


WALSH UNIVERSITY

**HEARING PANEL
TRAINING**


MAY 27, 2021

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Presentation Rules 

- Questions are encouraged
- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns

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Agenda 

- **REVIEW:** analyze hypothetical report and answer any questions regarding process, review policy elements, jurisdiction, and cross-examination/relevancy (9:00 a.m. – 10.15 a.m.)
- Break (10:15 a.m. – 10:30 a.m.)
- **PRACTICE:** facilitated hearing practice sessions for participants to witness portions of a mock hearing and then participate as well. (10:30 a.m. – 11:40 a.m.)
- **PROCESS:** Review of any lingering questions. (11:40 a.m. – 12:00 p.m.)

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Hypothetical Review (1 of 2)



1. Review the potential policy violations and create the list of elements that need to be proved. (Use Report and Policies)
2. Read the report with an eye toward:
 - (a) Which elements are not in dispute (if any)?
 - (b) Which ones are disputed?
 - (c) Are there elements that, even if there's no dispute about the facts, are not able to be proven by a preponderance of the evidence?
3. Identify potential credibility issues. (E.g. bias, lack of first-hand knowledge, memory impairment, failure to provide available information, lack of corroborating information when it should exist, etc.)

Hypothetical Review (2 of 2)



4. Is there information that would be excluded by regulations as "not relevant"?
 - Sexual history of Complainant? Privileged information? Medical records w/out consent?
 - Are there potential areas of inquiry where these would come up?
5. What parts of the Report do you want to clarify or explore? Is there something that does not make sense?
 - Remember that the parties have seen the report and have had the opportunity to provide comments and additional information; if new information comes up in the hearing, be alert! And ask why this information is being shared now.

Review of Training Report: Policy Elements, Jurisdiction

What are the Policy Violations?



Title IX Policy:

- Quid Pro Quo; and
- Hostile Environment Sex-Based Harassment.

Non-Discrimination:

- Harassment and Discrimination

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Title IX Sexual Harassment: Quid Pro Quo



Quid Pro Quo Sex-Based Harassment: unwelcome sexual advances, requests for sexual favors, or other unwelcome sexual conduct by an employee of the College if the submission to or rejection of such conduct is used as a basis for or a factor in decisions to provide aid, benefit, or service in College programs or activities.

Elements:

1. Unwelcome
2. sexual advances, requests for sexual favors, or other sexual conduct by an employee of the College; [and]
3. the submission to or rejection of such conduct is used as a basis for or a factor in decisions to provide aid, benefit, or service in College programs or activities.

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Title IX Sexual Harassment: Quid Pro Quo



Unwelcome

sexual advances, requests for sexual favors, or other sexual conduct by an employee of the College

the submission to or rejection of such conduct is used as a basis for or a factor in decisions to provide aid, benefit, or service in College programs or activities?

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**Title IX Sexual Harassment:
Hostile Environment**



Hostile Environment Sex-Based Harassment: unwelcome sex based conduct that is determined by a reasonable person standard to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to College benefits, services, programs, or activities. Sexual harassment may occur via various communication devices, via social media, or via the Internet. Conduct reported as sexual harassment will be evaluated by considering the totality of the particular circumstances, including the nature, frequency, intensity, location, context, and duration of the questioned behavior. Although repeated incidents generally create a stronger claim of sexual harassment, a serious incident, even if isolated, may violate this policy.

Elements:

1. Unwelcome sex based conduct;
2. That is **severe, pervasive and objectively offensive**;
3. Based on a reasonable person standard.

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**Title IX Sexual Harassment:
Hostile Environment**



Unwelcome sex based conduct;

That is **severe, pervasive and objectively offensive**;

Based on a reasonable person standard.

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**Non-Discrimination:
Discrimination and Harassment (1 of 2)**



It is the stated policy of Walsh University to promote and maintain a campus environment free from all forms of discrimination, intimidation, and exploitation, including sexual harassment. ***The use of one's institutional position or authority to promote discrimination against any individual or group or to solicit unwelcome sexual relations with a member of the Walsh University community*** is incompatible with the mutual trust and respect among the University community fundamental to the mission of the University. Discrimination and sexual harassment are considered unethical and unprofessional activities, especially when they involve persons of unequal power, authority, or influence. Furthermore, discrimination and sexual harassment are illegal under Title VII of the 1964 Civil Rights Act.

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**Non-Discrimination:
Discrimination and Harassment (2 of 2)**

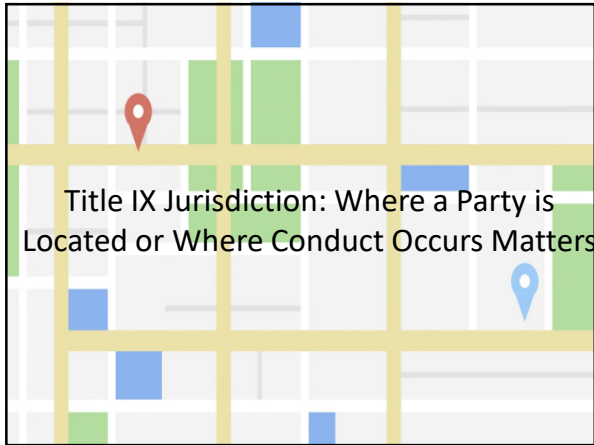


The use of one's institutional position or authority

to promote discrimination against any individual or group or

to solicit unwelcome sexual relations with a member of the Walsh University community

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Jurisdiction



- A recipient with **actual knowledge** of sexual harassment in an **educational program or activity** of the recipient against a **person in the United States, must respond promptly in a manner that is not deliberately indifferent.**
- **“Education program or activity”**: “includes **locations, events, or circumstances** over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.” §106.30(a)

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Off Campus conduct?



Two of the three conditions that can extend Title IX jurisdiction off campus are implicated by the report:

- (1) Incident occurs as part of the recipient's "operations" (meaning as a "recipient" as defined in the Title IX statute or the Regulations 106.2(h));
- (2) If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus

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Hypothetical: Title IX Jurisdiction



Issue: Did the reported conduct meet the definition of educational program or activity?

- Where did each incident of the reported conduct occur?
- If off-campus, did Walsh University exercise substantial control over the context of the harassment and the respondent? Was it part of the University' operations?

[Discussion of on-campus and off-campus conduct in Report]

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LIVE CROSS-EXAMINATION: Review

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Cross Examination



Traditionally, cross examination questions are those that try to elicit "yes" or "no" answers, not explanations.

Examples:

- You were at the party that night, weren't you?
- You'd agree with me that you had three beers, wouldn't you?
- You didn't call an Uber, did you?

Live Cross-Examination: Theory



- Essential for truth seeking (30313)
- Provides opportunity of both parties to **test "consistency, accuracy, memory, and credibility"** so that the decision-maker can better assess whether a [party's] narrative should be believed" (30315)

Live Cross-Examination: Theory



- Provides parties with the opportunity to "direct the decision-maker's attention to **implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility**" in the other party's statements. (30330)
- Promotes transparency and equal access (30389)

Live Cross-Examination: Regulations



In this process:

- Decision-maker must permit each party's advisor to ask the other party and any witnesses **all relevant** questions and follow-up questions, including those challenging **credibility**
- Must be conducted directly, orally, and in real time by the party's advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

Credibility Issues in Report



- What are the inconsistencies between Complainant, Respondent, and Witness information?
- What are the potential impacts on memory, accuracy, consistency, etc.? E.g. Prof. Miller (alcohol use, employment concerns?) and Zoe (incomplete information on impacts – compare Sarah's information about alcohol and drug use with Zoe's lack of information on that point)
- How do we handle missing/deleted/not provided text messages? Zoe (deletion rule on her iPhone) and Prof. Miller (new phone, no texts).
- Others?

Live Cross-Examination: Regulations



- **Before a party or witness may answer a question, the decision-maker must first determine whether the question is relevant and explain the reason if not relevant**

What is Relevant?



Under the **preponderance of the evidence** standard:

- Does this help me in deciding if there was more likely than not a violation? Is it related to an element of the prohibited conduct?
- Does it make it more or less likely?
- Why or why not?

If it doesn't move this dial: likely not relevant.

Relevancy: Not Relevant



The Department has determined that recipients must consider relevant evidence with the following exceptions:

- (1) Complainant's sexual behavior or disposition (except for two narrow exceptions):
 - its use is to prove that someone other than the Respondent committed the conduct, OR
 - it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent
- (2) information protected by a legal privilege
- (3) party's treatment records (absent voluntary written waiver by the party) (30337)

9 Tips for Hearing Panelists

#1 Keep an Open Mind



- Keep an open mind until all statements have been tested at the live hearing
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the evidence that can remain (statements in the record might have to be removed from consideration if not tested in live-hearing)

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#2 Sound, Reasoned Decision



- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

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#3 Consider All/Only Evidence



- You must make a decision based solely on the relevant evidence obtained in this matter and only statements in the record that have been tested in cross-examination
- You may consider nothing but this evidence

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#4 Be Reasonable and Impartial



- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any actual or perceived conflict of interest

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#5 Weight of Evidence



- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

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#5 Weight of Evidence



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

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#6 Evaluate Witness Credibility



- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.

#6 Evaluate Witness Credibility



- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

#6 Evaluate Witness Credibility



- Credibility is determined fact by fact, not witness by witness
 - The most earnest and honest witness may share information that turns out not to be true

#7 Draw Reasonable Inferences



- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning.

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#8 Standard of Evidence



Use the your standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.

- Preponderance of the evidence: a fact is more likely than not to be true (30373 fn. 1409)

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#8 Standard of Evidence



- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

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#9 Don't Consider Impact



- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.
- **Do not consider the impact of your decision.**

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Questions?

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