



Level 3
Title IX Decision-Maker
Writing Workshop



Presenters - Jessica



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Disclaimers



- **We can't help ourselves – we're lawyers**
- We are not giving you legal advice – consult with your legal counsel regarding how best to address a specific situation
- This training does not cover all of the basic subjects required for Title IX Investigators, institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals
- This training is not being recorded, but we will provide you with a packet of the training materials to post on your website for Title IX compliance

Presentation Rules

Again... we can't help ourselves. We're still lawyers.

- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

Can We Post these Materials?



34 C.F.R. §106.45(b)(10)(i)(D)

- Yes!
- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution electronically to post

Topics



Writing a Title IX Decision

- Requirements of a Written Decision under 34 C.F.R. 106.45(b)(7)(ii)
- Resolving Disputed Facts
- Structuring Your Decision
 - Synthesizing101
 - IRAC
- Common Mistakes that Prevent Clarity in Written Decisions
- Best Practices for Writing Neutral Decisions on Sensitive Subjects

Preparing to Write

Timing and Form

- Don't start writing before the hearing
 - You won't know what you can and cannot consider
 - You might be tempted to pre-judge the facts
- Find out whether your institution has a template for decisions
 - Use it and your policy as a checklist

Requirements of a Written Decision



34 C.F.R. 106.45(b)(7)(ii)(A)-(B)

(ii) The written determination must include -

(A) Identification of the **allegations** potentially constituting sexual harassment as defined in § 106.30;

(B) 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;

Requirements of a Written Decision



34 C.F.R. 106.45(b)(7)(ii)(C)-(D)

(ii) The written determination must include -

(C) **Findings of fact** supporting the determination;

(D) Conclusions regarding the **application of the recipient's code of conduct to the facts;**

Requirements of a Written Decision



34 C.F.R. 106.45(b)(7)(ii)(E)

(ii) The written determination must include –

(E) 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;

Requirements of a Written Decision



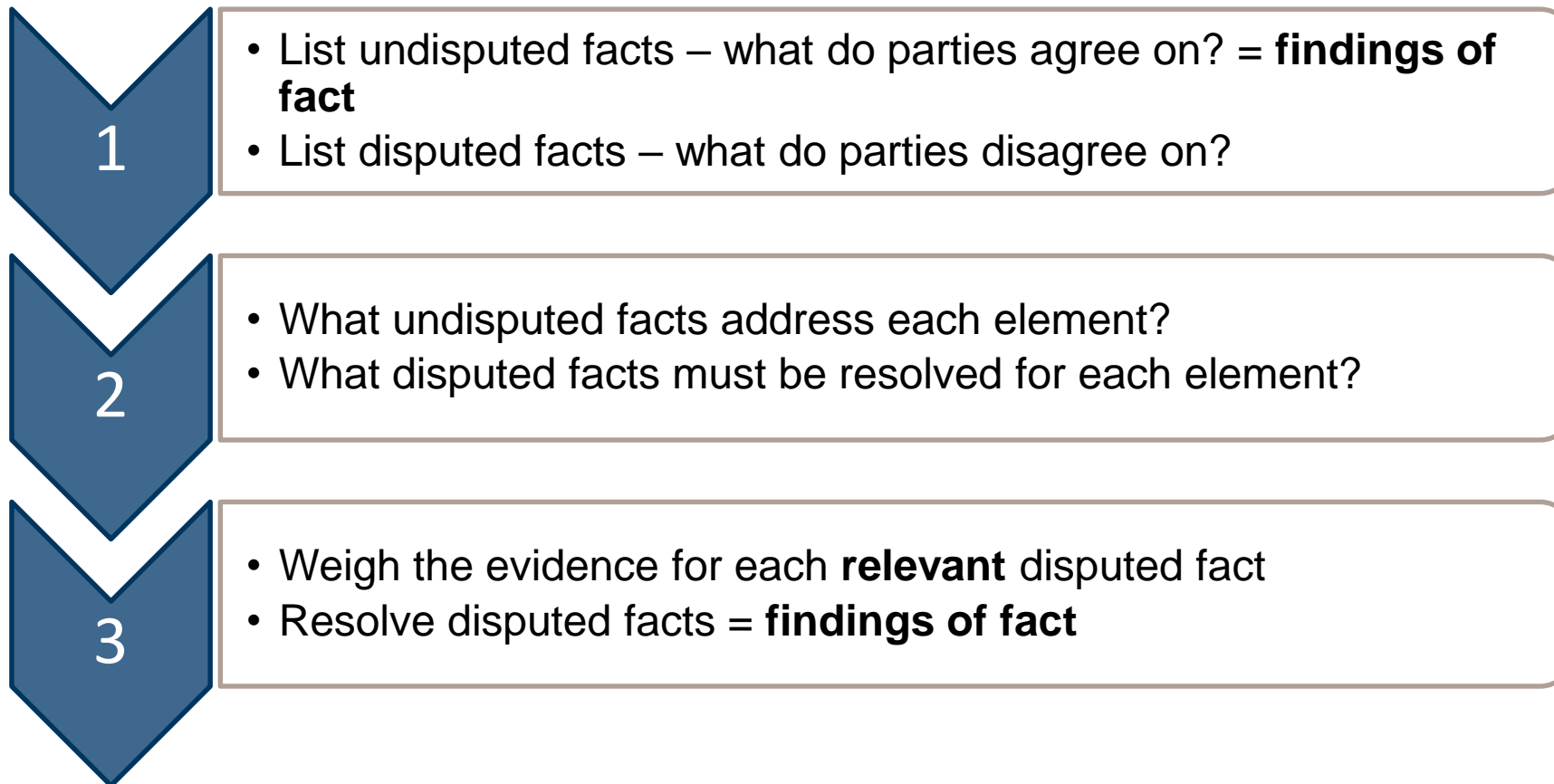
34 C.F.R. 106.45(b)(7)(ii)(F)

(ii) The written determination must include –

(F) The recipient's procedures and permissible bases for the complainant and respondent to **appeal**.

Resolving Factual Disputes

Fact Finding Process:



Resolving Factual Disputes



Fact Finding Process Step 1:

Undisputed vs. Disputed Facts

- List undisputed facts
 - What do parties agree on? = **findings of fact**
- List disputed facts
 - What do parties disagree on?

Resolving Factual Disputes



Fact Finding Process Step 2:

How do the facts fit the elements?

- What **undisputed** facts address each element?
 - These will be findings of fact that MUST be included
- What **disputed** facts must be resolved for each element?
 - Resolve in next step
 - These will be findings of fact that MUST be included

Resolving Factual Disputes



Fact Finding Process Step 3:

Resolve remaining factual disputes:

- Weigh the evidence for each **relevant** disputed fact
 - Remember the funnel – your list of relevant disputed facts should be pared down by this point

What Goes ON the scale?

Weighing the Evidence

- What goes on the scale?
 - Relevant Information that has been...
 - Subjected to Cross-Examination***
 - How is your institution addressing *VRLC*?

What DOESN'T Go On the Scale?

(1 of 2)



Weighing the Evidence

- What doesn't go on the scale?
 - Rape Shield
 - 34 C.F.R. § 106.45(b)(6)(i)
 - Legally Privileged Information
 - 34 C.F.R. § 106.45(b)(1)(x)
 - Treatment Records
 - 34 C.F.R. § 106.45(b)(5)(i)

What DOESN'T Go On the Scale?

(2 of 2)



Weighing the Evidence

- Statements that have not been subjected to cross-examination***
 - “If a party or witness does not submit to cross-examination at the live hearing...the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.” 34 C.F.R. 106.45(b)(6)(i).
- If *statement* is in a video or text message, still cannot be considered if no submission to cross-examination (Preamble, p. 30346)
- If the *conduct* is recorded (i.e., surveillance footage), it may be considered
- What if the statement *is* the conduct?

Preamble Considerations

Weighing the Evidence

The Preamble identifies the following considerations:

- That parties may benefit from the opportunity to challenge the opposing party’s “consistency, accuracy, memory, and credibility so that the decision-maker can better assess” the narrative to be believed. (Preamble, 30315).
- That parties may direct the decision-maker’s attention to “implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility” in a party’s statements. (Preamble, 30330).

Quality Versus Quantity

Weighing the Evidence

- It is the weight of the evidence, or its strength in tending to prove the issue at stake, that is important
- The quality of the evidence is not determined by its quantity
 - Don't compare 1 witness to 3 witnesses and make assumptions
 - Quantity *can* be a factor, but it should not be automatic

Even Weight Distribution

Weighing the Evidence

If nothing tips the scale:

- No finding of violation
- Remember your standard of evidence
 - Clear and Convincing
 - Preponderance of the Evidence

Things to Keep in Mind



Structuring Your Decision

- Each case includes at least TWO stories, maybe more
- Set the scene visually
- Be clear as to the source of information. Compare:
 - “Bob stated this happened.”
 - “This happened.”
- Make sure it is readable
 - Could someone unfamiliar with the incident pick up the decision and understand what happened?

Story One of (at least) Two

The Underlying Case

Each case includes at least TWO stories in one:

(1) The facts of the underlying case

- On August 25, 2020, Complainant and Respondent attended a party together at Thompson Point Residence Hall
- Complainant reports A, B, and C
- Respondent reports X, Y, and Z

Story Two of (at least) Two



The Investigation of the Underlying Case

Each case includes at least TWO stories in one:

(2) The investigation of the underlying case

- On August 30, 2020, Complainant filed a formal complaint
- On September 5, 2020, Complainant spoke with Investigator
- On December 10, 2020, Complainant shared the Investigation Report with Witnesses 1, 2, and 3

Different Ways to Tell These Stories



Structural Considerations

- Template
- Typical practice for your institution
- Remember the required components
- Common structural tools
 - Chronology
 - Subject Matter
 - IRAC or CRAC

Where to Begin?

Structuring Your Decision - Introduction

Introduction

- Should preview both stories
 - How did the underlying story get to the Title IX Office?
 - What about the underlying story was reported?
 - What are the **allegations**?
 - Remember to use the names of violations as they existed when the conduct is reported to have occurred
 - Same policy for definitions and procedure? Or a split?

Process and Procedure

Structuring Your Decision – Procedural History

Procedural Steps must be included

- **(B)** 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 (34 C.F.R. 106.45(b)(7)(ii)(B))
 - Works well between the introduction and discussion of facts
 - Pieces of this description may need to be repeated later
 - This is a logical place to discuss determinations re: relevance

Explaining the Facts

Structuring Your Decision – What Happened?

Telling two or more stories

- Infinite ways to structure a decision
 - We are providing suggestions *ONLY*
- Structure may need to change depending on the type of case and information presented
 - Think about this early in the writing process
- Remember – you are telling at least TWO stories to anyone reading your decision
 - Both must be readable

Subject Matter/ Chronologically

Pre-Game at Apartment B

- Combine accounts of everyone in attendance
- Note discrepancies
- Preview the importance of facts included later

Complainant's Room

- Fewer factual accounts (possibly)
- Combine subjects to tell more than one account of what happened (removal of clothing, progression from one physical act to the next)

Text Messages the Next Day

- Copy and paste messages
- Combine context for messages from various sources

Source of the Information

Complainant's Statement to the Investigator

- Summarize information from investigation report
- Note discrepancies between party accounts ("Contrary to Respondent's account, Complainant reported that...")

Complainant's Hearing Testimony

- Summarize information from the hearing
- Note discrepancies between investigation and hearing
- Note discrepancies between Complainant and Respondent

***Repeat for Respondent**

Individual Factual Allegations

Overview of Disputed Facts

- Claimant's account of the night in question (Investigation and Hearing)
- Respondent's account of the night in question (Investigation and Hearing)
- Witness statements (Investigation and Hearing)

Facutal Allegations

(1) Factual Allegation #1

- Combine all information re: this allegation – party statements, police report, SANE exam, etc.
- Describe Finding of Fact and rationale

(2) Factual Allegation #1

- Repeat for each allegation

Example Structure: Subject Matter/ Chronologically



Use Headings to Signal the Progression of Events

Pre-Game at Apartment B

- Combine accounts of everyone in attendance
- Note discrepancies
- Preview the importance of facts included later

Complainant's Room

- Fewer factual accounts (possibly)
- Combine subjects to tell more than one account of what happened (removal of clothing, progression from one physical act to the next)

Text Messages the Next Day

- Copy and paste messages
- Combine context for messages from various sources

Example Structure: Subject Matter/ Chronologically Pros and Cons



Does this work best for your case?

- Easiest way to tell the underlying story
 - But time-consuming to write
 - Requires synthesis of facts from multiple sources
- Reader-Friendly
- Use Subject Matter/Chronological Headings
- Works for a range of cases
 - Multiple locations and witnesses
 - Cases where timing of events is particularly important
 - Incapacitation or where something changes over time

Example Structure: Source of the Information

Begin with Complainant

Complainant's Statement to the Investigator

- Summarize information from investigation report
- Note discrepancies between party accounts ("Contrary to Respondent's account, Complainant reported that...")

Complainant's Hearing Testimony

- Summarize information from the hearing
- Note discrepancies between investigation and hearing
- Note discrepancies between Complainant and Respondent

Example Structure: Source of the Information

Move to Respondent

Respondent's Statement to the Investigator

- Summarize information from investigation report
- Note discrepancies between party accounts ("Contrary to Complainant's report, Respondent reported that...")

Respondent's Hearing Testimony

- Summarize information from the hearing
- Note discrepancies between investigation and hearing
- Note discrepancies between Complainant and Respondent

Example Structure: Source of the Information Pros and Cons

Does this work best for your case?

- Less time-consuming to write, but...
- Less readable than other examples
 - Requires the reader to go back and forth between different accounts of the same events
 - Repetitious
- Works well in a narrow set of cases
 - Cases with few or no witnesses
 - Cases where consistency, or a lack thereof, is crucial

Example Structure: Individual Factual Allegations



Begin with an overview – then get specific

Overview of Disputed Facts

- Claimant's account of the night in question (Investigation and Hearing)
- Respondent's account of the night in question (Investigation and Hearing)
- Witness statements (Investigation and Hearing)

Factual Allegations

- (1) Factual Allegation #1 (Ex: Respondent kissed Complainant without Complainant's consent)
 - Combine all information re: this allegation – party statements, police report, SANE exam, etc.
- (2) Factual Allegation #2 (Ex: Respondent choked Complainant)
 - Combine all information re: this allegation – party statements, police report, SANE exam, etc.

Example Structure: Individual Factual Allegations Pros and Cons



Does this work best for your case?

- Valuable in cases where credibility varies by fact
 - Credibility is determined fact-by-fact, not witness-by-witness
 - If a party or witness account is credible for one factual allegation but less credible for other factual allegations, separating those allegations may help with explaining credibility
- Reader-friendly in cases with multiple factual allegations and sources of information

Structuring Your Facts

Remember – Suggestions Only

- Use the structure that works for your institution
- Use the structure that works for the particular case
 - Your structure may change depending on the case
 - Think about the following:
 - Chronology
 - When does synthesizing facts help the reader?
 - When does separating facts help the reader?
 - Where does hearing testimony fit?

Synthesis 101

Look for opportunities to logically combine related facts

- Undisputed facts at the beginning
 - May give a framework without creating repetition
- Disputed facts
 - Facts may be related by:
 - Timing
 - Source
 - Topic

Synthesis Example – Subject Matter/ Chronologically



Logically combine related facts to tell a story

Pre-Gaming at Apartment B

Complainant and Witnesses A, B, and C, reported that they each took 3 shots of vodka when they arrived at Apartment B. Report, pp. 3, 6-7. This was largely consistent with their hearing testimony, except for Witness C who said they misspoke during their Title IX interview. Hearing Transcript, p. 4. At the hearing, Witness C testified that they only took one shot of vodka at the party. Hearing Transcript, p. 4. Later in the evening, approximately two hours after Complainant and Witnesses A, B, and C arrived and took vodka shots, Respondent arrived at Apartment B with Witness D. During his Title IX interview and at the hearing, Respondent reported that he did not take any shots of vodka and had a clear memory of the night. Report, p. 4; Hearing Transcript, p. 6. Respondent also reported in his interview and at the hearing that he did not observe Complainant take any shots of vodka that night, did not see Complainant stumbling when she walked around the apartment, and did not hear Complainant slur her speech at any time. Report, p. 4; Hearing Transcript, p. 6.

Synthesis Example #1 – Takeaways



Can you apply these takeaways in your cases?

Several things worth noting in this example:

- The information is presented under a topic heading
 - "Pre-Gaming at Apartment B"
- Information comes from different people and is blended together
 - Parties and witnesses
- Information comes from different documents and is blended together
 - The Investigation Report and the Hearing Transcript

Synthesis Example #1 – Takeaways (cont).



More takeaways

Several things worth noting in this example:

- Discrepancies between the investigation and hearing testimony are noted
 - Witness C
- Transitions to demonstrate shifts in time or topic
 - "Later in the evening, approximately two hours after Complainant and Witnesses A, B, and C arrived and took vodka shots, Respondent arrived at Apartment B with Witness D."

Synthesis Example – Individual Factual Allegations



Can you apply these takeaways in your cases?

Report that Respondent choked Complainant

As previously mentioned, Complainant reported four separate acts that might rise to the level of a policy violation. First, Complainant reported that Respondent choked her during their argument on September 1, 2020. Report, p. 1. When Complainant described this incident to the Title IX investigator, she said that Respondent used his hand to encircle her throat and then squeeze, preventing her from breathing or talking. Report, p. 4. Under cross-examination at the hearing, Complainant stated that Respondent used his left hand only, but that his hand was large enough to wrap entirely around Complainant's neck. Hearing Transcript, p. 10. Complainant submitted photographs of her neck during the Title IX investigation, which were included in the investigation report on pages 10 and 11. Two witnesses, Witness A and Witness B, reported to the Title IX investigator that they observed bruising on the Complainant's neck when they saw the Complainant the morning of September 2, 2020. Report, p. 6. Both witnesses provided testimony at the hearing that was consistent with their prior statements to investigators. Hearing Transcript, p. 12.

Respondent has consistently denied that he choked Complainant. In his statement to the Title IX Investigator...

Synthesis Example #2 - Takeaways



Can you apply these takeaways in your cases?

Several things worth noting in this example:

- The information is presented under a topic heading
 - “Report that Respondent Choked Complainant”
- Information comes from different people and is blended together
 - Parties and witnesses
- Information comes from different documents and is blended together
 - The Investigation Report and the Hearing Transcript

Synthesis Example #2 – Takeaways (cont.)



More takeaways

Several things worth noting in this example:

- Discrepancies between the investigation and hearing testimony are noted
 - Complainant's description of the choking
- Transitions to demonstrate shift from individual factual allegation to the response to that allegation
 - First discussing information supportive of Complainant's report
 - New paragraph to discuss response from Respondent

Rationale and Result



“Show Your Work”

Application of Policy to Findings of Fact

- IRAC or CRAC
 - Issue/Conclusion
 - Rule
 - Application
 - Conclusion
- “Rule” = your policy provisions
- “Application” = your explanation of whether the findings of fact amount to a policy violation
- Conclusion = the result of your analysis for each allegations

IRAC Example #1



Applying your Findings of Fact to the Policy

Finding of Fact on a Relevant and Disputed Issue:

A preponderance of the evidence supports a finding that Respondent choked Complainant during their argument on September 1, 2020.

- Issue:** Does Respondent’s act of choking Complainant rise to the level of dating violence under Section B of the Title IX Policy?
- Rule:** [Insert definition of Dating Violence from your policy]
- Application:** Explain whether choking during an argument amounts to dating violence under the policy definition
- Conclusion:** “For these reasons, Respondent’s act of choking Complainant during their argument on September 1, 2020 amounts to a violation of the Section B of the Title IX Policy, which prohibits dating violence.”

IRAC Example #2



Applying your Findings of Fact to the Policy

Finding of Fact on a Relevant and Disputed Issue:

A preponderance of the evidence supports a finding that Complainant was aware of her name, aware that she was having conversations with her roommate and with Respondent, aware of her surroundings, and aware of Respondent's physical advances

Issue: Was Complainant incapacitated at the time of the sexual encounter?

Rule: [Insert definition of Incapacitation from your policy]

Application: Explain whether the information above means that Complainant was incapacitated under your policy.

Conclusion: “For these reasons, Complainant was not incapacitated as that term is defined in the Title IX Policy. However, this does not end the inquiry on consent because Complainant further reported...”

Final Required Components



Sanctions, Remedies, and Appeal Rights

End with Sanctions, Remedies, and Appeal Rights

- These may be included earlier in the decision, but make more sense near the end
- Form language from your Student Conduct Office or Title IX Coordinator?
 - Be consistent
 - If there is a reason your explanation is different, explain that reason in your decision

Decision Checklist



34 C.F.R. 106.45(b)(7)(ii)(A)-(E)

- **Allegations**
- **Procedural Steps**
- **Findings of Fact**
- **Application of the Policy to the Facts**
- **A statement of, and rationale for, the result as to each allegation:**
 - 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;
- **Appeal**

Checking the Boxes while Telling the Stories



Be compliant and readable

Required Components of a Decision:

- **Allegations**
- **Procedural Steps**
- **Findings of Fact**
- **Application of the Policy to the Facts**
- **A statement of, and rationale for, the result as to each allegation:**
 - 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;
- **Appeal**

Sample Decision Outline

Introduction

- Include preview of (at least) 2 stories and **allegations**

Process and Procedure

- **Procedural Steps**

Fact Section (Structured for Readability)

- **Findings of Fact**

IRAC for each issue

- **Application of the Policy to the Facts**
- **Statement/Rationale for each Allegation**
 - **Determination re: responsibility**

Disciplinary Sanctions and Remedies

Appeal Rights

Common Writing Mistakes

Consistent and Precise Language



Inconsistent Terminology

- Referring to individuals or locations differently in different places in the report
- May leave the reader with the impression that you are talking about different places or people
 - Tom, Tom Smith, Mr. Smith, Thomas
 - Tom's room, Room 4A, Hubbard Hall

Word choice

- Be as precise as possible
- This can add time to the writing process, but can pay off in terms of clarity
- Avoid charged language

Common Writing Mistakes

Empathy and Tone



Empathy

- Stay away from charged words of advocacy
 - Clearly/obviously
 - Innocent/guilty
 - Victim/perpetration
- Watch your use of adjectives and adverbs – unless they are in a quote
 - “really drunk”
 - “forcefully pushed”

Tone

- Be non-judgmental
- Recognize the impact of your words

Common Writing Mistakes

Cite Your Source



Failing to include sources of information

- If explaining this in every sentence weighs down your writing, use footnotes to add clarity. (“Bob stated this happened.”)
- Citing the source of your information helps the reader and underscores your neutrality

Confusing Quotation Marks

- Is the quoted language from the interviewee or the interviewer?
- Did someone else put the language in quotation marks?
 - Footnote 4: The quoted language was attributed to Respondent on page 6 of the Investigation report.
 - Footnote 10: The quoted language was attributed to Respondent by Claimant during Claimant’s October 10, 2020 Title IX interview.

Common Writing Mistakes

Structure



Topic sentences and transitions

- Provide a roadmap in your introduction and under new headings
- Sentences should flow from one-to-another
- Remember – telling two or more stories to someone unfamiliar with the case

Pronouns

- Be careful of pronoun usage so that the reader always knows who is saying or doing what
- When using pronouns, make sure you are using the right pronouns for the individual

Common Writing Mistakes

Miscellaneous



Typos

- They happen to everyone, but
- Typos in every sentence undermine the integrity of a decision

Run-on sentences/Sentence fragments

- Make sure each sentence has a subject and a verb
- If combining multiple independent clauses, consider whether to separate sentences

Editing Exercise #1



Respondent engaged in sexual intercourse with Complainant from behind.

Issues:

- No source of the information
- From behind what? Complainant?
- Word choice

Fix:

According to Complainant, Respondent and Complainant were both standing near the pool table at the time that Respondent began to sexually penetrate Complainant's vagina with his penis. Complainant reported that her body was facing away from Respondent at the time, towards the table, and that Respondent pushed her forward...

Editing Exercise #2



Complainant couldn't explain why she was sitting on the couch by herself.

Issues:

- Pronouns are not clear

Fix:

At the hearing, Complainant testified that she observed Witness A sitting on the couch by herself. Complainant said that she could not explain why Witness A was sitting alone.

Editing Exercise #3



Respondent stated that he was uncomfortable cuddling with women that he was not close with during his freshman year.

Issues:

- Confusing
- Misplaced modifier (to what part of the sentence does “during his freshman year” refer?)

Fix:

Respondent explained that during his freshman year, he was uncomfortable cuddling with women with whom he did not have a close relationship.

Editing Exercise #4 (Version 1)



There was no evidence to support Complainant’s assertion that the activity occurred without her consent.

Issues:

- Sounds judgmental because the “assertion” itself is being disregarded
- If Complainant’s assertion was not tested by cross-examination, make that clear

Fix:

At the hearing, Complainant declined to answer questions posed by Respondent’s advisor about the issue of consent. For this reason, Complainant’s prior statements may not be considered in reaching this decision. See Section 4.B. of the Title IX Policy.

Editing Exercise #4 (Version 2)



There was no evidence to support Complainant's assertion that the activity occurred without her consent.

Issues:

- Sounds judgmental because the “assertion” is being disregarded
- If Complainant's assertion was not tested by cross-examination, make that clear

Fix:

Complainant testified that the sexual activity occurred without her consent. This assertion must be weighed against the testimony of two eyewitnesses, both of whom provided consistent accounts of their observations, and the testimony of Respondent.

Before You Begin to Write



Plan ahead

Before you begin to write

- Watch the hearing or review the transcript
- Think about how to structure your decision
- Review relevant policies and identify elements of each allegation
- Identify both factual and procedural issues that need to be addressed
- Consider drafting an outline
- Consider writing out your Fact Finding Process

As You Are Writing



Be flexible

As you write

- Don't stick with a structure or outline that fails
- If working with a template, consider talking to others who have used it (if possible)
- Use a checklist to make sure you are addressing the required components
- If you get stuck, put it aside and come back to it
- If you can think out loud with others, do it
 - But not with anyone else playing a role in the case

When You Have a Draft



Critique your work

When you have a draft

- If you have time, set it aside and come back to it later
- Remember to review it from the viewpoint of someone who is unfamiliar with the case
- If possible, have someone else proofread
- Put yourself in the position of the parties
 - Do you feel heard?
 - Do you feel judged?
 - What issues might come up on appeal? Can/Should those issues be addressed now?

Questions?



Additional information available at:

Title IX Resource Center at www.bricker.com/titleix

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