



GRAND RIVER | SOLUTIONS

Title IX Hearings in a Post Regulatory World

Day 2

Jessica Brown | October 2022

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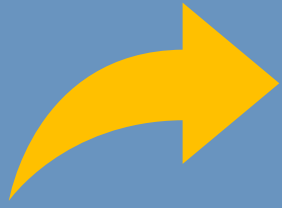
Jess Brown, J.D.

She/her

Senior Solutions Specialist

Meet Your Facilitator

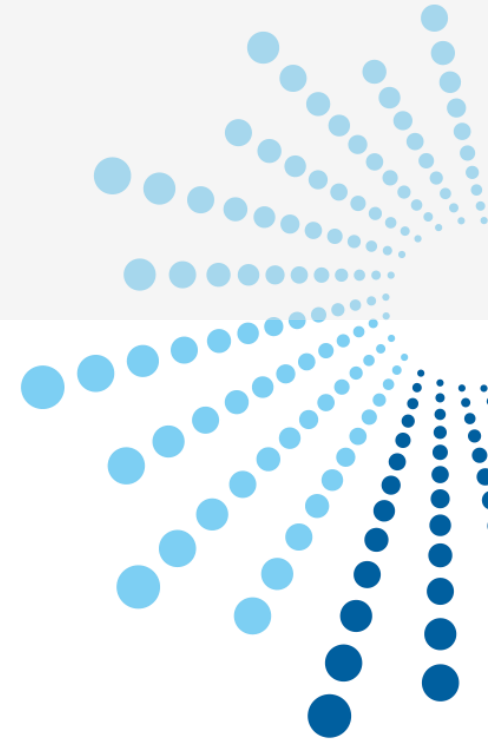
Jessica Brown is a Senior Solutions Specialist with Grand River Solutions. Prior to joining Grand River, Jessica served as Director of Educational Equity, Title IX & Section 504 at Lafayette College in Easton, Pennsylvania and as a Civil Rights Investigator at Baylor University in Waco, Texas. In her previous roles, Jessica conducted investigations of complaints alleging sexual harassment, sexual assault, or discrimination on the basis of a protected characteristic, as well as oversaw campus-wide prevention education and policy development. Jessica has extensive experience in development and management of Sexual Misconduct, Sexual Harassment, and Section 504 grievance policies and processes from intake and investigation through resolution. In addition, she has also been responsible for sexual violence education and training for campus partners and community.



After the Hearing

05

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Deliberations

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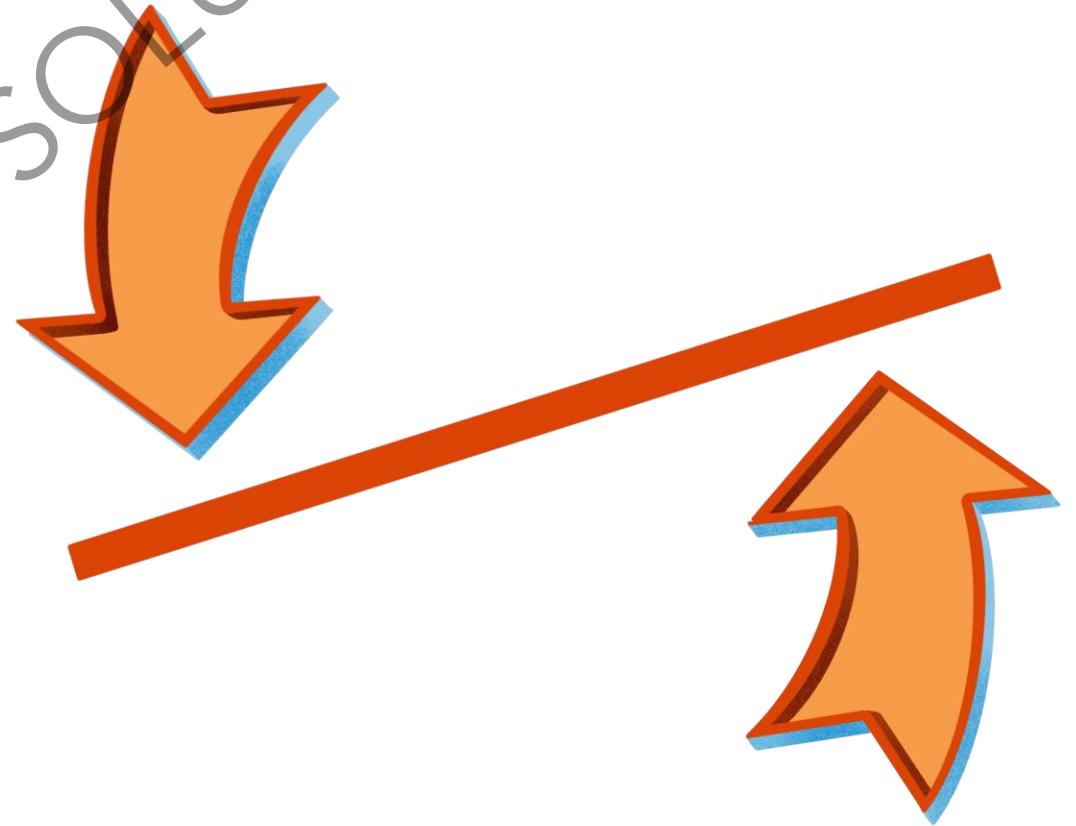


Preponderance of the Evidence

- Standard of proof by which determinations of responsibility are made
- "More likely than not"
- It does not mean that an allegation must be found to be 100% true or accurate
- A finding of responsibility = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated
- A finding of not responsible = There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated

Weighing the Evidence & Making a Determination

1. Evaluate the relevant evidence collected to determine what weight, if any, you will afford that item of evidence in your final determination;
2. Apply the standard of proof and the evidence to each element of the alleged policy violation;
3. Make a determination as to whether or not there has been a policy violation.





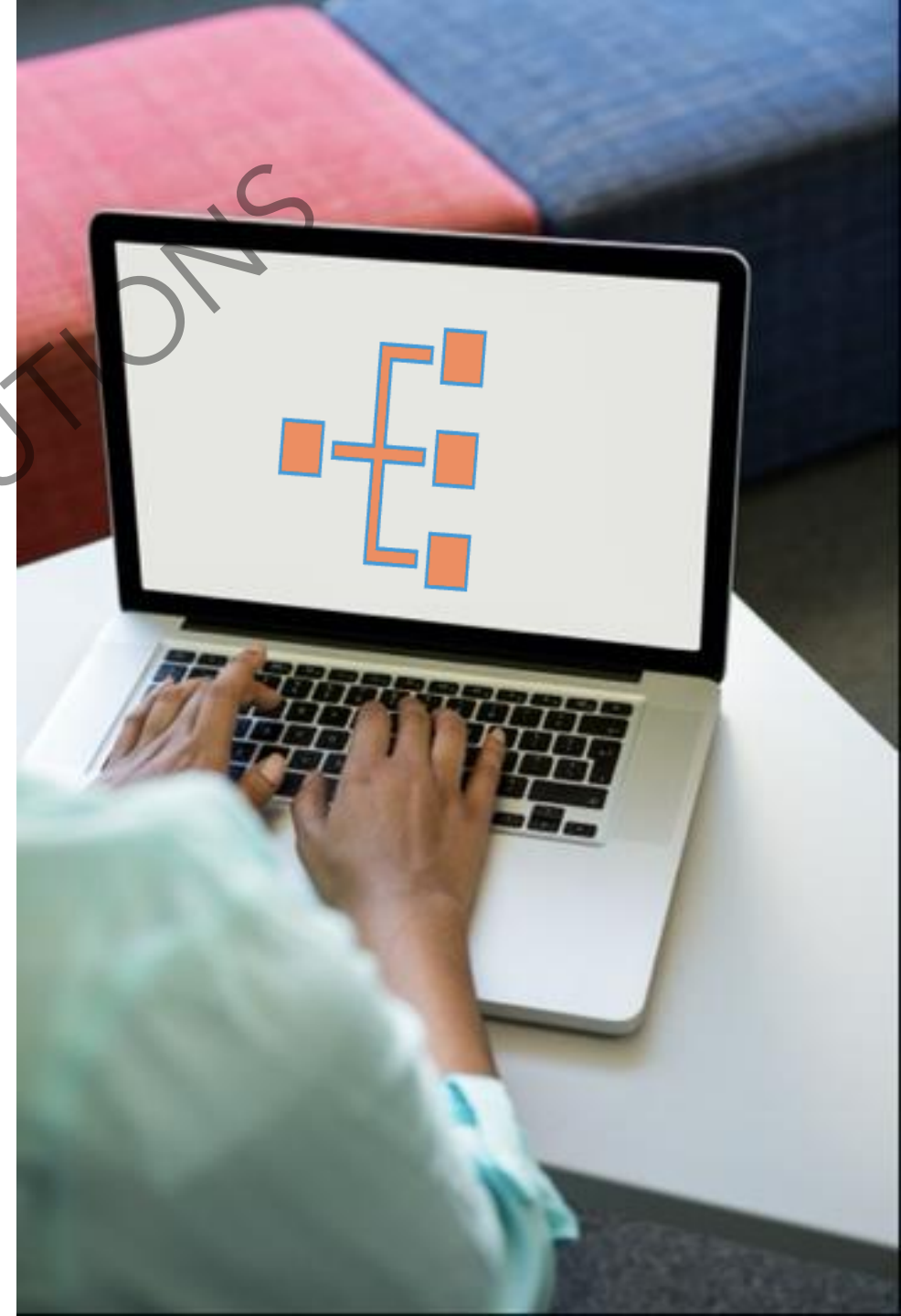
Findings of Fact

- **A "finding of fact"**
 - The decision whether events, actions, or conduct occurred, **or** a piece of evidence is what it purports to be
 - Based on available evidence and information
 - Determined by a preponderance of evidence standard
 - Determined by the fact finder(s)
- **For example...**
 - Complainant reports that they and Respondent ate ice cream prior to the incident
 - Respondent says that they did not eat ice cream
 - Witness 1 produces a timestamped photo of Respondent eating ice cream
- **Next steps?**

Policy Analysis

- Break down the policy into elements
- Organize the facts by the element to which they relate

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Allegation: Fondling




Fondling is the:

- ❑ touching of the private body parts of another person
- ❑ for the purpose of sexual gratification,
- ❑ Forcibly and/or without the consent of the Complainant,
 - ❑ including instances where the Complainant is incapable of giving consent because of their age or **because of their temporary or permanent mental or physical incapacity.**

Analysis Grid

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.</p>	<p>Respondent acknowledges and admits this element in their statement with investigators.</p> <p>"We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</p>	<p>Complainant: drank more than 12 drinks, vomited, no recall Respondent: C was aware and participating Witness 1: observed C vomit Witness 2: C was playing beer pong and could barely stand Witness 3: C was drunk but seemed fine Witness 4: carried C to the basement couch and left her there to sleep it off.</p>

Apply Preponderance Standard to Each Element

Touching of the private body parts of another person	For the purpose of sexual gratification	Without consent due to lack of capacity
<p>Undisputed: Complainant and Respondent agree that there was contact between Respondent's hand and Complainant's vagina.</p> 	<p>Respondent acknowledges and admits this element in their statement with investigators.</p> <p>"We were hooking up. Complainant started kissing me and was really into it. It went from there. Complainant guided my hand down her pants..."</p> 	<p>Complainant: drank more than 12 drinks, vomited, no recall Respondent: C was aware and participating</p> <p>Witness 1: observed C vomit Witness 2: C was playing beer pong and could barely stand Witness 3: C drank but seemed fine Witness 4: carried C to the basement couch and left her there to sleep it off.</p> 

Did You Also Analyze...?

(if required by policy)

- On campus?
- Program or Activity?
- In a building owned/controlled by a recognized student organization?
- Substantial control over respondent and context?
- Complainant was attempting to access program/activity?

Goals of Sanctions/Discipline

End the harassment, prevent its recurrence, remedy the harm

What steps would be reasonably calculated to end harassment and prevent recurrence?



Sanctioning



State law



System policy



Learning environment



Measures available

The Sanction Does Not Undo the Finding



No lesser sanction if
you disagree with
findings



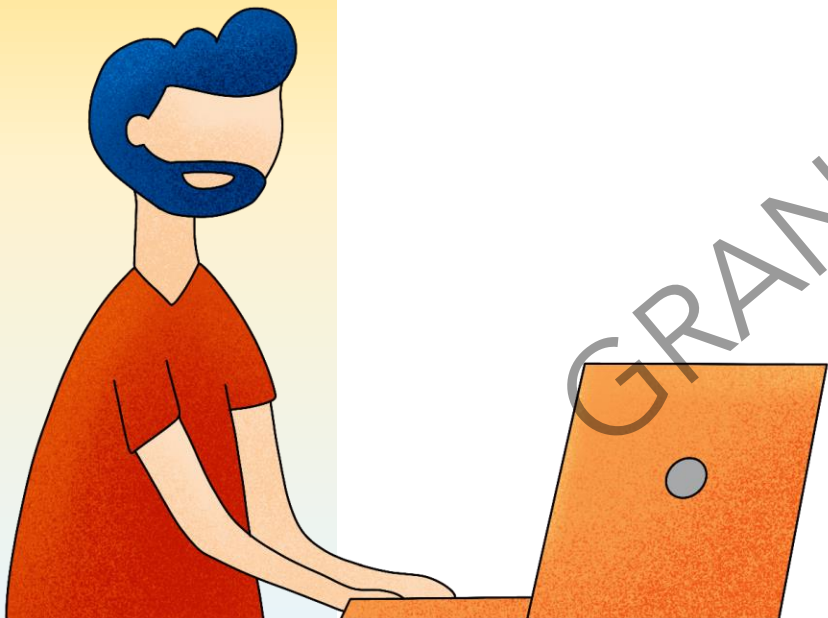
Sanctioning officer
must assume findings
are correct

Determining the Proper Sanction

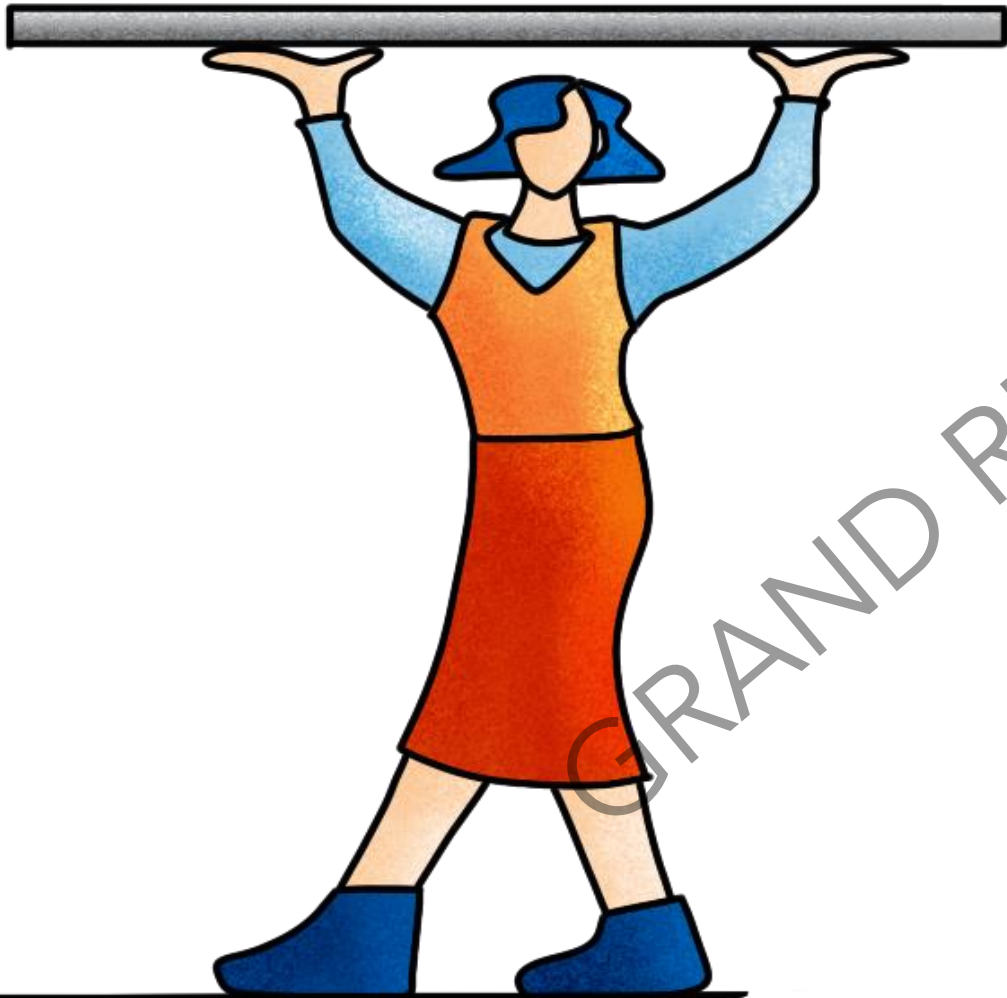
- Consistency
- Foreseeability of repeated conduct
- Past conduct
- Does bias creep in?
- Remorse?
- Victim impact?

Final Report

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and remedies
- Procedure for appeal



The Final Determination Should **STAND** On Its Own



- S** Simple and Easy to Comprehend
- T** Transparent/Clear
- A** Accurate
- N** Neutral/Unbiased
- D** Draw Attention to Significant Evidence and Issues

The Final Written Determination



§106.45(b)(7): Determinations Regarding Responsibility

When a decision-maker (or group of decision-makers, depending on the institution's process) reaches its determination of responsibility or non-responsibility, the Final Rule requires that it issue a written determination. The Rule mandates a list of six items that must be included in any determination to ensure that it is "adequate for the purposes of an appeal or judicial proceeding reviewing the determination regarding responsibility."

85 Fed. Reg. 30,389 (May 19, 2020)

The Final Written Determination Must Include the Following Information:

- 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;
- C. Findings of fact supporting the determination;
- D. Conclusions regarding the application of the recipient's code of conduct to the facts;
- 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; and
- F. The recipient's procedures and permissible bases for the complainant and respondent to appeal.

Information to Include in the Description of Procedural Steps Taken

- When the parties received the notice of allegations
- Who performed the investigation
- Which witnesses and parties were interviewed and when
- What locations, if any, were visited during the investigation
- What type of evidence was reviewed
- A description of the process undertaken to inspect and review the evidence and disseminate the investigative report, including the adherence to mandated procedural timelines
- Explanation of any delays in the process
- Explanation for why certain evidence was not sought or obtained

Finding of Fact: Supporting the Determination

- The Final Rule requires that the written decision include an analysis and finding as to those facts that are relevant to the determination of responsibility or non-responsibility.
- The written decision does not need to include an analysis of all of evidence presented at the hearing or during the investigation.

Conclusions Regarding the Code of Conduct

When the institution to applies principles or definitions not otherwise required under Title IX, those must be included in and addressed in the written determination.



The Rationale

The decision-maker must make a finding of responsibility or non-responsibility for each allegation in the formal complaint.

The written determination must include the rationale for each finding based on an “objective” evaluation of the evidence presented at the hearing.

Sanction and Remedies

The written determination must also indicate:

- The disciplinary sanctions, if any, that will be applied to the respondent when there is a finding of responsibility for the allegations.
- Whether remedies designed to restore or preserve equal access to the educational program or activity will be provided to complainant.

For Both The Report and
The Final Written
Determination

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Intended Recipients

The Parties

The Advisors

The Decision Maker

The Appeal Panel

Other Recipients?

Friends of
the Parties

Parents

Law
enforcement

Attorneys

Judges

Media

Social media

Why is it Important to Write a Solid Report and Decision?

All of the reasons given by the DOE, and...

It allows you to recall the details of your investigation and the final determination long after the event—this is important if there are complaints by or against the parties involved or litigation in the future.

It signals to others that the complaint was taken seriously—that it is important to the institution to get it right.

A well written and comprehensive report/decision shows that the investigation and hearing was fair, impartial, and thorough.

A well written and comprehensive report/decision protects you and your institution in case of litigation and helps to limit your liability.

Overview of Day Two

Let's Practice!

- Pre-Hearing Preparation
- Testimony and Cross Examination

Pre-Hearing

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The investigation is complete!

Rapid Fire #1

It is time to schedule the hearing...

Using the chat box:

share your "To Do" List for coordinating the hearing.



Rapid Fire Recap

Arranging for space

Arranging technology

Scheduling pre-hearing meetings with parties & advisors

Scheduling prehearing meetings of the panel

Providing report and record to panel and parties

Scheduling the hearing

Accommodations

Call for written submissions

Conflict checks

Other considerations?

You and your team did a great job scheduling the hearing and arranging all the logistics!

Rapid Fire #2

It is now one week prior to the hearing. You have already received and reviewed the report and record and you will be meeting with the rest of the panel (or spending some quite time by yourself) to prepare for the hearing.

Use the chat box to share what you plan to discuss/think about during the prehearing meeting.



Rapid Fire Recap

Development of introductory comments

Initial discussion of the evidence

Areas for further exploration

List of questions for the parties and the witnesses

Anticipation of potential issues

Logistics

Review of any written submissions by the parties

Other considerations?

Break Out!

#1

Say hi!

Pick a scribe

Discuss

- All groups: Areas or topics that you would like to explore further in the hearing
- Group 1: Questions for Complainant
- Group 2: Questions for Respondent
- Group 3: Questions for Witnesses Bob and Dylan
- Group 4: Questions for Witnesses Stevie and Nick
- Group 5: Questions for Witnesses Kayla and Caitlyn

Report Out

- **Group 1:** Questions for Complainant
- **Group 2:** Questions for Respondent
- **Group 3:** Questions for Witnesses Bob and Dylan
- **Group 4:** Questions for Witnesses Stevie and Nick
- **Group 5:** Questions for Witnesses Kayla and Caitlyn

Logical connection between the evidence and facts at issue

Assists in coming to the conclusion – it is “of consequence”

Tends to make a fact more or less probable than it would be without that evidence



The Hearing

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Break Out!

#2

 Say hi again

 Select a member of your group to take notes and to report out to the whole group

 Discuss the list of proposed questions for:

Group 1: Questions for Complainant

Group 2: Questions for Respondent

Group 3: Questions for Witnesses Bob and Dylan

Group 4: Questions for Witnesses Stevie and Nick

Group 5: Questions for Witnesses Kayla and Caitlyn



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Report Out



These questions are submitted by Complainant for Respondent

1. How many drinks did you have at Kayla's before going to TKE?
2. How big were those drinks?
3. Who mixed those drinks?
4. Were you drunk when you got to TKE?
5. How often do you go to parties?
6. How often do you get drunk at parties?
7. Why didn't you stay with your friends when you got to TKE?
8. When you got to TKE, did you intend to have sex with Angel that night?
9. What else do you remember from that night?
10. Did you play darts?
11. Isn't it true that you were easily able to throw darts and hit the bullseye that night?
12. When Angel was "hugging" you, as you called it, he was actually just holding on to you for support because he could not stand up, isn't that right?
13. How many times did he fall on to you when the two of you were on the couch?
14. Who got up first from the couch?
15. Isn't it true that you got up first and pulled Angel to his feet?
16. You told the investigator the two of you were drunk sloppy kissing? It seems you are admitting that Angel was drunk, isn't that correct?
17. Given all that you recall, it seems that you have a really good recollection of that night, no impaired memory, were easily able to play darts, and never fell down, so for you to act as if you were too drunk to give him a blow job and that you're the real victim here is nothing less than highly offensive, isn't that right?
18. If someone were sexually assaulted and the other person said it was the victim's fault, that is victim blaming, isn't it?
19. Are you alleging you were sexually assaulted?
20. Why would you make that up?
21. If you are saying that you were sexually assaulted, why didn't you file a complaint? Is that because you know you'll lose and be expelled for a false complaint and retaliation if you do that?
22. Are you making an allegation in order to retaliate against complainant?
23. Did you ever drink from Angel's water bottle?
24. Did you ever smell alcohol on Angel's breath while at the TKE party?
25. Have you seen the video of you giving Angel a blow job?
26. Did you initiate sex with Angel in order to get back at your boyfriend?
27. He wasn't restraining you, why didn't you just pull away?
28. Do you often give blowjobs to boys at parties?

Questions submitted by Respondent for Complainant

1. You said you do not remember anyone drinking from your water bottle. How can you remember that?
 2. Did you file a report with the police?
 3. Why not?
 4. Did you get a medical exam?
 5. Why not?
 6. Is it true that you are hoping to go to medical school?
 7. Isn't it true that you are really worried about your grades this semester?
 8. Isn't it true you were struggling with inorganic chemistry class?
 9. And isn't it true that you wanted to drop the class, but you would have had a "W" on your transcript?
 10. Did you end up withdrawing from that class?
 11. And isn't it true that there is no notation on the transcript because you were given the gift of being pulled from the class without any transcript notation?
 12. And is that why you filed this claim, so you could get out of taking the class without anything showing up on your transcript?
 13. You said to the investigator that you "could not believe anyone would film" the sex act that occurred at the TKE party, isn't that correct?
 14. Have you ever watched any porn videos?
 15. Didn't you take a video last year of some of your friends, including Bob and Dylan, playing a game that involved simulating sex acts?
 16. During your interview with the investigator, isn't it true that you had to be reminded by your own advisor that your "story" is that you were too drunk to remember anything, right?
 17. How many times did you and your advisor rehearse your interview?
 18. You said you had no information or memories about what happened at the party, but also claim to remember how her hands were moving, when the two of you were sitting on the couch in the basement. Which one of those statements is the lie?
-

Questions for Bob

By Complainant

1. When you were describing the vodka you poured into your water bottle, what exactly do you consider to be 2 or 3 shots?
2. Did you use shot glasses, red solo cups, or did you eyeball it?
3. What do you remember about Barb's Tinder profile?
4. Did it suggest what type of relationship she was looking for?
5. Did you match?
6. Why were you looking at Tinder?
7. How often do you troll on Tinder?
8. You said Barb took a huge gulp out of your water bottle toward the end of the evening. What did you mean by "huge gulp?"
9. How much of the vodka/orange juice in your bottle did you drink that night?
10. How much was left in the morning?

By Respondent

1. Doesn't your frat have a reputation on campus of getting girls drunk at parties?
 2. Isn't true when you say you take care of people at parties, that you actually just get them more drunk so they will have sex with one of your friends or brothers? That is what you were doing to the respondent, correct?
 3. Didn't you have to retake Measuring Science 101 where they teach you how to measure liquids?
 4. How many times did you watch that video before deleting it?
 5. Do you still have the video?
 6. Will you get in trouble with your fraternity for bringing in illicit alcohol to the party?
 7. Isn't it a violation of fraternity rules for you to drink, particularly when you were supposed to stay sober and prevent people from getting too drunk or harming themselves or others?
 8. Do you feel bad that, by drinking so much, you were unable to do your job well that night?
 9. Do you feel bad that, by drinking so much, you basically allowed the sex assault in the basement to occur, because you weren't keeping a watchful eye?
-

Questions for Dylan

By Complainant

1. You told the investigator you saw Angel spill beer on Barb, isn't that correct?
2. And didn't you tell the investigator that you also saw Angel stumbling and falling?
3. So basically, he was acting like he was so drunk that he could barely function, right?

By Respondent

1. You made a water bottle of vodka and orange juice correct?
 2. How much did you drink?
 3. Do you remember how much of it you had left at the end of the night?
 4. How strong was your orange juice and vodka?
 5. You bought beer. How old are you?
 6. Why do you have a fake ID?
 7. You said you saw Angel at the party, and that he was so drunk he could barely stand up; did you take any action to protect your drunk friend from drinking more?
 8. Is that because your friend was not really that drunk, or because you don't really care about someone being so drunk they can barely stand?
 9. Your friend passed out at the end of the night; which emergency number did you call for help?
 10. You said you put a trash can by him when you saw him passed out, but you didn't roll him on to his side? Is that because he was sleeping, and not really because he was drunk?
 11. Have you ever tried to hit on Barb?
 12. Didn't she reject your advances?
 13. Is that why you're exaggerating your supposed observations that Angel was so drunk?
 14. Respondent does better than you in all your classes, correct?
 15. And you said you once caught her cheating off of you, but isn't it actually true that you were the one referred to student conduct for a plagiarism charge?
 16. If you have a fake ID, what else is fake? Your testimony, for example?
-

Questions for Stevie

By Complainant

1. How much did you have to drink?
2. How drunk did you feel that night?
3. Do you think you were close to blacking out?
4. Given how drunk you were, isn't it likely that you don't really have a good memory of that night?
5. You said Angel stumbles even when he is not drinking, yet you know he is an athlete, so how is it that an athlete stumbles and is as uncoordinated even when sober, as you described to the investigator?
6. Do you have a crush on Barb?
7. How long have you wanted to have sex with her?
8. Are you minimizing how very drunk Angel was in order for her to like you more?

By Respondent

1. Did you see Barb and Angel playing darts?
 2. Was Angel able to play darts?
 3. Was he hanging on to Barb for dear life or standing up and throwing darts?
-

Questions for Nick

By Complainant

1. Isn't true you have no real friends?
2. You don't get good grades, correct?
3. That is because you are always smoking weed, correct?
4. How much weed did you smoke that night?
5. Does smoking weed impact your ability to remember things?
6. Isn't it true that the reason you started smoking weed was because you got a card for medical marijuana, for your anxiety and ADHD?
7. Did you imagine the conversation about Angel wanting to hook up with a girl?
8. Does your anxiety or ADHD make you imagine things that did not happen?
9. Why did you presume Angel was "cheating" when he was actually the victim of a sexual assault?
10. Did you watch the video?
11. Isn't it obvious to you that Angel is swaying and can barely stand up while she gives him a blow job?
12. Do you still have the video of that night on your phone?
13. If I were to call the police on you and tell them that that you have evidence of a crime on your phone, aren't you scared they will find it?

By Respondent

1. So, the complainant seemed desperate to hook-up with a girl that night?
 2. Are you certain you remember that conversation?
 3. What else do you recall from that night?
 4. Can you remember what you ate for breakfast that day?
 5. And isn't it true that you are a really honest person who would never lie?
-

Questions for Kayla

By Complainant

1. Did you notice the complainant stumbling or falling over, once he was in the basement?
2. Did you feel drunk that night?
3. Was the amount you had to drink that night a lot for you?
4. Given how much you had to drink, do you think you can even trust your memories from that night?
5. Barb is a good friend of yours, isn't she?
6. You would say anything to support her, wouldn't you?
7. Did you tell the investigator that Barb was mad at herself?
8. Is it possible she was mad at herself for violating Angel?
9. You said Barb and Angel were "drunk sloppy kissing." Did you get that phrase from Barb, or did she get it from you?
10. Did she tell you what to say here today?
11. Do you know that, if you are caught lying for her, you will be disciplined and might be suspended or expelled?

By Respondent

1. Would you categorize Angel as the initiator of all the contact between him and Barb?
 2. So you would call him the aggressor, is that right?
 3. How many times did you see Angel fill Barb's beer that night?
 4. And you saw him keep topping it off, is that right?
 5. Did that feel predatory to you?
 6. Have you seen Angel or any of his friends like Bob, Dylan, Stevie, or Nick try to get a girl really drunk at a party, on any other occasion?
-

Questions for Caitlyn

By Complainant

1. You would consider complainant a good guy, right?
2. Barb wanted to "have a good time" right?
3. Did she tell you she planned to have sex with Angel that night?
4. You saw her intentionally move down to give a blow job?
5. How often has she done this at other parties? Is giving blow jobs something she casually does at parties?
6. And she is a good friend, right?
7. So this is particularly painful for you, your telling the truth about her sexually assaulting him, right?
8. And would you agree that it does not matter if the victim is a man or a woman, but rape is rape, right?
9. You said Barb had her arm around Angel's waist when people were in the basement that night. Is that so that she could control him?

By Respondent

1. You told the investigator you had 4-5 beers and 2-3 swigs of from Bob's vodka, correct?
 2. Is that a lot for you?
 3. Were you feeling drunk that night?
 4. How drunk?
 5. Was the drink in Bob's water bottle strong?
 6. Given how drunk you were, why should we trust your recollections of that night?
 7. You said you were cheering on the sex act in the video; were you surprised to see yourself doing that?
 8. Do you remember cheering?
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