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NACUA Online Course
Title IX Coordinator Training

Module 7: Writing a Decision

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Submodule 1

How do I make a decision?

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Congratulations!

- The investigation is over.
- The hearing has been held.
- Now it's time to do the real work – deciding:
  - What happened?
  - Does what happened constitute a policy violation?

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Know the File

- Read the investigative report
- Read all attachments/evidence gathered
- Read all interview transcripts/summaries (if any)
- Read all responses to evidence
- Read the hearing transcript or listen to the hearing
- Take amazing notes as you review
  - What is disputed/undisputed?
  - Where are there contradictions?
  - What sticks out at you as being particularly important?

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Next, what do you need to decide?

- Look back to the allegations listed in the notice of investigation
- Break each down by element. Example:
  - Did the respondent touch complainant's private body part?

    - Did the respondent do so for sexual gratification?
    - Did the respondent do so without consent of the complainant?
        - [Was the complainant incapacitated?]
        - [Was consent voluntary in that it was not forced or coerced?]
        - [Was the complainant otherwise capable of consenting (age, disability, etc.)?]
- What undisputed facts fit under each element?
- What is disputed that you must resolve before you can analyze each element?

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For each disputed fact to resolve

- Do you have objective evidence on which to rely?
    - If so, does a party or witness contradict that evidence such that it affects their credibility?
- What weighs in favor of the fact having occurred?
- What weighs against the fact having occurred?

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Standard of Evidence

- Most institutions use the preponderance of the evidence, which means "is it more likely than not"
- A few institutions use clear and convincing evidence, which generally means "is it highly probable"
- Check your policy language for specific definitions!
- Note that this standard is applied to determine both your facts and your conclusions
    - Determining Facts: Is it more likely than not that Complainant said the words, "No, stop?" during the encounter?
    - Analyzing Conclusions: Is it more likely than not that Respondent acted without Complainant's consent?

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Weighing Opposing Information

- Details – Is one story more detailed than another?
- Corroboration – What can be corroborated by other evidence?
- Contradiction – What is contradicted by other evidence?
- Consistency – Has a party or witness been consistent over time?
- Credibility – Does the party or witness have a particular motive or bias?
    - Note: All parties have a motive to lie to "win," but that isn't usually particularly helpful in weighing information.
- Plausibility – Is the evidence possible?
- Reliability – Was the witness in the position to observe?

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Demeanor

- Some individuals try to interpret non-verbal cues in relation to whether their information is trustworthy
- Non-verbal cues require the observer to assign values to those cues. Example:

    - Lack of eye contact – Lying, deferential to authority, neurodivergence?
    - Fidgety – Lying, physically uncomfortable, naturally anxious, hyperactive?
- How confident are you in assigning your values to someone else's non-verbal behavior?

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The Role of Trauma in Deciding

- Individuals may have difficulty recalling information due to trauma that happened prior to, during, or after the incident in question
- Trauma can help explain gaps in the information
    - So can the passage of time, lack of attention in the moment, lying, etc.
- Being traumatized is not an element of any policy violation
    - However, impact matters for hostile environment and stalking
    - Signs of trauma ≠ policy violation
    - No signs of trauma ≠ no policy violation
- What do you do in cases involving trauma? Keep listening!

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Fact by Fact

- Determinations are made fact by fact, according to the standard of evidence
- Credibility is evaluated fact by fact, not necessarily human by human
    - Someone may not be credible (or may not be as credible) and still not be a liar
- If you are using preponderance of the evidence and your scale is at 50-50, the tie goes to the respondent

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Analysis

- Once you have a list of:
    - Undisputed facts; and
    - Disputed facts that you have resolved
- Now you know what happened! Apply the facts as you have found them to the language in the policy.
    - Is every required element met according to your standard of evidence?
        - If yes – Policy violation
        - If even one is missing – No policy violation

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Sanctioning

- Your institution may permit impact/mitigation statements from the parties – which you should review
- If there is a policy violation, check your policy to see who determines sanctions
    - Unionized employees may have a process in their collective bargaining agreement
- Potential sanctions should be listed in your policy
- Your institution likely has standard language for certain sanctions, which may be kept by your Title IX office, your student conduct office, your Provost's office, or HR, depending on the respondent's status

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Sanctioning Factors

Check your policy for factors to consider, which often include:

- Prior disciplinary history
- How similar conduct has previously been sanctioned
- Nature and violence of the conduct at issue
- Impact on the community
- Whether the respondent has accepted responsibility
- Whether the misconduct involved violating a no contact order
- Other mitigating/aggravating circumstances

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Remedies

If the Complainant requires additional assistance to remedy the effects of the policy violation, your decision should note that they are entitled to remedies.

Remedies are typically confidential to the Complainant, unless the Respondent has to know about them in order to implement them.

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Most Important Things

- Consider only the information presented through the process
- Consider whether your opinion is free from bias:
  - For or against complainants or respondents generally
  - For or against a particular complainant or respondent
  - If the genders of the parties were altered, would that affect the outcome? (It shouldn't!)
- Reach decisions based on the evidence, not your "gut"
- Be able to articulate your reasons for each finding (because you're getting ready to write them out!)

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Submodule 2

What must be included in a written decision?

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2020 Regulations (1 of 2)

- Identification of the allegations potentially constituting sexual harassment as defined in 106.30
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Findings of fact supporting the determination
- Conclusions regarding the application of the recipient's code of conduct to the facts

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2020 Regulations (2 of 2)

- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant
- The recipient's procedures and permissible bases for the complainant and respondent to appeal

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Submodule 3

What are the best practices for writing a decision?

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Double Storytelling

- Tell the story of the incident(s)
- Tell the story of how you got to where you did

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Connect the Dots

Diagram: a sequential arrow showing four stages in order:

- Charges
- Policy
- Facts
- Analysis

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My Typical Practice

- Different institutions use different templates
- Let's talk about how I craft a decision when there is no template provided

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Heading

- Confidential
- Institution
- Party names
- Date of decision
- My name/role

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Introduction/Allegations

- Who are the parties and what are their roles

- When was the report received
- When was notice provided
- What were the allegations included in the notice [copy/paste!]
- If true, these allegations could constitute ____ in violation of the _____ Policy.

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Procedural Steps

- Explain the history of the investigation
- Who was interviewed?
  - Who wasn't interviewed, and why?
- What evidence was gathered?
  - What wasn't gathered, and why?
- Were there any evidentiary disputes that need to be explained, such as relevancy?
- Are there any anomalies in the procedures that should be explained?
- "X did not participate, as is their right..."

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Jurisdiction

- Explain why this matter fits under this policy

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Applicable Policy Language

- Copy and paste excerpts straight from the policy at issue
- Use ellipses to indicate where you have removed language that is not relevant
- Remember to use the language that was in place at the time the conduct was alleged to have occurred

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Findings of Fact

- Many different structural components can be used, depending on the facts of the case. Examples:
  - Undisputed facts (with citations)
  - Undisputed timeline (with citations)
  - Disputed facts broken down by segment of the incident
    - What did complainant say?
    - What did respondent say?
    - What did the witnesses say?
    - What does the evidence show?
    - How do you weigh the evidence? Show your work!
- "The Decision Maker determines, by a preponderance of the evidence..."

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Findings of Fact - Tips

- Use at least one citation for every sentence that presents evidence
- Consider explaining how your citations work (e.g. "Tr. 1 refers to Transcript of Day 1 of the Hearing")
- Don't forget to include findings about impact if it is an element of the policy provision you are considering
    - "Footnote: This decision focuses on the impact to the complainant because the decision maker is required to analyze the impact on the complainant to make a determination as to whether a policy violation occurred. The decision maker appreciates that this situation has also impacted respondent."
- For the most important evidence, copy it straight into the decision. Screenshots, transcript excerpts, etc.

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Analysis

- Use the facts you have determined and apply your policy language
- You do not have to analyze things in order! It may make more sense to sequence the violations based on which elements overlap
- Make sure it is clear for each allegation that you are using your standard of evidence

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Keep in Mind

- Complete
- Unambiguous
- Respectful
- Valued
- Empathetic
- Spelling/Grammar

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Tone Check

- Read it from the perspective of the complainant
- Read it from the perspective of the respondent
- Is your tone appropriately neutral?
- Will both parties feel heard?

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