

Managing Sexual Misconduct Grievance Procedure

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Afternoon Agenda

- WIU Policy
- Responding to Reports
- Overview of Grievance Process
- Serving Impartially
- Scenarios and Mock Hearing



WIU Policy

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WIU Sexual Misconduct Policy

- Key Definitions
- Scope



Consent

Consent: Consent is the relevant standard that will be applied to determine whether consent was present is whether a sober, reasonable person in the same position should have known the other party could not consent to the sexual activity. Consent to engage in sexual activity must be clear, coherent, ongoing, and willing. This means that silence or lack of verbal/physical resistance is not a “yes”.

Consent

- Not inferred from silence, passivity, or lack of resistance
- Not inferred from relationship status

Consent

- Consent to one form of sexual contact does not constitute consent to any other form of sexual contact
- Dress does not constitute consent

Consent

- Ability to consent:
 - Incapacitation
 - Sleep, unconsciousness, intermittent consciousness, disability
 - Minor (under 17 years of age)

Consent

- Withdrawal of Consent
- Outward Demonstration Required

Programs and Activities

- In-person and online educational instruction
- Employment
- Research activities
- Extracurricular activities
- Residence life
- Dining services
- Performances
- Community engagement and outreach programs
- All on-property conduct
- Off-property conduct at WIU events

Confidentiality

- Nurses in Health Services
- Counseling Services
- Confidential Advisor
- Hearing Procedures

Reporting Obligations

- All WIU employees (excluding Confidential Resources)
- WIU Student Teaching Assistants
- Resident Advisors
- Volunteers

Consensual Romantic or Sexual Relationships

- Impact on Unwelcome Determination
- Impact on Consent Determination

Non-Discrimination Statement

Western Illinois University strives to provide an educational and working environment that is free from discrimination and harassment for faculty, staff, and students. WIU policy prohibits discrimination and harassment on the basis of sex, race, color, sexual orientation, gender identity, gender expression, religion, age, marital status, national origin, disability, genetic information, veteran status, and any other classes protected by state or federal law. This policy covers nondiscrimination in both employment and access to educational opportunities.

Discrimination Harassment Retaliation Policy

- Protected activity under this policy includes, reporting an incident that may implicate this policy, participating in the grievance process, supporting a Complainant or Respondent, assisting in providing information relevant to an investigation, and/or acting in good faith to oppose conduct that constitutes a violation of this policy.
- It is prohibited for any member of WIU's community to take materially adverse action by intimating, threatening, coercing, harassing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by law or policy, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this policy and procedure.

Trauma-Informed Response

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Trauma Pendulum Swing

Obama-era guidance supported a trauma-informed, victim-centric approach

Trump-era rules did not prohibit trauma-informed training/processes but noted that misuse can violate rules

- At least some courts have agreed with this approach

Biden-era – return to support for trauma-informed approach; caution regarding victim-centric approach

What is Trauma?

An emotional response to a terrible event

- Complex Trauma?
- *Repetitive and Continuous in nature*

Trauma has real and lasting effects on the brain, if we understand this, we can collect better evidence while also providing a safe environment to parties

Practical Tips – Trauma

Acknowledge pain/difficult situation

“It’s ok if you can’t remember every detail. We will just focus on what you can recall.” “I can tell this is difficult for you, I can give you a little time”

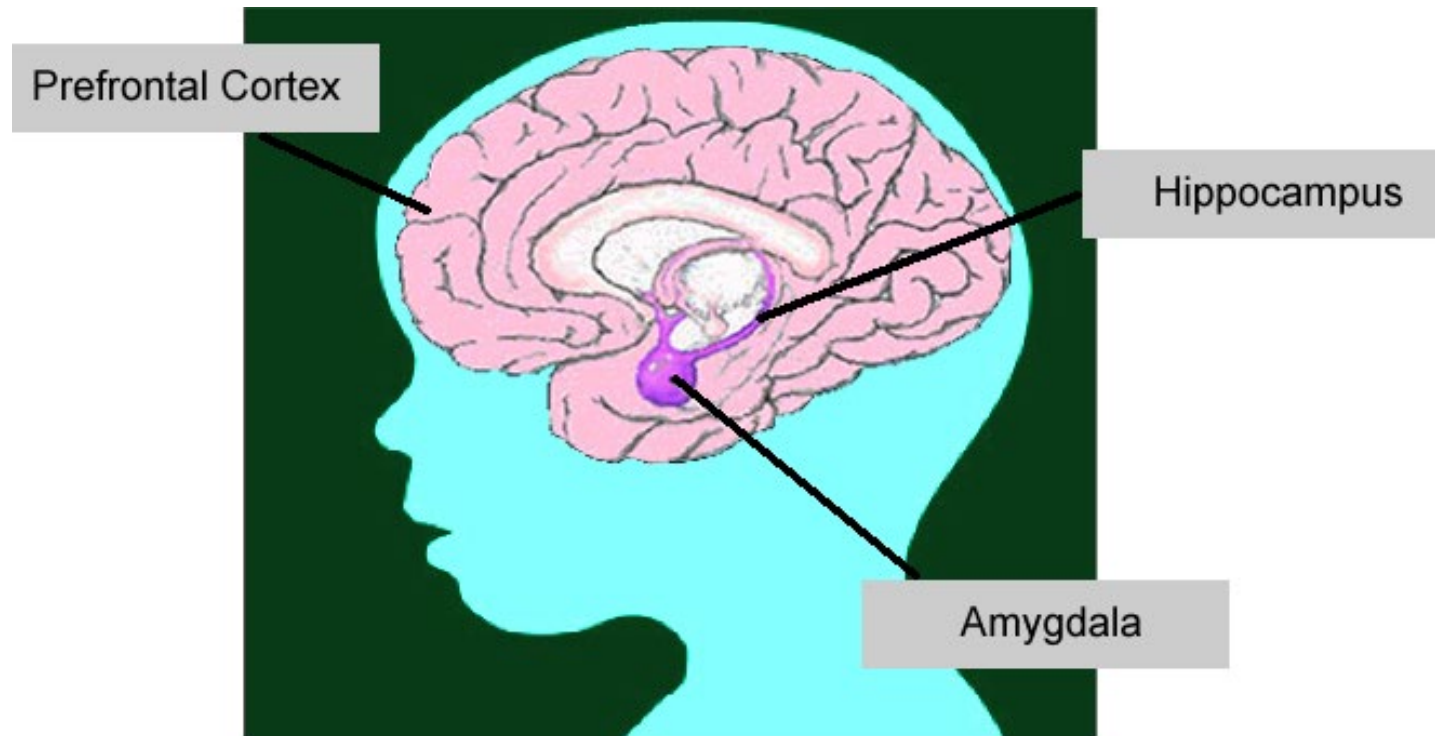


Do not demand starting at the beginning & providing every detail



Ask open ended questions

The brain's response to trauma



Intersectional Concern

Grace Kyungwon Hong, AAUP,
Intersectional and Anticarceral
Approaches to Sexual Violence in
the Academy



- If your determination approach assumes all sexual violence matters have a common denominator or follow a universal narrative, you may improperly prioritize those who fit that narrative and, even inadvertently, further marginalize those who are already vulnerable.

Impact on Effective Response

Department of Justice,
Identifying and Preventing Gender
Bias in Law Enforcement Response
to Sexual Assault and Domestic
Violence

- We all have explicit and implicit biases, including stereotypes about gender roles, sexual assault, and domestic violence
- Such bias can undermine the effectiveness of a response to reports

Impacts of Trauma

Trauma – Understanding impact

- Disorganized recall/processing
- Difficulty making decisions; may change mind about wanting to make a complaint or go to police

Trauma – Counter-intuitive “victim” behavior

- Demeanor (crying, rage, calm, unresponsive)
- Limited effort to resist during event
- Questioning self (“why didn’t I,” “maybe my fault”)
- Delayed reporting . . . recantation

**Victim
blaming**

Accusing

Judging



AVOID

INSTEAD....

- *Did you say anything in response?*
- *What prompted you to come forward now?*
- *Did you do anything else?*
- *Questions about going to hospital or police – relevant to the investigation?*



Trauma in Practice

- Effects of trauma should not be used against a party – to diminish credibility
- Avoid using trauma information as a substitute for evidence or to bolster credibility

2019 ATIXA Position Statement:
Trauma-Informed Training and the Neurobiology of Trauma

Be Fair

Avoid	Avoid biases against respondents, too
Use	Use similar questioning techniques
Remember	Remember that respondents may also experience stress and trauma

Emotions



Silence is ok



Sympathy is ok (within reason/neutral) – “I can tell this is hard” “I’m sorry this is difficult”



Allow breaks



Remember equality not equity is goal for processes

Examples of Impacts

- Memory improves over time
- Impacts on affect—smiling, laughing, stoic

Grievance Procedures

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Decision-Maker Responsibilities

- Review evidence collected during the investigation
- Oversee hearing and live cross
- Make relevancy determinations
- Make independent judgment on responsibility and sanctions

What You'll Receive

- Complaint (can be oral or written in 2024 regs)
- All relevant evidence gathered during the investigation
- Investigative report
- Written responses submitted by parties

Independent Judgment

- Make an independent judgement in objectively evaluating the relevant evidence to reach a determination regarding responsibility

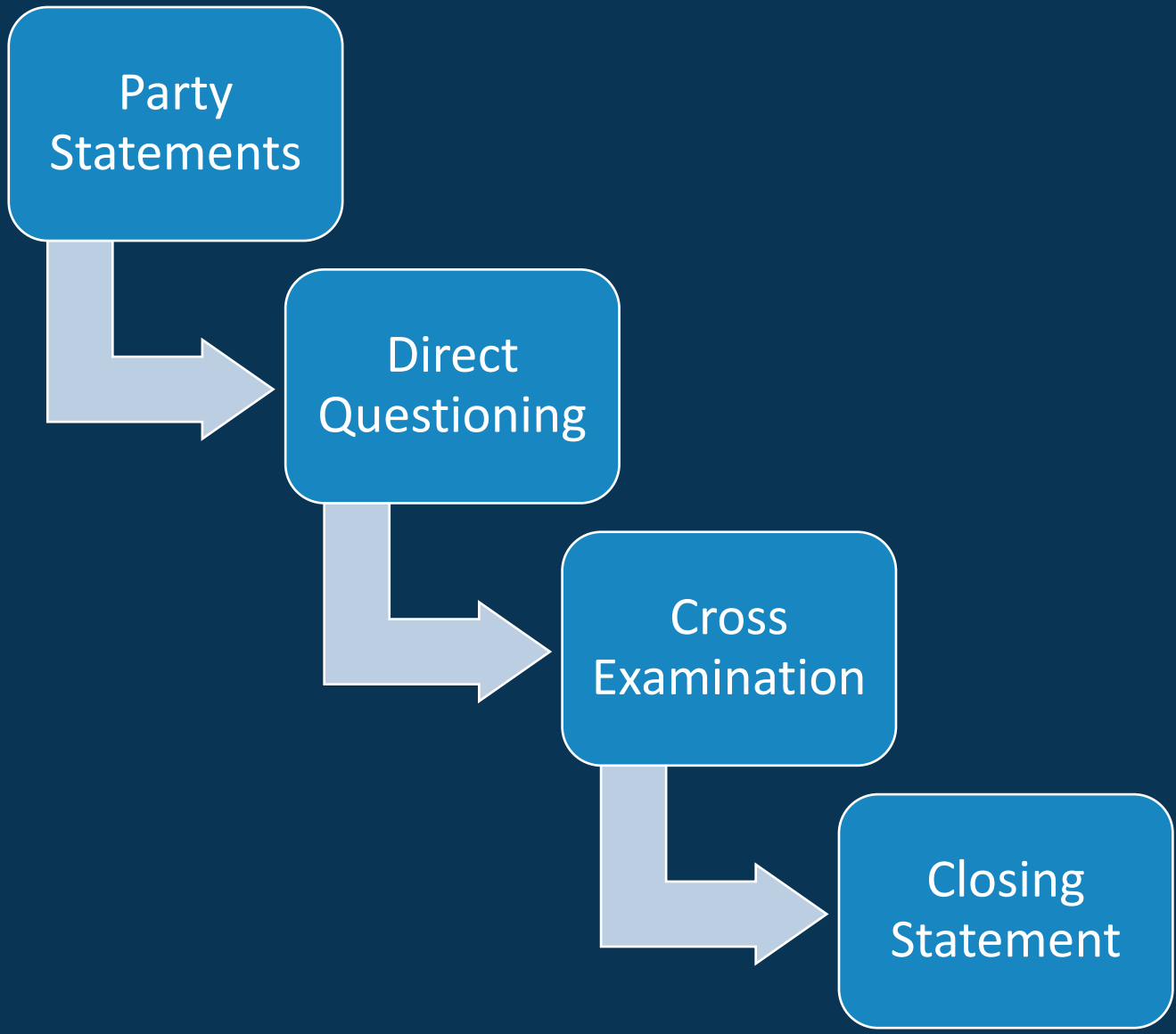
Elements of a Live Hearing

- Notice
- Process
- Cross Fundamentals
- Relevance Decisions
- Advisors Role
- Technology
- Live hearings are optional under 2024 regulations.

In Person
(One Room)

In Person
(Separate)

Virtual



Hearing Procedures

- Requirement to rule on relevancy
- Set clear expectations
- Consider confidentiality concerns



Live Hearing Tips

- Meeting prior to the hearing
- Using a script
- Maintaining decorum
- Taking breaks
- Asking questions

Cross Examination

2024 regulations, permit, but do not require, postsecondary institutions to use a live hearing for sex-based harassment complaints provides a postsecondary institution with reasonable options for how to structure its grievance procedures to ensure they are equitable for the parties while accommodating each postsecondary institution's administrative structure, educational community, and the applicable Federal, State, or local law. See 87 FR 41505.

A process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility when credibility is in dispute and relevant. (§ 106.45(g)).

Cross Examination

Important part of truth seeking.

2020 regulations require this to be live.

2024 regulations allows for submission of written questions.

Cross Examination

- Not for the protection only of respondents
- Both parties' advisors may direct decisionmaker's attention to implausibility, inconsistency, unreliability, ulterior motives, lack of credibility

Cross Examination

- An advisor may appear and conduct cross examination even when the party does not appear
- If neither the party nor the advisor appear, a recipient-provided advisor must cross examine appearing party
- Third-party cross examination insufficient

Cross: How & Where?

- Close-ended questions
- Advisor asks other party and any witnesses all relevant questions and follow-up questions
- Conducted directly, orally, and in real time by advisor
- May be in separate rooms (party request, institution choice)
- Must be relevant

Consider Relevant Evidence

Must objectively evaluate all evidence and
make determinations on relevancy



Includes inculpatory and exculpatory
evidence

Inculpatory: tends to
prove policy violation

Exculpatory: tends to
exonerate the accused

Rulings on Relevance

- Live, in the moment determinations
- Provide reasoning for irrelevance
 - No complicated or lengthy explanation required
- Admit and consider all relevant evidence
- Exceptions

Relevance Considerations

- Must apply definitions used by the institution with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the requirements of the Title IX grievance process

Rape Shield Law

- Exclude evidence of Complainant's prior sexual behavior or predisposition
- Two narrow exceptions
 - Someone other than respondent committed the conduct
 - Specific incidents of complainant's sexual behavior with respondent to show consent
- Does not apply to Respondent

Treatment Records

- Can't access, consider, disclose, or use records
- Made by a physician, psychologist, or other recognized professional
- Which are made and maintained in connection with the provision of treatment,
- Unless the party gives voluntary, written consent

Legally Privileged Information

- Cannot use questions or evidence that seek disclosure of legally privileged information, unless waived
- Consider:
 - Attorney-client communication
 - Privilege against self-incrimination
 - Confessions to a clergy member or religious figure
 - Spousal privilege
 - Confidentiality and trade secrets

Relevant Consideration: Prior Bad Acts

- Must consider
- May evaluate whether it warrants a high or low level of weight of credibility
- Must treat both parties equally in such weighing

Permissible?

- To Complainant: You typically have sex after drinking at parties, correct?

Permissible?

- To Respondent: You typically have sex after drinking at parties, correct?

Permissible?

- To either party: what date did you begin receiving treatment for depression?

Permissible?

- To Respondent: Isn't it true that you are avoiding answering questions for fear of criminal implications?

Permissible?

- To Respondent: You called the Complainant the next day to see if he was okay, correct?

Permissible?

- To Complainant: It was dark in the room so you couldn't see who actually assaulted you, could you?

Permissible?

- To Complainant: You tested positive for a sexually transmitted infection, correct?

Permissible?

- To Complainant: Isn't it true that you had consensual sex with Respondent the week following the alleged sexual assault?

Permissible?

- To Complainant: You told your attorney that the only reason you made a complaint was because your mom told you to do so, correct?

Role of Advisors in Hearings

- Parties must have an advisor to conduct cross-examination, whether chosen by a party or the recipient
- Challenging relevancy determinations
- Consider confidentiality obligations

Advisor Role

- Can adopt rules
- Can limit to just cross
- Want to allow more? Be equal.

Advisor Decorum

- Can adopt rules
- Can address abusive, intimidating, or disrespectful questioning

Advisor Decorum

- Essential function is not to embarrass, blame, humiliate, or emotionally berate
- Essential function is to give the decisionmaker the fullest view possible of the relevant evidence

Questions from Decisionmaker

- Hearing approach is proactive and reactive
- So you can ask questions

Making a Determination

- Remain unbiased and impartial
- Render a reasoned decision based on evidence
- Base decisions on relevant evidence alone
- Consider weight of evidence
- Evaluate witness credibility
- Standard of evidence

All Relevant Evidence

- Must consider all relevant evidence
- Must consider no irrelevant evidence

Written Determination

Written Determination

Allegations	Identify the allegations
Process	Describe procedural steps taken
Facts	Findings of fact
Conclusion	Apply the code of conduct to the facts
Result	Provide statement of result, with rationale, for each allegation
Appeal	Appeal procedures

Factual Findings

Separate findings for each alleged policy violation

Focus on material facts (i.e., those that affect outcome)

Can describe undisputed and disputed facts separately

For any facts in dispute, show your work and reasoning

Factual Findings

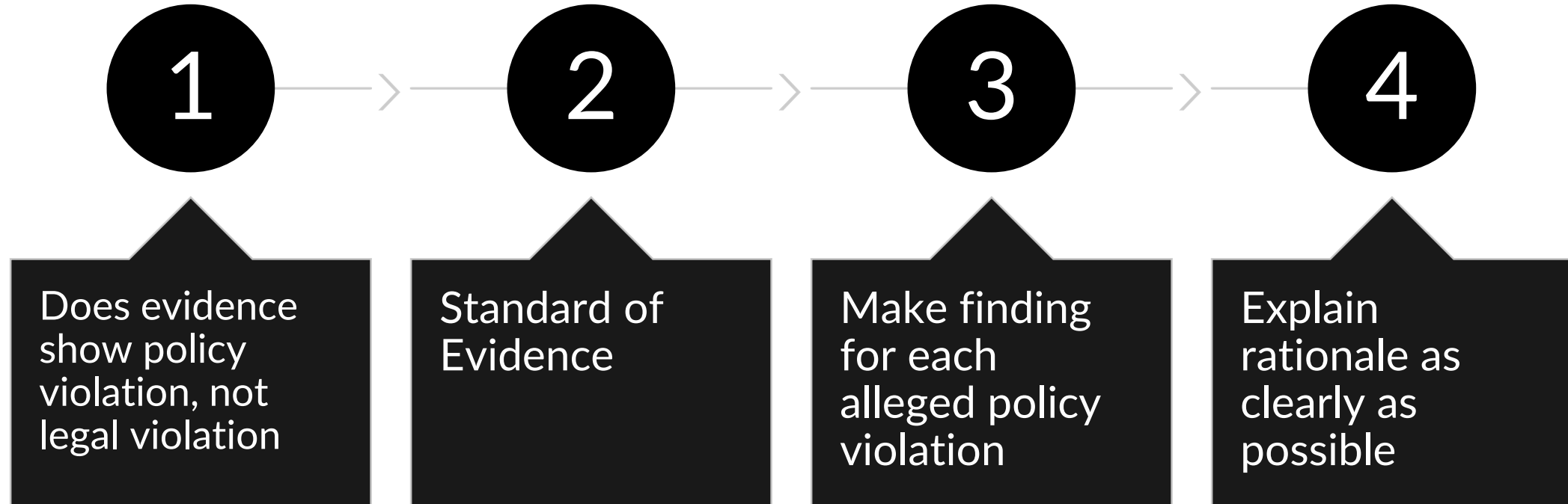
Consider	Consider both supporting/corroborating and conflicting/inconsistent information for each disputed fact
Make	Make credibility determinations by considering corroborating evidence, inconsistencies, logic of explanation/narrative, impact of trauma
Use	Use words of parties/witnesses
Be	Be detailed and precise

Opportunity to Review

Document opportunities given to parties to provide information, review evidence, and provide rebuttal

Explain if anything offered/mentioned was not considered/obtained and why.

Conclusion/Analysis



Serving Impartially

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Bias

The Title IX Decision-maker must not have a conflict of interest or bias for or against Complainants or Respondents generally or for or against any individual Complainant or Respondent. And that they not prejudge any matter before them.

Conflict of Interest

- Flexibility to choose employees or outsource adjudication functions
- No *per se* prohibited conflicts of interest when using school employees or individuals with histories of working in field of sexual violence as decisionmaker
- Caution against using generalizations to identify conflict of interest

Pre-Judgment

Tips for avoiding pre-judgment of facts:

- Each case is fact-specific
- Keep an open mind
- Actively listen to facts presented
- Statements by parties that do not submit to cross-examination cannot be considered

Sex Stereotypes

- Must not rely on sex stereotypes such as:
 - Women are “asking for it” based on actions or clothing
 - Men cannot be sexually assaulted
 - Women only decide they were assaulted after the fact due to regret or embarrassment
 - Men are more likely to be sexual aggressors
- Consider intersection of sex stereotypes with race, ability, sexuality, and gender identity

Credibility

- Consider other evidence
- Show your work

Appeal Process

- Available to both parties
- Three bases for appeal
- Notify party of appeal in writing
- Apply procedures equally for both parties
- Opportunity to submit written statement
- Issue written decision to both parties
- 2024 regs also allow for appeal of dismissal by both parties.

Appeal Process

- Procedural issue affecting the outcome
- New evidence that wasn't reasonably available at the time the determination regarding responsibility or dismissal was made that could affect the outcome
- TIXC, investigator, or decision-maker had conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
- Illinois: Disproportionate Sanction

Procedural Issue

- Failure to follow the rules in policy/procedure
- Can be intentional or inadvertent
- Resulted in inappropriate decision; not always the case

New Information

- New Information
- Not known at the time
- Would change the opinion of the decisionmaker if known at the time
- Not a review of information known at the time

Bias / Conflict

- Conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent
- Affected the outcome of the matter
- Address any that are raised

Recordkeeping Essentials

- Overview of Required Recordkeeping
- File Checklist

Scenarios and Mock Hearing

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Step 1: Identify Elements

- What type of harassment/discrimination is alleged?
- What do you need to prove to establish policy violation?

Step 2: Apply Facts

- What evidence shows satisfaction of elements?
- What is undisputed?
- Where disputed, what other relevant evidence?

Scenario 1: Assault No Witnesses

- Jane and John friends and agree they “hung out around campus, did homework together” and “spent time together”
- John invited Jane to “Grab-a-Date” event, which had a “champagne and shackles theme” meaning dates were zip-tied and share a bottle of champagne

Scenario 1: Assault No Witnesses

- Jane: “Intention was to go to her own room and go to sleep because she was incoherently drunk and incredibly tired, but in between blackouts ended up in John’s dorm room.”
- “Told John multiple times she wanted to leave and go to her own room, but John insisted they hang out. Too tired to argue and too confused, Jane saw John’s couch, laid down and fell asleep.”
- Woke up to John touching her underwear and moving it aside to penetrate her with his finger. Said “no,” but felt pinned and couldn’t do anything else to resist.
- “I do think during these ‘nos’ I was kissing him.” He penetrated me with his penis.

Scenario 1: Assault No Witnesses

- John: While watching Netflix in room, sat together and I put my arm around Jane. We started kissing and as we continued on, I started touching her intimate parts, in which she showed no resistance.
- Eventually she paused, and I asked if everything was okay. I asked because I knew we had been friends and perhaps being intimate was not worth losing a friendship.
- She said everything was fine and then continued to unbuckle my belt, unbutton my pants. She stopped a second time and said she wanted to stop. We stopped and she stayed a little longer to watch the movie.

Scenario 1: Decision Maker

- What are the elements?
- What is disputed?
- Apply the Burden of Proof

Scenario 2: Instructor Harassment

- Teaching Assistant reports that supervising professor has treated her less favorably since learning she is a lesbian.
- TA reports that professor gives other TAs more favorable assignments
- Professor calls TA “Pescatarian” in mocking tone before group social outings when selecting restaurant.

Scenario 2: Instructor Harassment

- Professor reports surprise at the complaint.
- Explains assignments as based on his understanding of the TA's interests.
- Professor shocked that pescatarian was offensive—thought it described TA's food preferences.

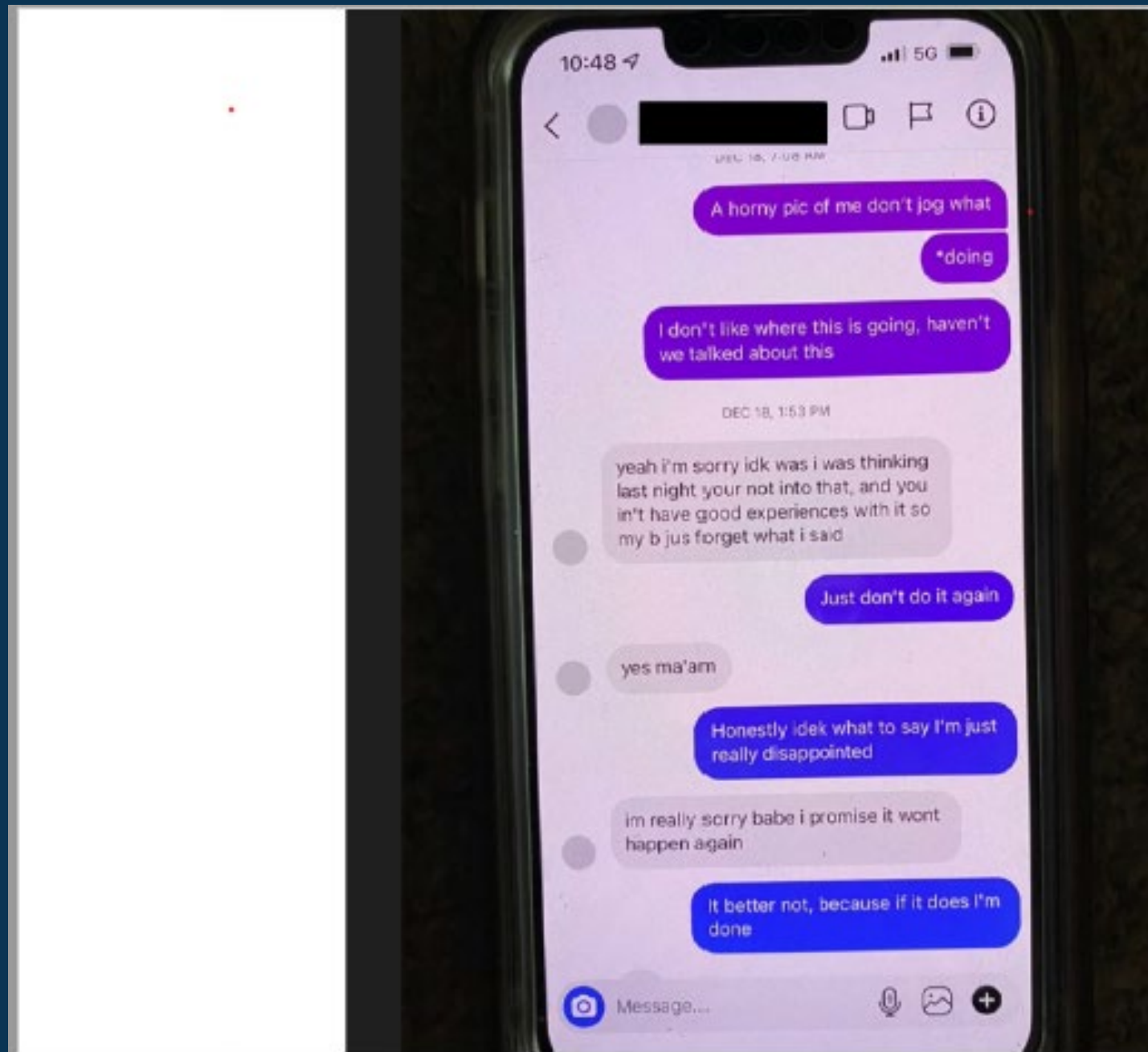
Scenario 2: Decision Maker

- What are the elements?
- What is disputed?
- Apply the Burden of Proof

Scenario 3: Electronic Harassment

- Two students recently ended a romantic relationship.
- They continue friendship, but one student repeatedly asks the other for naked photos.

Scenario 3: Electronic Harassment



Scenario 3: Decision Maker

- What are the elements?
- What is disputed?
- Apply the Burden of Proof

Mock Hearing-Groups

- Complainant Advisor
- Respondent Advisor
- Decision Maker

