Stockton University Decision Maker Training

Presented By
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Introduction

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Christine is an attorney who has extensive experience working with colleges and universities, focusing on Title IX compliance, investigations and decision-making, as well as responding to discrimination complaints based on race and disability in the workplace and educational environment. She served as the Interim Title IX Coordinator for multiple institutions of higher education.

Prior to entering private practice, Christine clerked for the Hon. James R. Zazzali at the Supreme Court of New Jersey and graduated from Rutgers School of Law-Camden with high honors.

Disclaimer

This presentation is for training purposes only. The content of this presentation is to provide news and information on legal issues and all content is provided for informational purposes only and should not be considered legal advice. The goal of the training is to familiarize attendees with the Title IX implementing regulations and Stockton University's Sexual Misconduct Procedure.

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Today's Objectives

- Know your responsibilities as a decision-maker within the Stockton Sexual Misconduct Procedure grievance process
- Gain familiarity with Title IX concepts and terminology
- Understand definitions of prohibited conduct as set forth in the Stockton Sexual Misconduct Procedure
- Discuss how to serve as a decision-maker without bias
- Preview the live hearing process
- Review practical guidance for the decision-making process

GRIEVANCE PROCESS

Purpose of the Grievance Process

- Establish a process for receiving and responding to complaints of sexual harassment/assault, stalking, dating violence and domestic violence
- Stop prohibited conduct, prevent its recurrence, and remediate any adverse effects of the conduct in the University's education program and activities
- Provide **supportive measures** to the parties – these are non-disciplinary, non-punitive individualized services
- Treat parties equitably and give them equal opportunities to share information in support of their perspective

Grievance Process Overview

Formal Complaint	Investigation	Pre-Hearing	Hearing	Appeal
▪ Formal complaint signed and notices distributed to the parties ▪ Appeal opportunity if TIX Coordinator dismisses Formal Complaint	▪ Investigation conducted ▪ All directly related evidence shared with parties, opportunity to respond ▪ Investigation Report summarizing relevant evidence issued, opportunity to respond	▪ Hearing notice and notice of charges issued ▪ Pre-hearing meeting conducted	▪ Hearing conducted ▪ Written determination of responsibility and sanctions if any ▪ TIX Coordinator issues outcome to parties within 10 business days after hearing	▪ Appeal filed (within 7 business days of determination) ▪ Non-appealing party responds ▪ Appeal outcome issued (within 10 business days of response)

Focus of Decision-maker Role

Note on the Informal Process

- Follows the filing of a formal complaint
- Alternative to the investigation / hearing process
  - No finding of responsibility by the University, but an agreement between the parties
  - Available any time prior to reaching determination regarding responsibility
  - May take form of mediation
- Not available to resolve student v. employee complaints
- Both parties must consent in writing to an informal resolution
- At any time prior to agreeing to resolution, any party has the right to withdraw from the informal resolution process and resume the formal grievance process

TITLE IX OVERVIEW

Title IX

"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."

- Applies to students and employees
- Jurisdictional requirements apply

2020 Title IX Regulations

- Give direction on how to comply with the statute in the context of sexual harassment / assault, dating & domestic violence, and stalking
- Define sexual harassment and assault for Title IX purposes
- Create new procedures for Title IX complaints relating to these types of prohibited conduct
- Mandate a live hearing for Title IX complaints and a written determination
- Mandate that parties have advisors at the hearing for the purpose of questioning the other party and witnesses
- Leave it to schools to determine how to handle non-Title IX sexual misconduct and discrimination
- Require training for investigators, advisors and decision-makers who handle Title IX matters

Title IX Prohibited Conduct Defined

Jurisdictional Requirements

- ❑ In the United States
- ❑ Within Stockton's education program or activity
- ❑ At time of filing the complaint, Complainant was participating or attempting to participate in the education program or activity

Types of Prohibited Conduct

- ❑ Sexual harassment
- ❑ Sexual assault
- ❑ Stalking
- ❑ Dating Violence
- ❑ Domestic Violence

Education Program or Activity: Includes any location, event, or circumstance over which the University exercises substantial control over both the Respondent and the context in which the alleged sexual harassment/sexual assault occurs. This includes all of the University's education programs or activities, whether occurring on or off-campus, and any building owned or controlled by a student organization that is officially recognized by the University.

Stockton's Structure

Multiple policies and procedures prohibit sexual misconduct, sexual harassment and/or discrimination based on sex

- **Sexual Misconduct Procedure (6940)**
  - Primary tool for addressing incidents of alleged sexual misconduct which violates the below policies
  - All reported incidents of sexual misconduct will be handled in accordance with the SMP
- Policy Prohibiting Discrimination in the Workplace (VI-28)
  - Procedure for Internal Complaints Alleging Discrimination in the Workplace (6360)
- Student Policy Prohibiting Discrimination and Harassment in the Academic/Education Environment (I-120)
  - Student Procedure Prohibiting Discrimination and Harassment in the Academic/Education Environment (1200)
- Campus Conduct Code (I-55)

Sexual Misconduct Procedure

Sexual Misconduct is defined in the SMP as:

- Unwelcome behavior of a sexual nature committed without consent or by force, intimidation, coercion or manipulation

- Includes but is not limited to
  - Sexual harassment
  - Rape, fondling, incest, statutory rape
  - Dating violence
  - Domestic violence
  - Stalking
  - Gender-based harassment

Sexual Misconduct Procedure

Jurisdictional Requirements

- Applies to employees, students, contractors, and any person over whom Stockton has control
- Applies to sexual misconduct
  - On University property, or
  - At University-sponsored educational program or activity, or
  - That adversely affects the University community, or
  - Threatens the health and/or safety of a member of the University community

Types of Prohibited Conduct

- Sex discrimination
- Sexual harassment
- Sexual assault / rape
- Fondling
- Statutory rape, incest
- Stalking
- Dating violence
- Domestic violence
- Gender-based harassment
- Coercion / Intimidation

KEY CONCEPTS

Terminology (1/4)

- **Complainant –** individual who is alleged to be the victim of conduct that could constitute sexual harassment/assault

  Not: *"victim" or "plaintiff"*

- **Respondent –** individual who has been reported to be the perpetrator of conduct that could constitute sexual or gender-based harassment or misconduct

  Not: *"perpetrator" or "defendant"*

- **Formal Complaint –** Document filed by a Complainant or signed by the TIX Coordinator alleging sexual harassment against a Respondent and requesting that the University investigate the allegation

Terminology (2/4)

- **Hearing –** Procedure in which both parties have the opportunity to present a narrative, witnesses and evidence and for their advisors to question the parties, witnesses, and investigator

  Not: *"trial"*

- **Cross Examination –** Opportunity for advisor, on behalf of advisee, to question parties and witnesses to establish facts and test credibility

- **Preponderance of the Evidence –** the standard by which findings of fact and responsibility are made. A finding will be made if the evidence as a whole shows that it is "more likely than not" that the alleged conduct occurred.

- **Finding of Responsibility –** the outcome of a hearing will find the Respondent either "Responsible" or "Not Responsible" for specific alleged policy violations.

  Not: *"guilty," "not guilty" or "innocent"*

Terminology (3/4)

- **Advisor –** Party is entitled to advisor of choice who may be an attorney. Role is limited conferring with party and, at the hearing, questioning the other party and witnesses ("cross-examination"). May not otherwise impede the process or formulate responses or statements for the party
  - REQUIRED to have an advisor at the hearing
  - Stockton will appoint advisor if party does not choose one

- **Support Person –** Party is entitled to a support person of choice. Role is limited conferring with party. May not impede the process, coach, speak on behalf of the party, formulate questions, statements or responses for the party
  - Optional

Terminology (4/4)

- **Hearing Officer –** External lawyer or judge, not the TIX Coordinator or investigator, who moderates the live hearing and:
  - Makes relevancy determinations as to questions and evidence
  - Enforces general rules of decorum
  - Obtains information necessary to make decision regarding responsibility
  - Makes findings of responsibility
  - Prepares written determination
  - Refers matter to sanction decision-maker if respondent found responsible

- **Sanctions Decision-Maker –** Internal representative from Office of Human Resources or Office of Student Conduct who attends the live hearing and prepares a written determination of sanctions to be included in the written determination that goes to the parties

- **Appeal Officer –** Decision-maker responsible for deciding appeal of hearing outcome or appeal of dismissal of complaint

Sexual Harassment

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

- An employee conditions the provision of aid, benefits, or service of the University on an individual's participation in unwelcome sexual conduct
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive and objectively offensive that it effectively denies a person of equal access to the education program or activity
- Sexual assault, dating violence, domestic violence or stalking, as each is defined by statute

Sexual Assault

An offense classified as a forcible or non-forcible sex offense under the FBI's Uniform Crime Reporting system, including:

- **Rape –** penetration no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without consent
- **Fondling –** touching of private body parts of another for the purpose of sexual gratification, without consent, including when the person is incapable of giving consent due to age or mental incapacity
- **Incest –** sexual intercourse between two persons who are related to each other by blood within degrees where marriage is prohibited by law
- **Statutory Rape -** sexual intercourse with a person who is under the statutory age of consent (16 years old in NJ)

Sexual Assault

Any conduct proscribed by NJ Criminal Code 2C:14-2, including:

- Any act of penetration performed or perpetrated on one person by another under circumstances indicating a lack of consent, either due to force, or an inability of one party to consent due to age, relationship, mental defect, or physical incapacitation

Consent

Affirmative, conscious, informed and voluntary agreement to engage in sexual activity

- No consent without clear verbal or non-verbal consent
- No consent if individual was forced, coerced, threatened, sleeping, beaten, forcefully restrained, unconscious, or unable to give consent due to age, relationship, mental defect, or mental or physical incapacitation, or incapacitation due to the voluntary or involuntary use of any drug, intoxicant or controlled substance

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for the person's own safety or safety of others or suffer substantial emotional distress

- **Course of conduct** means two or more acts, including but not limited to acts in which the stalker directly, indirectly or through third parties, by any action, method, device or means, follows, monitors, observes, surveils, threatens or communicates to or about a person or interferes with a person's property

Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the complainant

- Existence of such a relationship determined based upon:
  - Length of parties' relationship
  - Type / nature of relationship
  - Frequency of interaction between the parties involved in the relationship

Domestic Violence

Felony and indictable or misdemeanor crime of violence committed by:

- Current or former spouse or intimate partner of the victim;
- Person with whom victim shares a child;
- Person with whom victim cohabitates or has cohabitated as spouse or intimate partner;
- Person similarly situated to a spouse under the NJ DV laws; OR
- Any other person against an individual who is protected from that person's acts under NJ DV or family violence laws

Domestic Violence

Crime of violence means:

- An offense that involves the use, attempted use, or threatened use of physical force against the person or property of another; or
- Any other offense that is a felony or indictable crime that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense

Other Crimes

The following crimes are also covered under the SMP:

- Sexual contact
- Lewdness
- Invasion of privacy
- Human trafficking
- Promoting prostitution
- Prostitution
- Cyber-harassment when sexual in nature

Coercion / Intimidation

If a person refuses or does not consent to engage in sexual activity, the other may not coerce or attempt to coerce or intimidate the person. Includes, but is not limited to:

- Persuading or attempting to persuade with the use of force or threats
- Causing or attempting to cause actual physical harm
- Threatening physical harm
- Spreading or threatening to spread malicious lies or rumors
- Disseminating or threatening to disseminate personal information, including images, texts or electronic communications
- Following the person
- Making harassing phone calls or online communications or posts
- Sending harassing, demeaning or offensive electronic or text communications
- Vandalizing the person's property

SERVING WITHOUT BIAS

Serving Without Bias

- We all have unconscious biases!
- **Implicit bias -** unconscious attitudes that influence behavior (may even be contrary to our conscious attitudes)
  - Implicit bias can be based on stereotypes that we acquire unconsciously throughout our lives
  - Recognize the stereotype, counter it with examples that disprove the stereotype, engage in individuation and perspective taking
- Must avoid pre-judging facts and parties based on their status as complainant or respondent, gender, or other status
- No conflict or bias as to specific parties or witnesses
- Avoid generalizations and be objective

Conflicts of Interest

- Arise when a member of the University community uses or has the authority to use, their position to improperly influence a decision, action, or outcome

- Responsibility of all Stockton community members to identify and disclose potential or actual conflicts as they arise to the Title IX Coordinator

- In the event any individual with a responsibility under the SMP is a witness or has a conflict of interest that would compromise that individual's objectivity, the University will appoint a designee

THE HEARING

Pre-hearing Steps

Notice of hearing and charges and pre-hearing meeting

- 10 business days prior to hearing, Parties are provided:
  - Investigation report and evidence (written response permitted)
  - Notice of charges
  - Date, time and location of hearing, names of decision-makers
- Pre-hearing meeting will review of hearing process with party and advisor, answer questions, explain notice of charges and potential sanctions
- Respondent will be asked to enter a plea as to each charged violation

The Hearing (1/7)

Title IX requires that a live hearing be held

- Facilitated by external Hearing Officer who is not the Title IX Coordinator or the investigator
- May be conducted in person or virtually
- Participants must be able to simultaneously see and hear each other
- Hearing officer manages the hearing and ensures questioning is relevant, respectful and non-abusive
- Hearing will be recorded

The Hearing (2/7)

An opportunity for:

- Parties to address decision-makers in person
- Parties to give an opening and closing statement
- Parties to question the other party and/or witnesses via an advisor through cross-examination
- Decision-makers to obtain information following the investigation that is necessary to make a determination of whether a sexual misconduct violation occurred and the appropriate sanctions, if any

Not an opportunity to restate all evidence in the investigation report

The Hearing (3/7)

Due process in an administrative context

- Hearing procedures are administrative in nature and are not considered legal proceedings, but procedures designed to address policy violations
- Rules of evidence do not apply
- Respondent presumed not responsible
- Stockton – NOT the Parties – bears burden of proof to establish that a respondent, more likely than not, is responsible for the alleged violation
- Allegations of Campus Conduct Code violations involving discrimination / harm to another are adjudicated using the **preponderance of the evidence** standard
- Advisors are required and will be appointed if party does not choose one

The Hearing (4/7)

The hearing is closed to the public and confidential

- Only parties, advisors, hearing officer, sanctions decision-maker, support persons, and select University administrators may attend
- Hearing Officer has discretion to determine admission to hearing room and has authority to discharge or to remove any person whose presence is deemed unnecessary or obstructive to the proceedings
  - If advisor is removed due to obstructive or disrespectful behavior, the hearing cannot continue until a new advisor for the party is selected or appointed
- Witnesses are called into the hearing individually then excused

The Hearing (5/7)

Level of participation at the hearing depends on the role of the individual

- Parties are not required to attend
- If witness or party does not attend, decision-makers may consider statements made during investigation
  - Hearing officer cannot draw an inference of responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer questions
- Role of support person is limited to conferring with party
- Role of advisor includes conferring with party and questioning witnesses, but generally the advisor does not speak, defend or present information or evidence on behalf of the party

The Hearing (6/7)

Cross-examination is conducted by advisors

- Hearing officer will permit each party's advisor to ask the other party and any witnesses relevant questions and follow-up questions, including those challenging credibility
- Questioning will be conducted directly, orally and in real time by the party's advisor and never by the party directly
- Questions must be relevant as determined by the Hearing Officer
  - Hearing officer determines whether questions are relevant before an answer is given and explains any decision to exclude a question that is not relevant

The Hearing (7/7)

Evidence collected during investigation is available to the parties

- Parties are entitled to review evidence obtained as part of the investigation that is directly related to the allegations that is not privileged or otherwise protected, including evidence upon which the University does not intend to rely
- Includes inculpatory and exculpatory evidence
- Directly related evidence shared with parties will be made available to the parties at the hearing
- Directly related evidence is not necessarily relevant evidence that is summarized in the investigation report

What is Relevant?

Relevant evidence or information is that which tends to make an alleged fact more or less likely to be true

- Regulations preamble: "relevant" is to be determined by common sense
- Examples include:
  - Documents such as texts, social media posts, pictures, videos
  - Witness observations of the parties before, during and/or after the incident
  - Source and timing of witness's knowledge of facts
  - Statements by parties to witnesses

What is Not Relevant?

☒ Certain categories of information are not relevant per the regulations

- Complainant's sexual predisposition or prior sexual behavior, unless the information is offered to:
  - Show someone other than Respondent committed the alleged conduct; or
  - Prove consent by showing prior incidents of sexual behavior between the parties
- Treatment records or other privileged information (unless party consents in writing to disclosure)

HEARING OUTCOME

Hearing Outcome

Parties will receive written determination within 10 business days (more time if there are three or more parties), that includes:

- Summary of allegations potentially constituting sexual harassment, sexual misconduct or other conduct prohibited by the Campus Conduct Code
- Procedural history from formal complaint through determination
- Findings of fact and conclusions regarding application of the relevant policies and procedures to the facts
- Statement of and rationale for the result as to each allegation, including determination of responsibility and sanctions imposed
- Statement as to whether remedies will be implemented
- Procedures and permissible bases for either party to appeal

SANCTIONS

Sanctions

- After the hearing officer reaches a determination that a respondent is responsible for some or all of the charges, the sanctions decision-maker determines the appropriate sanctions
  - OHR representative for employee respondents
  - OSC representative for student respondents
- Range of disciplinary action includes, but is not limited to, reprimand, probation, deferred suspension, administrative leave with or without pay, temporary or permanent separation from the University
- Third parties or invitees who violate the procedure or related policies may have their relationship with Stockton terminated and/or their privilege of being on University premises withdrawn

Sanctions - Students

- **Status changes** reflect the seriousness of a behavior and range from warning to expulsion. Sanctions for sexual misconduct violations typically range from a minimum of probation to a maximum of expulsion
- **Educational sanctions** may include a workshop, online class, community service, training modules
- **Fines / restitution** are imposed for all cases with a finding of responsibility. Fines will not exceed $50. Restitution may be applied if the reported incident resulted in damage to University property
- Some sanctions (not expulsion) may be deferred upon request by student

APPEALS

What can be appealed?

- Either party can appeal:
  - Title IX Coordinator's decision to dismiss the Formal Complaint
  - Determination following a hearing (within 7 business days of receipt)
- On the basis of:
  - Procedural irregularity or substantive error that affected the outcome
  - Availability of new evidence that was not reasonably available at the time of the hearing that could affect the outcome
  - Title IX Coordinator, investigator, decision-maker had a conflict of interest or bias that affected the outcome

Appeal Process (1/2)

- Written process only
- Link for submission will be provided in outcome letter
- University will notify the non-appealing party in writing when an appeal is filed
- All parties will have reasonable time and equal opportunity to submit a written statement in support of, or challenging, the outcome

Appeal Process (2/2)

- Appeal will not be decided by the same person that reached the determination regarding responsibility or dismissal, the investigator or TIX Coordinator
- Appeal decision-makers will also be free of bias and conflicts
- Written decision describing the result and the rationale will be provided simultaneously to both parties within 10 business days of receipt of the non-appealing party's response statement

Levels of Appeal

Student Appeals:

- Level One: reviewed and decided by a panel of 3 trained faculty/staff members
- Level Two: reviewed and decided by VP Student Affairs when sanction is suspension; by University President when sanction is expulsion

Employee Appeals:

- Managed through Office of Human Resources
- Reviewed and decided by University President or designee
- Outcome will (i) sustain original judgment; (ii) adjust charges and modify the sanction; (iii) direct a rehearing; or (iv) dismiss the case

PRACTICAL GUIDANCE

Preparing For The Hearing

- Review notice of charges and understand violations charged
  - Identify elements of charged prohibited conduct
  - Determine what facts are not disputed
  - Understand range of sanctions for similar cases where responsibility was found
- Review the Investigation Report in depth

Preparing For The Hearing (cont'd)

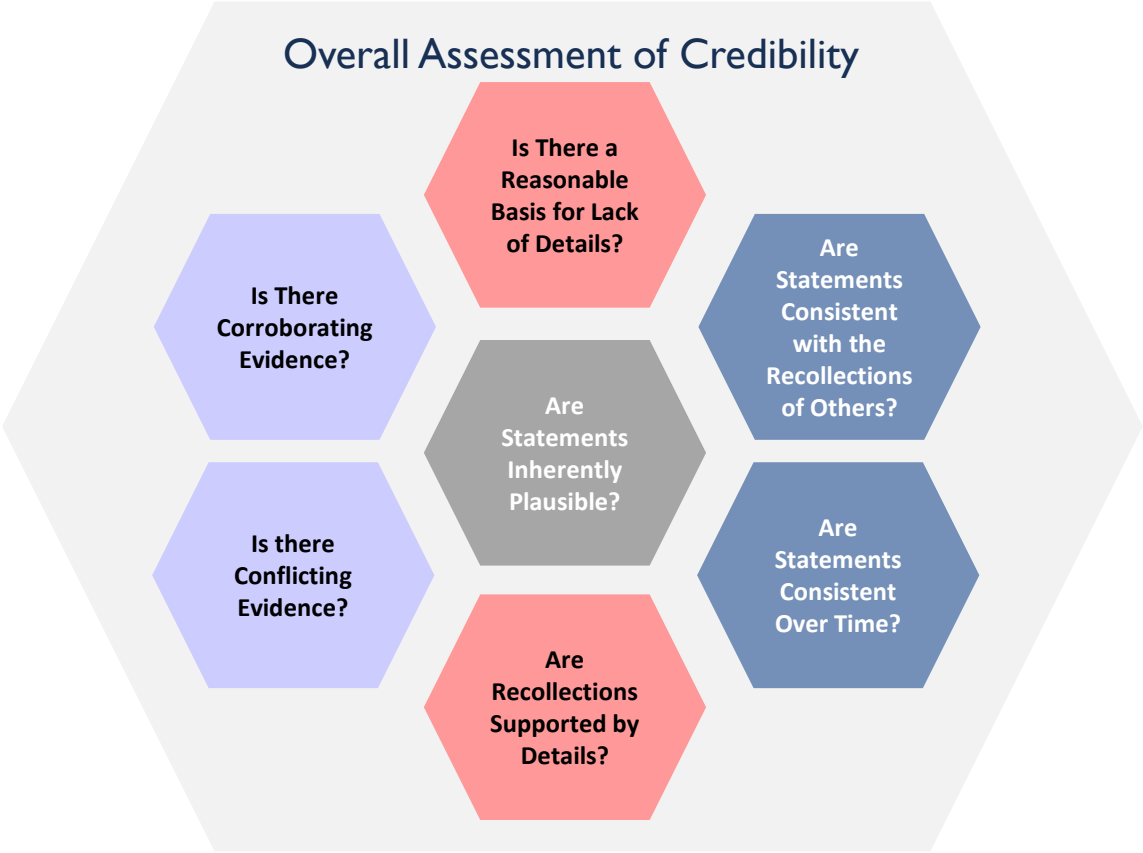
- Prepare questions for Parties and Witnesses
  - Focus on reconciling inconsistencies and clarifying missing & confusing information from the investigation report
  - No need to establish every statement "on the record" at the hearing because the investigation report will become part of the hearing evidence
  - Identify areas of aggravating / mitigating circumstances that need to be understood for potential sanctions decision

- Review suggested hearing "script" and customize it for the matter at hand

Assessing Credibility

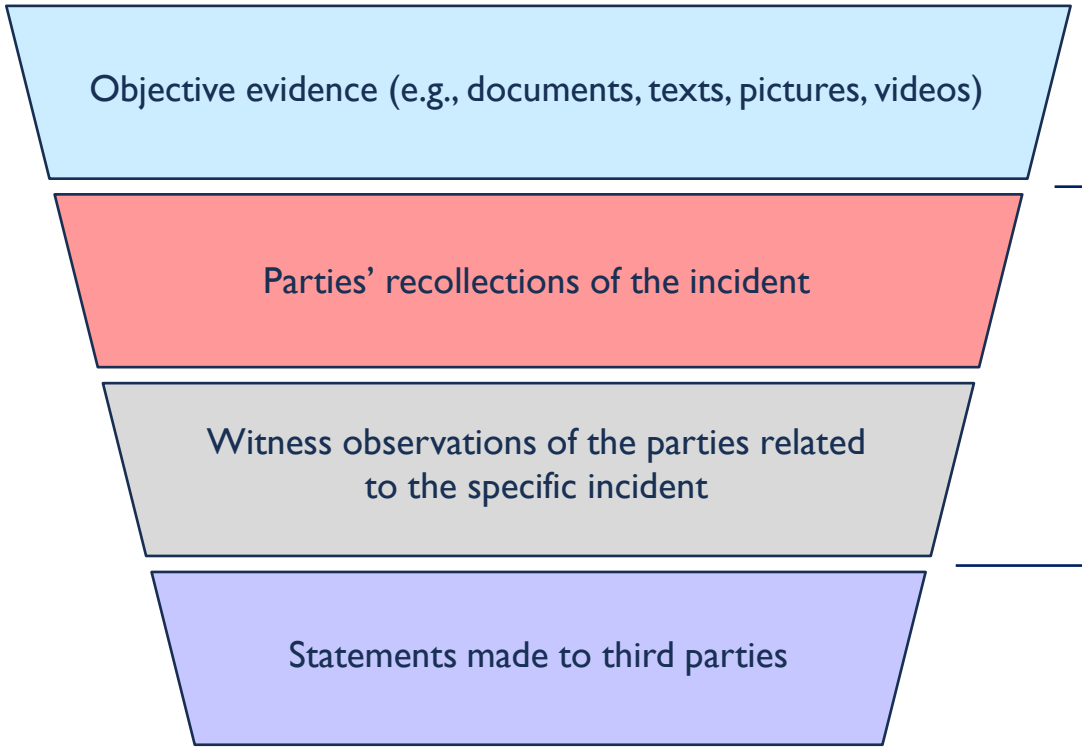
Common Considerations…

1. Plausibility
2. Evidence
3. Supporting Details
4. Consistency



Weighing Evidence

Common Considerations…



Objective Evidence

Recollections

Complainant/Respondent Statements

Assigning Sanctions

Decision-maker Considers Totality of Circumstances

QUESTIONS

THANK YOU!