



BAY COLLEGE TITLE IX TRAINING

September 13 and 14, 2021

Rebecca Leitman Veidlinger



Together we will learn about

■ Today

- *Complaint intake—moving from complaint to investigation*
- *Understanding the investigative process*
- *Interviewing parties*
- *Interviewing witnesses and collecting other evidence*
- *Writing summaries of interviews*

■ Tomorrow

- *Understanding the hearing process and the roles of the advisors*
- *Important analytical concepts: relevance, reliability, credibility, and probative value*
- *Evaluating the evidence and making the determination*
- *Writing hearing determinations*

Quick background refresher on Title IX

- What are we talking about when we say Title IX?
 - *Statute*
 - *Regulations*

Title IX of the 1972 Education Amendments

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

Title IX Sexual Harassment is

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

- 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 determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- 3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

Complaint intake—moving from complaint to investigation

- Formal complaint filed
- Initial assessment by Title IX Coordinator
- If it alleges Sexual Harassment, then:
 - *Supportive measures (available even absent a formal complaint)*
 - *Investigation of the allegations*
 - *With parties' consent and if Title IX Coordinator thinks appropriate, the Title IX Coordinator may refer the matter for informal resolution process*

Understanding the investigative process at Bay College

- Notice to both parties
- Collection of evidence
- Investigator provides access to evidence; opportunity for response
- Investigator creates Investigation Report
 - *Includes investigators' conclusions as to whether allegations occurred, and if so, whether the conduct violates the Policy*

Overarching goals of an investigation

- Collect as much reliable and relevant evidence as possible
- Utilize a process where the parties are treated fairly and impartially
- Analyze the evidence in a thorough and reasonable manner
- Write a report that illustrates you did all of the above

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Top five challenges of conducting interviews



1)

2)

3)

4)

5)

An initial fundamental thing to remember:

The goal of interviews





BREAK



Interviewing the parties



- Prepare
- Let the party know what is happening, before you meet and when you meet
- Have a standard way that you explain:
 - *Your neutrality*
 - *Investigative process*
 - *Resources and support*
 - *Confidentiality, privacy, and disclosure issues related to their statement*
 - *And, provide written copy of policy and any informational documents*
- Make a note of and ask for every written/electronic item they mention

Interviewing the parties



- Ask for (and discuss) list of witnesses
- Last question before closing meeting should be open-ended invitation for them to add anything
- At end of meeting:
 - *Remind them of next steps and resources*
 - *Close with comfortable conversation*
- Be mindful:
 - *Interactions with advisors/attorneys*
 - *You must ask the difficult questions. Know how to do so.*

Interviewing techniques



- Learning from different systems:
 - *Child forensic interview*
 - *Trauma-informed interview*
 - *Forensic experiential trauma interview*
- If asking a sensitive question, explain why
- Handling challenging interviews

Issues unique to respondent interviews

- Decision re: open-ended or prepared questions
- Be prepared for a demand to know the allegations– and tell them what the allegations are
- Give respondent opportunity to respond to every CLAIM
- Explore all reasons why complainant might have raised the concerns: “Do you have any idea why the complainant would make these allegations?”



How do you ask about . . .

- Alcohol consumption
- Specific details of/surrounding the sexual act
- Post-incident initiation of contact by Complainant toward Respondent
- Complainant's 18-month delay in reporting incident

Asking Questions

Help me understand . .	Tell me all about . . .
What were your thoughts and feelings at that time?	What were you hearing when this was happening?
You said X. I want to make sure I understand what you mean by X.	I don't want to make any assumptions, so can you explain what you mean by X?
I am going to ask some questions about X, because it is important that I understand X.	I am going to shift gears and ask about X.
What part of their body touched your body?	How did you know the other person wanted to do X?

Asking the complainant the right questions

- Consent
- Incapacitation
- Coercion



Asking the respondent the right questions

- Consent
- Incapacitation
- Coercion



Witnesses



- Advise witnesses of neutrality, lack of confidentiality and retaliation
- Ask about relationship to parties/conversations about interview
- Give the witness very little specific information about the allegations
- Last question before closing meeting should be open-ended invitation for them to add anything

Asking the witness the right questions

- Incapacitation



Other evidence common in campus investigations



- Texts/emails/voicemails
- Employment records
- Social media posts
- Police reports
- Photos
- Medical records
- Phone records



Writing summaries of interviews

- Construct a chronological narrative out of the information collected.
- Use “direct quotes” for important language.
- Sometimes, when appropriate note the person’s demeanor/interviewing style.
- If person said they didn’t know or didn’t remember, include that in statement.
- Keep each person’s contributions within their sections. Save the comparisons for the analysis section.
- Address feedback on the summary of the evidence appropriately.
- Think about the critical claim and make sure the statement provides sufficient detail around it.

Drafting the interview summary

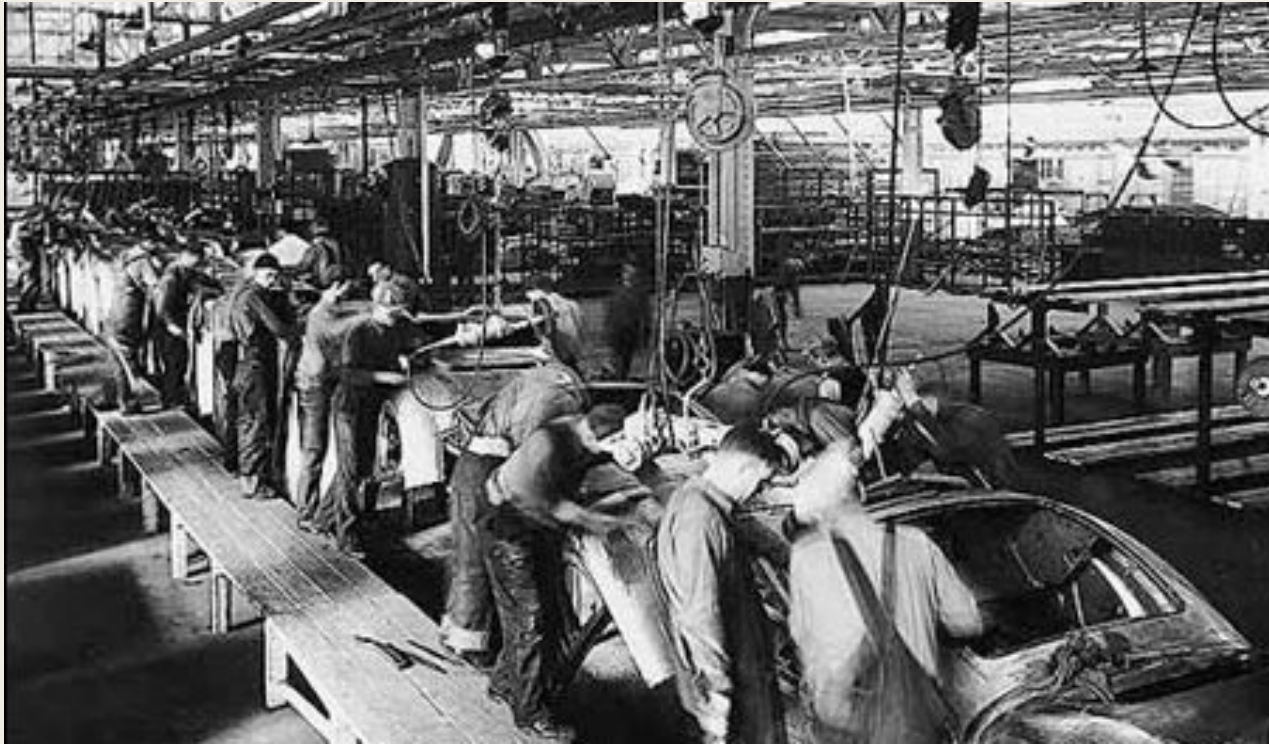


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- Sometimes, when appropriate note the person’s demeanor/interviewing style.
- If person said they didn’t know or didn’t remember, include that in statement.
- Create a logical order of the information

Drafting the interview summary (cont'd)



- Keep each person's contributions within their sections. Save the comparisons for the analysis section.
- Address feedback on the summary of the evidence appropriately.
- Think about the critical claim and make sure the statement provides sufficient detail around it.
- Use topic sentences to help the reader



- Summarized in investigation report
- Information that each party responds to
- Basis for decision-maker
- Basis for appellate entity

The information we collect:
Where does it go?

Questions?





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Understanding the hearing process and the roles of the advisors

- Hearing is conducted by a Hearing Decision Maker
- Minimum 10-day notice to parties of hearing date
- Can be conducted remotely
- Hearing is recorded and transcribed
- Advisor can be appointed by College
- Advisor's role is limited to conducting cross examination

Pre-hearing work

- Confirm advisors for each party; appoint if necessary; consider having back-ups available
- Figure out who will be requested to attend
- Explain to the parties what to expect
- Establish ground rules and share with the parties
- Consider convening a pre-hearing conference
- Make logistical and technology decisions (including recording, having info available for parties, and remote access)

Structure of hearings at Bay College

- Hearing Decision Maker explains procedures and rules
- Statement of the Investigator's Findings and Conclusion
- Complainant's opening statement
- Respondent's opening statement
- Presentation of Complainant's witnesses and evidence
- Presentation of Respondent's witnesses and evidence
- Complainant's closing statement
- Respondent's closing statement

Understanding the rule about submitting to cross examination

- What it means to submit to cross examination
- What does NOT submitting to cross examination look like?
- Consequences of NOT submitting to cross examination
- THIS WILL CHANGE





Remember special categories of evidence that are off-limits

- IRRELEVANT: Complainant's prior sexual predisposition or prior sexual history (with two exceptions)
- IRRELEVANT: Information protected under a legally-recognized privilege
- CAN'T USE: Medical, psychological and similar records without written consent of party



BREAK



Weighing the evidence and making a determination

- *Findings of Fact*: Making the determination of what happened,

and then
- *Policy Determinations*: Analyzing whether the conduct that happened constitutes a violation of Bay College's policies



Important concepts



Relevance



Reliability



Credibility



Weight/
probative
value



Activity on relevance: Non-consensual sexual intercourse



- *Before going to the bar, Complainant told her friend that she wanted to “hook up” with Jason, who is not the Respondent*
- *Complainant did not wear a bra to the bar*
- *Complainant willingly laid down in Respondent’s bed*
- *Complainant texted Respondent after and did not mention complaint of sexual assault*
- *Parties have engaged in sexual intercourse on two previous occasions*
- *SANE exam shows no injury*
- *Prosecutor has declined to file rape charges*



“Perhaps you would like to rephrase your last answer.”

DETERMINING CREDIBILITY

How to determine if a person is credible?

EEOC says to
consider:

- **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- **Demeanor:** Did the person seem to be telling the truth or lying?
- **Motive to falsify:** Did the person have a reason to lie?
- **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?
- **Past record:** Did the alleged harasser have a history of similar behavior in the past?

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How to
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Jury instruction
says to
consider:

- Relationship to the Plaintiff or to the Defendant
- Interest, if any, in the outcome of the case-- Anything to gain or lose from the case
- Manner of testifying – did they appear to be lying? Appear to be telling the truth?
- Opportunity to observe or acquire knowledge concerning the facts about which the witness testified
- Candor, fairness and intelligence
- The extent to which testimony has been supported or contradicted by other credible evidence
- Any bias or prejudice?
- Inconsistency within testimony? Reasonable/minor or significant?
- Use your common sense and your everyday experience in dealing with other people.

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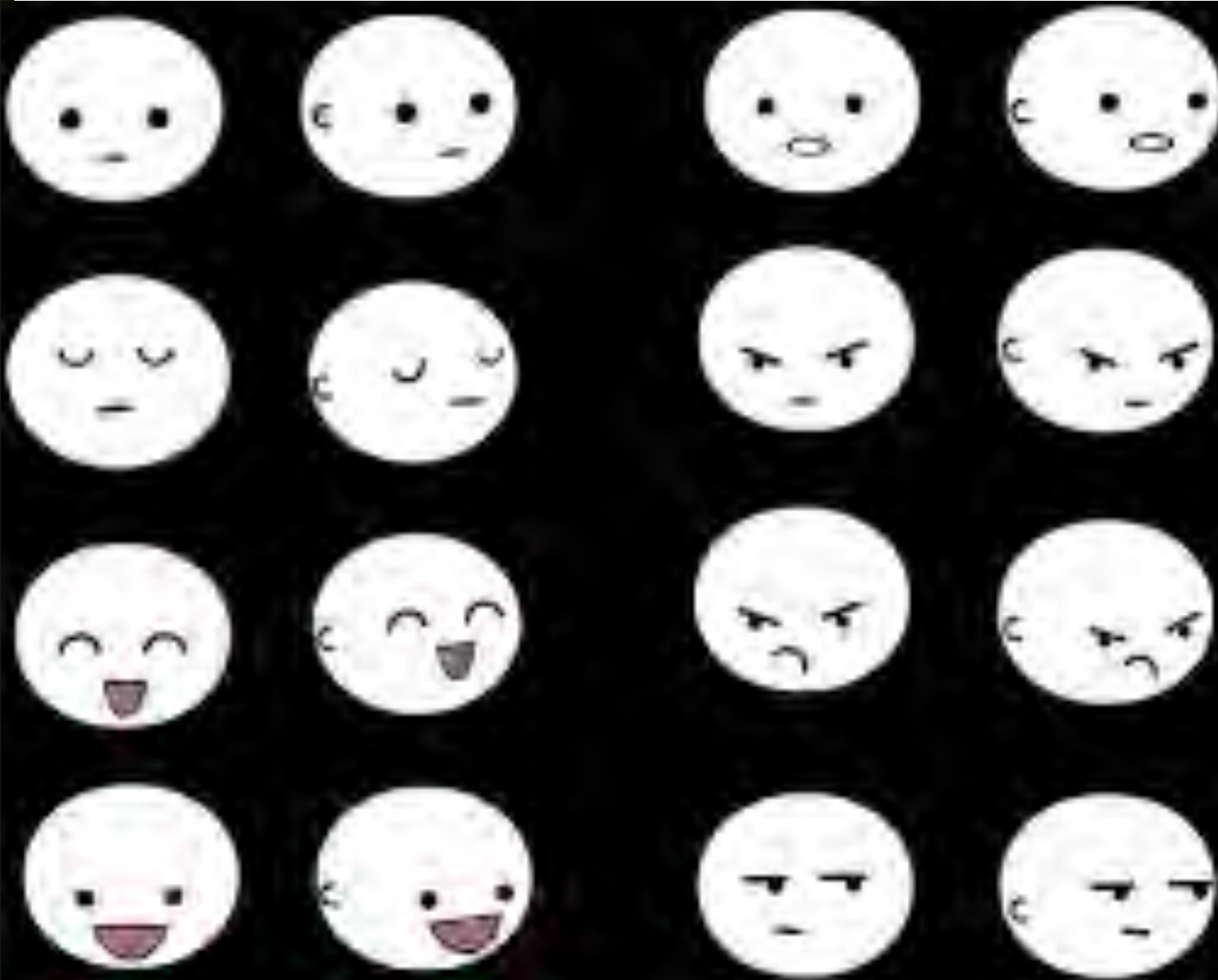
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How to
determine if
person is
credible?

Cops say:

- Body language
- Gut feeling
- Experience
- If person has prior criminal history





CAUTION
RE:
DEMEANOR
EVIDENCE



USE DISCIPLINED, UNBIASED
EVALUATION OF RELEVANT
EVIDENCE:

THINGS NOT TO CONSIDER

Preponderance of the evidence

IS

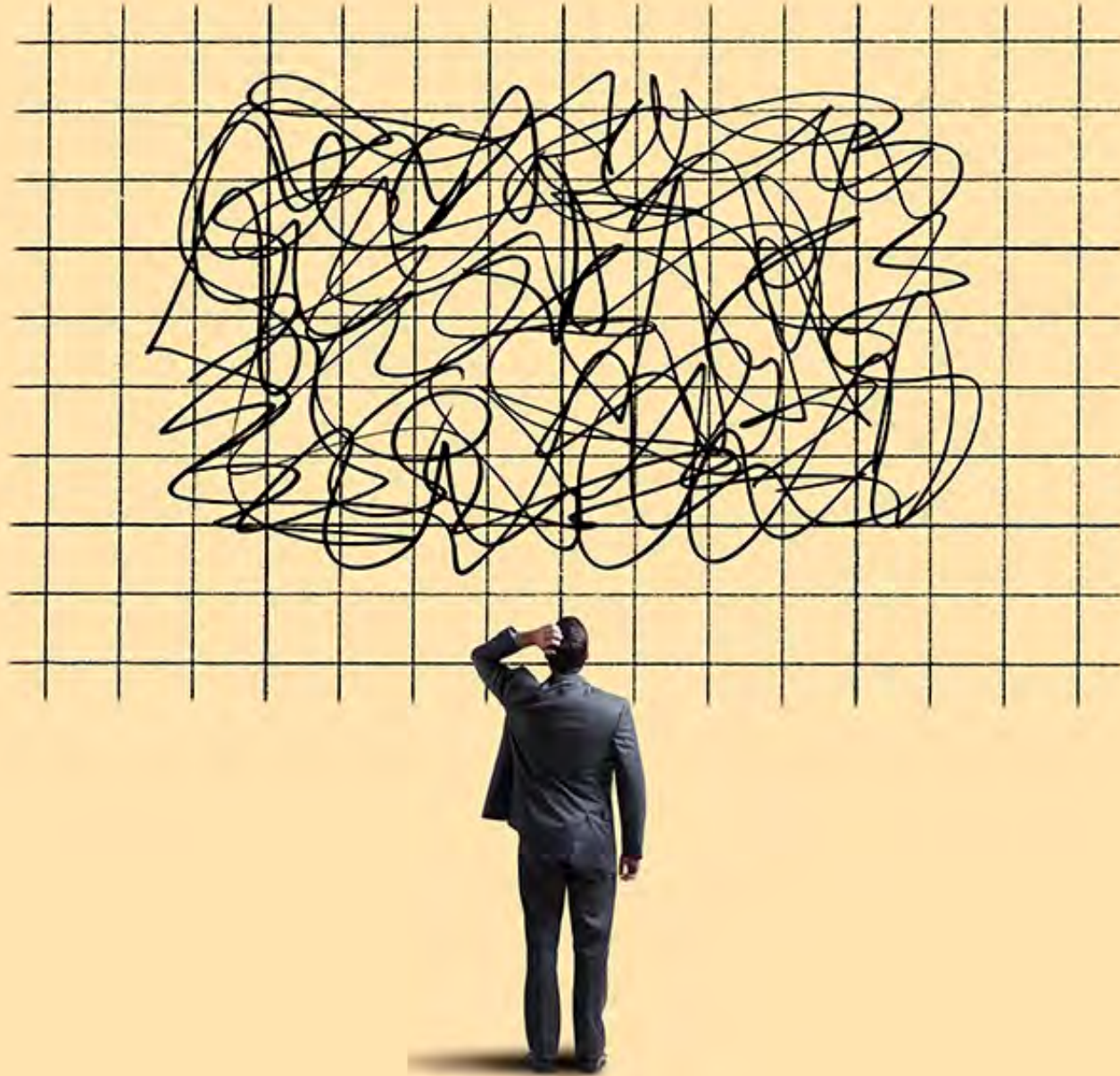
- Starting from the presumption of non-responsibility, is the complainant's account supported by the majority of the evidence?
- Starting from the presumption of non-responsibility, does the evidence establish that the complainant's account is most likely to have occurred?

IS NOT

- I think the information shows the respondent most likely to have engaged in the conduct, but I am not convinced beyond a reasonable doubt
- I think the information shows the respondent most likely to have engaged in the conduct, but I am not firmly convinced
- Since the prosecutor declined to file charges, I don't think we should hold the respondent responsible either

Your reasoning should NOT sound like this:

- I don't think the evidence is sufficient to support a finding of responsibility, but I don't want to cause a problem for Bay College because this is a high-profile matter.
- I think the respondent did it, but I don't like the complainant and think the complainant filed this claim just to hurt the respondent.
- Yes this is a technical violation of the policy, but I disagree with the policy's definition of consent.
- I don't really think the respondent did it, but I feel really bad for the complainant who is clearly traumatized.
- I think the respondent did it, but I don't want to ruin the respondent's life.



Evaluating inconsistencies and unanswered questions

Fun activity applying evidence in a sexual harassment matter

1. Unwelcome conduct (subjective and objective)
2. Severe
3. Pervasive
4. Objectively offensive
5. Effective denial of equal access to school's education program or activity

Example: The Case of the Neck Bite

1. *Making the determination of what happened, i.e. whose account is more credible, and then*
2. *Analyzing whether the conduct that happened constitutes a violation of Bay College's policies*



Analyzing the evidence: Part 2

- You have now found that that the preponderance of the evidence supports the Complainant's account that the Respondent bit her neck and within a minute of her entering the fraternity house and when she was facing away from the Respondent and toward the dance floor.
- Apply the policy to the facts to determine whether the conduct constitute a violation
 - *Does the Respondent's neck bite constitute fondling?*

Analyzing the evidence: Part 2

Fondling

The touching of the private body parts of another person for the purpose of sexual gratification, without their consent.

Break down the elements:

- Touching
- Private body parts of another person
- For purpose of sexual gratification
- Without consent



Decision and written determination

- Use disciplined, unbiased evaluation of relevant evidence
- Include specific elements required by regulations

Hearing Decision Maker's written determination should include



- Identification of allegations potentially constituting sexual harassment
- Description of procedural steps from complaint through determination
- Findings of fact
- Conclusions regarding application of Policy to facts
- Statement of and rationale for each result of each allegation
- Statement of and rationale for sanction/remedies to be implemented
- Statement of whether remedies are designed to restore/preserve equal access to the education program/activity
- Appeal instructions
- Date that written determination becomes final

Grounds for appeals

- Procedural irregularity that affected the outcome of the matter
- New evidence or witnesses that were not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- The existence of an alleged conflict of interest or bias that affected the outcome of the matter



Questions?

