

Preponderance of the Evidence – UCB Training Activity

Purpose and Background

In serving on the University Conduct Board (UCB), one of your responsibilities is to make a determination on responsibility in the Formal Hearing process. Students participating in the conduct process can be found responsible or not responsible for the alleged violations to the Student Code of Conduct. This finding is based on the standard of proof set by the University and the facts and information presented in the conduct process.

The standard of proof at East Stroudsburg University is the *Preponderance of the Evidence*. This means that “it is more likely than not” that a violation occurred based on the information available. Sometimes this is referred to colloquially as ‘50% and a feather’, and it is important to remember these facts about this standard of proof:

- For most cases, the burden of proof falls on the University – this means that the University must provide adequate information to make a decision. Students are not expected to “prove” their involvement, or lack thereof, in incidents but the information presented by students and witnesses should always be considered. Cases brought through the Sexual Misconduct (Title IX) Policy are different.
- The standard of proof is always preponderance of the evidence, no matter what violations are involved in a Formal Hearing process. Ask yourself: Is it more likely than not that this violation occurred based on the evidence presented and the information provided by the student?
- You may also need to ask if there is enough information to determine that the alleged violation occurred. Each piece of information should be considered individually, and in the context of the whole situation.
- Sometimes, the preponderance of the evidence can be based on the totality of the circumstances. There may not be an answer immediately clear from one piece of information alone. Preponderance is a relatively low standard of proof, but in each and every situation it is essential to review all information. In some cases, UCB members will also need to report which pieces of information specifically led to a finding of responsibility. UCB members should always consider all pieces of information available and review the evidence carefully.

Our students can be involved in complicated situations that may be violations of the Student Code of Conduct. It is essential for UCB members to be ready to listen to situations and details and determine if the information presented leads to a finding of “responsible” or “not responsible” for the student(s) involved.

The following learning outcomes will be addressed through this exercise:

- Participants serving on the University Conduct Board will be able to define the following terms in their own language: *Preponderance of the Evidence & Standard of Proof*
- UCB Members will be able to:
 1. Determine the relevancy of a particular piece of information given individually;
 2. Articulate if a particular piece of evidence leads towards a student being responsible or not responsible for an alleged violation; and
 3. Review the relevancy of an individual piece of evidence in totality with other evidence to make a decision on the alleged violations.

These learning outcomes are assessed through observation by the Student Conduct and Community Standards staff, discussion questions, and reflective exercises.

This “Preponderance of the Evidence” training document is heavily based on a document provided by the Office of Student Conduct at North Carolina State University. This document has been modified for use at East Stroudsburg University.

Training Note: These scenarios are used for the specific purpose of University Conduct Board training. These are not actual student conduct cases or actual statements from hearings.

Instructions

In this training exercise, UCB members will assess various pieces of evidence and information that could have been presented in the process of a Formal Hearing. UCB members will consider all pieces of information and discuss whether a piece of information helps in making a determination of responsibility for alleged violations.

The facilitator will provide a brief summary of the situation and review the alleged violation(s) that are involved in each scenario. The facilitator will then read various statements, pieces of information, and evidence for UCB members to consider.

Specific Instructions for In-Person Trainings

After each statement is read, UCB members will make one of the following determinations:

- The statement adds to the preponderance of evidence for an alleged violation; if so, step forward
- The statement pulls away from the preponderance of evidence for an alleged violations; if so, step back
- Or, the statement is not relevant information for the Formal Hearing and/or does not provide any assistance with making a determination of responsibility; if so, remain in place

UCB members should consider the information, make one of the above decisions, and then be prepared to articulate their rationale.

Specific Instructions for Virtual Trainings

After each statement is read, UCB members will make one of the following determinations:

- The statement adds to the preponderance of evidence for an alleged violation; if so, choose “yes” from the participant feedback options on Zoom
- The statement pulls away from the preponderance of evidence for an alleged violations; if so, choose “no” from the participant feedback options on Zoom
- Or, the statement is not relevant information for the Formal Hearing and/or does not provide any assistance with making a determination of responsibility; if so, choose “away” (the clock symbol) from the participant feedback options on Zoom

UCB members should consider the information, make one of the above decisions, and then be prepared to articulate their rationale.

Decision-Making Process for Both Training Formats

At the conclusion of the practice scenario, UCB members will determine if the student in the scenario is responsible or not responsible for the alleged violations. Remember that the standard of proof is the preponderance of the evidence and the University is responsible for the burden of proof. Be sure to consider the following questions as you make your decisions:

- What other information would you want to know in order to meet preponderance?
- What questions would have helped? Are there any key elements of the violation not met by the information presented?
- Is there anything not mentioned that could change your decision of responsible or not responsible?

As you make a final determination of responsibility, remember that as a decision-maker you must review the alleged violation(s) and the actual behavior/information. Sometimes behavior may be concerning but not actually meet the elements of the alleged violations.

Scenario #1 - The Basic Facts

The Basic Facts

At approximately 10:35pm on Saturday, February 20th RA Patti Smith (she/her) and University Police Officer Michaels (he/him) were walking on the 3rd floor of Sycamore Suites. Upon walking the floor, both RA Smith and Officer Michaels smelled a strong scent of cannabis around the outside of Suite 357. Resident Charles Connors (he/him) currently resides in this suite. Following the incident RA Smith and Officer Michaels completed reports which were sent to Student Conduct and Community Standards. Student Charles Connors has elected to participate in the Formal Hearing process after an initial meeting with SCCS.

The Alleged Violation(s)

Based on the referral information, SCCS has charged the student with the alleged violation(s) of:

- **Failure to Comply** - Failure to follow the directions of University officials made in the performance of their duties. This includes, but is not limited to, failure to complete disciplinary sanctions, failure to accurately identify oneself when requested, and/or failure to respond to requests from Residential and Dining Services staff.
- **Narcotics and Drugs** - Acts involving the manufacture, distribution, sale, exchange, use, offer to sell or possession of illegal drugs, narcotics, drugs not prescribed for the person in possession of the drug, or drug paraphernalia. Illegal drugs are defined by state and federal statutes. The use of counterfeit or synthetic substances, frequently referred to as “designer drugs” is also prohibited. Medical marijuana it is prohibited from being present and/ used on campus as it is still considered a schedule 1 Federal drug. Attending class, an organizational meeting, or educational event that is specific for an educational purpose, such as but not limited to, a lecture or presentation that may be a course requirement, while under the influence of drugs, as noted in this section, is a violation. Further, if medical assistance is sought for a student in need who has consumed drugs, the student and the student caller may qualify for Medical Amnesty as defined under Pennsylvania ACT 66. See also the Drug-Free Schools and Communities Act Amendments of 1989.

Information and Statements of Evidence to Consider

The following pieces of information are presented in the Formal Hearing process:

1. RA Smith and Officer Michaels smelled a strong scent cannabis on the 3rd floor of Sycamore Suites.
2. The smell seemed to get stronger as they got closer to the door of suite 357 in Sycamore.
3. Muffled voices were heard inside of the room.
4. The RA knocked on the door and announced “RA Staff and University Police”.
5. Upon the knock, the voices stopped.
6. After 30 seconds, the RA knocked again and said “RA Staff and University Police”.
7. The voices started up again and were now speaking in a hushed tone.
8. RA Smith and Officer Michaels heard movement in the room - it sounded like drawers opening and closing and items being moved around.
9. After another 30 seconds, the RA knocked again and announced “RA Staff and University Police”
10. Within 10 seconds, the door cracked, a student poked their head out and said “hey, what’s up.”
11. When the door was cracked, the smell of marijuana seemed to grow stronger.
12. The RA and Officer introduced themselves and asked for the student’s name. The student replied “I’m Charles” and asked why they were there.

13. Officer Michaels explained that they noticed a smell of marijuana outside the room while conducting building rounds and asked Charles if they were able to come into the room to talk.
14. Charles told RA Smith and Officer Michaels that he was not smoking any marijuana and that he was alone, had the TV on, and was FaceTiming with his mom.
15. Charles continued to hesitate when asked by staff if they could come into the room.
16. The RA observed that Charles had bloodshot eyes.
17. After a few minutes, Charles allowed RA Smith and Officer Michaels into the room.
18. The RA and Officer observed a set of rolling papers on top of the coffee table near the TV.
19. The Officer asked Charles about the rolling papers; he said they belonged to a friend who visited the previous weekend.
20. The Officer asked Charles if he had cannabis in the room; he replied that he did not have any cannabis in the room.
21. After discussing the rolling papers and the smell of cannabis, the Officer asked if Charles had smoked cannabis at all that day. Charles said that he was “not sure.”
22. The Officer told Charles he would need to bring forth any other paraphernalia or items in the room.
23. After some hesitation, Charles opened a drawer in an end table by the couch and pulled out a bong.
24. The bong had a smell of cannabis and what appeared to be residue located in it.
25. The RA asked for the student’s name and ID number and explained that they would need to follow up with a conduct referral. Charles said he lost his ID.
26. Officer Michael’s asked to see Charles’ license instead. Charles found his ESU ID card and provided his last name (Connors) and ID number (123456) and presented his driver’s license.

Make a Decision

Based on the preponderance of evidence, discuss if the referred student is responsible or not responsible for the alleged violation(s).

Scenario #2

The Basic Facts

Alex Moore (they/them/theirs) is currently a student in “Introduction to Communication” with Professor Jackson. They are a sophomore taking this class for a General Education credit. Professor Jackson administered an exam on Tuesday, April 6th. During the exam period, Professor Jackson observed Alex look at another student’s exam. Professor Jackson referred this information to the Student Conduct and Community Standards office for review. Alex has elected to participate in the Formal Hearing process after an initial meeting with SCCS. Alex has denied cheating, and they are frustrated about these accusations.

The Alleged Violation(s)

Based on the referral information, SCCS has charged the student with the alleged violation(s) of:

- **Academic Misconduct (a)** - During a test or examination, using anything, such as, but not limited to, any device, document, person or other resource not authorized by the instructor.

Information and Statements of Evidence to Consider

The following pieces of information are presented in the Formal Hearing process:

1. Alex received B’s and C’s on all quizzes and tests between January and March.
2. Alex has never missed a class and is always on time, sometimes arriving before the professor.
3. During exams, students are separated by an empty desk between one another. Professor Jackson stays at the front of the room for questions and the teaching assistant make regular rounds of the room.
4. The classroom is a large lecture hall, with 15 rows of 10 desks. There is a clock on the right side of the classroom, facing the front, high up on the wall.
5. Alex was taking the test at a desk about 8 rows up from the front of the room and at the end of the row. Alex was on the right side of the room (facing the front of the classroom).
6. Professor Jackson observed Alex looking at the exam of the person seated in the row in front of them, which was diagonal to the right from Alex’s seat.
7. According to the professor, Alex was observed looking at another student’s exam on three separate occasions.
8. Professor Jackson stood at the front of the room for the duration of the exam. The professor watched Alex for approximately 5 minutes after the second time noticing Alex’s behavior.
9. The teaching assistant, graduate student Joe Phillips, believes he saw Alex looking at another person’s paper.
10. After further questioning, the TA described Alex’s eyes as “darting back and forth” to an area in front of their desk at least twice.
11. The TA observed Alex begin writing on their test paper after their eyes “darted back and forth” for a moment.
12. The TA did not mention his observations about Alex’s behavior until approached by Professor Jackson the day after the exam.
13. Alex explained that they would look away from the exam paper to look at the clock on the wall.
14. Alex stated they were nervous about finishing the exam in time.
15. Alex was one of the last students to finish the exam (after approximately 2 hours).
16. The test was multiple choice, short answer and essay format. Alex completed the entire exam.
17. Alex received a C on the exam.

18. The professor explained that Alex answered about half of the multiple choices questions correctly, but they did very well on at least 2 short answer questions.
19. The professor described Alex's answers on the short answer prompts as "sophisticated" answers, beyond what Alex has displayed in the class throughout the semester.
20. Alex denies looking at another student's exam paper and says they did not cheat on the test.
21. Alex stated that they spent more time than usual reviewing the practice short answer questions provided in the textbook study guide.
22. When asked, Professor Jackson stated that a number of students did not do well on the multiple choice questions and many students received full credit for the first short answer question.

Make a Decision

Based on the preponderance of evidence, discuss if the referred student is responsible or not responsible for the alleged violation(s).

Scenario #3

The Basic Facts

Sarah-Anne (she/her/hers) and Tyler (he/him/his) dated for approximately two months from February to early April. They first met at a Warrior Den event on campus and started dating soon after. They had consensual sex multiple times during their time dating, and both claim that they broke up after little arguments and realizing they did not have as much in common as they initially thought.

About one month after the break up, Tyler found out from a friend (Jason) that there was a video of Tyler and Sarah-Anne that was briefly posted to Sarah-Anne's private SnapChat account. Tyler confronted Sarah-Anne in the Lenape lounge to ask about the video, which he did not know had been recorded. Tyler claims that Sarah-Anne yelled at him and said he had agreed to making the tape after one of their dates. They engaged in a loud verbal altercation which Tyler claims ended when Sarah-Anne slapped his face and called him a "scumbag". Resident Advisor Elizabeth Collins had been studying just outside the Lenape lounge and came into the room after hearing Tyler and Sarah-Anne yelling. RA Collins knew that Sexual Misconduct and Sexual Harassment incidents have to be reported right away, so she submitted a referral and alerted University Police.

Tyler decided not to pursue criminal charges, but did meet with the Title IX Coordinator to discuss options. After review, the Title IX Coordinator referred this information to the Student Conduct and Community Standards office for review under the Student Code of Conduct.

Sarah-Anne has elected to participate in the Formal Hearing process after an initial meeting with SCCS. Sarah-Anne brings their Process Advisor, Ms. Smith, to the Formal Hearing. Tyler (with Process Advisor Mr. Jones) and RA Collins participate in the formal Hearing process as witnesses for the University. Jason also attends as a witness for the University. Title IX Coordinator and two Title IX Deputies also attend the Formal Hearing.

The Alleged Violation(s)

Based on the referral information, SCCS has charged the student with the alleged violation(s) of:

- **Policy or law** - Violations of University Policy and/or federal, state or local law.
- **Physical Abuse** - Assault and/or battery upon another person or the threat thereof. Inflicting or attempting to inflict harm to another person while engaging in intentional or reckless behavior.
- **Sexual Harassment: Sexual Exploitation (iii)** - Engaging in sexual behaviors directed toward or involving another person when Consent is not present. This includes, but is not limited to, the following actions, including when they are done via electronic means, methods or devices:
 - (iii) Recording or distributing information, images or recordings of any person engaged in sexual or intimate activity in a private space without that person's Consent.

Information and Statements of Evidence to Consider

The following pieces of information are presented in the Formal Hearing process:

1. The Title IX Deputies share their report based on the interviews conducted with the involved individuals. The Deputies believe that there was enough information based on the referral and interviews to have this complaint moved into the Student Conduct process.
2. Sarah-Anne and Tyler dated from early February to the beginning of April.
3. During their relationship, they had numerous consensual sexual encounters.

4. They ended their intimate relationship amicably, as both Sarah-Anne and Tyler state during their interviews with Title IX Deputies.
5. Right before the end of classes, Tyler heard from his friend Jason that there was a video that looked like it was of Tyler and Sarah-Anne on her SnapChat story.
6. Jason stated that although the video was quick, it looked like Tyler and Sarah-Anne were getting undressed and kissing.
7. In the video, Tyler seemed focused on Sarah-Anne, but Sarah-Anne looked towards the camera multiple times.
8. Jason showed Tyler the video on SnapChat, and states that Tyler “freaked out”.
9. Tyler decided to approach Sarah-Anne to get the video taken down.
10. Tyler states that he did not agree to filming their sexual encounter.
11. Tyler does not remember Sarah-Anne asking if she could record them having sex.
12. Tyler does remember that he and Sarah-Anne joked about making a “sex tape” after watching a movie one time, but he believes they were both joking about it.
13. Tyler is applying for summer internships and says he “would never” post something like this video online, even temporarily, as it could jeopardize his internship opportunities.
14. When Tyler approached Sarah-Anne, they started yelling at each other and Tyler admits that he “got pretty loud, but never touched Sarah-Anne”.
15. Tyler says that Sarah-Anne hit his face with an open-palm. He says that it stung for a little while, but there was no bruising.
16. During the cross-examination process, Tyler states that he does remember the sexual encounter that was in the video. He states that it was the same night that he and Sarah-Anne had “joked” about making a sex tape.
17. Ms. Smith asks Tyler about the verbal argument, and confirms that Tyler had backed Sarah-Anne into a corner of the Lenape Lounge.
18. Sarah-Anne states that she only recorded the video because she and Tyler had decided to make one after having a date night downtown and then watching a movie with a sex-tape storyline in her apartment.
19. Sarah-Anne says that she and Tyler both agreed to it, and that they were not “joking about it” as Tyler claims.
20. Sarah-Anne claims that she accidentally posted that video to SnapChat, and had intended to post a different video. She took the video down as soon as she became aware of the issue.
21. Sarah-Anne states that in the video she was not looking at the camera, but rather looking at the door to her apartment because she thought she heard someone knocking.
22. Sarah-Anne claims that she only smacked Tyler because she was backed into a corner of the room and didn’t see anyone else around. She was afraid that Tyler was going to hurt her.
23. Sarah-Anne claims that she is sad about what happened, but that the video was something they both decided to make and that she didn’t mean to post it on SnapChat.

Make a Decision

Based on the preponderance of evidence, discuss if the referred student is responsible or not responsible for the alleged violation(s).