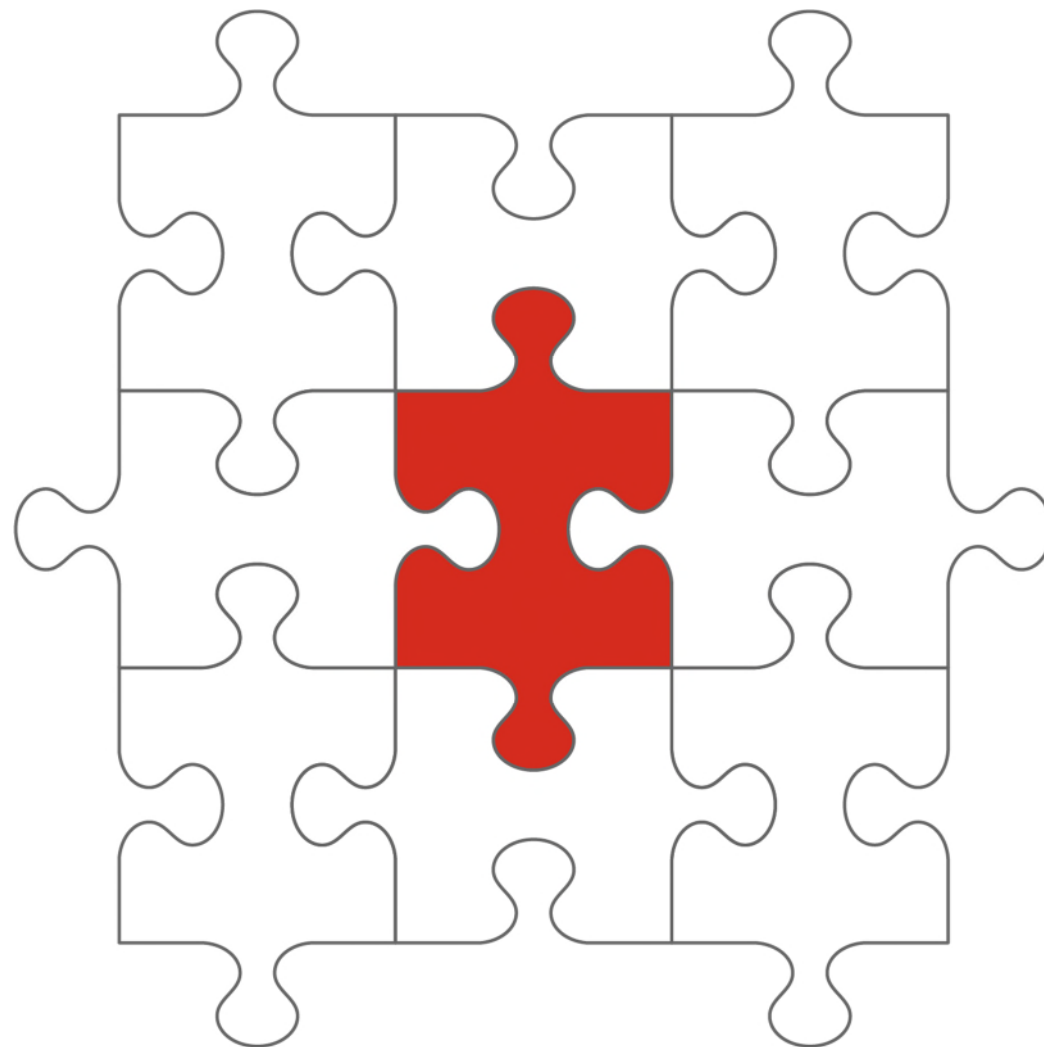
Evaluating Consent

- ▶ **Incapacitation:** An individual is considered to be incapacitated if, by reason of mental or physical condition, the individual is manifestly unable to make a knowing and deliberate choice to engage in sexual activity. Individuals who are asleep, unresponsive, or unconscious are incapacitated.
 - ▶ Other indicators that an individual may be incapacitated include, but are not limited to, inability to communicate coherently, inability to dress/undress without assistance, inability to walk without assistance, slurred speech, loss of coordination, vomiting, or inability to perform other physical or cognitive tasks without assistance.

BOR Uniform Policy XVI(A)

Incapacitation

- Manifestly unable to make a knowing and deliberate choice to engage in sexual activity.
- Can result from mental disability, sleep, involuntary physical restraint, or from intentional or unintentional taking of alcohol and/or other drugs.
- Whether someone is incapacitated is typically judged from the perspective of an objectively reasonable person.



Evaluating Consent





Sanctions

Sanctions

If the Board/Panel finds an individual in violation of the policy, the following criteria may be considered, among other factors, when determining sanctions:

- ✓ The nature and severity of the violation(s);
- ✓ The Institution's responsibility to ensure appropriate behavioral standards for the Campus Community;
- ✓ The requests of the Complainant and the impact of the violation(s) on the Complainant;
- ✓ The level of cooperation of the Respondent during the disciplinary processes;
- ✓ Any prior disciplinary action of the Respondent or violations of this policy by the Respondent (prior discipline will be considered only when determining sanctions); and
- ✓ Whether other judicial measures have been taken to protect the Complainant or discipline the Respondent (e.g., civil protection orders).

Sanctions

- Institutions should describe the range of sanctions for employees and students.
 - Individual campuses have discretion to choose appropriate sanctions. These may include, but are not limited to:
 - Residence hall suspension/expulsion
 - Disciplinary probation
 - Warnings
 - Fines
 - Loss of privileges
 - Restitution
 - College/university suspension/expulsion





Appeals

Appeals

- Appeals should only be raised on one or more of the following grounds, for example:
 - a procedural irregularity that affected the outcome of the matter;
 - to consider new facts or information that were not known or knowable to the appealing party before or during the time of the resolution and that are sufficient to alter the decision;
 - the Title IX Coordinator, Investigator, or Adjudicator(s) had a conflict of interest or bias that affected the outcome of the matter (34 C.F.R. 106.45(b)(8)(i)-(ii));
 - the decision reached was not supported by [an Institution's chosen burden of proof]; or
 - the sanctions were disproportionate to the findings.
- As to all appeals the Institution should, at a minimum:
 - Notify the other party in writing when the appeal is filed and implement appeal procedures equally for both parties;
 - Ensure the decision maker(s) for the appeal **is/are not** the same individual(s) who reached the determination regarding responsibility or dismissal, the Investigator(s) or the Title IX Coordinator;
 - Give both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the outcome;
 - Issue a written decision describing the result of the appeal and the rationale for the result; and
 - Provide a written decision simultaneously to both parties.

✓ **Appeals Board Decisions Are Final and Conclusive**

(But, a private right of action remains.)



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