Hearings in a Post Regulatory World
Oregon Alliance

Martha Compton | March 2022
Meet Your Facilitator

Martha Compton
She/her
Director of Strategic Partnerships and
Client Relations

Martha consults and trains nationally on Title IX and student conduct and has previously served as a technical trainer for Department of Justice VAWA campus grantees. Martha is a former President of the Association for Student Conduct Administration, has been a faculty member for ASCA’s Gehring Academy, and was part of the core team that developed ASCA’s Sexual Misconduct Institute. A student conduct professional for over 20 years, Martha is also a former dean of students and has extensive experience in residence life, behavior intervention, emergency services, orientation, leadership, and working with student organizations.
About Us

Vision
We exist to help create safe and equitable work and educational environments.

Mission
Bring systemic change to how school districts and institutions of higher education address their Clery Act & Title IX obligations.

Core Values
• Responsive Partnership
• Innovation
• Accountability
• Transformation
• Integrity
Agenda

1. Title IX Requirements for Hearings
2. Process Participants
3. Pre-Hearing Tasks
4. The Hearing
5. After The Hearing
6. Practical Application
Title IX Requirements For Hearings
Title IX of the Education Amendments Act of 1972

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”
Section 106.30: Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

(1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

(2) Unwelcome conduct 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; or

**AND... Only Covered, IF:**

### Place of Conduct
- On campus
- Campus Program, Activity, Building, and
- In the United States

### Required Identity
- Complainant participating/attempting to participate in Program or Activity, AND
- Control over Respondent
### Procedural Requirements for Investigations

<table>
<thead>
<tr>
<th>Notice to both parties</th>
<th>Equal opportunity to present evidence</th>
<th>An advisor of choice</th>
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<tbody>
<tr>
<td>Written notification of meetings, etc., and sufficient time to prepare</td>
<td>Opportunity to review all evidence, and 10 days to submit a written response to the evidence prior to completion of the report</td>
<td>Report summarizing relevant evidence and 10 day review of report prior to hearing</td>
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Procedural Requirements for Hearings

- Must be live, but can be conducted remotely
- Cannot compel participation of parties or witnesses
- Standard of proof used may be preponderance of the evidence or clear and convincing; standard must be the same for student and employee matters
- Cross examination must be permitted and must be conducted by advisor of choice or provided by the institution
- Decision maker determines relevancy of questions and evidence offered
- Written decision must be issued that includes finding and sanction
The Requirement of Impartiality
Section 106.45(b)(1)(iii)

| The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution not to have a conflict of interest or bias: | For or against complainants or respondents generally, or An individual complainant or respondent |
Section 106.45(b)(1)(iii)

Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution must receive training on...how to serve impartially, including avoiding prejudgment of the facts at issue, conflict of interest, and bias. This training material may not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.
Hearing Technology: Requirements and Considerations

- If hearings cannot be in person, or if someone chooses to participate remotely, must have a remote participation platform available.
- All hearings must be recorded.
- Participants must be able to communicate during the hearing:
  - The parties with the decision maker(s)
  - The parties with their advisors
Purpose of the Hearing

1. Review and Assess Evidence
2. Make Findings of Fact
3. Determine Responsibility/Findings of Responsibility
4. Determine Sanction and Remedy
Evaluating the Evidence

- **Is it relevant?**
  Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.

- **Is it authentic?**
  Is the item what it purports to be?

- **Is it credible?**
  Is it convincing?

- **Is it reliable?**
  Can you trust it or rely on it?

- **What weight, if any, should it be given?**
  Weight is determined by the finder of fact!
Trauma-informed practices provide tools/techniques for engaging with the Complainant, Respondent, and Witnesses.
Process Participants
# The Participants

## The Parties

<table>
<thead>
<tr>
<th>Complainant</th>
<th>Respondent</th>
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<tr>
<td>The person who is alleged to be the victim of conduct prohibited under the policy.</td>
<td>The person who has been reported to be the perpetrator of conduct prohibited under the policy.</td>
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</tbody>
</table>
The Participants
The Investigator

• Can present a summary of the final investigation report, including items that are contested and those that are not;
• Submits to questioning by the Decisionmaker(s) and the parties (through their Advisors).
• Can be present during the entire hearing process, but not during deliberations.
• Questions about their opinions on credibility, recommended findings, or determinations, are prohibited. If such information is introduced, the Chair will direct that it be disregarded.
- Can be anyone, including a lawyer, a parent, a friend, and a witness
- No particular training or experience required (institution appointed advisors should be trained)
- Can accompany their advisees at all meetings, interviews, and the hearing
- Advisors should help the Parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith
- May not speak on behalf of their advisee or otherwise participate, except that the advisor will conduct cross examination at the hearing.
- Advisors are expected to advise their advisees without disrupting proceedings
The Participants
Advisors: Prohibited Behavior

An Advisor who oversteps their role as defined by the policy should be warned once. If the Advisor continues to disrupt or otherwise fails to respect the limits of the Advisor role, the meeting may be ended, or other appropriate measures implemented. Subsequently, the Title IX Coordinator has the ability determine how to address the Advisor’s non-compliance and future role.
The Participants

The Hearing Facilitator/Coordinator

- Manages the recording, witness logistics, party logistics, curation of documents, separation of the parties, and other administrative elements of the hearing process
- Non-Voting
The Participants
The Decision-Maker(s)

- One person or a panel
- Questions the parties and witnesses at the hearing
- Determines responsibility
- Determines sanction, where appropriate
The Participants
The Hearing Chair

- Is a decision-maker
- Answers all procedural questions
- Makes rulings regarding relevancy of evidence, questions posed during cross examination
- Maintains decorum
- Prepares the written deliberation statement
- Assists in preparing the Notice of Outcome
Pre-Hearing Tasks: Hearing Panel & Chair

What should be done in advance of the hearing
Hearing Panel as a Whole

- Review evidence and report
- Review applicable policy and procedures
- Preliminary analysis of the evidence
- Determine areas for further exploration
- Develop questions of your own
Hearing Panel Chair

- Provide names of all individuals invited to participate in the hearing
- Provide parties with investigation report and all pertinent evidence
- Compile questions on behalf of the Panel
- May convene a pre-hearing meeting
- Review questions submitted by the parties
- Anticipate challenges or issues
- Become familiar with the script
Common Areas of Exploration

- Credibility?
- Clarification on timeline?
- The thought process?
- Inconsistencies?
Pre-Hearing Meetings

Review the Logistics for the Hearing

Set expectations

- Format
- Roles of the parties
- Participation
- Decorum
- Impact of not following rules

Cross Examination Expectations
The Hearing
Order of the Proceedings

01 Introductions and instructions by the Chair; Opening Statements
02 Presentation by Investigator
03 Presentation of information and questioning of the parties and witnesses
04 Closing Statements
05 Deliberation & Determination
Opening Introductions and Instructions by the Chair

- The institution should have a script for this portion of the proceedings, and it should be used.
- Introduction of the participants.
- Overview of the procedures.
- Be prepared to answer questions.
Presentation of Information
Presentation of Information & Questioning of the Parties

01 The Hearing Panel will question Complainant first

02 Cross examination of Complainant will occur next

03 Follow up by the Hearing Panel

04 The Hearing Panel will question Respondent second

05 Cross examination of Respondent will occur next

06 Follow up by the Hearing Panel
Questioning of the Witnesses

01 The Chair will determine the order of questioning of witnesses

02 The Hearing Panel will question first

03 Advisor cross-examination will occur next (suggested: Complainant’s advisor followed by Respondent’s advisor)

04 Follow up by the Hearing Panel
General Questioning Guidelines
Format of Questioning

The Hearing Panel or the advisor will remain seated during questioning.

Questions will be posed orally.

Questions must be relevant.
What constitutes a relevant question?

The Department declines to define “relevant”, indicating that term “should be interpreted using [its] plain and ordinary meaning.”

See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:

“Evidence is relevant if:
• (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
• (b) the fact is of consequence in determining the action.”
When is evidence relevant?

- Logical connection between the evidence and facts at issue
- Assists in coming to the conclusion – it is “of consequence”
- Tends to make a fact more or less probable than it would be without that evidence
Questions that seek to illicit irrelevant information
- Complainant's prior sexual history
- Information protected by an unwaived legal privilege
- Medical treatment and care

Duplicative questions

Information that is otherwise irrelevant
When Questioning…

Be efficient.

Explore areas where additional information or clarity is needed.

Listen to the answers.

Be prepared to go down a road that you hadn’t considered or anticipated exploring.

Take your time. Be thoughtful. Take breaks if you need it.
Foundational Questions to Always Consider Asking

- Were you interviewed?
- Did you see the interview notes?
- Did the notes reflect your recollection at the time?
- As you sit here today, has anything changed?
- Did you review your notes before coming to this hearing?
- Did you speak with any one about your testimony today prior to this hearing?
Common Areas of Where Clarity or Additional Information is Needed

- Details about the alleged misconduct
- Facts related to the elements of the alleged policy violation
- Relevancy of Certain Items of Evidence
- Factual Basis for Opinions
- Credibility
- Reliability
- Timelines
- Inconsistencies
Questioning to Assess Reliability

- Inherent plausibility
- Logic
- Corroboration
- Other indicia of reliability
No formula exists, but consider asking questions about the following:

- opportunity to view
- ability to recall
- motive to fabricate
- plausibility
- consistency
- character, background, experience, and training
- coaching
Credibility Versus Reliability

Reliable Evidence

• I can trust the consistency of the person’s account of their truth.
• It is probably true and I can rely on it.

Credibility

• I trust their account based on their tone and reliability.
• They are honest and believable.
• It might not be true, but it is worthy of belief.
• It is convincingly true.
• The witness is sincere and speaking their real truth.
Opinion Evidence

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?
Asking Questions to Assess Authenticity
Investigating the Products of the Investigation

Never assume that an item of evidence is authentic.

Ask questions, request proof.

Request further investigation of the authenticity if necessary.
Is it authentic?

- **Question the person who offered the evidence**
- **Request originals**
- **Obtain originals from the source**
- **Have others review and comment on authenticity**
- **Are there other records that would corroborate?**
What are the “Hard” Questions

- Details about the sexual contact
- Seemingly inconsistent behaviors
- Inconsistent evidence/information
- What they were wearing
- Alcohol or drug consumption
- Probing into reports of lack of memory
How to Ask the Hard Questions

Lay a foundation for the questions

• Explain why you are asking it
• Share the evidence that you are asking about, or that you are seeking a response to

Be deliberate and mindful in your questions:

• Can you tell me what you were thinking when....
• Help me understand what you were feeling when...
• Are you able to tell me more about...
Special Considerations for Questioning the Investigator

• The Investigator’s participation in the hearing is as a fact witness;
• Questions directed towards the Investigator shall be limited to facts collected by the Investigator pertinent to the Investigation;
• Neither the Advisors nor the Decision-maker(s) should ask the Investigator(s) their opinions on credibility, recommended findings, or determinations;
• The Investigators, Advisors, and parties will refrain from discussion of or questions about these assessments. If such information is introduced, the Chair will direct that it be disregarded.
Special Considerations for Questioning the Investigator

1. Ask questions about how they conducted their investigation.
2. Explore the investigators decision making.
3. Seek clarity about evidence collected:
   - Where it came from
   - Authenticity of the evidence
4. Ask factual questions that will assist in evaluation of the evidence.
5. If bias is not in issue at the hearing, the Chair should not permit irrelevant questions of the investigator that probe for bias.
Special Considerations for Panels

- If a panel, decide in advance who will take the lead on questioning
- Go topic by topic
- Ask other panelists if they have questions before moving on
- Do not speak over each other
- Pay attention to the questions of other panelists
- Ok to take breaks to consult with each other, to reflect, to consult with the TIXC or counsel
The Decision Maker’s Role in Advisor Questioning
Cross Examination

Who does it?

Must be conducted by the advisor

If party does not appear or does not participate, advisor can appear and cross

If party does not have an advisor, institution must provide one
The Role of the Decision Maker During Questioning by the Advisors

After the Advisor poses a question, the proceeding will pause to allow the Chair to consider it.

Chair will determine whether the question will be permitted, disallowed, or rephrased. The Chair may explore arguments regarding relevance with the Advisors.

The Chair will limit or disallow questions on the basis that they are irrelevant, unduly repetitious (and thus irrelevant), or abusive.

The Chair will state their decision on the question for the record and advise the Party/Witness to whom the question was directed, accordingly. The Chair will explain any decision to exclude a question as not relevant, or to reframe it for relevance.

The Chair has final say on all questions and determinations of relevance. The parties and their advisors are not permitted to make objections during the hearing. If they feel that ruling is incorrect, the proper forum to raise that objection is on appeal.
When Assessing Relevance, the Decision Maker Can:

- Ask the Advisor why their question is relevant
- Take a break
- Ask their own questions of the party/witness
- Review the hearing record
After the Hearing
Deliberations
Weighing the Evidence & Making a Determination

1. Evaluate the relevant evidence collected to determine what weight, if any, you will afford that item of evidence in your final determination;

2. Apply the standard of proof and the evidence to each element of the alleged policy violation;

3. Make a determination as to whether or not there has been a policy violation.
Preponderance of the Evidence

More likely than not

Does not mean 100% true or accurate

A finding of responsibility = There was sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated

A finding of not responsible = There was not sufficient reliable, credible evidence to support a finding, by a preponderance of the evidence, that the policy was violated
Findings of Fact

• A "finding of fact"
  • The decision whether events, actions, or conduct occurred, or a piece of evidence is what it purports to be
  • Based on available evidence and information
  • Determined by a preponderance of evidence standard
  • Determined by the fact finder(s)

• For example...
  • Complainant reports that they and Respondent ate ice cream prior to the incident
  • Respondent says that they did not eat ice cream
  • Witness 1 produces a timestamped photo of Respondent eating ice cream

• Next steps?
Policy Analysis

• Break down the policy into elements
• Organize the facts by the element to which they relate
Allegation: Fondling

Fondling is the:

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

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

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Did You Also Analyze...? (if required by policy)

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

- The allegations
- Description of all procedural steps
- Findings of fact
- Conclusion of application of facts to the policy
- Rationale for each allegation
- Sanctions and remedies
- Procedure for appeal
The Final Determination Should STAND On Its Own

- Simple and Easy to Comprehend
- Transparent/Clear
- Accurate
- Neutral/Unbiased
- Draw Attention to Significant Evidence and Issues
Scenario 1

Respondent appears at the hearing with Witness 7. Respondent would like Witness 7 to provide information testimony about text messages between them and Complainant that indicate that Complainant has made the allegations up.

- Can the HP hear from Witness 7 at the hearing?
Scenario 2A

Respondent provides a polygraph report to investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations.

- The Investigator determines the report is irrelevant. Must the Investigator share the report with the decision maker?
Scenario 2B

Respondent provides a polygraph report to Investigators wherein it is concluded that Respondent is not being deceptive when denying the allegations. The polygrapher appears and answers all relevant questions on cross.

- Must the Hearing Panel find Respondent not responsible because of the findings in the report?
Title IX Hearings in a Post Regulatory World

Day 2

Jody Shipper & Jessica Brown
March 2022
Meet Your Facilitators

Jody Shipper
She/Her/Hers
Co-Founder and Managing Director

Jessica Brown
She/Her/Hers
Senior Solutions Specialist
Overview of Day Two

Let’s Practice!

- Pre-Hearing Preparation
- Testimony and Cross Examination
Pre-Hearing
It is time to schedule the hearing...

Using the chat box, share your “To Do” List for coordinating the hearing.

The investigation is complete!
## Rapid Fire Recap

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<tr>
<th>Task</th>
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<tbody>
<tr>
<td>Arranging for space</td>
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<tr>
<td>Arranging technology</td>
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<tr>
<td>Scheduling pre-hearing meetings with parties &amp; advisors</td>
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<tr>
<td>Scheduling prehearing meetings of the panel</td>
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<tr>
<td>Providing report and record to panel and parties</td>
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<tr>
<td>Scheduling the hearing</td>
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<tr>
<td>Accommodations</td>
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<tr>
<td>Call for written submissions</td>
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<tr>
<td>Conflict checks</td>
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<tr>
<td>Other considerations?</td>
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</tbody>
</table>
It is now one week prior to the hearing. You have already received and reviewed the report and record and you will be meeting with the rest of the panel (or spending some quite time by yourself) to prepare for the hearing.

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

- Development of introductory comments
- Initial discussion of the evidence
- Areas for further exploration
- List of questions for the parties and the witnesses
- Anticipation of potential issues
- Logistics
- Review of any written submissions by the parties
- Other considerations?
Break Out!

#1

Say hi!

Pick a scribe

Discuss

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

Email your responses to Laura

• lfigueredo@grandriversolutions.com
Report Out

• Group 1: Questions for Complainant and Witnesses Bob, Dylan, Stevie

• Groups 2: Questions for Respondent and Witnesses Nick, Kayla, Caitlyn
Logical connection between the evidence and facts at issue

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

Tends to make a fact more or less probable than it would be without that evidence
The Hearing
Break Out!

#2

Say hi again

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

Discuss the list of proposed questions for:

Group 1: Questions by Complainant for Respondent; Bob, Dylan, Stevie
Group 2: Questions by Respondent for Complainant; Nick, Kayla, Caitlyn
Report Out
These questions are submitted by Complainant for Respondent

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

Questions submitted by Respondent for Complainant

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

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

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

Questions for Dylan

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

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

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

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

**Questions for Nick**

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

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

**Questions for Kayla**

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

By Respondent
1. Would you categorize Angel as the initiator of all the contact between him and Barb?
2. So you would call him the aggressor, is that right?
3. How many times did you see Angel fill Barb’s beer that night?
4. And you saw him keep topping it off, is that right?
5. Did that feel predatory to you?
6. Have you seen Angel or any of his friends like Bob, Dylan, Stevie, or Nick try to get a girl really drunk at a party, on any other occasion?
Questions for Caitlyn
By Complainant
1. You would consider complainant a good guy, right?
2. Barb wanted to “have a good time” right?
3. Did she tell you she planned to have sex with Angel that night?
4. You saw her intentionally move down to give a blow job?
5. How often has she done this at other parties? Is giving blow jobs something she casually does at parties?
6. And she is a good friend, right?
7. So this is particularly painful for you, your telling the truth about her sexually assaulting him, right?
8. And would you agree that it does not matter if the victim is a man or a woman, but rape is rape, right?
9. You said Barb had her arm around Angel’s waist when people were in the basement that night. Is that so that she could control him?

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

Jody Shipper
Co-Founder & Managing Director

GRAND RIVER SOLUTIONS
EVIDENCE: WEIGHING, ANALYZING

Avoiding Common Errors
EVIDENCE

- Testimony
- Text Messages
- Social Media Posts and Messages
- Emails
- Surveillance
- Videos
- Photographs
- Police Body Camera Footage
- Swipe Records
- Medical Records
- Phone Records
- Audio Recordings
CAN YOU RELY ON THE EVIDENCE GATHERED?

• Thorough? (Does it tell whole picture?)
• Authenticated?
• Is there an explanation for what was omitted?
SHE TEXTED ME “ALL THE TIME”

Do you have those texts?

May I have those texts?

Oh, they weren’t “texts,” they were DMs?

Who else might have seen them?

Was anyone else copied?
THE “HARD” QUESTIONS: YOU CANNOT WEIGH IT IF NO ONE ASKED IT

Details About The Sexual Contact
Seemingly Inconsistent Behaviors
Inconsistent Evidence/Information
What They Were Wearing
Alcohol Or Drug Consumption
Probing Into Reports Of Lack Of Memory
YOU CANNOT WEIGH IT IF NO ONE ASKED

LAY A FOUNDATION FOR THE QUESTIONS

• Explain why you are asking it

• Share the evidence that you are asking about, or that you are seeking a response to

BE DELIBERATE AND MINDFUL IN YOUR QUESTIONS:

• Can you tell me what you were thinking when....

• Help me understand what you were feeling when...

• Are you able to tell me more about...
WEIGHING EVIDENCE
TYPES OF EVIDENCE

Direct Evidence
- Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

Circumstantial Evidence
- Evidence based on inference and not on personal knowledge or observation.

Corroborating Evidence
- Evidence that differs from but strengthens or confirms what other evidence shows.
EVALUATING THE EVIDENCE

Is it relevant?
Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.

Is it authentic?
Is the item what it purports to be?

Is it credible/reliable?
Is the evidence worthy of belief?

What weight, if any, should it be given?
Weight is determined by the finder of fact!
AUTHENTICATING EVIDENCE

1. At 1:18 am, Pat captured a video of Elliott and Sam. In the video, Sam had one arm around Elliott’s shoulders, and Elliott’s head was resting on Sam’s shoulder. In the video, both Sam and Elliott, and at least 2 others, were loudly singing Happy Birthday, although the video cut out before the singers said the name of the person to whom they were singing.

2. Elliott alleged that Sam later sent him a threatening message, and the next day showed up at his dorm, uninvited, twice. Elliott stated he did not have the message, because it was on SnapChat, but had kept a screenshot of the message, although the screenshot cut off part of the message. Sam denied sending any threatening message, and also stated that he never used SnapChat.
IS IT AUTHENTIC?

- Question The Person Who Offered The Evidence
- Request Originals
- Obtain Originals From The Source
- Have Others Review And Comment On Authenticity
- Are There Other Records That Would Corroborate?
CREDIBILITY AND RELIABILITY

• Do you really need to assess either?
• Why they are different
• How to write about it
• When a party attacks credibility of the other, but on a non-issue (delay in reporting, did not go to law enforcement, minimized the report in comments to a friend or family)
• How to ask questions to get to the bottom of it without being offensive
• How to apply your conclusions to the process
YOU BELIEVE ONE PARTY’S VERSION OF EVENTS OVER ANOTHER – WHY?

• Corroboration?
• Plausibility?
• They were convincing when they shared their story?
• They could not have seen what they said they saw?
• That makes no sense?
• They seemed more trustworthy?
• Some combination of the above?
CREDIBILITY: IT IS CONVINCING

RELIABILITY: YOU CAN TRUST IT
CREDIBILITY? OR RELIABILITY?

• Reliable evidence:
  • I can trust the consistency of the person’s account of their truth.
  • It is probably true, and I can rely on it.

• Credibility:
  • I trust their account based on their tone, and reliability.
  • They are honest and believable.
  • It might not be true, but it is worthy of belief.
  • It is convincingly true.
  • The witness is sincere and speaking their real truth.
A CREDIBLE WITNESS MAY GIVE UNRELIABLE TESTIMONY
RELIABILITY

• Did the witness correctly observe, process, interpret and recall the information? Is there corroboration?

• vs. Credibility: bias, collusion, motive in outcome, outright (proven) lying, judging the person
FACTORS WE WERE TAUGHT TO USE: ARE THESE STILL THE RIGHT ONES?

- Corroborating evidence
- Inconsistencies
- Sufficient or insufficient explanation of inconsistencies
- Logic, plausibility
- Pattern or history
- Past record
- Motive to falsify
- Bias for/against a party
- Material omission
- Ability to recollect events
ARE YOU WORTHY?

• Dyer v. MacDougall, 201 F.2d 265, 268-69 (2d Cir. 1952) (acknowledging the conduct, manner, and appearance that make up a witness's demeanor).

• Courtroom Psychology for Trial Lawyers (1985): People with enlarged pupils are compassionate and those with beady eyes use cold logic; a person who looks up and to the left while thinking is metaphorical . . . a low pitched voice indicates confidence, while a high-pitched voice reduces believability.
ASSESSING CREDIBILITY AND RELIABILITY

NO FORMULA EXISTS, BUT CONSIDER THE FOLLOWING:

- Opportunity to view
- Ability to recall
- Motive to fabricate
- Plausibility
- Consistency
- Character, background, experience, & training
- Coaching
- Bias
CREDIBILITY/RELIABILITY ANALYSIS

STEP BY STEP

1. Determine the material facts – focus only on material facts.

2. Determine which material facts are:
   • Undisputed – consistent, detailed and plausible, and/or agreed upon by the parties [e.g., Marcy and Jack attended a fraternity party on April 5, 2019]
   • Disputed – unsupported by documentary or other evidence, or are facts about which an element of doubt remains [e.g., Marcy alleged that Jack kissed her without her consent around 1am at the party, and Jack asserted he never kissed Marcy and went home early]
   • State clearly which facts are accepted, and which are rejected, and state the reasons why.

• “While Jack maintained that he never kissed Marcy and went home early, several witnesses corroborated that he was at the party until 3 a.m. In addition, a photo was submitted by a witness showing Jack kissing Marcy. Therefore, I find that Jack’s version of events cannot be credited as being more likely than not to be true.”
PRACTICE ON WEIGHING EVIDENCE

- Expert testimony

- Polygraph examiner's report

- News article that the college has a history of covering up sex assaults

- Case involves DV and allegation of strangulation. Witness discusses respondent's repeated angry outbursts in social situations and class settings.
**REMEMBER – CREDIBILITY IS NOT FIRST**

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WE LOVE FEEDBACK
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Demystifying Sanctions
Understanding, Implementing, & Communicating Campus Disciplinary Actions

Jody Shipper
Co-Founder & Managing Director

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MEET YOUR FACILITATOR

Jody Shipper
Co-Founder & Managing Director
SANCTIONING
GOALS OF SANCTIONS/DISCIPLINE

END

- End The Harassment

PREVENT

- Prevent The Recurrence

REMEDY

- Remedy The Harm, Restore Equal Access
WHAT DOES THE SANCTION “SAY”?  

Who is valued, who is not?  

Community values?
THE SANCTION DOES NOT UNDO THE FINDING

No lesser sanction if you disagree with findings

Sanctioning officer must assume findings are correct
SANCTIONING CONSIDERATIONS

Expulsion/Termination not required

Must be able to articulate why the action taken is reasonably calculated to end the harassment

Must be able to articulate why the action is reasonably calculated to prevent the recurrence

Remedy: To restore or preserve equal access; implemented by Title IX Coordinator.
Determining the Proper Sanction

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

- Impact
- Past Conduct
- Multiple violations
- Abuse of power/position
- Enhancements: filming the act, predation, weapon
THE ROLE OF IMPACT STATEMENTS

Think ahead, and include in your training for sanctioning officers:

• Would the sanctioning officer become convinced that the conduct was worse than, or less than, the findings made by the hearing officer?

• Would it create a bias to sanction more, or not at all?

• If it is poorly written, or makes no sense, would that influence the sanctioning officer?
Complainant requested that university appoint “school monitors” to supervise off-campus events at fraternities.
An institution’s remedial measures do not amount to deliberate indifference simply because a reporting individual disagrees with their severity.


Complainants do not have right to choose the particular sanction (or remedial measure)
Following a finding of sexual misconduct, the respondent was sanctioned with a no-contact order and deferred suspension. The complainant sued, alleging deliberate indifference, arguing that respondent should have been removed from campus to prevent any possible future encounters, which was more likely given that both were students in the same program and therefore more likely to access the same campus building.

What did the court say?
Sanctioning officer asked the respondent to confess to the misconduct, and informed the respondent that the failure to admit to the misconduct would be taken into account as part of the sanction. The student did not admit to the misconduct, in part because he was facing a concurrent criminal investigation. In court, the respondent argued that his due process rights were violated when the sanctioning officer met with him and asked him to confess.

WHAT DID THE COURT SAY?
RESPONDENT’S ADMISSION

• Can sanction take an admission into account?

• Can sanction be more harsh for a respondent who “refuses” to admit to the conduct?

• Should failure to admit to the conduct ever a part of the sanctioning determination?
AGGRAVATING CIRCUMSTANCES

- Premeditation
- Predation
- Physical Violence
- Multiple policy violations in one incident

- Harm to others, impact on complainant and/or community
- Did the behavior continue after intervention?
- Effort to conceal or hide the incident?
- Refusal to attend past trainings
- Past failures to comply with directives
ERRORS IN SANCTIONING

- Delays in delivering the sanction
- Using a sanction not listed (in handbook, code of conduct, policy)
- Inconsistent sanctions
- Sanctioning on basis of incidents not in the notice letter
During the investigation, the respondent was found responsible for sexual assault, and there was considerable evidence gathered that the student was also responsible for underage drinking and providing alcohol to minors. Would you adjust the sanction on sexual assault to also take into account the findings on underage drinking and providing alcohol to minors?
A student found responsible for disruptive and harassing behavior received sanction of a written warning and the requirement to write an essay.

In lawsuit, student argued that the college’s registration hold (until he turned in the essay) was a denial of his due process rights.
WHAT WOULD A COURT SAY?

Respondent was found responsible for a sexual assault. Being certain of litigation from the respondent, and wanting to at least “do something” and send a message, the sanctioning officer sanctioned respondent to a three-year restriction on accessing certain campus buildings, including the lab; a three-year ban on holding any paid or volunteer position at the university, including a post-doctoral position for Spring 2015; and a no-contact order with the complainant with no end duration.

In court, the complainant argued this was evidence of gender discrimination.
WHAT DID COURT SAY?

After a finding of sexual assault (rape), the complainant argued that the university had engaged in deliberate indifference because the respondent was sanctioned with “six counseling sessions, a book assignment, completion of an online class on consent that was required of all incoming students, and staying away from the [reporting individual’s] assigned workplace, and a ‘perpetual’ no contact order.” The respondent was also placed on “behavioral probation.” The complainant also noted that the university had never expelled any student for sexual assault.

During sanctioning, the Title IX Coordinated noted that respondent did not understand the meaning of consent and was emotionally immature.

Would your answer change if respondent violated the no contact directive and university did not respond?
TWO STUDENTS FOUND RESPONSIBLE

A male and a female student were each found responsible for sexual assault. The female student was suspended, the male was expelled. The college explained that the difference was that the male student had engaged in a penetrative sex act, and the female student had not, and therefore it was the specific type of misconduct that caused the difference in sanction, and not gender.

What did the court say?
The Sixth Circuit Court of Appeals, which has suggested, without deciding, that a decision-maker’s failure to identify the “degree” of the violation, such as exactly what types of sexual misconduct were the basis for the finding of responsibility, could be a Title IX violation, as it leaves the respondent without a “precise basis for the punishment administered.”

*Doe v. Case Western Reserve Univ., No. 19-3520, 2020 WL 1672830, at *3 (6th Cir. Apr. 6, 2020)*
TO KEEP IN MIND

01
Suspension - do you assume all is well upon return?

02
Protecting returning person from retaliation

03
Is the respondent forever "marked"? Where is room for rehabilitation?
SANCTIONS AND INTERIM MEASURES DURING APPEAL PROCESS

- Maintaining or changing interim measures during the process
- Communicating and documenting sanctions and interim measures
- Deciding whether to impose sanctions during the process
  - Pros and Cons
CAN A SANCTION INCREASE ON APPEAL

A. In response to Complainant’s appeal
B. Sua sponte (meaning, just on their own determining it was not sufficient)
QUESTIONS?
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Davis Crow

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Jody Shipper

Co-Founder & Managing Director of Grand River Solutions, Jody Shipper is a nationally-recognized subject-matter expert with more than 20 years of experience in Title IX and related fields. She is known for her insight into best-in-class programming, policies, and community outreach aimed at addressing sexual misconduct on campus. She lectures extensively throughout the U.S.
THE BASIC TENETS

Dear Appeals Officer . . .
EVIDENCE:
GATHERING, WEIGHING, ANALYZING

Avoiding Common Errors
Trauma-Informed

Each in their lane: The limits of an appeal officer’s task

Fundamental Fairness

Due Process

Follow Your Process
Both the complainant and respondent have the right to:

- Appeal the same things in the same way to the same person(s);
- Receive information about the appeal process;
- Appeal a sanction;
- Have all aspects of the process be the same for each party;
- Have their appeal reviewed and decided upon;
- Receive notice of the outcome of the appeal.
SANCTIONS AND INTERIM MEASURES DURING APPEAL PROCESS

• Maintaining or changing interim measures during the process
• Communicating and documenting sanctions and interim measures
• Deciding whether to impose sanctions during the process
  • Pros and Cons
DUE PROCESS DURING THE APPEAL PROCESS

Equal Rights and Fair Process for Each Party

• Using regular, published procedures
• Grounds for appeal
• Who is reviewing or hearing the appeal
BEFORE THE APPEAL
# Notification of the Appeals Process

<table>
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<tr>
<th>Who Gets Notified</th>
<th>What They are Notified Of</th>
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<tr>
<td>Complainant</td>
<td>Allegations</td>
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<td>Respondent</td>
<td>Investigation Outcome</td>
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<td>Student Conduct?</td>
<td>Applicable Policy</td>
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<td>Human Resources?</td>
<td>Appeals Process</td>
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<td>Dates</td>
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<tr>
<td></td>
<td>How to submit</td>
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</tbody>
</table>
WHOSE JOB IS IT?

Receive the appeals

Determine whether the grounds for appeal have been met

Notify the person(s) responsible for reviewing the appeal

Arrange the logistics for the appeal

Communicate with complainant and respondent and advisors and witnesses as appropriate
WHOSE JOB IS IT? (CONTINUED)

• Communicate the decision
  • Complainant and Respondent
  • Title IX

• Document retention

• Determine remedies
DE NOVO APPEALS?

We Are Never, EVER, going back to this.
DIFFERENCES IN RESPONSIBILITY

RESOLUTIONS
• Investigate, Hearing
• Determine What Happened
  • Findings of Fact
  • Findings of Policy

SANCTION

APPEAL
• Review the Appeal
• Determine Whether Grounds for Appeal Have Been Met
• Make Decision Regarding Merits of Appeal
DIFFERENCES IN BURDEN

COLLEGE/UNIVERSITY

Error correction

COMPLAINANT RESPONDENT

Persuade and point out error with supporting evidence or facts
HAS THE BURDEN BEEN MET?

Review the information provided by Complainant and/or Respondent and determine whether it contains sufficient information concerning the grounds for appeal and the reasons related to those grounds.

This step is not to decide the merits of the appeal, but to identify the nature and scope of the issues to be addressed.
WAS AN APPEAL FILED?

Review the information provided by Complainant and/or Respondent and determine whether it contains sufficient information concerning the grounds for appeal and the reasons related to those grounds.

This step is not to decide the merits of the appeal, but to identify the nature and scope of the issues to be addressed.
IN THEIR APPEAL, RESPONDENT Writes:

• I have new evidence not previously available to me. Having read the hearing officer's report, I now know the hearing officer was biased (new evidence) because the hearing officer found against me, and there is no way that any unbiased hearing officer would have properly weighed the evidence and come to any conclusion other than the fact that complainant was lying.

• The hearing officer failed to call 1 key witness. The Title IX coordinator should have been questioned, and she could have explained that Complainant was given a free pass and allowed to drop out of organic chem after it was obvious Complainant was going to fail. This would have proven that Complainant made up the complaint and filed only to avoid failing a difficult class.
WHAT DOES THIS MEAN?

- You are reviewing the appeal for what it says, not how it is said.

- You are identifying what the party says went wrong in the process or whether the party has identified new information and IF the party has articulated that what went wrong or what is new, if true, would have led to a different outcome.
COMMON CHALLENGES

Non-Participating Parties

- Bias/conflict of interest
- Error

Uncooperative Witnesses

Uncooperative Advisors
DEAR APPEALS OFFICER...

• I am the victim of a false accusation...
• The police were not contacted and I was not charged by law enforcement with a crime
• After the supposed sexual assault, she sent me a friend request on Instagram and asked me to dance at a party
• No one listened to my explanation or reviewed the evidence so they could see that I was falsely accused.
DOES THIS MEET ANY GROUNDS FOR APPEAL?

- Procedural error?
- Bias/conflict of interest?
- New evidence?
NEW EVIDENCE: WHAT WOULD YOU DO?

Appeal states there is new evidence...

Evidence not provided with the appeal

How do you know it is new?

It is new but is it relevant and reliable?
DEAR APPEALS OFFICER...

I am the victim of a false accusation. Something went terribly wrong.....
PROCEDURAL ERROR: THE DECISION WAS UNREASONABLE

The decision was unreasonable based on the evidence.

- I am the victim of a false accusation
- There was no crime
- She initiated it, not me
- We were both drunk
PROCEDURAL ERROR

There was a procedural error in the process that materially affected the outcome.

• Someone was not interviewed
• I was not allowed to cross-examine the complainant
• Burden was put onto me to prove consent
DENIAL OF A PROCESS YOU DON’T OFFER

- Cross examination
- Representation
- Discovery
- Subpoena / compel witnesses
WHEN A RESPONDENT REFUSES TO PARTICIPATE IN THE PROCESS BUT CLAIMS DUE PROCESS IS VIOLATED

“The Plaintiff waived his right to challenge the process resulting in his expulsion by failing to participate in the process afforded him.”

- Herrell v. Benson
WHEN EXCEPTIONS TO PROCESS OCCURS

Some examples

- University brings the case against one if its own
- Recusal of a member of a panel
- Changing composition of a panel
BIAS

• What constitutes bias?

• The investigator was biased against me because...

• The investigator was biased against (complainants/respondents generally) because . . .
ALLEGATIONS FOR BIAS

“Pro-victim bias does not equate to anti-male bias.”
-Doe v. University of Colorado

Anti-violence bias does not equate to anti-male bias.
ALLEGATIONS OF BIAS AS THE BASIS FOR APPEAL

An allegation of bias without factual support “no longer passes muster”.
-Doe v. University of Colorado
NEW INFORMATION

• Is it really new?

• If it is new, would it change the findings/outcome

• Who investigates new information?
COMMON ERRORS
SOMETIMES INSTITUTIONS DO THE WRONG THING

• Missing deadlines for providing materials
• Misunderstanding of consent or incapacitation
• Errors at a hearing
DETERMINING CREDIBILITY ON APPEAL

If Complainant does not participate, can you judge credibility?

Do you need to see demeanor to note credibility?
EVIDENCE – KNOWING WHAT TO CONSIDER

• Drunk vs. Intoxicated vs. Incapacitated
  • Language matters
  • Clarity and consistency of application

• Who has to prove consent?

• Know the language of your policy

Courtesy Weird Al’s Word Crimes
CROSS COMPLAINTS

• Was it handled?
• How was it handled?
• When raised for first time in the appeal, what is your process?
• Who handles?
APPEALS PANELS THAT EXCEED THEIR AUTHORITY

• Stay In Your Lane
• How Do You Know
• How To Correct
TREATING THE PARTIES DIFFERENTLY

1. He filed an appeal, argued there was a procedural error because he did not agree with the panel’s interpretation of a text message. Appeal granted, determination overturned. She then filed an appeal on basis that appeal panel exceeded their authority, her request to file an appeal was denied. **What did the court say?**

2. Hearing chair did not inform parties that a key witness was her student, nor that he had discussed the case (in brief) with the witness prior to her first interview. **What did the court say?**
WHY SHOW YOUR WORK:
WHEN A JUDGE HAS A DIFFERENT DEFINITION OF CONSENT

“Because she removed her own shirt when Respondent suggested having sex, there was insufficient proof of a lack of affirmative consent.” Haug v. SUNY Potsdam, 2018

As the Complainant did not report the rape, and did not initially think she had been raped . . . more likely there was an erroneous outcome due to gender. Doe v. Dordt University, 2022
LESSER-INCLUDED CHARGES ON APPEAL

There are no lesser-included charges
Reflects lack of notice and opportunity to respond.

• Powell v. St. Joseph’s University
• Doe v. U.S.C.
SANCTIONS ARE NOW WRONG BECAUSE FINDING WAS WRONG

Does appeals officer determine new sanction, or send case back for appropriate determinations?
CAN A SANCTION INCREASE ON APPEAL?

A. In response to Complainant’s appeal?

B. Sua sponte (meaning, just on their own determining it was not sufficient)?
**LANGUAGE MATTERS WHEN WRITING APPEAL RESPONSE**

<table>
<thead>
<tr>
<th>Drunk vs. Intoxicated vs. Incapacitated</th>
<th>Language matters</th>
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<tbody>
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<td></td>
<td>Clarity and consistency of application</td>
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Who has to prove consent?

Know the language of your policy
HOW MUCH INFORMATION TO PROVIDE ON APPEAL?

The appellate officer’s failure to plainly articulate why he granted the appeal, which resulted in a new hearing that found the respondent in violation, was “perplexing” to the reviewing court, along with the appellate officer’s ad hoc decision to request an independent Title IX opinion prepared in the course of determining the appeal.
COMMUNICATIONS ERRORS

• Communicate the decision
  • Complainant and Respondent
  • Title IX
• Interim measures
• No contact directives
• Remedial measures
• Sanctions
APPELLATE OFFICER/PANEL MAY NOT...

- Substitute their own findings for the findings of the decision maker
- Engage in fact-finding/weigh new evidence
- Correct procedural errors on their own
QUESTIONS?
THANKS FOR JOINING US!

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WE LOVE FEEDBACK
Your Opinion Is Invaluable!