

Adjudicator Training

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EHC
Campus and Workplace Solutions

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Agenda

- 1 The End in Mind
- 2 Relevance
- 3 Preparation
- 4 Managing a Hearing
- 5 Decision-Making and Writing




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Section 1

The End in Mind



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Keep the End in Mind

Title IX Regulations Require the Determination of Responsibility to Include:

- Identification of allegations potentially constituting sexual harassment as defined in regs
- Conclusions regarding the application of the code of conduct to the facts
- Description of procedural steps taken throughout
- Statement of and rationale for:
 - The result as to each allegation, including a determination regarding responsibility
 - Any sanctions the recipient imposes
 - Any remedies provided to the complainant designed to restore or preserve access to the program or activity
- Findings of fact used to support the determination

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Section 2

Relevance



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Relevance- Title IX

Investigators must create an investigative report that fairly summarizes relevant evidence.
Hearing officers must also focus on relevance.

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Relevant and Probative?

Relevance

the tendency of a given item of evidence to prove or disprove one of the elements of the case, or to have probative value to make one of the elements of the case likelier or not.

Probative

“tending to prove.” Probative evidence “seeks the truth.”
Tends to prove the proposition for which it is proffered.



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Credibility Determinations

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Credibility Determinations

The EEOC recommends using the following information to assess credibility:

- **Plausibility.** Is the witness's version of the facts believable? Does it make sense?
- **Corroboration.** Are there documents or other witnesses that support the witness's version of events?
- **Demeanor.** Does the witness seem to be telling the truth?
- **Past record.** Does the alleged wrongdoer have a past record of inappropriate conduct?
Use appropriately.
- **Motive.** Does the person have a reason to lie?



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Exercise




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Section 3
Preparation



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Preparing for a Hearing

- 1 Get your policy out
- 2 Report AND COMMENTS review
- 3 It's elemental.....
- 4 Questions




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1. Prepping


- Policy
- Definition
- Elements




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Elements



Parts of a whole.



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3. Element

- *(noun)* a component or constituent of a whole or one of the parts into which a whole may be resolved by analysis.



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2. Report Review- It's Elemental

- What are you looking for?
- Relevance- in report but what is your determination?
- Consistency, credibility
- Objective evaluation
- Inculpatory and exculpatory
- What is missing?



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4. Creating Your Questions. Curiouser and curiouser...

- What is missing?
- What do you want to know?
- What do you want to test?
- What do you need to test?



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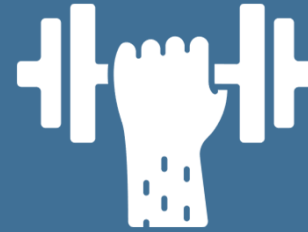


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Exercise



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Section 4

Managing a Hearing



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Hearing- Live with Cross Examination

- The decision-maker must explain to the party's advisor asking questions any decision to exclude questions as not-relevant (include relevant).
- If a party or witness does not submit to cross examination at the hearing, the decision maker must not rely on any *statement* of that party or witness in reaching a determination regarding responsibility the investigation.
- Provide both parties equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including evidence that the recipient *does not intend to rely upon in reaching a determination regarding responsibility*.

No assumptions about the party may be made if they do not appear.



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Parties, advisors, hearing officers, and panelists.
What happens if someone shows up without an advisor?

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Hearing Prep

- 1 Technical set up
- 2 Evidence availability
- 3 Housekeeping & agenda
- 4 Ground rules & expectations of behavior



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Off we go

- 1 Introduction
script
- 2 Sequence
script
- 3 Assessing questions
script
- 4 Your checklist and outline
- 5 What ifs.....?



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Adjudicator

- **Reads script outlining process**
Will parties provide opening statements?
Do you want those in advance?
Will you ask follow-up questions after cross?
- **Asks questions**
Kicking the tires on key facts that relate to the elements
Kicking the tires on relevant information that relates to credibility
- **Then to the parties for cross.**
Who goes first?
- **What is your script for assessing and deciding relevancy determinations?**
- **What is your script for addressing behavior?**
- **What is your script for concluding one side's cross and starting the other side's cross?**
- **What is your script for closing hearing?**



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Title IX Quiz: relevant or permissible?

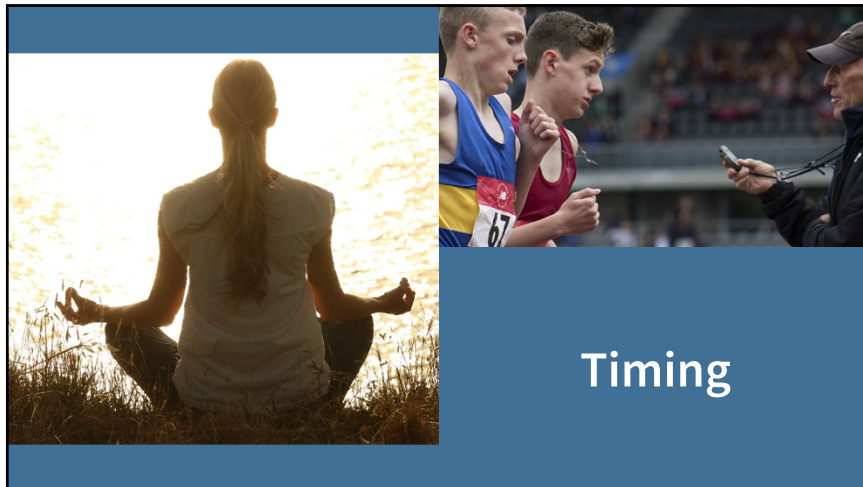
- **Questions and evidence about complainant's sexual predisposition or prior sexual behavior**
- **Questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege**
- **Expert witnesses**



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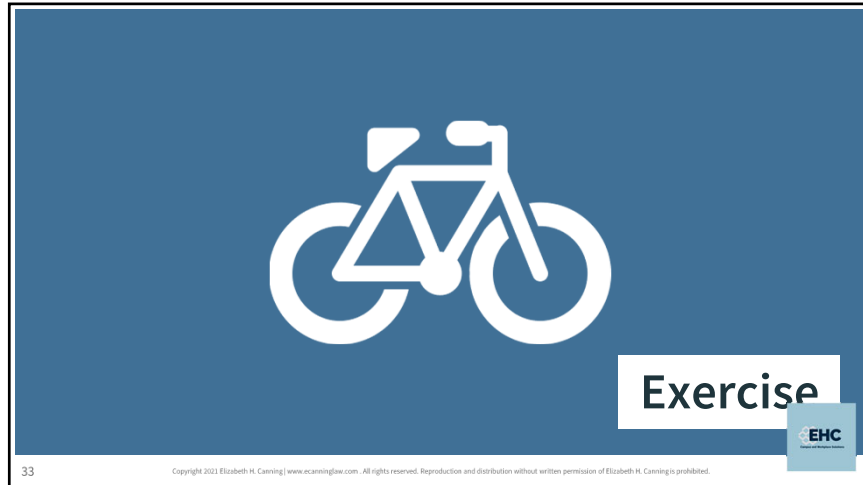
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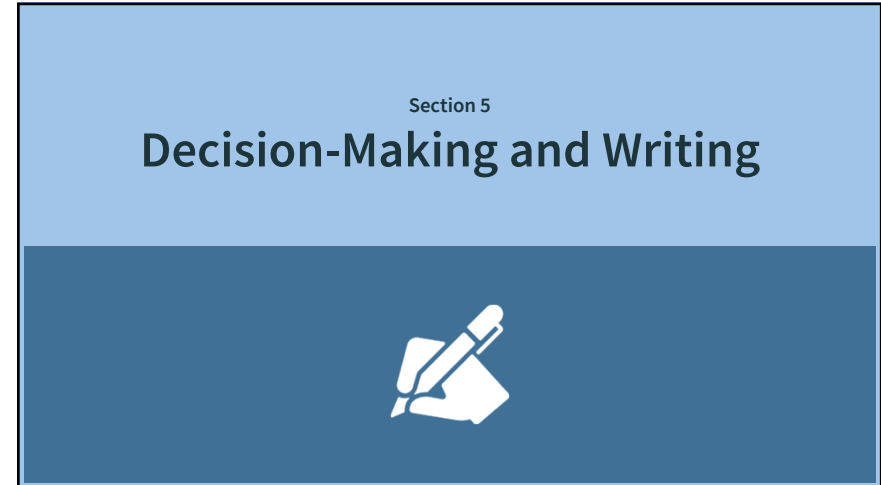
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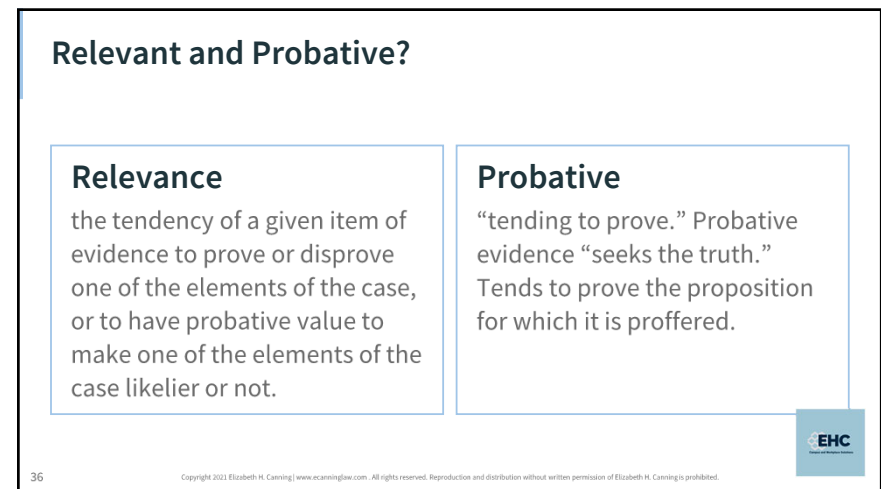
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Let's
Talk
about...



Elements



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106.30 Definitions

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
- ② Unwelcome conduct on the basis of sex that is so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the recipient's education program or activity
- ③ Sexual assault, as defined in 20 USC 1092(f)(6)(A)(v), dating violence as defined in 34 USC 12291(a)(10), domestic violence as defined in 34 USC 12291(a)(8) or stalking as defined in 34 USC 12291(a)(30)



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Element breakdown

- Employee
- Conditioning the provision of an aid, benefit, or service of the recipient
- on an individual's participation
- in unwelcome
- sexual conduct



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Elements- sexual harassment

- Unwelcome
- Conduct on the basis of sex
- Severe, pervasive AND objectively offensive
- that it *effectively denies a person equal access* to the recipient's education program or activity



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Focusing In

- So severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.
- *“The objective nature of the inquiry simply means that evaluation is made by a reasonable person considering whether, standing in the shoes of the complainant, the conduct would be offensive.”*
- *“The reasonable person standard appropriately takes into account whether a reasonable person, in the position of the particular complainant, would find the conduct offensive.”*

Quotations from DOE commentary in unofficial version p. 514



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Consent

- A clear, knowing, and voluntary agreement to engage in specific sexual activity at the time of the activity.

Consent can be communicated by words or actions as long as those words or actions create mutually understandable permission regarding willingness to engage in (and the conditions of) sexual activity.

- See also: coercion and incapacitation



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Rape

- The carnal knowledge of a person
- without consent of the victim



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Title IX Fondling

- The touching of the private body parts
- of another person
- for the purpose of sexual gratification
- without consent of the victim

including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.



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Dating Violence

- Violence committed by a person—(A) who is or has been in a social relationship of a romantic or intimate nature with the victim; AND
- (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) The length of the relationship.
 - (ii) The type of relationship.
 - (iii) The frequency of interaction between the persons involved in the relationship.



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Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - (A) fear for his or her safety or the safety of others; or
 - (B) suffer substantial emotional distress



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Credibility Determinations



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Objective Evaluation

Reasonable standard.

No bias.
Challenge the evaluation when necessary.



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Credibility Determinations

The EEOC recommends using the following information to assess credibility:

- **Plausibility.** Is the witness's version of the facts believable? Does it make sense?
- **Corroboration.** Are there documents or other witnesses that support the witness's version of events?
- **Demeanor.** Does the witness seem to be telling the truth?
- **Past record.** Does the alleged wrongdoer have a past record of inappropriate conduct?
- **Motive.** Does the person have a reason to lie?


Use appropriately.



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Consistency



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Making a Decision

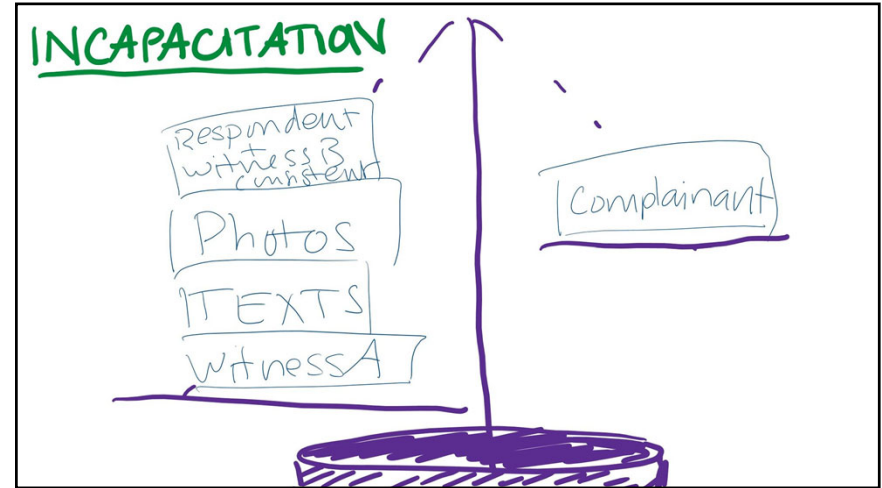


- Findings of fact used to support determination
- Conclusions regarding application of the code to the facts
- Statement and rationale for:
 1. The result as to each allegation, including a determination regarding responsibility
 2. Any sanctions the recipient imposes
 3. Any remedies provided to the complainant designed to restore or preserve access to the program or activity

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Put the Determination of Responsibility Together

Title IX Regulations Require the Determination of Responsibility to Include:

- Identification of allegations potentially constituting sexual harassment as defined in regs
- Description of procedural steps taken throughout
- Findings of fact used to support the determination
- Conclusions regarding the application of the code of conduct to the facts
 - Do not forget to note the application of the preponderance of the evidence standard
- Statement of and rationale for:
 - The result as to each allegation, including a determination regarding responsibility
 - Any sanctions the recipient imposes
 - Any remedies provided to the complainant designed to restore or preserve access to the program or activity

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Information Build Up- Reflective and Repetitive

- 1 Complaint
- 2 Notice of Investigation
- 3 Investigation Report
- 4 Notice of Outcome

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Appeals

- **Parties may appeal:**

Determination regarding responsibility and
Dismissal of a formal complaint or an allegation
thereof



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Appeal grounds

- 1 Procedural irregularity
- 2 New evidence that was not reasonably available at the time of determination regarding responsibility or dismissal was made, that would affect the outcome of the matter
- 3 The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against parties generally or the individual party that affected the outcome of the matter
- 4 Other bases determined by the school, provided offered to both parties



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Thank you!

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