



HIGHER EDUCATION LEVEL TWO: TITLE IX DECISION-MAKER TRAINING

Advanced Title IX Decision-Maker Training

FEBRUARY 25, 2021

MARCH 18, 2021



Bricker & Eckler
ATTORNEYS AT LAW

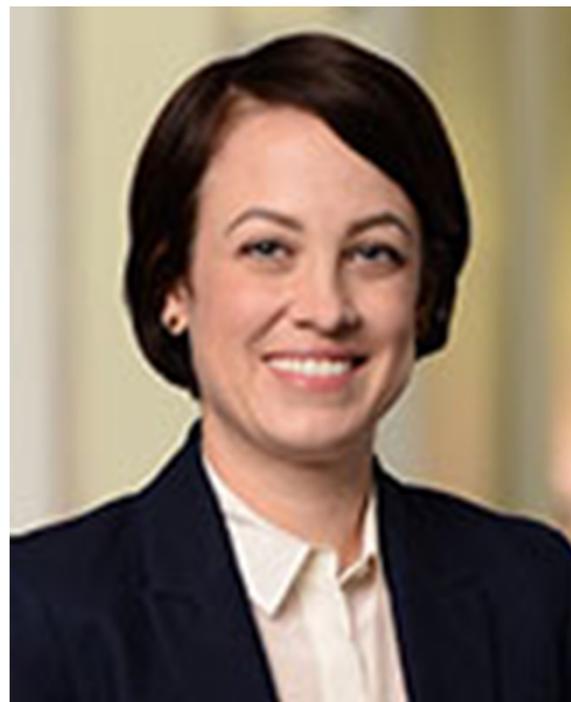
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Disclaimers



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 is designed to assist attendees who have already completed their Title IX Regulations-required training for decision-makers with more hypotheticals and practice running a live hearing. *This training does not cover annual Clery training or 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 websites for Title IX compliance.

Presentation Rules



Questions are encouraged

- “For the sake of argument...” questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

Aspirational Agenda



1:00-1:30	Overview of Scenario/Investigation Report
1:30-2:30	Relevancy refresher
2:30-2:45	Presentation to model
2:45-3:00	Break and join small group
3:00-3:45	Practice in small groups
3:45-4:00	Break
4:00-4:15	Debrief what learned in small groups
4:15-5:00	Overview of Script Checklist and Refresher of Tools for Decision Maker

Posting these Training Materials?



YES – Post away!

- The “recipient” is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website
- We know this and will make this packet available to you electronically to post.



Review of Investigation Report

Relevancy Refresher



Relevancy Refresher

(1 of 10)



- Regulations do not define “relevant,” but tells us what is not relevant
- Per *Regulations* 34 C.F.R. 106. 45(b)(6)(i):
 - “Only relevant cross-examination and other questions may be asked of a party or witness.”
 - **“Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.”**

Relevancy Refresher

(2 of 10)



Under the **preponderance of the evidence/clear and convincing** standard:

- Does this help me in deciding if there was more likely than not a violation/highly probable to be a violation?
- Does it make it more or less likely/does it make it highly probable?
- Why or why not?

If it doesn't move this dial: likely not relevant.

Relevancy Refresher

(3 of 10)



Under the **clear and convincing** standard of evidence:

- Does this help me in deciding if a fact is highly probable to be true?
- Does it make it more or less probable?
- Why or why not?

If it doesn't move this dial: likely not relevant.

Relevancy Refresher

(4 of 10)



- Recipient must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (Preamble, p. 30331)
- A recipient may not adopt rules excluding certain types of relevant evidence (Preamble, p. 30294)
- May not adopt Rules of Evidence.

Relevancy Refresher

(5 of 10)



What is NOT relevant:

Questions and evidence about the **complainant's** sexual predisposition or prior sexual behavior **are not relevant, UNLESS**

- 1) Such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- 2) If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

[34 C.F.R. 106.45(b)(6)(i)]

Relevancy Refresher

(6 of 10)



What is NOT relevant:

Information protected by a legal privilege

[34 C.F.R. 106.45(b)(1)(x)]

This will vary state-by-state, so check with your legal counsel.
Most common in this context are:

- a) Attorney-client privilege
- b) Doctor-patient/counselor-patient
- c) Fifth Amendment/right not to incriminate self (not really applicable in this venue, but sometimes raised and cannot force to answer questions)

Relevancy Refresher

(7 of 10)



What is NOT relevant:

A party's treatment records (absent voluntary written waiver by the party)

[34 C.F.R. 106.45(b)(5)(i)]

Relevancy Refresher

(8 of 10)



What is NOT relevant:

No improper inference from a party or witness electing not to participate in cross-examination.

[34 C.F.R. 106.45(b)(6)(i)]

Relevancy Refresher

(9 of 10)



Consideration of past statements of a party or witness that does not answer questions on cross-examination.

- Preamble
- Open Source and September 4, 2020 Q&A

Discuss with your legal counsel and Title IX Coordinator.

Relevancy Refresher

(10 of 10)



When statement IS the sexual harassment...

When it constitutes the sexual harassment, it is not the Respondent's "statement" as used in 34 C.F.R. 106.45(b)(6)(i), because the verbal conduct constitutes part or all of the allegations of sexual harassment itself.

<https://www2.ed.gov/about/offices/list/ocr/blog/index.html> (May 22, 2020 blog post)

Relevancy Refresher



Decorum

Relevant questions must not be abusive and enforcement of decorum must be applied evenhandedly. Where the substance of a question is relevant, but the manner of the question is “harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically ‘leans in’ to the witness’s personal space).” (Preamble 30331)

The decision maker may remove any advisor, party, or witness who does not comply with expectations of decorum. (Preamble 30320)

**Relevancy
Refresher: Practice
Making Relevancy
Determinations**

Relevancy Determination Hypotheticals

(1 of 2)



Okay, decision-maker, is this question relevant?

For practice, we will pose these in cross-examination format. As discussed before, the traditional cross-examination style is aimed at eliciting a short response, or a “yes” or “no,” as opposed to open-ended question which could seek a narrative (longer) response.

For example, instead of, “How old are you?” the question would be, “You’re 21 years old, aren’t you?”

Relevancy Determination Hypotheticals

(2 of 2)



For each practice hypothetical, ask yourself:

Is this question relevant or seeking relevant information?

- Why or why not?
- Does the answer to this depend on additional information?
- If it is so, what types of additional information would you need to make a relevancy determination?

Relevancy Determination Hypotheticals Disclaimer



Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

Practice Hypothetical #1



Question from Anders (Roger's advisor) to Cassie

Cassie, did Roger tell you he wanted you to touch his penis?

Practice Hypothetical #2



Question from Felicia (Cassie's advisor) to Roger

Roger, you didn't ask Cassie if she wanted to have sex, did you?

Practice Hypothetical #3



Question from Anders (Roger's advisor) to Cassie

Cassie, you'd agree that it seems difficult to have sex as you've described?

Practice Hypothetical #4



Question from Anders (Roger's advisor) to Rogers

Roger, could you have physically had sex with Cassie in the way she described it?

Practice Hypothetical #5



Question from Anders (Roger's advisor) to Cassie

*Cassie, you've had sex with other men
you met at parties, right?*

Practice Hypothetical #6



Question from Felicia (Cassie's advisor) to Roger

Roger, you've had sex with other women you met at parties, right?

Practice Hypothetical #7



Question from Anders (Roger's advisor) to Cassie

Cassie, could you have had sex with someone else that night too?

Practice Hypothetical #8



Question from Anders (Roger's advisor) to Cassie

Cassie, you didn't provide your rape kit results because they were inconclusive, correct?

Practice Hypothetical #9



Question from Felicia (Cassie's advisor) to Roger

Roger, I got your counseling records right here from a friend, can you read aloud your statement here?

Practice Hypothetical #10



Question from Felicia (Cassie's advisor) to Cassie.

Cassie, you brought your counseling records today, correct?

Practice Hypothetical #11



Question from Anders (Roger's advisor) to Cassie

Cassie, did you tell Felicia during break that you thought today was not going well for you?

Practice Hypothetical #12



Question from Felicia (Cassie's advisor) to Roger

Roger, did you tell your attorney during break that you thought today was not going well for you?

Practice Hypothetical #13



Question from Felicia (Cassie's advisor) to Roger

Roger, did you tell your counselor you raped Cassie?

Practice Hypothetical #14



Question from Felicia (Cassie's advisor) to Cassie

Cassie, are you willing to tell us what your doctor diagnoses you with?

Decision-Maker Hearing Practice

Debrief Practice in Large Group

Hearing Scripts and Toolkit Refresher

Hearing Script Checklist (1 of 6)



- Introduction
 - Identify parties and advisors
 - Identify specific allegations and policy violations
 - Identify specific elements of each policy violation
 - Identify standard of proof and presumption of no violation
 - Identify order of questioning of parties and witnesses
 - Identify rights and responsibilities for each party and have them agree to understanding and agreeing to the rights and responsibilities
 - Right not to answer a question, but know that their statements and answers to questions cannot be considered by decision-maker
 - Expectation of truthful statements and reminder of any student/faculty/staff conduct violations for false statements

Hearing Script Checklist (2 of 6)



Introduction (continued)

- Use of breaks
 - Explain that you will provide breaks as needed and that a party, witness or advisor may request a break at any time
 - You may call a break at any time
 - You have a duty and responsibility to question parties and witnesses to ensure the questions you need answered are addressed

Hearing Script Checklist (3 of 6)



Introduction (continued)

- Decorum
 - Explain that you have a duty to run a truth-seeking hearing and you expect the parties, advisors, and witnesses to respect those rules.
 - Identify that decorum includes: not yelling, screaming, harassing, or intimidating a party or witness
 - Explain that you retain the discretion to remove a person who does not comport with your expectations of decorum

Hearing Script Checklist (4 of 6)



Introduction (continued)

- Expectation for Advisors
 - Explain that, in addition to the expectations of decorum, advisors are expected to:
 - ask only relevant question
 - Speak only when the decision maker has provided an opportunity for them to ask questions or asked the advisor a question
 - No other comments or arguments from advisors are tolerated and will be considered an issue of decorum

Hearing Script Checklist (5 of 6)



Throughout the hearing

- Before the questioning of each party, consider restating rights and responsibilities of a party answering questions
- Before the questioning of each witness, read the rights and responsibilities for each witness and confirm on the records that they understand and will comply with the rights and responsibilities



Refresher on Decision-Making Tools

- Pre-hearing conference
- Use of scripts
- Use of breaks
- Call to TIX Coordinator or designee
- Remember that relevancy determinations are not the same as weight of evidence (the two-roles of the decision maker)
 1. Run the hearing and make relevancy determinations
 2. Write the decision and weigh the evidence in the record

Questions?

Additional information available at:

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

Free upcoming webinars at www.bricker.com/events

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**Sign up for
email insights
authored by
our attorneys.**



Text 'Bricker'
to 555888.

For Training Purposes Only

**Ohio Department of Higher Education Advanced Decision-Maker Training
Modeling and Practice Script for Training Only
February 25, 2021 and March 18, 2021**

This script is for training purposes only and is not based upon an actual matter or individuals. Because this script was designed for training only, it is incomplete. Scripts should be tailored to each institution and to each matter.

Part I – This is an example of the introduction of a script for the live cross-examination hearing for you to have and take back to your institutions based upon the scenario provided to you this morning. We will present it to you and then go over it as a group.

Decision Maker: Good morning and thank you for joining me today for the live cross-examination hearing in case No. 2020-0001. My name is ____ and I will be serving as the decision-maker in this matter. As we prepare to begin the hearing today, I want to point out that I am reading from a script to ensure transparency and consistency between hearings. The hearing process is unique to the University and is designed to provide a live cross-examination hearing to resolve the Title IX claims in this matter. The process is not the same process used in civil or criminal courts.

The matter today involves two claims by Complainant Cassie Coulter alleging violations of the Title IX Sexual Harassment Policy by Respondent Roger Reynolds. Specifically, Cassie alleges that Roger sexually assaulted Cassie in violation of Corona College's Title IX Policy in two ways: (1) by touching her breasts without consent, and (2) by engaging in sexual intercourse with her without consent.

Cassie is here today with her advisor, Felicia Faulkner. I'll note for the record that Felicia is also a witness in this matter who will be testifying today, as well.

Roger is here today with his advisor, attorney Alan Anders.

Both parties identified the following witnesses:

- Sam Sawyer, who is scheduled to log in this afternoon
- Todd Taylor, who did not respond to requests to attend today
- Gus Greeley, who did not respond to requests to attend today
- Bob Bartender, who did not respond to requests to attend today
- Xavier Xerxes, who did not respond to requests to attend today

This is a hearing script based on a completely fictionalized investigation report that has been prepared for use in a Title IX training for decision-makers. Any resemblance to any individual, situation, or case is purely coincidental. This script is not detailed to the recommended level because it is not tailored to a specific Title IX policy. This script does not include every topic that can or should be included in a hearing script, and it is not intended to be used a hearing script in its current form. Please consult with institutional legal counsel about how to modify parts of this hearing script to be consistent with your institution's Title IX policy.

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Additionally, the following witnesses were identified by Cassie to attend today:

- Roger Reynolds, Respondent
- Felicia Faulkner

Additionally, the following witnesses were identified by Roger to attend today:

- Cassie Coulter, Complainant

In compliance with the Title IX Regulations, I may not consider when I write my decision any prior statements by parties or witnesses that are not subjected to cross-examination in this hearing.

We will proceed today with questioning in the following order:

- Questioning of Cassie by Roger's advisor. I will then allow Cassie's advisor to ask follow up questions of Cassie. I may ask questions of Cassie.
- Questioning of Roger by Cassie's advisor. I will then allow Roger's advisor to ask follow-up questions of Roger. I may ask questions of Roger.
- Questioning of the witness:
 - Sam Sawyer by Cassie's advisor. I will then allow Roger's advisor to ask questions of Sam. I may ask questions of Sam.

I will now read the rights and responsibilities for the parties and their advisors and discuss my expectations for this hearing today. At the end of my explanation of the rights and responsibilities of this process, I will ask each party and advisor to confirm that they understand the rights and responsibilities. I will repeat this process for each witness before the witness answers questions.

[Discussion about options to include reminders for pauses after questions for decision-maker to issue a relevancy determination and on decorum]

[Also consider providing opportunities for questions]

Part II -live presentation by our staff to provide you with examples of questioning and decision-maker determinations on issues of relevance pursuant to the Title IX Regulations: relevancy, Rape Shield and exceptions, treatment records, and privilege.

A. Relevancy General

Decision Maker: Attorney Anders, you may begin your questioning of Cassie.

Roger's Advisor: Cassie, you are enrolled at the University, correct?

Decision Maker: Relevant, you may answer.

Cassie: Yes.

Roger's Advisor: You met Roger on September 19, 2020, correct?

Decision Maker: Relevant, you may answer.

Roger's Advisor: You remember meeting him at a party?

Decision Maker: Relevant, you may answer.

Cassie: Yes.

Roger's Advisor: Do you remember kissing him?

Decision Maker: Relevant, you may answer.

Cassie: Yes.

Roger's Advisor: Do you remember putting your hands down Roger's pants?

Decision Maker: Relevant, you may answer.

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B. Presentation of questioning of Complainant (Cassie) with focus on the Rape Shield protection and its exceptions for complainant's sexual behavior or predisposition

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, UNLESS

- Such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

[34 C.F.R. 106.45(b)(6)(i)]

Cassie: Yes.

Roger's Advisor: You met Roger on September 19, 2020, correct?

Decision Maker: Relevant, you may answer.

Cassie: Yes.

Roger's Advisor: You met him at a party, correct?

Decision Maker: Relevant, you may answer.

Cassie: While I was really drunk.

Roger's Advisor: Is that a 'yes'?

Decision Maker: Relevant, you may answer.

Cassie: Yes.

Roger's Advisor: You ended up having sex with Roger that night?

Decision Maker: Relevant, you may answer.

Cassie: I was raped, yes.

Roger's Advisor: Have you had sex with other people you met at parties?

Decision Maker: Under the policy, I must exclude evidence of the Complainant's "sexual behavior or predisposition" UNLESS (1) its use is to prove that someone other than the Respondent committed the conduct, OR

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(2) it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent. Can you help me understand if this question fits into one of these two exceptions?

Roger's Advisor: My question, and line of questions, concern a pattern by Cassie of having consensual sex with people she meets at parties.

Decision Maker: Your question does not fall into one of the exceptions I have detailed and your question is not relevant here. Please ask another question.

C. Presentation of questioning of parties on treatment records

According to 34 C.F.R. 106.45(b)(5)(i), cross-examination must exclude **consideration** of a party's records that are made or maintained in connection with the treatment of the party by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting or assisting in the professional's or paraprofessional's capacity UNLESS

- institution of higher education obtains party's voluntary **and** written consent to consider for the grievance process

[...]

Cassie's Advisor: Cassie, did you get a rape kit completed on September 20, 2020?

Decision Maker: Relevant, you may answer.

Cassie: Yes.

Cassie's Advisor: I have the rape kit records right here, can you read it aloud for me?

Decision Maker: According to 34 C.F.R. 106.45(b)(5)(i), cross-examination must exclude **consideration** of a party's records that are made or maintained in connection with the treatment of the party by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting or assisting in the professional's or paraprofessional's capacity UNLESS the institution of higher education obtains party's voluntary **and** written consent to consider for the grievance process.

The rape kit, or Sexual Assault Nurse Exam (SANE) is a treatment record of Cassie's. I do not see anything in the record reflecting the voluntary and written consent to include these records in this process.

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Cassie's Advisor: Cassie, you are fine with me using this, right?

Decision Maker: I am still required to have written consent. Cassie, I see your SANE report in the record, but I don't see your written waiver to include it. Can someone point me to that document?

D. Presentation of questioning of parties on attorney-client privilege, and conversations with counselors and medical professionals.

According to 34 C.F.R. § 106.45(b)(1)(x), a recipient's grievance process cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of information protected under a legally recognized privilege, UNLESS the person holding such privilege has waived the privilege.

Cassie's Advisor: Roger, didn't your attorney tell you how to answer these questions today?

Decision Maker: According to 34 C.F.R. § 106.45(b)(1)(x), a recipient's grievance process cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of information protected under a legally recognized privilege, UNLESS the person holding such privilege has waived the privilege. Your question appears to seek attorney-client privileged information. A question seeking what Mr. Anders told Roger or what Roger told Mr. Anders is privileged. This question is not relevant. Please ask another question.

E. Issues of Decorum

Relevant questions must not be abusive and enforcement of decorum must be applied evenhandedly. Where the substance of a question is relevant, but the manner of the question is "harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically 'leans in' to the witness's personal space)" you may evenhandedly enforce the rules of decorum and remind participants to be respectful and non-abusive.

Cassie's Advisor: Roger, you're a rapist aren't you!

Decision Maker: Felicia, I'll remind you of the rules of decorum in this hearing. There is no yelling or harassing permitted. Please ask your question in a respectful and non-abusive manner.

Cassie's Advisor: He doesn't deserve respect because he's a scumball!

Decision Maker: Felicia, I will again remind you of the expectation of decorum in this hearing and I will remove you from this hearing if you do not comply.

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At this point, the University would provide another advisor for Cassie. Let's take a 10-minute break.

Part III - We will now break out into smaller groups for practice. Please join the Zoom link assigned to you this morning, for practice making relevance determinations for the Rape Shield protection and its exceptions, use of treatment records at a hearing, and questions seeking attorney-client privileged information.

Your break-out room information Zoom information is:

Facilitator: Josh Nolan, Partner, Bricker & Eckler

Zoom Info:

Please either follow this link:

<https://bricker.zoom.us/j/95402297103?pwd=ejdOMjVEZXdpNmJkL2xJZ01mZFFrQT09> or go to www.zoom.us, select “join a meeting” and enter Meeting ID: 954 0229 7103 Passcode: BrickerTOR

Our staff will play the roles of advisors, and volunteers (hopefully you!) will practice making relevancy determinations as modeled by our staff above.

Questioning of Cassie by Roger's Advisor

Practice Question 1:

Roger's Advisor: Cassie, have you ever had sex with Roger's roommate Sam?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Roger's Advisor, Decision Maker, and Cassie]

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Practice Question 2:

Cassie's Advisor: Cassie, were you confused about who was having sex with you the night of September 19, 2020?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Cassie]

Practice Question 3:

Roger's Advisor: Cassie, have you had sex with anyone since you were allegedly sexually assaulted by Roger?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Roger's Advisor, Decision Maker, and Cassie]

Practice Question 4:

Roger's Advisor: Why isn't there a copy of the rape kit in the record?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Roger's Advisor, Decision Maker, and Cassie]

Practice Question 5:

Roger's Advisor: Cassie, did you tell your friend Felicia that you liked having sex with Roger?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Roger's Advisor, Decision Maker, and Cassie]

For Training Purposes Only

Practice Question 6:

Roger's Advisor: Cassie, you're a liar, aren't you?!

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Roger's Advisor, Decision Maker, and Cassie]

Practice Question 7:

Roger's Advisor: Cassie, were you upset Roger didn't want to date you?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Roger's Advisor, Decision Maker, and Cassie]

Questioning of Roger by Cassie's Advisor

Practice Question 8:

Cassie's Advisor: Roger, you don't ever ask for verbal consent before you have sex with women, do you?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Roger]

Practice Question 9:

Cassie's Advisor: Roger, you didn't get verbal consent for sex from Cassie, did you?

Decision Maker: *[For group]*

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Roger]

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Practice Question 10:

Cassie's Advisor: Roger, did you tell your attorney the truth about what you did that night?

Decision Maker: [For group]

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Roger]

Practice Question 11:

Cassie's Advisor: Roger, have you been accused of rape before?

Decision Maker: [For group]

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Roger]

Practice Question 12:

Cassie's Advisor: Roger, do you have a conscience!?!

Decision Maker: [For group]

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Roger]

Practice Question 13:

Cassie's Advisor: Roger, are you lying today?

Decision Maker: [For group]

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Roger]

Practice Question 14:

Cassie's Advisor: Roger, you weren't surprised by Cassie's Title IX complaint, were you?

Decision Maker: [For group]

For Training Purposes Only

[discuss as group possible next conversation/questioning with Cassie's Advisor, Decision Maker, and Roger]

When you and your group are done, you may exit your break out Zoom session and return to the main Zoom session.

Zoom meeting ID for full group training:

To join the webinar (video):

<https://bricker.zoom.us/j/94412294593>

To join the webinar (audio):

+1 (646) 876-9923

Meeting ID:

944-1229-4593

Password:

BRICKERTIX

Having technical difficulty? Contact: Alyse Demme at
ADemme@bricker.com or call at
614.227.6914

**Advanced Decision-Maker Training for
Ohio Department of Higher Education
Live Cross-Examination Hearing
Relevancy Cheat Sheet**

Relevancy Cheat Sheet for Practice¹

The Department has determined that recipients must consider only relevant evidence with the following exceptions (limited to “Rape Shield” and Exceptions, Party’s Treatment Records, and Privileged communications for purposes of this training only):

Relevancy

No definition in Regulations tells us what is not relevant (see below). Helpful tips:

- Does this help resolve an element to a policy violation? How?
- Does it help show a violation is more or less likely to have occurred?
- Remember, you can ask advisor to explain why advisor thinks it is relevant.
- Cannot bar evidence by type (cannot exclude expert witnesses, lie detector tests, character evidence) just because it is the type of evidence—still have to do a relevancy analysis
- Whether a question is relevant is different from how you assign weight to the answer when you sit down to write the decision.

(1) “Rape Shield” and Exceptions

Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, UNLESS

- Such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- If the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.

[34 C.F.R. 106.45(b)(6)(i)]

(2) Party’s Treatment Records

According to 34 C.F.R. 106.45(b)(5)(i), cross-examination must exclude **consideration of a party’s records** that are **made or maintained in connection with the treatment of the**

¹ This training focuses on only three relevancy issues ease of practice of the decision-maker role, not all of the relevancy issues in the regulations. For a complete list of the relevancy issues, please see the decision-maker training slides.

party by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting or assisting in the professional's or paraprofessional's capacity UNLESS

- institution of higher education obtains party's voluntary **and** written consent to consider for the grievance process

(3) Privileged Information

According to 34 C.F.R. § 106.45(b)(1)(x), a recipient's grievance process cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of information protected under a legally recognized privilege, UNLESS the person holding such privilege has waived the privilege.

For practice here:

- Attorney-client privileged communications (e.g., "My attorney told me...", "I asked my attorney...", "Did your attorney tell you...")
- Counselor-client privileged communications (e.g., "My counselor told me I have PTSD...", "My counselor told me I have anxiety from the incident...", "I told my counselor...")
- Medical professional-client privileged communications (e.g., "I told the doctor...", "Did a doctor diagnose...")

(4) **No improper inference** for why a party or witness is not participating in the grievance process.

(5) **Decorum** – no yelling, intimidating, or harassing of parties or witnesses.

Investigative Report¹

In re: Cassie Coulter, Complainant, and Roger Reynolds, Respondent

Case: 2020-0001

Date: October 26, 2020

Investigator: Inspector Gadget

On September 20, 2020, a formal complaint was filed by Complainant alleging that Respondent violated the University's Title IX Sexual Harassment Policy ("the Policy"). As a result of the formal complaint, an investigation was initiated into whether Respondent touched Complainant's breasts and engaged in sexual intercourse with Complainant without consent and while she was incapacitated due to alcohol consumption. This conduct is reported to have occurred during a party at Respondent's on-campus apartment on September 19, 2020. If true, this conduct could violate the Policy's prohibition on Sexual Assault.

Pursuant to the the Policy, this investigator was assigned by the Title IX Coordinator to gather evidence for use in determining, by a preponderance of the evidence, whether the Respondent engaged in such conduct in violation of University Policy. In determining whether the alleged conduct constitutes a violation of the Policy, the University will look at the totality of the circumstances, including the nature of the alleged offense as well as the location of and the context in which the alleged incident occurred. The determination as to whether a particular action constitutes a violation of the Policy will be a factual determination made on a case-by-case basis, based on an objective evaluation of all relevant evidence, including both inculpatory and exculpatory evidence.

This report summarizes the evidence gathered during the investigation, but does not contain any factual findings, nor does it contain a determination as to whether Respondent has violated the Policy.

I. Procedural Steps

A. Formal Complaint

On September 20, 2020, the Complainant met with the Title IX Coordinator and filed a formal complaint. The formal complaint was the University's first notice of the reported conduct. As required by Ohio law, this matter was reported to law enforcement by the Title IX Coordinator. At the time this report was prepared, no law enforcement investigation was ongoing.

¹ This is a completely fictionalized report that has been prepared for use in a Title IX training. Any resemblance to any individual, situation, or case is purely coincidental. This report is not detailed to the recommended level so as to provide more opportunities for cross-examination during the exercise; it is **not recommended** that this report be used to demonstrate best practices in an investigation report.

The Title IX Coordinator determined that the University has jurisdiction over the case and that the reported conduct, if true, constitutes sexual misconduct under Title IX, thus making this case eligible for a hearing. This case was assigned to the undersigned investigator on September 21, 2020. The undersigned investigator is an external investigator that has no previous experience with either of the parties, nor is he aware of any conflict of interest or bias he may have with respect to this case.

B. Investigation

Notice of the Investigation was sent to both parties on September 22, 2020. Due to a global pandemic, all investigative interviews were conducted via Zoom. The investigator interviewed the following individuals:

- Complainant on September 24, 2020
- Respondent on September 26, 2020
- Felicia Faulkner (Complainant's friend) on September 27, 2020
- Sam Sawyer (Respondent's roommate) on September 27, 2020
- Todd Taylor (Respondent's roommate) on September 30, 2020
- Gus Greeley (Respondent's roommate) on September 30, 2020
- Bob Bartender, bartender at the Local Restaurant, on October 1, 2020
- Xavier Xerxes (Respondent's friend and next-door neighbor) on October 4, 2020

Brian Bunyan and Joe Jenkins, the Respondent's next-door neighbors, declined to participate. No other witnesses were identified by the parties or deemed relevant by the investigator. Interview summaries are incorporated into this report as relevant and attached in full to this report.

During the course of the investigation, the investigator collected the following evidence relating to the allegations:

- Text messages between Complainant and Felicia Faulkner, September 19-20, 2020
- Call log for Complainant to Felicia Faulkner, September 20, 2020
- Text messages between Respondent and Xavier Xerxes, September 20, 2020
- Security footage from the Local Restaurant, September 19, 2020

Each of these conversations are incorporated into this report as relevant and attached in full to this report.

C. Parties Review of Evidence

All of the above interview summaries and evidence was shared with both parties and their advisors on October 5, 2020 for their review and response prior to October 15, 2020. The response of each party is integrated into this report where appropriate.

II. Relevant Policy Definitions

The reported conduct is governed by the Policy, which prohibits, in relevant part:

Sexual Harassment

Conduct on the basis of sex, occurring in the United States, that satisfies one or more of the following:

- ***
- Sexual assault, dating violence, domestic violence, or stalking. (See definitions for Sexual Assault, Dating Violence, and stalking)

Sexual Assault

Sexual assault is defined as:

- Sex Offenses, Forcible: Any sexual act directed against another person, without the consent of the complainant, including instances in which the complainant is incapable of giving consent because of incapacitation.
- Forcible 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 the consent of the complainant.
- ***
- Forcible Fondling: The touching of the private body parts of another person (buttocks, groin, breasts), for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances in which the complainant is incapable of giving consent because of incapacitation.

Also relevant to this case is the definition of "Consent" as found in the Policy:

Consent

An affirmative agreement through clear actions or words to engage in intimate and/or sexual activity. Individuals giving consent must act freely, voluntarily, and with understanding of their actions. Consent can be withdrawn at any time. A person cannot give consent if the person is mentally or physically incapacitated such that the person cannot give consent if force (express or implied) duress, intimidation, threats or deception are used on the person. Silence or the absence of resistance does not necessarily imply consent. Consent to some sexual acts does not imply consent to other acts, nor does prior consent to sexual activities imply ongoing future consent with that person or consent to that same sexual activity with another person. Consent does not exist when one knew or should have known of the other's incapacitation. A factor in determining consent is whether an individual has taken advantage of a position of influence or authority. Proof

of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on the University to determine whether the Policy has been violated.

Incapacitation

A state in which rational decision-making or the ability to consent is rendered impossible because of a person's temporary or permanent physical or mental impairment, including, but not limited to, physical or mental impairment resulting from drugs or alcohol, disability, sleep, unconsciousness, or illness. Incapacitation is determined based on the totality of the circumstances. Incapacitation is more than intoxication, but intoxication can cause incapacitation.

Factors to consider in determining incapacitation can include, but are not limited to, the following:

- Lack of awareness of circumstances or surroundings (e.g., an inability to understand, either temporarily or permanently, the who, what, where, how and/or why of the circumstances; blackout state);
- Inability to physically or verbally communicate coherently, particularly with regard to consent (e.g., slurred or incoherent speech);
- Lack of full control over physical movements (e.g., difficulty walking or standing without stumbling or assistance); and/or
- Physical symptoms (e.g., vomiting or incontinence).

III. Summary of Information Gathered

A. Background

Both parties agree on several background matters that help to give context to the information that follows:

- On the night of September 19, 2020 into the early morning hours of September 20, 2020, Respondent and his roommate, Sam Sawyer, hosted a small gathering in their on-campus apartment.
- Complainant and Felicia Faulkner attended the gathering together. Todd Taylor and Gus Greeley also attended the gathering.
- Respondent, Sam, Complainant, and Felicia all drank beer and tequila at the gathering.
- Complainant and Respondent consensually kissed while dancing at the gathering.
- Complainant vomited at the gathering in the presence of Respondent.
- Complainant and Respondent had sexual intercourse in Respondent's bedroom.

B. Information from Complainant

Complainant is a first-year student from Columbus, Ohio. Complainant stated that on Saturday, September 19, 2020, she and her friend Felicia decided to go to dinner at The Local Restaurant, an off-campus restaurant and bar known as “the LR”. Complainant stated that she met Felicia at the Sundial at 8:35 p.m. and that they walked over to the LR together.

Complainant provided the following text messages between her and Felicia regarding their plans:

Complainant (5:32p): LR tonight?
Felicia (5:32p): yaaaaas i could use fries
Complainant (5:34p): Sundial 8:30?
Felicia (5:36p): ok nom nom fries
Felicia (8:27p): will be 5 min late
Complainant (8:35p): I see you

Complainant reported that they arrived at the LR at approximately 8:55 p.m. Complainant stated that she and Felicia sat at the bar and ordered three different types of French fry appetizers. Complainant stated that at about the time the fries were brought to them, a friend of Felicia’s from back home stopped by to talk to Felicia. The student’s name was Sam Sawyer. Complainant reported that Sam was stopping at the LR to take dinner to go, but Felicia invited him to sit down with them and share their fries. Sam sat on the bar stool next to Felicia. Complainant stated that neither she, Felicia, nor Sam drank any alcohol at the LR.

Complainant stated that she, Felicia, and Sam talked until approximately 10:30 p.m. At that point, Sam invited Complainant and Felicia to come to his apartment for a “small gathering” to hang out. Complainant and Felicia agreed. Complainant reported that they walked to Sam’s apartment together. Complainant stated that they arrive around 11:00 p.m.

Complainant stated that when she, Sam, and Felicia arrived at Sam’s apartment, the door was open and two students greeted them. Complainant did not know the names of these students during her initial interview, but subsequent investigation has established that the individuals were Todd Taylor and Gus Greeley, Respondent’s other roommates. Upon arriving at the apartment, Todd and Gus told Complainant and Felicia that they needed to drink a shot of tequila as the “cover charge” for entering the apartment. Complainant reported that she, Felicia, and Sam each had one shot of tequila.

Complainant stated that there was music playing when they arrived. She recalled that in the main room, there were two couches facing each other. She and Felicia sat on one couch and Sam sat on the other couch. Complainant estimated that they talked for about an hour, during which time she had two large plastic cups of beer from a small keg on the coffee table. Sam poured them for her. Complainant stated that she also shared a marijuana joint with Sam and Felicia during this time. Sam provided the joint.

Complainant stated that Todd and Gus were going in and out of the apartment frequently, occasionally bringing in individuals to drink a shot of tequila. Complainant did not know any of the individuals that were coming in and out of the apartment. Complainant stated that at some point, there were several people dancing between the kitchen and the couches, but that Todd came in and told them to get in the hallway because of COVID restrictions on gatherings.

Complainant estimates that at about midnight, Sam's other roommate, Respondent, came out of his bedroom and sat down on the couch next to Sam. Complainant and Respondent had never previously met and spent approximately another hour talking about study abroad, football, and politics. During this conversation, Complainant had two more large plastic cups of beer, which Respondent poured for her since he was closest to the keg. Respondent also had two large cups of beer. At some point during the conversation, Respondent and Felicia switched seats so that Respondent and Complainant could talk more easily.

Complainant recalled that around 1:00 a.m., she was feeling "buzzed" and realized that Sam and Felicia were no longer on the other couch. Complainant provided the following unanswered text messages to Felicia:

Complainant (12:07a): where you at
Complainant (12:11a): did you leave
Complainant (12:14a): ??hello

Complainant excused herself from the conversation to use the restroom and look for Felicia. When she got up, Todd and Gus told Complainant that Felicia and Sam were in Sam's room. Complainant stated that Gus handed Complainant another shot of tequila, which she drank.

Respondent then approached Complainant and asked her to dance. Complainant could not recall the song that was playing other than it was slow. Complainant excused herself to use the restroom instead. When she came back, the song had restarted. Respondent handed her a shot of tequila, which Complainant drank. Respondent also drank a shot of tequila. They then began to dance in the space between the kitchen and the couches.

Complainant described her memory as "fuzzy at this point." Complainant could not remember if she had anything more to drink. She recalled kissing Respondent while they danced, and liking it. She could not recall whether she or Respondent initiated the kissing, but described it as "mutual." Complainant recalled throwing up in the kitchen garbage can that Respondent held for her. She recalled that either Todd or Gus asked if she was sick, but she laughed and told them that she was fine. Complainant recalled that Respondent pulled her by the hand into his bedroom and closed the door. Complainant said the way he pulled on her hand "caught a ring funny" and made her hand hurt.

Complainant recalled that Respondent held her by the waist and kissed her in his room, then put his hand up her shirt. Complainant remembered trying to push Respondent away, but

felt dizzy and fell backwards. Complainant recalled Respondent then climbed on top of her and began having sexual intercourse with her.² Complainant's pants and underwear were above her knees as they had sex. Complainant reports that her jeans were tight and that the position was very awkward.

The next thing Complainant remembers is waking up at around 7:00 a.m. on the floor of Respondent's bedroom with a pounding headache. Respondent was lying asleep on his bed. Complainant was fully dressed except for her bra, which was next to her. Complainant let herself out of the apartment, threw up in the bushes along the sidewalk, and went straight back to her residence hall room. Complainant does not have a roommate.

Complainant recalls taking a long shower and then drinking a cup of coffee to help with the headache. Complainant then called Felicia to report that she had been raped. The call log indicates that this call occurred at 9:22 a.m. and lasted for sixteen minutes. Felicia called the University Police Department, then immediately came over to the Complainant's residence hall room to be there while the Police came to interview Complainant.

Complainant declined to pursue a criminal investigation and declined a medical investigation, although she reported some soreness in her genital area at the time of her interview, four days after the incident.

C. Information from Respondent

Respondent is a junior majoring in Political Science. He is roommates with Sam Sawyer for the second year. This is his first year rooming with Todd Taylor and Gus Greeley.

On September 19, 2020, a Saturday, Sam wanted to study. Respondent stated that he suggested to Sam that he would get a keg and they would instead stay in, maybe host a few people. Sam agreed. Respondent went to the corner store that afternoon and bought a small keg and some chips. While Respondent was gone, Sam left to go to a student organization meeting on the other side of campus.

Todd and Gus came home and heard that there was going to be a gathering, so they went to the apartments on either side of them to coordinate a larger gathering while still complying with the COVID gathering restrictions. Todd and Gus set out shots of tequila and kept going in and out of the apartment. Respondent sat on the couch and smoked a joint with two friends from next door, Brian Bunyan and Joe Jenkins. At about 10:30 p.m., Respondent's girlfriend called from Oberlin College. Respondent said goodbye to Brian and Joe, grabbed a beer, and went to his bedroom. Respondent did not see Brian or Joe for the remainder of the party.

At around midnight, Respondent hung up the phone and went back out into the living room. Respondent recalled that Sam was there with two girls, whom he introduced as Felicia and Complainant. Respondent and Complainant had a "couple of beers together" and talked for

² In her response to reviewing the evidence, Complainant clarified that Respondent put his penis into her vagina at that time. Complainant stated that she could not recall whether Respondent ejaculated. Complainant further stated, with regard to reading Xavier's statement (below), that "I do not remember having sex in this position. If it is true, then it is another example of sexual intercourse without my consent."

a long time. At some point, Sam and Felicia left. Respondent recalled that Complainant got up to go find her friend. Respondent described Complainant as “looking worried.” Respondent got up with her and told her that Felicia was probably with Sam. Respondent invited Complainant to dance, in part so she would not be worried. According to Respondent, Complainant said that Todd and Gus told her that Sam and Felicia were having sex, stating, “It’s a good party for that I guess. So anyway, let’s dance.”

Respondent recalled that Gus and Todd had relocated the kitchen table from the main room for that evening. Respondent and Complainant danced in between the living room and the kitchen where the kitchen table usually was. Respondent recalled that Complainant put her hands on Respondent’s chest and buttocks, and that she “leaned into” his neck and kissed him while moving side to side. Respondent stated that he kissed Complainant back, and that the kissing was consensual.

Respondent stated that after they danced the first song, they did a shot of tequila together, at which point Respondent thought Complainant was a little tipsy but not drunk. During the second song, Complainant started to “giggle” and put her hands down Respondent’s pants. Respondent told Complainant that they should go to the bedroom for a little more privacy. Respondent reported that Complainant grabbed his hand to pull him to the bedroom, but that she only got a few feet before she started retching. Respondent grabbed the kitchen trash can and Complainant vomited into.

Respondent stated that after vomiting, Complainant appeared to feel much better. Respondent reported that she was not slurring her words and was able to carry on a conversation. Respondent recalled that Todd asked Complainant if she was OK, and she told him that she was “fine” and said that “tequila makes her sick.” Respondent told Todd and Gus that he would make sure she was OK. Respondent then took Complainant’s hand and led her to the bedroom. Respondent reported that Complainant continued to “giggle” on the way to the bedroom.

Respondent stated that when he closed the door and turned around, Complainant starting “digging through [his] stuff.” Respondent asked what she was looking for, and she told him she wanted mouthwash. Respondent got her some mouthwash and she spit it out in the trashcan. Respondent recalled that he and Complainant began kissing again. Respondent stated in the interview that at this point, he did not expect that they would actually have sex, and he did not have a condom in his room.

Respondent stated that while they kissed, he undid Complainant’s bra and put his hand up the front of her shirt to “play with” her nipples while they kissed. Respondent stated that Complainant grabbed him by his shirt and pulled him down on top of her on the floor. Respondent characterized Complainant’s actions as “pretty aggressive.” Respondent stated that they kissed for a few moments before Respondent tried to take off her pants and underwear. Respondent recalled that the pants were too tight for him to remove. Respondent stated that Complainant kept her arm around his waist and wouldn’t let him get off of her to fix her pants. Respondent described Complainant as continuing to pull him closer to her.

Respondent then had sex with Complainant. Respondent described the sex as “awkward” because she still had her pants on to her knees. Respondent stated that he injured his back during the process. He recalled that Complainant was “moaning and enjoying” the sex, and that he ejaculated into a tissue. Respondent stated that Complainant then rubbed her own genitalia for a few moments, rolled onto her side, and fell asleep. Respondent recalled that at some point during the sex, his friend Xavier Xerxes had opened the door and then closed it again.³ Respondent did not see Xavier, but knew it was him because of some text messages that he got the next morning:

Xavier (11:16a): sorry about last night

Xavier (11:16a): thought your room was the bathroom

Respondent (11:22a): riiiiight you just wanted the show

Respondent (11:23a): now we are even sucka

Respondent stated that he was very tired and she looked comfortable, so he put a pillow on the floor for her instead of trying to wake her up or lift her onto the bed. Respondent then climbed into bed and fell asleep in his underwear. When he awoke the next morning, Complainant was gone.

When asked what signs of consent Respondent had observed to let him know that Complainant wanted the sex, Respondent stated that Complainant was “totally into it” and was the one that had initiated kissing, made a comment that it was a good night for sex, and had grabbed his penis while dancing.

D. Information from Felicia Faulkner

Felicia Faulkner is a first-year student. She met Complainant during orientation and they have several classes together.

Felicia recalled that she met Complainant around 8:30 p.m. on September 19, 2020, to go to the LR for some fries. While they were sitting at the bar, Felicia’s friend from home, Sam Sawyer, came in. Felicia reported that Sam was good friends with her older brother in high school, and that Sam was one of the people to convince Felicia to come to the University. Felicia told the investigator that she had not seen Sam since she arrived on campus and was “overjoyed” to see him. Felicia recalled that she invited Sam to sit with them and share their fries.

Felicia recalled that she, Sam, and Complainant talked for “quite a while,” but she could not remember for how long. She stated that Sam invited them back to a “small gathering” at his apartment. Felicia had not seen the upperclass apartments and wanted to see what they were like. Complainant came too. They walked to the apartment together. When asked about

³ In his response to reviewing the evidence, Respondent noted Xavier’s statement that he saw Respondent having sex with Complainant while she was laying halfway on the bed. Respondent noted that this position “would have made more sense since I couldn’t get her pants off, but she wouldn’t let me change positions.” Respondent stated he had no recollection of having sex with Complainant in that position.

intoxication levels at this point, Felicia said that she had not had any alcohol at that point in the evening and that she did not believe Sam or Complainant had, either.

When they arrived at the apartment, two guys named Todd and Gus were handing out tequila shots. Sam, Felicia, and Complainant each had one. They sat down on couches in the living room to talk. There was a small keg of beer on a coffee table and Sam kept refilling their cups of beer. Felicia only had one cup because the tequila did not sit well with her. Felicia did not recall how much Complainant or Sam drank. Felicia recalled sharing a joint with Sam and Complainant.

At some point, Felicia recalled that Sam's roommate, Respondent, sat down on the couch next to Complainant and began talking to her. Sam talked with Felicia. Felicia stated that Sam took her into his bedroom to see some pictures on his computer. Felicia stated that when she left Complainant and Respondent, Complainant did not appear to be drunk or stoned and was conversing with Respondent about Russian politics or a similar subject. Felicia described Complainant as "very animated" during this discussion.

Felicia stated that she fell asleep in Sam's room and awoke at around 4:00 a.m. She got up and no one was in the living room anymore. Felicia walked home by herself.

Felicia recalled that later that morning, Complainant called Felicia. Felicia described Complainant as being "very calm" and telling Felicia, "I think I might have been raped. I mean, I think Roger raped me." Felicia and Complainant talked for a few minutes as Felicia walked over to Complainant's residence hall to be with Complainant. When Felicia arrived, Complainant said she "couldn't talk about it," so they talked about an English assignment instead. Then Complainant told Felicia, "I think I was really, really drunk last night, and I don't remember everything, but I remember having sex with Roger and I remember trying to push him away, but he did it anyway." Felicia called the Police and waited with Complainant until they arrived.

E. Information from Sam Sawyer

Sam Sawyer is a junior who has been living with Respondent for over a year. He has known Respondent since freshman orientation. He has known Felicia since before high school. Sam described himself as Felicia's older brother's "best friend" during high school, although they have since grown apart due to being at different universities.

Sam said that Respondent has been "bugging" him to be more social. On the afternoon of September 19, 2020, Sam said that Respondent told Sam that Respondent would be inviting some neighbors over for a "small gathering." Sam reminded him of the COVID gathering rules, but Respondent assured him that they would comply. Sam went to the library to study, then stopped at the LR with the intention of grabbing a hamburger to go on the way home.

When Sam got to the LR, he ordered at the front desk and went to the bar, intending to have a drink while they made his food. Felicia was there with a friend, Complainant. Sam sat down at the bar next to Felicia to talk. They ate fries. Sam didn't drink because Felicia and Complainant weren't drinking. Sam invited both women back to his apartment for the small

gathering. Sam told the investigator that he “felt a connection with Felicia and wanted to spend more time talking,” and Complainant was “along for the ride.” The three walked back to Sam’s apartment.

When they arrived, Sam stated that Todd and Gus were setting up the shots of tequila and were planning on going door-to-door to hand them out down the hall. Sam could not recall having any tequila that night, but he recalled Felicia and Complainant each taking a shot. Sam, Felicia, and Complainant sat down on the couches in the living room to listen to music and talk.

Sam stated that he talked primarily with Felicia and Complainant mostly just listened. They shared a joint. Sam stated that Complainant told him that Complainant had never smoked pot before. Complainant mostly just sat listening to the music. Felicia moved to sit next to Sam. Sam remembered handing Complainant and Felicia each a beer from a small keg that was on the coffee table.

After a while, Respondent came out of his bedroom and started talking with Complainant. Sam stated that they appeared to hit it off, as they both began talking “animatedly” with each other. Sam took Felicia into his bedroom, where they had sex. He did not see Complainant or Respondent for the rest of the night. Sam did not recall whether Complainant appeared to be intoxicated when he left her. Sam reported having three beers while sitting on the couches and stated that he was not paying much attention to Complainant, particularly once Respondent arrive. Felicia left at some point in the middle of the night.

The next day, Sam woke up and went to study. He did not see Respondent until around dinner time. Respondent “seemed fine.” They did not talk about Complainant.

F. Information from Todd Taylor

Todd Taylor, a junior, has known Sam and Respondent since their first year. They hang out occasionally. Todd was Gus’s roommate last year, and this year, Todd and Gus moved into a four-person apartment with Sam and Respondent.

On the night of September 19, 2020, Todd and Gus were coordinating a hall party, where each apartment would only have a certain number of people in it due to COVID limitations. Each apartment was also sponsoring a different type of alcohol, so everyone could go and sample a little of everything. Before the party, Todd and Gus went to see some friends in another residence hall, where they had “a couple of beers.” Todd and Gus then went to the liquor store to buy some tequila, which was the alcohol they were supposed to provide. Todd estimated they got back to the apartment at about 10:00 p.m.

Todd stated that he and Gus poured tequila into little paper Dixie cups they got out of their bathroom. They made up a rule that whoever came onto the floor had to take a shot. They spent much of the evening in the hallway roaming up and down, making sure that everyone in each apartment was having a fun time. Todd stated that he hates tequila and did not take any drinks himself. Todd stated that he had had “a few incidents” his first year with alcohol and knew his limit, so he stayed sober the rest of the evening. Todd stated that Gus took “more than a few shots” as he walked around to the different apartments.

Todd stated that at first, there were several people dancing in their apartment, but they left when Sam brought a couple of girls over and turned the music down lower so they could talk. Sam did not introduce his guests, but Todd recalled that each girl took a shot of tequila when she arrived. Todd said that when Sam sat down to talk with the girls, he and Gus left to go to other rooms. Todd recalled letting a neighbor, Brian Bunyan, into his apartment to distribute jello shots on a tray at some point. He did not go in with Brian.

When Todd came back to the apartment, maybe around 12:30 a.m., he recalled that the room smelled overwhelmingly of pot. The music had been turned back up, and Todd began to get worried that someone would call the police. Respondent and Complainant were dancing by themselves. Todd referred to Complainant as “the girl in the black shirt and jeans that came in with Sam.” At that point, Todd and Gus turned on both bathroom fans and opened the window in the living room. Todd said that Sam and “that other girl in the red shirt” were not in the living room anymore, so Todd assumed they had gone into Sam’s bedroom because he hadn’t seen them leave the apartment.

Todd said that he started pouring tequila back into the bottle since they hadn’t drank all of the alcohol in the Dixie cups. Todd recalled that Complainant left Respondent and asked where her friend was, and that Gus told Complainant that the friend was “probably banging Sam in his bedroom.” Todd stated that the girl started retching, and Respondent grabbed the kitchen trash can for her. Respondent only managed to catch half of the Complainant’s vomit in the trash can.

Todd told the investigator, “There was something about the way they interacted that suggested to me that they were going to have sex, but I can’t put my finger on it. She was sort of draped all over him, very handsy. And Respondent had a look on his face that let me know he liked it.” Todd asked the girl if she was OK, and the girl told him, “Yeah, I’m fine. I just should have had more to eat before I had tequila.” Todd told the investigator, “she could talk better than she could walk.” Todd wasn’t sure if the girl was having trouble standing up or if she was just “really into” Respondent. Respondent told Todd, “Don’t worry, I’ll take care of her.” Todd stated that Respondent “led her” into his bedroom and closed the door.

Todd said that he ended up cleaning up the vomit from the kitchen floor and taking out the trash so the apartment didn’t smell. Once the apartment was cleaned up, Todd went to sleep. Todd did not see either girl again. Todd estimated that he went to sleep at 2:00 a.m.

G. Information from Gus Greeley

Gus Greeley is a junior. He reported transferring to the University his sophomore year, at which time he was assigned to live with Todd. He met Respondent and Sam last year and they are all rooming together this year.

Gus said that on the night of September 19, 2020, they were hosting an “around the world” part on their floor of the apartment building. Each apartment was supposed to buy alcohol from a different country. Gus said that he decided their apartment would buy tequila because Gus had never had any straight tequila, and if they didn’t drink it all they could make

margarita's some other day. Gus said that some of the apartments decorated, but that he and Todd didn't decorate at all.

Gus said that before their party, he and Todd went over to a different residence hall to see some friends. Gus said that he had "several beers" while at the residence hall, and that by the time he went to buy the tequila, he was feeling "quite tipsy."

After buying tequila, Gus reported that he and Todd went back to their apartment and began pouring the tequila in little Dixie cups. They poured only nine cups at a time, so that if asked they could say that they were adhering to gathering guidelines.

Gus went door to door with a tray of tequila shots. He estimated that he had three shots of tequila himself. He also sampled shots of alcohol from each of the other four apartments that were participating. Gus stated that at some point, he walked back into his apartment and realized that it smelled like marijuana, but he did not smoke any that night.

Gus recalled that there was dancing in their apartment at one point early in the evening, and that at one point he worried because they had more than ten people in the apartment. Gus said that the dancing people left when Sam came to the apartment with two girls. Gus said he didn't pay a lot of attention to the two girls after they took a shot of tequila. He spent most of his time in other rooms that night.

At some point in the evening, Gus saw Sam take one of the girls back into his bedroom. At some other point, Gus recalled Respondent and Complainant (who he described as "that other girl in the black shirt") dancing. Gus said that Complainant began to throw up, and that Respondent didn't catch all of it in a trash can. Gus told the investigator that the Complainant "looked too drunk," but when Todd asked if she was OK, the girl said she was and said it was just the tequila that made her sick. Gus said it looked like the girl needed help walking, but that she did not slur her words and sounded fairly sober. Gus said that Respondent said that he would take care of the girl, and that the girl leaned on Respondent to walk to Respondent's room.

Gus stated that the puking "killed the party mood" and that he helped Todd clean up. Gus recalled that Todd got mad because Gus couldn't walk down the hall to take the trash out. Gus believe that he was in bed by 2:30 a.m.

H. Information from Bob Bartender

Bob Bartender works at The Local Restaurant, where he has been a bartender for the last six years. He is also the night manager. On the night of September 19, 2020, he was working at the bar. It was a busy night. He saw Felicia, whom he knew because she had previously applied unsuccessfully for a job. Felicia was sitting with another girl. They bought an order of gravy fries, an order of nachos fries, and an order of Italian fries. They also bought sodas.

After they had been there for a while, a boy sat down with Felicia. The boy looked familiar to Bob, so Bob believed he must be an upperclassman. The three students talked for a while. Bob recalled being frustrated that the three students were not leaving the bar, because he had a long line of people waiting to be seated.

When asked about the relative intoxication of the three individuals, Bob stated that although none of them had ordered any alcohol while at the LR, the girl that accompanied Felicia was “overly giggly” and appeared to be having trouble counting out change so that she could pay her portion of the bill. Bob suspected that the girl may have been drinking before she arrived, but stated that “she didn’t appear drunk by any means.”

Bob provided the investigator with a copy of the security footage from that evening when Felicia and Complainant entered, and when they left with Sam. Bob watched the video and stated that it showed that the students did not show any signs of intoxication upon either entering or exiting, which is consistent with his memory.

I. Information from Xavier Xerxes

Xavier Xerxes is a junior. He lives next door to Respondent and has known Respondent since they were roommates their first year.

Xavier stated that he arrived at Respondent’s house at 9:45 p.m. on September 19, 2020. He talked with Brian Bunyan and Todd Taylor for a few minutes, drank a shot of tequila, and ate some chips. Brian told him that Respondent was “getting yelled at” by his girlfriend. Xavier stated that he danced for a while on the dance floor with a girl whose name he did not know. He stated that he left around 10:30 to go down the hall to see what was happening his own room.

Xavier stated that he had several shots of various types of alcohol that night as he went to different apartments on the floor. Respondent stated that he came back to Respondent’s room at around 1:00 in the morning. Xavier had stopped by to see whether Respondent and his girlfriend had broken up. He stated that Respondent was dancing with “some girl,” so Xavier did not stay.

Xavier stated that he came back to the room at about 2:15 a.m. He stated that he went to Respondent’s bedroom, anticipating that he might “catch [him] in the act” with the girl he had been dancing with, because it had been “clear on the dance floor that they were all over each other.” Xavier stated that when he opened Respondent’s door, the girl was lying face down on the bed with her legs over the side and her pants pulled halfway down. Xavier stated that Respondent was standing behind her and having sex with her. Xavier could not see the girl’s face. Xavier stated that when he opened the door, Respondent stopped and turned around to see who had come in, so Xavier shut the door quickly.

Xavier confirmed the text message conversation with Respondent from the next day.

IV. Conclusion

This matter has been referred to hearing pursuant to the Policy.