



**February 16, 2021 & March 19, 2021**

**ODHE  
Advanced Title IX Decision-Maker  
Writing Workshop**





# Presentation Rules



\$ J D L Q « Z H F D Q ¶ W K H O S R X U V H O Y H V : H ¶ U H

- ‡ Questions are encouraged!
- ‡ <sup>3</sup>) R U W K H V D N H R I D U J X P H Q W « '
- ‡ 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.  
i106.45(b)(10)(i)

# 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
  - Synthesizing
  - IRAC

- ‡ Common Mistakes that Prevent Clarity in Written Decisions
- ‡ Best Practices for Writing Neutral Decisions on Sensitive Subjects

# Aspirational Agenda



Actual times may vary

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± 1:00 ±1:15

# Preparing to Write



## Timing and Form

- ‡ ' R Q ¶ W V W D U W Z U L W L Q J E H I R U H W K H K H D U L G
  - o < R X Z R Q ¶ W N Q R Z Z K D W \ R X F D Q D Q G F D Q Q R W F F
  - o You might be tempted to pre-judge the facts
  
- ‡ Find out whether your institution has a template for decisions
  - o Use it and your policy as a checklist



## 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 i 106.30;

**(B)**





## 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**;



## 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;



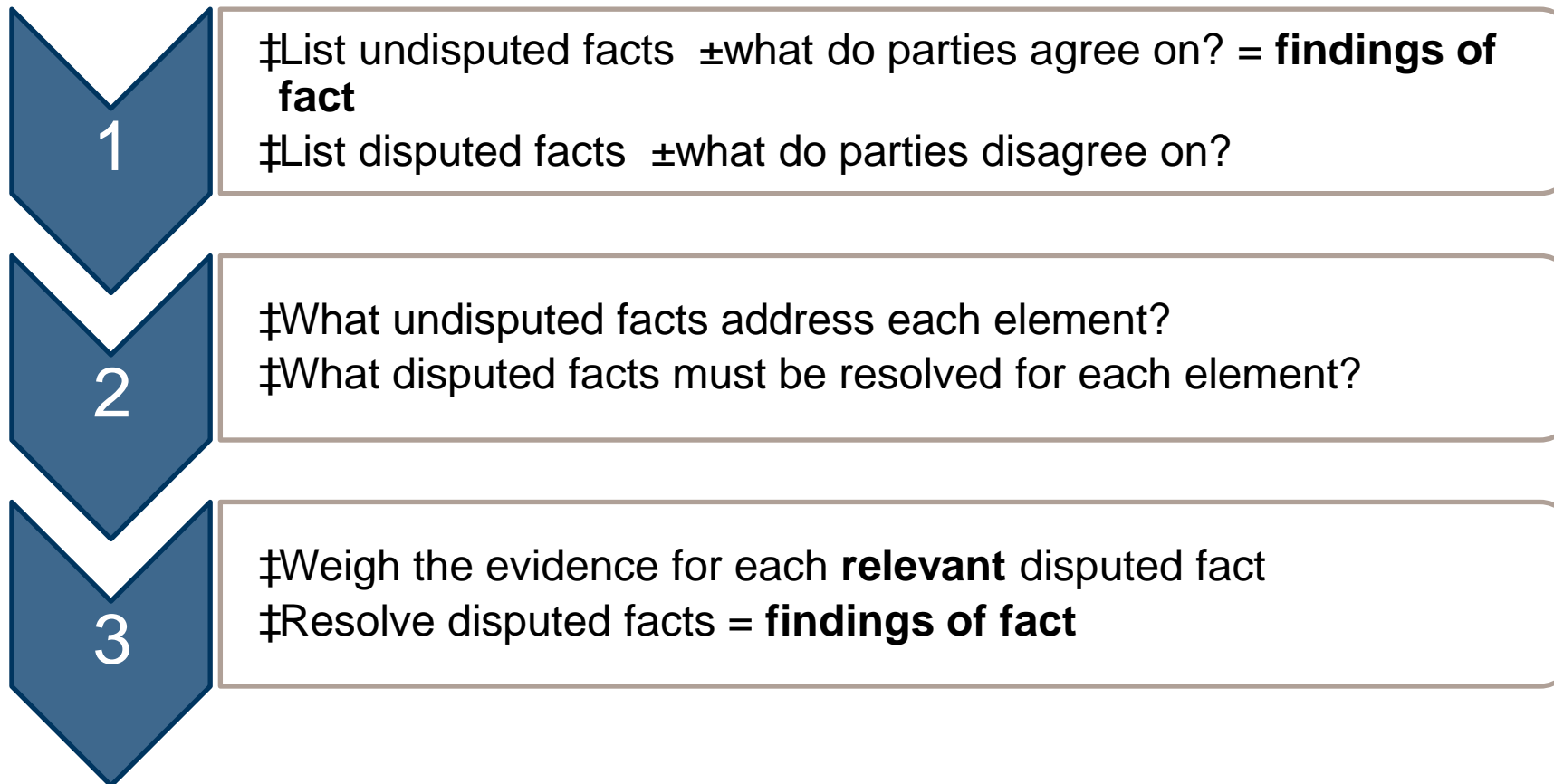
## 34 C.F.R. 106.45(b)(7)(ii)(F)

(ii) The written determination must include  $\pm$

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



# Fact Finding Process:





## Fact Finding Process Step 1:

### Undisputed vs. Disputed Facts

‡ List undisputed facts

o What do parties agree on? = **findings of fact**

‡ List disputed facts

o What do parties disagree on?



## 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



## 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



: K D W ' 2 ( 6 1 ¶ 7 \* R 2 Q W K H G F I



(1 of 3)

## Weighing the Evidence

‡ What G R H go on the scale?

sRape Shield

‡34 C.F.R. i 106.45(b)(6)(i)

sLegally Privileged Information

‡34 C.F.R. i 106.45(b)(1)(x)

sTreatment Records

‡34 C.F.R. i 106.45(b)(5)(i)



: K D W ' 2 ( 6 1 ¶ 7 \* R 2 Q W K H G F I



(3 of 3)

## Weighing the Evidence

6 H S W

4 X H V W L R Q V D Q G \$ Q V Z H U V 5 H J D U G L Q J W K H ' H S

‡ <sup>3</sup> & R Q Y H U V H O \ L I D S D U W \ R U Z L W Q H V V D Q V Z H U V R Q H R  
 H [ D P L Q D W L R Q T X H V W L R Q V D V N H G E \ D S D U W \ ¶ V D G Y L V R  
 witness has not submitted to cross- H [ D P L Q D W L R Q D Q G W K D W S D U W \ ¶ V  
 cannot be relied on by the decision-maker. See 3 U H D P E O H D W S D J H <sup>3</sup> W K  
 G H F O L Q H V W R D O O R Z D S D U W \ R U Z L W Q H V V W R <sup>3</sup> Z D L Y H '  
 circumvent the benefits and purposes of cross-examination as a truth-seeking tool for  
 S R V W V H F R Q G D U \ L Q V W L W X W L R Q V ¶ 7 L W O H , ; D G M X G L F D W

‡ Talk to your legal counsel about how to handle this



# Preamble Considerations

## Weighing the Evidence

The Preamble identifies the following considerations:

- ‡ That parties may benefit from the opportunity to challenge the opposing S D U W F R Q V L V accuracy, memory, and credibility so that the decision-maker can better D V V H the narrative to be believed. (Preamble, 30315).
- ‡ That parties may direct the decision- P D N V



# 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

‡ ' R Q ¶ W F R P S D U H      Z L W Q H V V      W R      Z  
assumptions

‡ Quantity can be a factor, but it should not be automatic





# 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

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

- o On August 30, 2020, Complainant filed a formal complaint
- o On September 5, 2020, Complainant spoke with Investigator
- o 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
- ‡

# 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

# Explaining the Facts



## Structuring Your Decision ±What Happened?

### Telling two or more stories

- ‡ Infinite ways to structure a decision
  - o We are providing suggestions



# 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

(1 of 2)



## 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 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

# 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

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## 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:

- sTiming

- sSource

- sTopic

# 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  
s"Pre-Gaming at Apartment B"
- ‡ Information comes from different people and is blended together  
sParties and witnesses
- ‡ Information comes from different documents and is blended together  
sThe 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 Z U D S H Q W L U H O \ D U R X Q G & R P S O D L Q D Q W ¶ V Q H F N + H D U L Q J 7 U D 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 L Q Y H V W L J D W R U W K D W W K H \ R E V H U Y H G E U X L V L Q J R Q W K H & R P S 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 , Q Y H V W L J D W R U «

# 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

s<sup>3</sup>5HSRUW WKDW 5HVS RQGHW &KR NHG &RPSODLQDQ

‡ Information comes from different people and is blended together

sParties and witnesses

‡ Information comes from different documents and is blended together

sThe Investigation Report and the Hearing Transcript

# Synthesis Example #2 ±Takeaways



## More takeaways

Several things worth noting in this example:

± Discrepancies between the investigation and hearing testimony are noted

s & R P S O D L Q D Q W ¶ V G H V F U L S W L R Q R I W K H F K

± Transitions to demonstrate shift from individual factual allegation to the response to that allegation

s ) L U V W G L V F X V V L Q J L Q I R U P D W L R Q V X S S R U V  
s New paragraph to discuss response from Respondent



# IRAC Example #1



# 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**

5 H V S R Q G H Q W D Z D U H R I K H U V X U U R X Q G L Q J V D Q G D Z D U H R

**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:** <sup>3</sup>) R U W K H V H U H D V R Q V & R P S O D L Q D Q W Z D V Q R W L Q  
the Title IX Policy. However, this does not end the inquiry on consent because  
& R P S O D L Q D Q W I X U W K H U U H S R U W H G « '



## 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

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

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- ‡ Allegations
- ‡ Procedural Steps
- ‡ Findings of Fact
- ‡ Application



# Common Writing Mistakes

## Consistent and Precise Language

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### 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
  - o Tom, Tom Smith, Mr. Smith, Thomas
  - o 7 R P ¶ V U R R P 5 R R P \$ + X E E D U G + D O O

### 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

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### 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
  - ³UHDOO\ GUXQN´
  - ³IRUFHIXOO\ SXVKHG´

### Tone

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

# Common Writing Mistakes

## Cite Your Source

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Failing to include sources of information (discussed earlier)

- ‡ If explaining this in every sentence weighs down your writing, use footnotes to add clarity. ( 3 % R E V W D W H G W K L V K D S S H Q H G ' )
- ‡ 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?
- o Footnote 4: The quoted language was attributed to Respondent on page 6 of the Investigation report.
- o Footnote 10: The quoted language was attributed to Respondent by Claimant G X U L Q J & O D L P D Q W ¶ V 2 F W R E H U 7 L W O



# Common Writing Mistakes

## Miscellaneous

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### 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





## 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 & R P S O D L Q D Q W ¶ V Y D J L Q D Z L W K K L V S H Q L V & R F was facing away from Respondent at the time, towards the table, and that 5 H V S R Q G H Q W S X V K H G K H U I R U Z D U G «



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& R P S O D L Q D Q W F R X O G Q ¶ W H [ S O D L Q Z K \ V K H Z I  
**herself.**



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

Issues:

‡ Confusing

‡ 0 L V S O D F H G P R G L I L H U W R Z K D W S D U W R I W K H  
I U H V K P D Q \ H D U ' U H I H U "

Fix:

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



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7KHUH ZDV QR HYLGHQFH WR VXSSRUW & RPSO  
**activity occurred without her consent.**

Issues:

- ‡ 6RXQGV MXGJPHQWDO EHFDXVH WKH <sup>3</sup>DVVHUW
- ‡ ,I & RPSODLQDQW ¶V DVVHUWLEExamination, make WHV  
that clear

Fix:



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7KHUH ZDV QR HYLGHQFH WR VXSSRUW & RPSO  
**activity occurred without her consent.**

Issues:

‡ 6RXQGV MXGJPHQWDO EHFDXVH WKH DVVHUW  
‡ ,I & RPSODLQDQW V DVVHUWL Examination, make WHV  
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.

## Plan ahead

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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

## Be flexible

As you write

- ‡ ' R Q ¶ W V W L F N Z L W K D V W U X F W X U H R U R X W O L Q H
- ‡ 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





# Questions?



# Additional information available at:

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**Title IX Resource Center** at [www.bricker.com/titleix](http://www.bricker.com/titleix)

Find us on **Twitter** at  
**@BrickerHigherEd**



## Events

Upcoming **Free** Webinars

[www.bricker.com/events](http://www.bricker.com/events)

**Title IX Resource Center:**

<https://www.bricker.com/resource-center/title-ix>

**Erin Butcher**

[ebutcher@bricker.com](mailto:ebutcher@bricker.com)

**Jessica Galanos**

[jgalanos@bricker.com](mailto:jgalanos@bricker.com)

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