

Student Sexual Misconduct Hearings

Guidance for Hearing Examiners and Committees

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Based on information provided by the Office of General Counsel
University of Wisconsin System

Introduction

- Institutions of higher education have an ethical and legal obligation to promote campus environments that are safe and welcoming and conducive for effective teaching and learning
- Part of this obligation requires that institutions take seriously their commitment towards effectively and compassionately preventing and responding to issues of sexual misconduct on campus

Introduction

- Among these actions is to provide training to those who will “adjudicat[e]” complaints of sexual harassment and sexual violence
- Today’s workshop is offered both to satisfy this expectation and to supplement what many of our institutions are already offering in terms of practical training for our student misconduct hearing examiners and panel members and continue to raise awareness about the important issue of campus sexual violence

Important Themes to Keep in Mind

- Use of words and phrases (“sexual misconduct,” Title IX, complainant, respondent)
- Topic is sensitive and may trigger varied reactions and responses
- Discussion should be respectful and courteous
- Hearings are not trials. It is not a legal proceeding, although at times it may feel that way. This training is for non-attorneys who will be conducting the hearings

Competencies

- Understanding the special aspects of sexual assault cases
- Possessing familiarity and compliance with rules
- Being fair and impartial
- Promoting institutional values



Understanding Special Aspects of Sexual Assault Cases

- Addressing myths and assumptions and biases
- Challenges of talking about “what happened” for all involved
- Impact of trauma
- Few or no witnesses other than individuals involved
- Little to no physical evidence
- Potential impact of drugs/alcohol
- Interplay with law enforcement
- Parity of rights in proceedings
- Terminology



Myths and Assumptions

- A victim will recognize immediately that the assault occurred and will likewise report it immediately
- Sexual assault most often occurs between strangers
- Sexual assault is fundamentally about sex
- False reports are common
- Only heterosexual women are victims of sexual assault



More Myths and Assumptions

- Previous consent to sexual intercourse implies later consent
- Victims are responsible for sexual assault due to inappropriate clothing or use of alcohol or drugs
- Individuals in relationships cannot be sexually assaulted
- Victims of sexual assault will respond, heal, or tell their story in a particular way



Definitions

Sexual assault: An offense that meets the definition of rape, [fondling](#), [incest](#), or [statutory rape](#) as defined by 20 U.S.C. 1092(f)(6)(A)(v), 34 CFR 668.46(a).

(see handout of full list of definitions)



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Definitions

Sexual Harassment: Conduct on the basis of sex that satisfies one or more of the following:

- An employee of the institution conditions a benefit on a student's unwelcome sexual conduct
- Unwelcome conduct of a sexual nature directed towards a person participating in a program or activity of the university that:
 - Is so severe, pervasive, and objectively offensive that it effectively denies the person equal access to the institution's education program or activity or
 - Is so severe or pervasive and objectively offensive that it has the purpose or effect of unreasonably interfering with an individual's academic or work performance or participation in an university sponsored or supported activity, or creates an intimidating, hostile, or offensive academic, working, or program or activity related environment.



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Impact of Trauma

Understanding how trauma can inform how a victim might respond

- Symptoms can include flashbacks, fear, anger, change in appetite, concentration problems, changes in sleep patterns, memory loss
- No “typical” response during or following an assault; some behavior may seem counterintuitive



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Intent vs Impact

INTENT VS IMPACT

In 2014, Bombay High Court ruled:

“Even if you keep your hand on the shoulder of a woman, it is for the lady to comment on the nature of the touch, whether it was friendly, brotherly or fatherly.”

In other words, only a woman/girl can decide the nature of the touch; it is not the intent, but is the perception and impact which determines whether or not an act is sexual harassment.



“In the end what does the intent of our action really matter if our actions have the impact of furthering the marginalization or oppression of those around us?”

- Jamie Utt

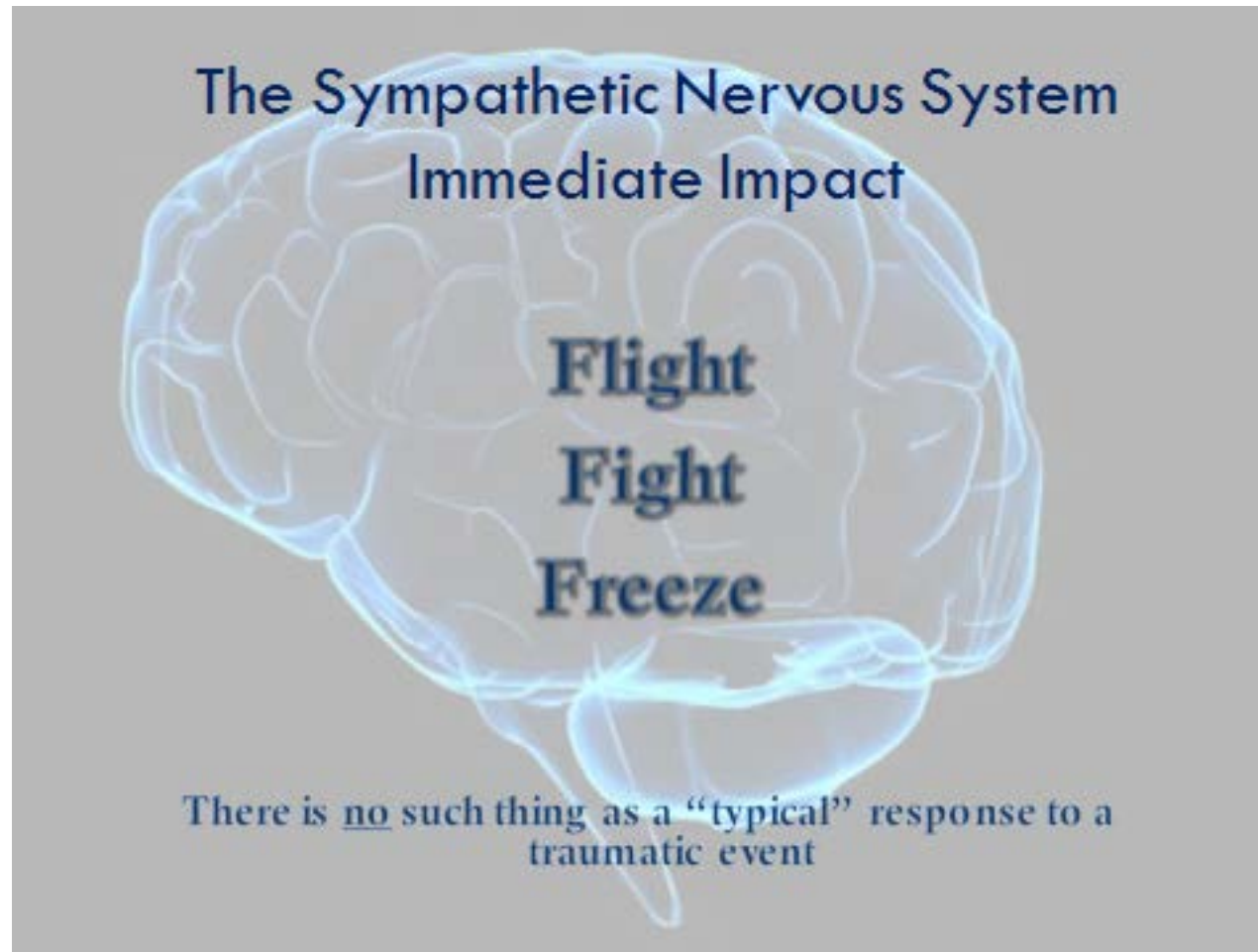
Please note: the statement made in the above picture states woman/girl. This is intended to mean “person who is being touched”, regardless of sex or gender.)

Information retrieved from <https://everydayfeminism.com/2013/07/intentions-dont-really-matter/>



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Flight, Fight, Freeze



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The Brain and Body

Release of chemicals

- Catecholamine: Fight-Flight-Freeze
- Cortisol: makes energy quickly available
- Opioids: reduces pain
- Oxytocin: produces a good feeling

Chemicals involve the amygdala & the hippocampus of the brain

- Inhibits processing events into memory and memory consolidation
- Memory *may be* recalled over time
- *Alcohol can impede memory – no memory to recall.

Campbell, R. (2012). *Research for the real world: The neurobiology of sexual assault* [webinar]. National Institute of Justice.
Retrieved from <http://nij.gov/multimedia/presenter/presenter-campbell/Pages/welcome.aspx>



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What this can look like...

- Inability to process timeline of events
- Inability to remember some or all of events
- Memory scatter
- Flat affect
- Unpredictable behavior (smiling, laughing, disruptive, violent)
- Tonic Immobility (TI)- also known as Rape-induced paralysis. Uncontrollable response to extreme fear

(Campbell, 2012)



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How do we respond?

Validation

Empathy

Allowing time

Realistic expectations

Consideration

Understanding

*Risks v Benefits to victim = Recant or Continue
What is in their own best interest?*



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Familiarity and Compliance with Applicable Rules

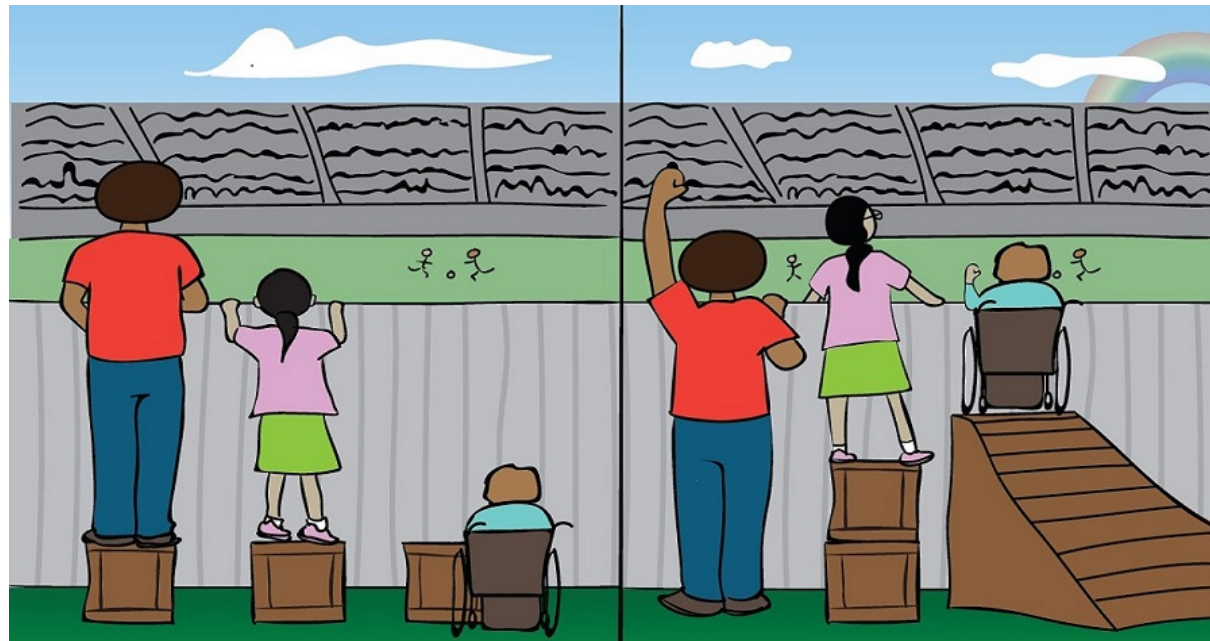
- Administrative Code (Chapter UWS 17)
- Institutional Rules
- Title IX, VAWA and federal guidance
- Constitution (Due Process)



Fairness/Impartiality

- Treating the parties in a way that does not favor one over the other; does not necessarily mean the *same*
- *What about implicit bias?*

Equality vs Equity



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Hearing Stages

Background

Prehearing

Hearing

Post-Hearing

Disciplinary Timeline – After Alleged Misconduct Occurs

Initial Resource Meetings

- Title IX Coordinator “promptly” contacts the complainant and offers to meet in person to provide resources and options
- If respondent is known, then the complainant is notified in the resource meeting that the Title IX Coordinator will also meet with respondent to give resources and options
- If either party wants a formal investigation, the Investigating Officer sends both parties a notice of investigation and meets with complainant, respondent, and any witnesses



Disciplinary Timeline – After Alleged Misconduct Occurs

Investigation

- Once information is gathered in the investigation, the Investigating Officer will send to each party and their advisor the evidence subject to inspection and review.
- The parties then have 10 days to review and submit a written response, which the investigator will consider prior to final report.
- Investigator reviews the responses and compiles a complete investigative report.
- Then sends that report again to the parties and their advisors to have another ten days to participate in either a live hearing or settlement agreement meeting.



Disciplinary Timeline – After Alleged Misconduct Occurs

If Live Hearing is Chosen:

- Hearing scheduled within 15 days
- Hearing held within 45 days unless agreed to by IO and student or postponed by examiner or presiding officer of committee
- Decision prepared within 14 days of the hearing
- [Accused Student /Complainant has 14 days to appeal to chancellor; chancellor has 30 days to issue his/her decision]



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Conflict of Interest Issues

- Hearing examiner/Committee member should recuse themselves if:
 - They have personal knowledge of the charges independent of their role as examiner or committee member
 - They have anything to gain personally from the outcome
 - They have personal knowledge of the parties such that it would prevent them from being impartial
 - Other reasons that would prevent the individual from being impartial or if others might reasonably question the individual's objectivity
- Obligation to disclose the *existence* of a potential conflict, not necessarily the specifics

Sensitive Proceedings

Duty of all participants to respect confidential nature of proceedings:

- Student records, including those used or created during any hearing, are protected under the federal Family Educational Rights and Privacy Act (“FERPA”). All parties to the hearing process should maintain confidentiality with regard to student records and student records information.
- General notions of respect for private information



Scenario 1

A committee member was sexually assaulted as a child, and confides this information to another committee member. The other panelist tells the committee member that he must recuse himself.



Scenario 2

You are on the hearing committee that has been asked to decide whether a male student sexually assaulted a female student. One of your colleagues approaches you to ask your impression of the case and whether you have reviewed the accused student's grades. She says she has talked to the accused student because he is one of her students. She tells you that she doesn't believe the student did it because he was a wonderful student until the University accused him of sexual assault. Now he barely comes to class, is withdrawn when he is in class, and is failing her course. How should you respond?



Role of Attorneys at Prehearing

- A student may be *accompanied* by an advisor, who may be an attorney, but the attorney may only *participate* actively in the hearing when the recommended sanction is suspension or expulsion, or where the student has been charged for a crime in connection with the same conduct; or, at the discretion of the hearing Chair.
 - No subpoena power
 - No opportunity for motions
 - Few restrictions on evidence (irrelevant or redundant)
 - Students must still answer questions directed to them
 - Unreasonable delays or continual re-scheduling need not be accommodated



Scenario 2

When the lists of witnesses are submitted, between the University, the complainant, and the accused student there are 30 witnesses listed.



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Scenario 3

The Complainant wants to have an expert in sexual assault trauma responses testify. The respondent wants to bring in her own expert to challenge the opinion of the Complainant's expert.



Scenario 4

The accused student objects to having the complainant testify by telephone or via WebEx, out of sight of him and the hearing committee. The chair of the committee overrules the objection, stating that Title IX requires that the hearing must happen in real time, but complainants have a right to be separated, with use of technology, as long as both parties can be cross examined.



Hearing Participants

- Respondent and advisor
- University Representative (IO) (and attorney)
- Complainant and advisor
- Hearing Examiner/Committee (and attorney)
- Witnesses
- Staff member coordinating witnesses and recording device



Parity of Rights

Complainant and Respondent both have right to:

- Present relevant witnesses and evidence
- Be accompanied by an advisor of choice
- Examine witnesses
- Access information to be used at hearing
- Be present during hearing



Hearing Mechanics

- The hearing will be held in closed session in a private space
- The hearing is recorded
- There may be temporary barrier installed to protect complainant and respondent from seeing one another
- The complainant may be phoned WebEx'd in
- Information may come from testimony of witnesses and documentary information
- Hearing examiner determines relevance of evidence and questions



Sample Hearing Procedure

- **Examiner/Chair opens meeting – moves to closed session**
- **Examiner/Chair introduces hearing, including parties and panelists, and reviews procedure**
- **Opening statements are made (Investigating Officer, accused student, complainant)**
- **Investigating Officer invites University's witnesses and introduces University's documents**
 - Respondent asks questions of University's witnesses
 - Complainant or representative/advocate may ask questions
 - Examiner/Committee asks questions of University witnesses
- **Respondent invites his or her witnesses and introduces documents**
 - Investigating Officers asks questions of accused student's witnesses
 - Examiner/Committee asks questions of accused student's witnesses
 - Complainant or representative/advocate asks questions of witnesses
- **Closing statements (Investigating Officer, Respondent, Complainant)**



Procedure for Closing a Hearing

- Meeting should be noticed (“Student Disciplinary Hearing” – completed by Dean of Students Office)
- Convene in open session
- Identify purpose of meeting (without names) and ask for a motion to go into closed session (or move if examiner) pursuant to sections 19.85(a) and (f) of the Wisconsin Statutes
- Vote (if committee)
- Close meeting – all who are not required to be in meeting must leave

Managing Witnesses

- **Hearing Committee/Examiner does not have subpoena power – cannot compel a witness to attend**
- **No oath administered**
- **Witnesses should be brought into the hearing one at a time and leave at conclusion of testimony and questioning**
- **Nonverbal responses should be verbalized for the record**
- **If agreed upon, it is okay to have a witness phone or videoconference in**
- **Witnesses should be reminded to respect sensitive nature of proceeding**



Evidence

- Documents and witness testimony
- Any information that has fact supporting the documentation shall be admitted
- Hearing examiner determines relevance of information and evidence
- Opening and closing statements are *argument*, not *evidence*



Special Evidence

- SANE evidence
- Trauma evidence
- Impact of alcohol/drugs
- Use of electronic evidence (texts, social media, etc.)
- Pattern evidence



Impact of Alcohol/Drugs

- **If the complainant was impaired by alcohol or drugs, hearing examiner/committee evaluates whether respondent knew or should have known that complainant was incapable of giving consent**
- **And, under Wisconsin law, whether the respondent had the purpose of having sexual contact with the person while that person was incapable of giving consent**



Impact of Alcohol/Drugs

- **Relevant concerns may include:**
 - Type and amount of alcohol/drugs
 - period over which it was consumed
 - Size of individual
 - History of use
 - Note: individual experiences vary



Electronic Evidence

- **May include:**
 - Text messages
 - Email
 - Social media (Facebook)
- **Unique aspects: Informal, transitory (in some cases), instantaneous, accuracy?**



Pattern Evidence

- **May include:**
 - Past sexual history
 - Prior “bad acts” (previous misconduct)
 - Habits, tendencies
- **Unique aspects: relevance, purpose for which it is offered, prejudicial**

Handling Alleged Procedural Violations

- Hear both sides
- Consider:
 - Is there a violation?
 - If yes, did the violation result in material prejudice to the student?
 - If yes, consider appropriate remedy.



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Effective Questioning

- Open-ended—avoid leading questions
- Use to resolve conflicts in information
- Ask brief questions; avoid multi-part questions
- Give opportunity to answer
- Do not hesitate to follow-up to clarify response
- Avoid questions that appear to “blame” either party



Effective Questioning

- **Effective questioning will help the examiner/committee:**
 - Understand if a violation of policy occurred (including all elements of the violation)
 - Make a final decision (not merely satisfy curiosity)
 - Evaluate the appropriate sanction, if any



Effective Questioning

Ask questions to help determine whether a violation of UWS 17 occurred:

- **“We understand that you (Complainant) told the investigating officer that you had a lot to drink that night. It may be helpful for us to understand how much you drank and how you felt it affected you. Can you tell us about that?”**
- **“I understand you (Respondent) told the investigating officer that the Complainant was “totally into it” when the two of you were having sex. Can you tell us how what the Complainant said or did to indicate her consent?”**



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Scenario 1

During the hearing, the IO begins asking the respondent about her prior sexual history. Her attorney objects as to relevance. Following a conference in the hallway between the IO and the accused student's attorney, they indicate to the hearing examiner that they've agreed that anyone can ask about prior sexual history.



Scenario 2

A committee member asks the accused student about an article the accused student had written in the campus newspaper in which the student was critical of the claim that sexual assault is underreported on the basis that it can't be verified.



Scenario 3

The respondent attends the hearing but refuses to talk, stating, “On the advice of my attorney, I am exercising my 5th amendment rights.”

Scenario 4

The Complainant and the Respondent meet up at a party. Complainant has a cup of jungle juice in his hand when they start talking and he tells Respondent that he just came from Ripp's Bar. A couple hours later the two meet up again at the party. According to a witness who knows the Complainant, he was much more "flirty" with the Respondent than he was earlier in the evening. They do a few shots together, and his friend gives him a "high five" as the two go upstairs and engage in sex. The next week, the Complainant tells the Dean of Students he was sexually assaulted.



Scenario 5

The Respondent's attorney begins cross-examining the Complainant during the hearing. The Complainant begins to cry and her attorney demands that cross-examination stop. How should the Hearing Examiner/Committee respond?



Scenario 6

In her testimony, the Complainant states that she would never have consented to having sex with the Respondent because she was a virgin. On cross-examination, the Respondent's attorney brings in a witness, and asks the witness how he knows the Complainant. Complainant's attorney objects on the basis that prior sexual history is inadmissible. How should the Hearing Examiner/Committee proceed?



Post-Hearing Overview

- Committee moves into closed session
- Examiner/committee deliberates; Committee votes on outcome
- Prepare written decision and deliver to student within 14 days



Preponderance of the Evidence Standard

“Preponderance of the evidence” means information that would persuade a reasonable person that a proposition is more probably true than not. It is a lower standard of proof than “clear and convincing evidence” and is the minimum standard for a finding of responsibility under Chpt. UWS 17

- It is used in all disciplinary hearings where the alleged violation involves sexual assault or sexual harassment (regardless of the proposed sanction)



Deliberations

- Unless deliberations follow hearing, have to provide notice of meeting per Open Meeting Law
- Encourage discussion
- Discuss only information presented at the hearing
- Remember charge: Did University prove violation of code of conduct per evidentiary standard (preponderance of evidence) and if so, what sanction is warranted?
- Try to achieve consensus of Committee on result and basis for decision

Question for Deliberations

1. Did the alleged misconduct occur?
 - Focus on evidence (testimony, documentation), not argument or opinion
 - Look at elements of the alleged misconduct—each must be met
2. Do you consider the witnesses credible?
 - Corroboration
 - Generalities vs. detailed recollection
 - Resolving/reconciling timelines
 - Explanations for inconsistencies
 - Any motive that might shape a particular response



Sanctions Permitted by UWS 17.10

The disciplinary sanctions that may be imposed for nonacademic misconduct, in accordance with the procedures of ss. [UWS 17.11](#) to [17.13](#), and 17.17 to 17.19 are one or more of the following:

- (a) A written reprimand.
- (b) Denial of specified university privileges.
- (c) Payment of restitution.
- (d) Educational or service sanctions, including community service.
- (e) Disciplinary probation.
- (f) Imposition of reasonable terms and conditions on continued student status.
- (g) Removal from a course in progress.
- (h) Enrollment restrictions on a course or program.
- (i) Suspension.
- (j) Expulsion.



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Sanctions

- **The Committee/examiner has the authority to impose any sanction up to including that recommended by the IO**
- **However, the committee may not impose sanctions of restrictions on a course or program, suspension, or expulsion unless it is recommended by the IO**



Effective Sanctions

An effective sanction should:

- **Educate the respondent**
- **Stop the conduct and prevent recurrence**
- **Remedy effects on complainant**
- **Foster safe campus community**



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Preparing the Written Decision

The hearing examiner or committee shall prepare written findings of fact and a written statement of its decision based upon the record of the hearing. Chpt. UWS 17. 18(8)

- **The report should include:**
 - Identification of the allegations
 - Description of the procedural steps taken including methods used to gather evidence
 - Findings of fact supporting determination
 - Conclusions regarding the application of Chapter UWS 17
 - A statement of, and rationale for, the result as to each allegation
 - Remedies designed to restore equal access to university's education program or activity
 - Sanctions
 - Appeal process



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Notice Requirements

Complainant and Respondent must be notified “simultaneously” and “in writing” of:

- **The outcome of the proceeding;**
- **Any appeal procedures;**
- **Any change to the result before it becomes final;**
- **When the result becomes final**



Scenario 1

During deliberations, a committee member states in her opinion, there was no sexual assault because the complainant's testimony differed in critical parts from what she told the police. Another committee member states, "Well, her changing of her story is entirely due to the trauma she suffered."

Scenario 2

In reviewing the recording of the hearing, the hearing examiner realizes that there were critical references by both parties to a series of text messages but that neither party provided the messages.



Scenario 3

During deliberations the committee was divided over the issue of consent: The Complainant stated that the two hooked up through Tinder, they had been drinking at a bar and went back to the Respondent's apartment where they kissed and both took off their clothes. He climbed on top of her and they continued kissing, but she stated she did not consent to sex. The Respondent stated that the Complainant never said anything and seemed completely into it at the time, but when parents found out the next day, they took her to get a SANE exam and she accused him of sexual assault.

Conclusion...

- **Be grounded in competencies**
- **Seek and provide additional training as needed**
- **Follow Chapter UWS 17**
- **Request an OGC attorney to advise the committee (if not already arranged)**
- **Stay tuned for upcoming changes**



Questions?

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