

Title IX Decision Makers

2026-2027
Summer 2026



Aspirational Agenda

- Title IX Process
- Grievance Process
- Serving Impartially
- Relevancy
- Technology
- Writing an Outcome Letter



Title IX

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subject to discrimination under any educational program or activity receiving federal financial assistance.”

-Title IX of the Education Amendments of 1972

- Signed in 1972
- Part of United States Code (U.S.C.) and the Code of Federal Regulations (C.F.R.)
 - 20 U.S.C. §1681
 - 34 C.F.R. §160
- Wright State policy 1270
 - Sex/Gender-Based Discrimination, Harassment, and Sexual Misconduct

Federal Title IX Oversight

- **Historically:** Office of Civil Rights (OCR) within the Department of Education (ED)
- **Currently:** OCR of Department of Justice (DOJ) and/or Health and Human Services (HHS)
 - Recent cases in Maine and Minnesota have been determined by HHS and resulted in consistent oversight of the school systems

Impacting our Policy

Title IX of 1972

34 CFR §106

Title IX defines sexual harassment and outlines the grievance process for complaints

Clery Act of 1990

34 CFR §668

Clery defines sexual assault including rape, fondling, statutory rape, incest

VAWA of 1994

34 CFR §668.46

VAWA defines dating violence, domestic violence, and sex-based stalking

Changes Over Time



THE CLERY ACT & TITLE IX

1972

Title IX, a federal civil rights law prohibiting sex discrimination in educational programs, is signed into law.

1986

Jeanne Clery was raped and murdered in her college residence and the Clery family begins to advocate for transparency and accountability related to campus crimes.

1990

The Crime Awareness and Campus Security Act, later renamed the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, was signed into law, requiring colleges and universities to record campus crime statistics and safety policies.

1992

Amendments are made to the Clery Act to implement policies and procedures to protect the rights of sexual assault survivors.

2011

The Office of Civil rights issues a "Dear Colleague Letter" with guidance on what measures institutions should take to address sexual harassment.

2013

The Clery Act was expanded to include all incidents of sexual violence, sexual assault, domestic violence, dating violence and stalking.

2020

Updated Title IX regulations came into effect, resulting in significant changes to how institutions must define and respond to sexual harassment.

2022

Celebrating the 50th anniversary of Title IX!

WSU Grievance Process

Harmed Party- Complainant
Alleged Perpetrator- Respondent

Complainant has the opportunity to meet with the Title IX Coordinator, discusses **supportive measures** and reporting options:

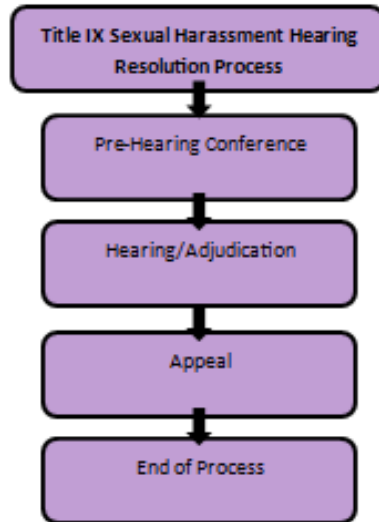
- Informal Resolution- must be at the same level
- Formal Resolution- option, only option for differing levels

Decision Maker is part of the Formal Resolution process.

Wright State University Title IX and Sexual Misconduct Decision Tree



Formal Resolution



Decision Makers participate in the Pre-Hearing conference and the Hearing.

Pre-Hearing Conference: includes information for the party and their advisor to know the flow of the hearing and answer procedural questions.

Hearing: opportunity for the parties to introduce their perspective and provide clarification to the Final Investigation Report.

Appeals: determined by the Appellate Officers.

Informal Resolution: determined by the Informal Resolution Facilitator

Covered Within WSU Policy

- Sex/Gender-Based Harassment, Discrimination, and Sexual Misconduct policy (WSU 1270)
 - Program equity (ie sports)
 - Pregnant & parenting related conditions
 - Sexual harassment:
 - Conduct on the basis of sex that is unwelcome and determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity. (1270.4(6))

Scope of Title IX at Wright State

What?

- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape
- Dating Violence
- Domestic Violence
- Sex-based Stalking
- Quid Pro Quo Sexual Harassment
- Unwelcome Sexual Conduct

Who?

- Members of the university community
- Faculty
- Staff
- Registered students
- Student organizations
- Vendors
- Volunteers
- Visitors on and off campus
- *Covers behavior on and off campus

Title IX at Wright State

- Sex/~~Gender~~-Based Harassment, Discrimination, and Sexual Misconduct policy (WSU 1270)
- Prohibited Behaviors:
 - Sexual Assault: rape, statutory rape, incest, assault with an object, fondling, sodomy
 - Dating Violence
 - Domestic Violence: felony or misdemeanor crime of violence
 - Sex-Based Stalking
 - Quid Pro Quo Sexual Harassment
 - Unwelcome Conduct Sexual Harassment
 - Sexual Misconduct

Wright State's Non-Discrimination Policy

(1280)

Prohibits discrimination based on protected traits including:

- Race
- Color
- Religion
- Gender
- Gender identity or expression
- National origin
- Military status
- Disability
- Age (40 years or older)
- Status as a parent (pregnancy and after birth)
- Status as a parent of a young child
- Status as a nursing mother
- Status as a foster parent
- Genetic information
- Sexual orientation

Definitions: Sexual Assault

- **Rape-** carnal knowledge
- **Sodomy-** oral or anal sexual intercourse
- **Sexual Assault with an Object-** unlawful penetration
- **Fondling-** touching for the purpose of sexual gratification
- **Incest-** sexual intercourse between relation
- **Statutory Rape-** sexual intercourse with anyone under 16 years old

Definitions: Dating Violence

- Conduct on the basis of sex that consists of violence committed by a person who is or has been in a romantic or intimate relationship with the complainant.
 - Intimate/romantic relationship =
 - length of relationship
 - Type of relationship
 - Frequency of interactions between individuals

Definitions: Domestic Violence

- Conduct on the basis of sex that consists of a felony or misdemeanor crime of violence by
 - Current/former spouse or intimate partner
 - Person with whom the victim shares a common child
 - Person cohabitating (or former) of the victim as a spouse or intimate partner
 - Person similarly situated to spouse of victim y domestic/family violence laws of the jurisdiction
 - Any other person against an adult or youth victim who is protected from that person's acts under domestic/family violence laws

Definitions: Sex-Based Stalking

- Conduct on the basis of sex that consists of engaging in a course of conduct directed at a specific person to cause reasonable: (A) fear for safety; (B) suffer emotional distress
 - Two or more acts: direct or indirect action, method, device, or means to follow, monitor, observe, surveil, threaten, or communicate to or about, or interferes with a person's property

Sex-Based Stalking (Continued)

- Reasonable Person: reasonable under similar circumstances with identities similar to the victim
- Substantial Emotional Distress: significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling



Definitions: Quid Pro Quo Sexual Harassment

- Conduct on the basis of sex when a university employee, vendor, or volunteer conditions the provision, aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct. Includes but not limited to:
 - Unwelcome sexual advances
 - Requests for sexual favors
 - Other verbal/physical conduct of a sexual nature by a person with authority over others

Definitions: Retaliation

- None, including the university, may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with rights or privileges secured by Title IX or this policy because of a report or complaint
- Reports of retaliation will be addressed in accordance with policies regarding retaliation.

Scope (1 of 2)

- Operations of the University
- Locations, events, or circumstances over which the University substantial control over both the respondent and the prohibited behaviors
- Buildings that are owned or controlled by recognized student organizations

Scope (2 of 2)

Conduct must have occurred:

- Against a person in the United States
- Within WSU's education program or activity
- Complainant must be participating in, or attempting to participate in, education program or activity at the time the formal complaint is filed



Being Impartial and Avoiding Bias, Conflict of Interest, and Prejudgment of Facts

Impartiality

- Bias
- Avoiding prejudgment of fact
- Using information free from reliance on sex stereotypes
- Conflicts of interest
- Fair and Impartial
- Keep an open mind

Bias: Concerns Raised in preamble

- Are all paid staff members biased in favor of the institution that employs them?
- Was an institutional history of covering up issues enough for bias?
- Were past tweets or public comments that appear to support complainants or respondents sufficient to show bias?
- Is identifying as a feminist enough to show bias?
- Should bias extend to “perceived bias” or did it require actual bias?

Bas: Response of Department of Ed.

- Department declined to determine whether bias has to be actual or if perceived is sufficient to create an issue.
- Each specific bias issue requires fact finding analysis

(30252)

Bias: How WSU Minimizes Bias

No single-investigator model

- Decision-makers cannot be the same person who served as Title IX Coordinator or Investigator (330367)
- Prevents the decision-maker from improperly gleaning information from the investigation that isn't relevant that an investigator might be aware of from gathering evidence (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

Bias: Objective Rules and Discretion

- WSU has objective rules for determining when an adjudicator (or Title IX Coordinator, Investigator, or Informal Resolution Facilitator) is biased, and the Department of Education allows university's to maintain discretion. (30250)
- WSU has the discretion to have a process to raise bias during the investigation.
- Bias is a basis for appeal of decision-maker's determination (34 C.F.R. 106.45(b)(8)(i)(C))

Being Impartial

A party should not be “unfairly judged due to inability to recount each specific detail of an incident *in sequence*, whether such inability is due to

- trauma,
- the effects of alcohol or drugs,
- or simple fallibility of human memory.” (30323)

Avoiding Prejudgment of Facts

- Read the entirety of the Final Investigation Report (FIR)
 - Including appendices and irrelevant information
- Take notes
- Focus on the policy and alleged violations
- Respondent is **presumed not responsible until such time as the respondent is found responsible** (WSU 1270.1)

Free of Sex Stereotypes

Avoid stereotypes based on sex:

- “such that even if a cross-examination question impermissibly relies on **bias or sex stereotypes** while attempting to challenge a party’s plausibility, credibility, reliability, or consistency,
- **It is the trained decision-maker**, not the party advisor asking a question **who determines whether the question is relevant**, then evaluates the question and any resulting testimony in order to reach a determination on responsibility” (30325)

Examples of Sex-Stereotypes

Decision-makers *must* not rely on sex stereotypes such as:

- Women have regret sex and lie about sexual assaults
- Men are sexually aggressive or likely to perpetrate sexual assault
- Consideration of marginalized groups: people with disabilities, people of color, people who identify in the “LGBTQ” community (30259-30260)

Avoid Rape Myths

“Beliefs about rape that serve to deny, downplay or justify sexually aggressive behavior that men commit against women” which “can be descriptive, reflecting how people believe instances of sexual assault should react” (30325)

- Myths about dress, consumption of alcohol, or previous relationships
- Belief that women make false accusations of rape
- Belief that “genuine assault” would be reported to authorities immediately
- Belief that a victim would “fight back”

Confidentiality

- 106.71 requires that our process and volunteers keep party and witness identities confidential except as permitted by law or FERPA, and as needed to conduct an investigation or hearing (30316)
- Prevents anyone in addition to the advisor to attend the hearing with the party, unless otherwise required by law (30339)

Conflict of Interest: Concerns from Preamble

- Similar to Bias:
 - Does a decision-maker's financial ties to the institution create conflict?
 - Would the Title IX Coordinator directly supervise the decision-maker?
 - Does past advocacy for a survivor's or respondent's rights group create conflict?
 - Are perceived conflicts sufficient or do the conflicts have to be actual?

Preamble Discussion: Conflict of Interest

(1 of 2)

- No *per se* prohibited conflicts of interest from using employees and administrative staff, including supervisory hierarchies (30352)
 - However, we will not permit the Title IX Coordinator to directly supervise a decision-maker
- No *per se* conflict of interest or bias for professional experiences of affiliations of decision-makers and other roles in the grievance process (30353)

Preamble Discussion: Conflict of Interest

(2 of 2)

The preamble discussion:

- Provides as an example that it is not a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead recommends using a reasonable-person test to determine whether bias exists

Discussion Regarding Training's Role

“[T]he very training required by 106.45(b)(1)(iii) [**that you are sitting in right now**] is intended to

- Provide Title IX personnel with the tools needed to serve impartially and without bias
- Such that the prior professional experience of a person whom [WSU] would like to have in a Title IX role
- Need not disqualify the person from obtaining the requisite training to serve impartially (30252)

Examples in Discussion for Unreasonable Conclusion that Bias Exists: Review of Outcomes

- Department also cautioned parties and institutions from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations” (30252)
- Explained this means the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias” (30252)

Reminders (1 of 3)

- Individual cases are not about statistics
- Decision in every case must be based on **preponderance of evidence**
- Cannot fill in evidentiary gaps with statistics, personal beliefs, or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions are impartial view of evidence presented

Reminders (2 of 3)

- Withhold pre-judgement: the parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing not unfair victim-blaming, or societal/personal bias

Reminders (3 of 3)

- Burden of gathering the evidence is on the institution, not the parties (30333)
- Should be an issue with investigation, but might be something you see as the decision-maker

Live Cross-Examination



Cross Examination: Theory (1 of 2)

- Essential for truth seeking (30313)
- Provides opportunity for both parties to **test “consistency, accuracy, memory, and credibility** so decision-maker can better assess which narrative to believe” (30315)
- Provide party’s opportunity to direct decision maker’s attention (30330)
- Promotes transparency and equal access (30389)

Cross Examination: Theory (2 of 2)

Achieves the purpose of:

- Effectuating title IX's non-discrimination mandate by ensuring **fair, reliable outcomes** viewed as **legitimate** in resolution of formal complaints of sexual harassment so that victims receive remedies
- **Reducing and preventing sex bias** from affecting outcomes; and
- Ensuring that Title IX regulations are consistent with **constitutional due process and fundamental fairness** (30327)

Live Cross-Examination: How it Should Look

“[C]onducting cross-examination consists simply of posing questions intended to advance the asking party’s perspective with respect to the specific allegation at issue.”
(30319)

Live Cross-Examination: Regulations (1 of 2)

In this process:

- Decision-maker must permit each party's advisor to ask the other party and any witnesses **all relevant** questions and follow-up those questions, including those challenging **credibility**
- Must be conducted directly, orally, and in real time by the party's advisor, *but never the party personally*
- Only **relevant** cross-examination and other questions may be asked of a party or witness

Live Cross-Examination: Regulations (2 of 2)

- Before a party of witness may answer a question, the decision-maker must first determine whether the question is relevant and explain the reason if not relevant
- Hearings will be audio/visually recorded and recordings are available to parties upon written request

Submission to Cross-Examination

- The 2020 amendments at 34 C.F.R. §106.45(b)(1)(ii) require “an objective evaluation of all relevant evidence.” To the extent that statements made by a party or witness who does not submit to cross-examination at a live hearing satisfy the regulation’s relevance rules, they must be considered in any postsecondary school’s Title IX grievance process.
- Due to *Doe v Baum* (2018) says that the sixth circuit requires cross-examination if there could be separation from the institution.

Role of the Decision-Maker in Asking Questions

The preamble discussion provides some additional information on protecting neutrality of the decision-maker:

“To the extent that **a party wants the other party questioned in an adversarial manner** in order to further the asking party’s views and interests, that questioning is conducted by the party’s own advisor, **and not by the recipient**. Thus no complainant (or respondent) need feel ask though the [university] is “taking sides” or otherwise engaging in cross-examination to make a complainant feel as though the [university] is blaming or disbelieving the complainant.” (30316)

Cross Tools: What are the goals of cross-examination?

- Obtain **factual admissions** helpful to your party's case.
- **Corroborate the testimony** of your party's witnesses.
- Minimize the other party's case by ***impeachment*** of *witness* being questioned.
- Minimize the other party's case by ***impeachment*** of *other witnesses* through the witnesses being questioned.
- Reduce **confusion and seek truth**.

Cross Tools: Impeachment (1 of 5)

- Bias: (a) lay witnesses and (b) experts.
- Relationships (friendship and romantic)
- Experts: getting paid for testimony
 - You charge fees based on an hourly rate?
 - You were paid to produce a written report?
 - Based on this report, you're testifying today?
 - You're charging money for each hour you're here?

Cross Tools: Impeachment (2 of 5)

- Perception and Recall
 - What is the witness's perception of the facts?
 - Has time impacted recall or ability to remember clearly?
 - How many times has the witness talked to the party about the case?
 - Was there anything that impacts the person's physical or mental ability to perceive or recall facts accurately?
 - Is the expert limited by the information provided to inform the expert report?
 - Does the witness form a conclusion without knowing certain information?

Cross Tools: Impeachment (3 of 5)

Example: Intoxication level information from witness.

- You did not see the consumption, or keep track of how long the party was consuming alcohol?
- You did not measure the alcohol poured by _____ or the party?
- Your statements are based on information provided by others? The other party?
- Party's statements were made after they had been drinking alcohol (consuming other drugs, etc.)?

Reminder: delineate whether the party or witness is speaking from personal knowledge.

Cross Tools: Impeachment (4 of 5)

Inconsistency in Statements

- If a fact was very important, why is the hearing the first time it has come up?
- What possible reasons might the witness have for changing their testimony?
- Did a witness receive coaching from the party or others between making one statement and another?
- Has the witness's perspective or motive changed between statements?
- Does changing this fact help the other party's case?

Cross Tools: Impeachment (5 of 5)

Lack of Corroborating Evidence

- Example: Missing receipts...
 - You testified that you were drinking with the Complainant on the night of the incident?
 - You testified that you paid for the alcohol?
 - You paid with your credit card?
 - But you did not provide the receipt to the investigator?
 - You didn't even provide access to your credit card statement?

Remember: if a party elects not to provide information, it is an empty spot on the table.

Relevancy



Relevancy (1 of 2)

- Per 34 C.F.R. 106.45(b)(6)(i):
 - “only relevant cross-examination and other questions may be asked of a party or witness”

“[C]ross examination must focus only on questions that are relevant to the allegations in dispute.” (30319)

Relevancy (2 of 2)

Party or witness **cannot** answer a question until the decision-maker determines whether it is relevant.

- Requires decision-makers to make “on the spot” determinations and explain the “why” if a question or evidence is not relevant (30343)

What is Relevant? (1 of 3)

Decisions regarding relevancy do not have to be lengthy or complicated:

“...it is sufficient...to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, **or because the question asks about a detail that is not probative of any material fact concerning the allegations.**”

(30343)

What is Relevant? (2 of 3)

Under preponderance of the evidence standard:

- Does this help me in deciding if there was more likely than not a violation?
- Does it make it more or less likely?
- Why or why not?

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

What is Relevant? (3 of 3)

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 or less probable?
- Why or why not?

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

Relevancy Determination

WSU 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).” (30331)

- WSU may not adopt rules excluding certain types of relevant evidence (ie lie detector or rape kits) where that type of evidence is not labeled irrelevant in the regulations (eg. Sexual history) or otherwise barred under 106.56 (privileged) and must allow fact and expert witnesses (30294).

Relevancy: Not Relevant

The Department has determined that universities must consider relevant evidence with the following exceptions:

- (1) Complainant's sexual behavior (except for two narrow exceptions)
- (2) Information protected by a legal privilege
- (3) Party's treatment records (absent voluntary written waiver by the party) (30337)

Relevancy: Rape Shield Law-Complainants

- According to 34 C.F.R. 106.45(b)(6)(i), Cross-examination **must exclude** evidence of the Complainant's "sexual behavior or predisposition **UNLESS**
 - Its use is to prove that someone other than the Respondent committed the conduct, OR
 - It concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent

Relevancy: Regulations' Rape Shield Law- Respondents

- Rape shield protections do not apply to Respondents
- “The Department reiterates that the rape shield language...does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”
- BUT- is it relevant? Could it be harassing?

Relevancy: Treatment Records

“[C]annot access, consider, disclose, or otherwise use party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and **which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent** to do so for a grievance process” §106.45(b)(5)(i) (see also 30317)

Relevancy: Legally Privileged Information (1 of 2)

Section 106.45(b)(1)(x):

A [university's] process **must not 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.

Relevancy: Legally Privileged Information (2 of 2)

Other typical privileges recognized across jurisdictions but with variations (will want to involve your legal counsel for definitions in your jurisdiction):

- Attorney-client communications
- Implicating oneself in a crime
- Confessions to a clergy member or other religious figures
- Spousal testimony in criminal matters
- Some confidentiality/trade secrets

Relevancy: Improper Inference

When parties do not participate:

- “if a party or witness does not submit to cross-examination at the live hearing...the decision-maker(s) cannot draw an inference about the determination regarding responsibility **based solely** on a party’s or witnesses’s absence from the live hearing or refusal to answer cross-examination or other questions.” 34 C.F.R. 106.45(b)(6)(i)

Issues of Relevancy

“[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties.” (30294)

BUT

“[I]f a [university] trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the [university’s] training materials.” (30293)

The Hearing



The Hearing: Pre-Hearing Conference

- During the pre-hearing conference, you have the ability to share the process with the parties and their advisors
- Share the layout of the hearing
- Practice with the technology
- Get a list of witnesses the party wants called
- Answer questions

The Hearing: Decorum (1 of 3)

“[Universities] may adopt rules that govern the **conduct and decorum of participants at live hearings** so long as such rules comply with these final regulations and **apply equally to both parties**...These final regulations aim to ensure that the truth-seeking value and function of cross-examination applies for the benefit of both parties while minimizing the discomfort of traumatic impact of answering questions about sexual harassment.” (30315)

The Hearing: Decorum (2 of 3)

“[W]here the **substance of a question is relevant**, but the manner in which an advisor attempts to ask the question is **harassing, intimidating, or abusive (for example, the advisor yells, screams or physically ‘leans in’ to the witness’s personal space)**, the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.” (30331)

The Hearing: Decorum (3 of 3)

- “[T]he essential function of cross examination is **not to embarrass, blame, humiliate, or emotionally berate a party**, but rather to ask questions that probe a party’s narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue.” (30319)
- Nothing in this rule prevents [university] from enforcing decorum rules in the hearing and “the recipient may require the party to use a different advisor” if the advisor does not comply, so that an advisor can conduct cross-examination on behalf of the party (30320)

The Hearing: Technology

- We use WebEx to record our hearings and host virtual hearings
- Parties and advisors have an opportunity to sit in the same room together, if they choose
- We can secure a room for them if needed

Objectively Evaluating Relevant Evidence

- As addressed in the preamble and discussed earlier, the decision-maker should evaluate:
- “consistency, accuracy, memory, and credibility” (30315)
- “implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility” (30330)
- Standard of proof and using it to guide decision

Preponderance Standard



Making Credibility Decisions

The preamble includes the following additional information on credibility:

- “studies demonstrate that inconsistency is correlated with deception” (30321)
- Credibility decisions consider “plausibility and consistency” (30322)

Resolving Disputes (1 of 4)

Considerations

- Statements by any witnesses to the alleged incident
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)

- Evidence of the complainant's reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes (3 of 4)

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - BUT: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complaint may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred? (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?

Weight of Evidence (1 of 2)

- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgement.

Weight of Evidence (2 of 2)

- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

Evaluate Witness Credibility (1 of 3)

- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.

Evaluate Witness Credibility (2 of 3)

- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

Evaluate Witness Credibility (3 of 3)

- Credibility is determined fact by fact, not witness by witness
 - The most earnest and honest witness may share information that turns out not to be true

Draw Reasonable Inferences

- Inferences are sometimes called “circumstantial evidence”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning

Do Not Consider Impact

- Don't consider the potential impact o your decision on either party when determining if the charges have been proven.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.

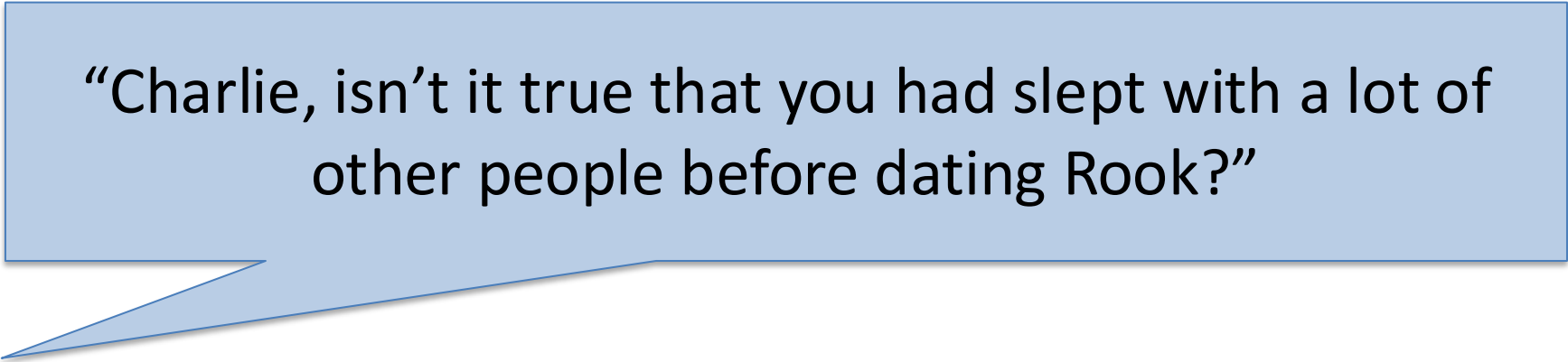
Relevancy Practice



Summary of Allegations

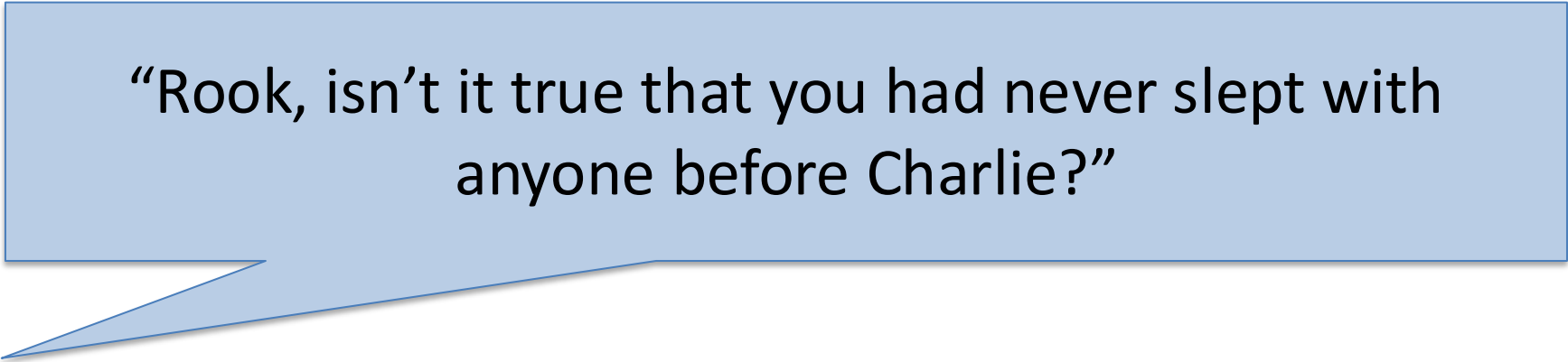


Practice Hypothetical #1



“Charlie, isn’t it true that you had slept with a lot of other people before dating Rook?”

Practice Hypothetical #2

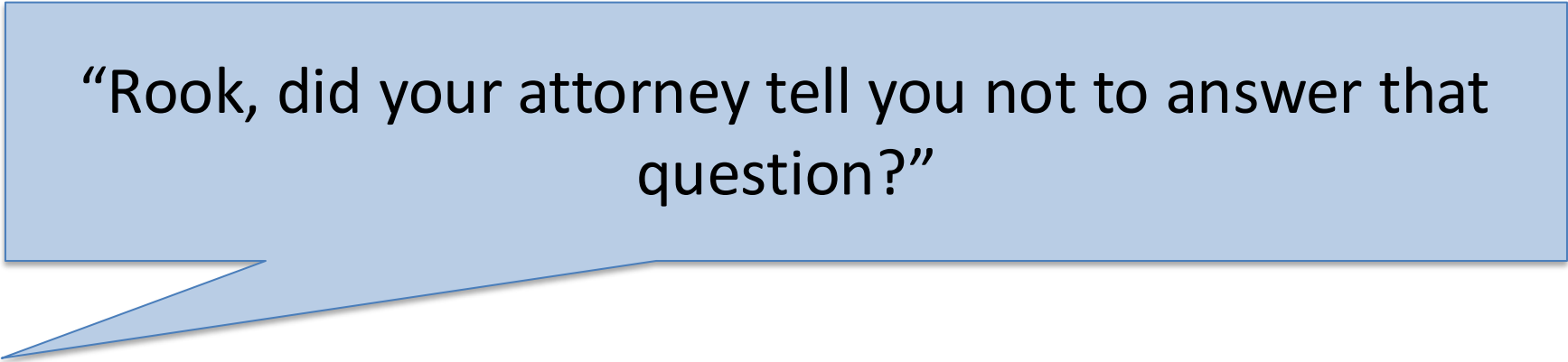


“Rook, isn’t it true that you had never slept with anyone before Charlie?”

Practice Hypothetical #3

“Charlie, isn’t it possible that you wanted to have sex that night but were too drunk to remember?”

Practice Hypothetical #4



“Rook, did your attorney tell you not to answer that question?”

Practice Hypothetical #5

“Rook, did you tell your counselor that Charlie was unresponsive during sex in the alleged incident?”

Practice Hypothetical #6

“Charlie, isn’t it true you took off Rook’s clothing during the sexual encounter?”

Practice Hypothetical #7

“Rook, isn’t it true you began sexual contact with Charlie while she was asleep?”

Practice Hypothetical #8

“Charlie, isn’t it true that you hit Rook before January 5, 2025?”

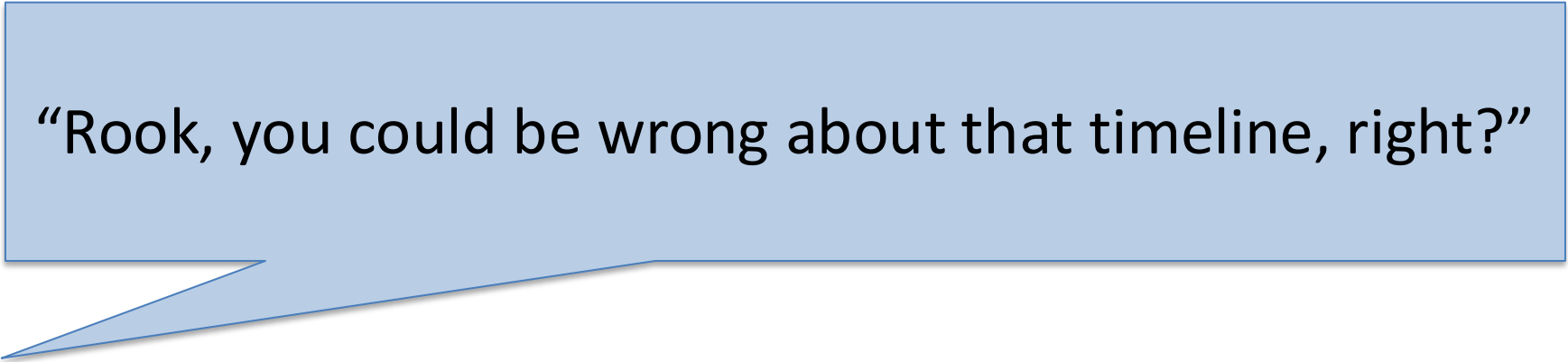
Practice Hypothetical #9

“Rook, if you were as drunk as you just stated you were, isn’t it possible that you initiated sexual contact with Charlie while she was asleep?”

Practice Hypothetical #10

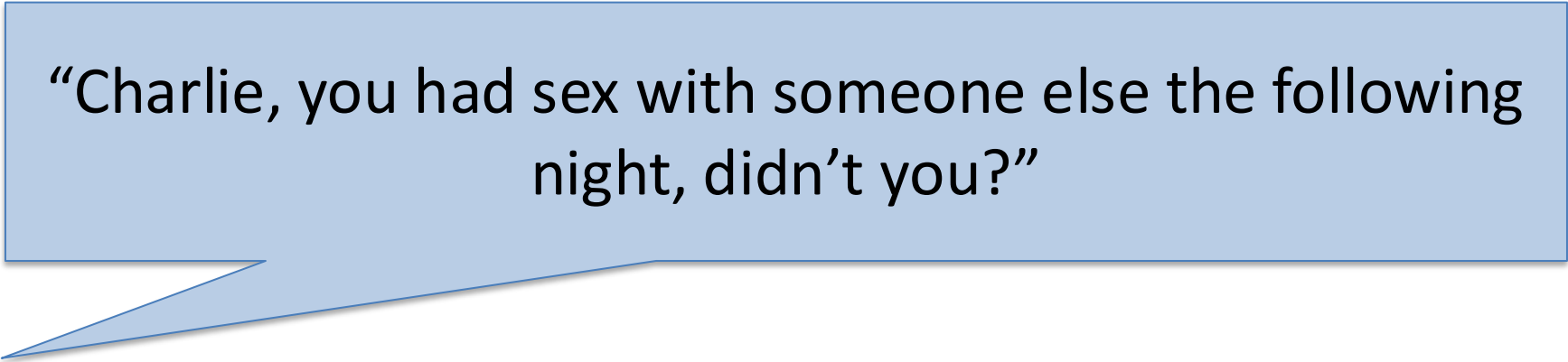
“Charlie, if you were sexually assaulted, why didn’t you go to the police right away?”

Practice Hypothetical #11



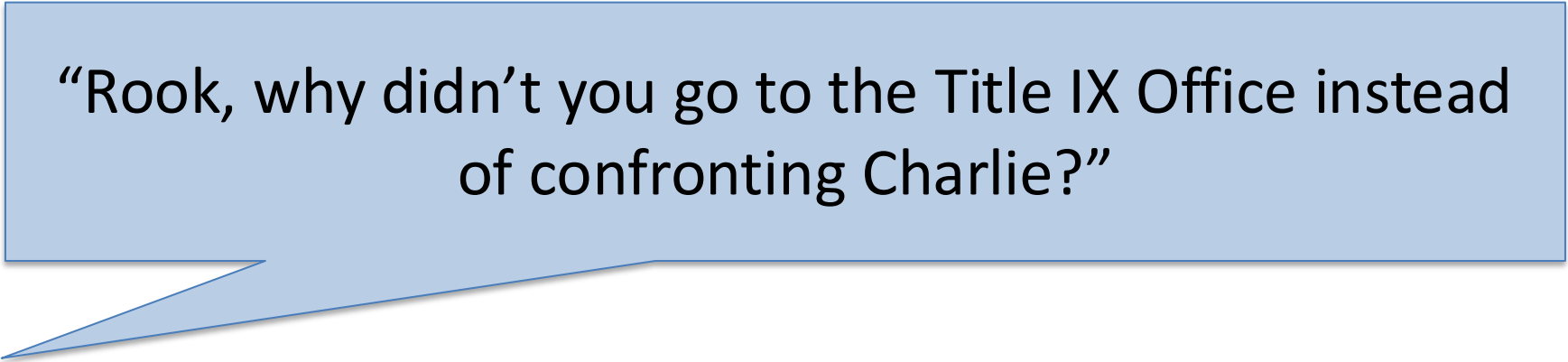
“Rook, you could be wrong about that timeline, right?”

Practice Hypothetical #12



“Charlie, you had sex with someone else the following night, didn’t you?”

Practice Hypothetical #13



“Rook, why didn’t you go to the Title IX Office instead of confronting Charlie?”

Written Decision



Written Determination

- Per our policy, you will have 15 business days to complete and send the written decision (WSU1270, Appendix B)
- Decision must include:
 - Identification of allegations
 - Description of procedural steps taken from the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings

Written Determination Elements

- Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the university to reach its decision; and should match up with the decision (30391)

Written Determination

- Purpose:
 - “so the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions.” (30389)

Written Decision 1 of 5

- Include a statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions imposed on the Respondent, and whether remedies designed to restore or preserve equal access to education program or activity will be provided by the university to the Complainant

Written Decision 2 of 5

- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Decision 3 of 5

- Include information for parties to submit a written appeal, as well as bases for appeal:
 - Procedural irregularity
 - New evidence that was not reasonably available prior to the determination
 - Conflict of interest at some point in the process (including from the Title IX Coordinator, Investigator, or Decision-Maker)
- Decisions are sent to the parties/advisors simultaneously in an effort to ensure equitable treatment and process

Written Decision 4 of 5

Reference to code of conduct not prohibited:

“Recipients **retain discretion to also refer to the written determination to any provision of the recipient’s own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however the final regulations apply only to Title IX portion”(30389)

Written Decision 5 of 5

The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness).”

Be Clear

- Consistent in terminology
- Source of information:
 - “Bob stated that this happened” vs “this happened”
- Could someone unfamiliar with the case understand the decision?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

Specific

- Set the scene visually (will help identify inconsistency in stories)
- Use quotation marks carefully
- Include details to the level that anyone can thoroughly understand
- Be careful of pronoun usage so that we always know who is saying what

Empathy

- Maintain a non-judgmental tone
- Stay away from charged words of advocacy:
 - Clearly/obviously
 - Innocent/guilty
 - Victim/perpetrator
- Watch adjectives and adverbs- unless in a quote
- Recognize impact of words

Example 1



Respondent was very believable when they said they had been attacked by Complainant.



Respondent stated that they were attacked by Complainant outside of Laurel Hall. Respondent provided the names of witnesses and contact information for those witnesses.

Example 2



Complainant stated that she didn't think she had witnessed anything, but that I should check with her.



Complainant stated that Complainant did not believe that her roommate, Wendy, had witnessed anything. Complainant asked the investigator to follow up with Respondent to verify what, if anything, Respondent witnessed.

Example 3



Respondent seemed nervous at the interview and wasn't consistent with the information.



Respondent provided the following information at the interview: that Respondent had 3 whiskey sours, that Respondent had 2 whiskey sours, and that Respondent may not have had any whiskey sours.

Appeals



Appeal Officer's Role(s)

- Know the process in the policy
 - How it functions
 - How it applies
- Know the big picture role
 - Specific details of the case
 - Be able to move back and forth between perspectives

3 Grounds for Appeal

- Procedural Irregularity
- New evidence
- Conflict of interest

Information about WSU's appeal process and grounds for appeal can be found in policy 1270, Appendix B.

Bases for Appeal: Procedural Irregularity

- Some sort of irregularity within the procedure that affected the outcome of the matter.
 - Does the process in policy align with the process as applied?
 - Ie: Charges were for a policy that has since been updated and the party was not charged under the policy that existed at the time of the incident/complaint

Bases for Appeal: New Evidence

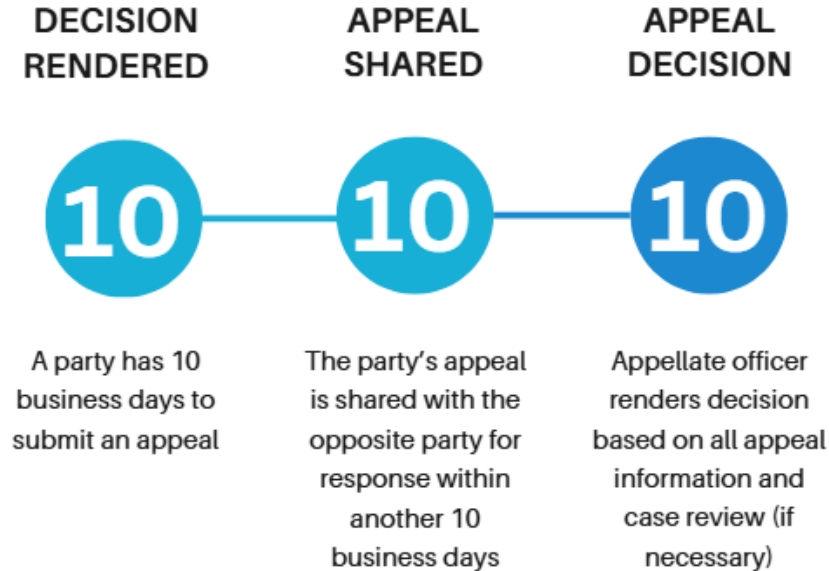
- New evidence that was *not reasonably available* at the time determination was rendered or when dismissal was made **and** could *affect the outcome* of the matter.
 - I.e. A new person came forward with a video of the incident that depicts the incident from a clear angle.

Bases for Appeal: Conflict of Interest

- Conflict of interest or bias against a party by the Title IX Coordinator, investigator(s), or decision maker(s) that *affected the outcome of the matter.*

Requires that the appellate officer is able to make determinations on bias and conflict of interest and understands the case enough to determine if bias affected the outcome.

Process for Appeal



Review



Summary of Case Allegations



Hypothetical: Charlie → Rook

Claims by Charlie against Rook

- Decision-maker (DM) finds that the record does not support a preponderance of the evidence that Rook engaged in conduct prohibited by the University's Title IX policy for **sexual assault: fondling** under Title IX.
- DM finds that the record does support a preponderance of the evidence that Rook engaged in conduct prohibited by the University's Title IX policy for **sex-based stalking** under Title IX.

Hypothetical Rook ← Charlie

Claims by Rook against Charlie

- DM finds that the record does not support by a preponderance of the evidence that Rook engaged in conduct prohibited by the University's Title IX policy for **sexual assault: fondling** under Title IX.
- DM finds that the record does support by a preponderance of the evidence that Charlie engaged in conduct prohibited by the University's Title IX policy for **dating violence** under Title IX.

Hypothetical: Charlie's Appeal- Procedural Irregularity

The Investigator was biased against me and procedural irregularity existed, both effecting the outcome of the decision against me for the domestic violence finding against me. Specifically, the Investigator failed to interview any of the witnesses I requested who witnessed my fear and need to use self-defense when slapping Rook and that I was not motivated by anger. I requested the Investigator interview Juan Juarez and Kylie Kelp, both of whom I remember leaving the main door at North Hall on January 6, 2023. The Investigator did not interview them and they would have provided information that changed the outcome – which I raised in response to the evidence packet before the hearing, but nothing was done.

Hypo: Charlie's Appeal- New Evidence

New evidence from the criminal case has come out since the decision that may change the outcome of the decision. Specifically, the attached video interview of Rook by the police supports that Rook was untruthful in their statements in the hearing, where they talked about never having lost memories from drinking. Although I made a FOIA request for this information months ago, the police just produced it to me yesterday, two days after the Decision.

Hypo: Rook's Appeal- Irregularity

The Decision-Maker erred in making a relevancy determination that prevented my attorney from asking Wendy Wallis a question that supports that she was lying about my ability to consent. Since the Decision-Maker found that the evidence did not support by a preponderance of the evidence that Charlie assaulted me because of the alleged message provided by Wendy in the investigation, this would have changed the outcome. The Decision-Maker should have allowed my attorney to ask Wendy why she did not produce the Snapchat messages during the investigation. She didn't do it because they don't exist and never did. She made up what she told the investigator.

Hypo: Rook's Appeal- Bias and Procedural Irregularity

The Decision-Maker was biased against me as a party, often rejecting my advisor's questions as not relevant when my advisor questioned Charlie about the sexual assault, but not providing the same protection for me when Charlie's advisor questioned me. This bias negatively affected the outcome of the decision because the Decision-Maker removed my attorney from the hearing and should have found that Charlie violated the Title IX Policy for fondling under Title IX. Had the Decision-Maker allowed my attorney to continue and properly question Charlie, the Decision-Maker would have found that Charlie violated the Title IX Policy. This entire process is biased against Respondents and that's exactly how I'm being treated here!

Appeal Process

- Know the policy
- Regulations require an appeal if formal complaint is dismissed or after responsibility determined in live-cross examination

Appeal

MUST:

- Notify the other party in writing when an appeal is filed and implement procedures equally for both parties
- Ensure that you were not also the decision-maker below, investigator, or Title IX Coordinator
- Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- Issue and provide to both parties simultaneously a written decision “describing the result of the appeal and the rationale for the result”

Appeal Considerations

Procedural Issue?

- Was there a procedural issue?
- If yes, did it affect the outcome of the matter?

New Evidence?

- Is there new evidence?
- If yes, was the evidence reasonably available at the time of the determination regarding responsibility or dismissal?
- If not, could its inclusion affect the outcome of the matter?

Conflict of Interest or Bias?

- Did the Title IX Coordinator, investigator(s), decision-maker(s) have a conflict of interest or bias?
- If yes, was it for or against a party generally or specifically?
- If yes, did it affect the outcome of the matter?

Written Appeal Decision



Written Appeal Determination 1 of 3

- Per our policy, you will have 10 business days to complete and send the written decision (WSU1270, Appendix B)
- Decision template includes:
 - Determination of whether grounds for appeal was met
 - Explanation of fact

Written Appeal Decision 2 of 3

- Include a statement of, and rationale for, the results as to each grounds for appeal, including determination regarding appeal, and any appropriate outcome that follows.

Written Appeal Decision 3 of 3

- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations

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Questions?

