



Office of Civil Rights and Title IX Compliance Spring 2023 Training

**OCR Intake, Investigation, and
Resolution**

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Monday

11:00 a.m. – 3:00 p.m.

- Training Requirements
- Title IX Themes
- Title IX Process Overview
- Title IX Sexual Harassment definition
- Education Program or Activity for Title IX Jurisdiction

3:00 p.m. – 5:00 p.m.

- Trauma-Informed Responses to Reports

Tuesday

9:00 a.m. - 3:00 p.m.

- Finish Title IX discussions from Monday
- Serving Impartially
- Relevance for Investigators
- Best Practices for Investigations
- Begin Discussion of Weighing the Evidence (non-Title IX cases)

Wednesday

9:00 a.m. – 12:00 p.m.

- Continued Discussion of Weighing the Evidence (non Title IX Cases)
- Writing Investigation Reports and Outcome Letters

12:00 p.m. – 3:00 p.m.

- Title IX Hearings

Can We Post These Training Materials?

YES – Post away!

The “recipient” (college or university) is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website.



Title IX Training Requirements – Who?

34 CFR §106.45(b)(1)(iii)

- “A recipient must ensure that
 - Title IX Coordinators,
 - investigators,
 - decision-makers, and
 - any person who facilitates an informal resolution process...”

Title IX Training Requirements – What?

34 CFR §106.45(b)(1)(iii)

- ...receive training on...
 - the definition of sexual harassment in §106.30,
 - the scope of the recipient's education program or activity,
 - how to conduct an investigation and grievance process including hearings, appeals, and informal resolution process, as applicable, and
 - how to serve impartially, including
 - avoiding prejudice of the facts at issue,
 - [avoiding] conflicts of interest, and
 - [avoiding] bias."

Title IX Training Requirements - Investigators

- Issues of relevance to create an investigative report that fairly summarizes relevant evidence



Title IX Training Requirements – Decision-Makers

- Technology to be used at a live hearing
- Issues of relevance of questions and evidence
 - Including rape shield provisions in §106.45(b)(6)



Training Requirements – Clery/VAWA

34 CFR § 668.46

- Under the Clery Act, those involved in the disciplinary process must receive annual training on:
 - Issues related to sexual assault, domestic violence, dating violence, stalking
 - How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

General Training Requirements - IL PSVHEA

110 ILCS 155/25(b)(3)

(3) All individuals whose duties include resolution of complaints of student violations of the comprehensive policy shall receive a minimum of 8 to 10 hours of annual training on issues related to sexual violence, domestic violence, dating violence, and stalking and how to conduct the higher education institution's complaint resolution procedures, in addition to the annual training required for employees as provided in subsection (c) of Section 30 of this Act.

Trauma-Informed Training Requirements – IL PSVHEA

110 ILCS 155/30(c)

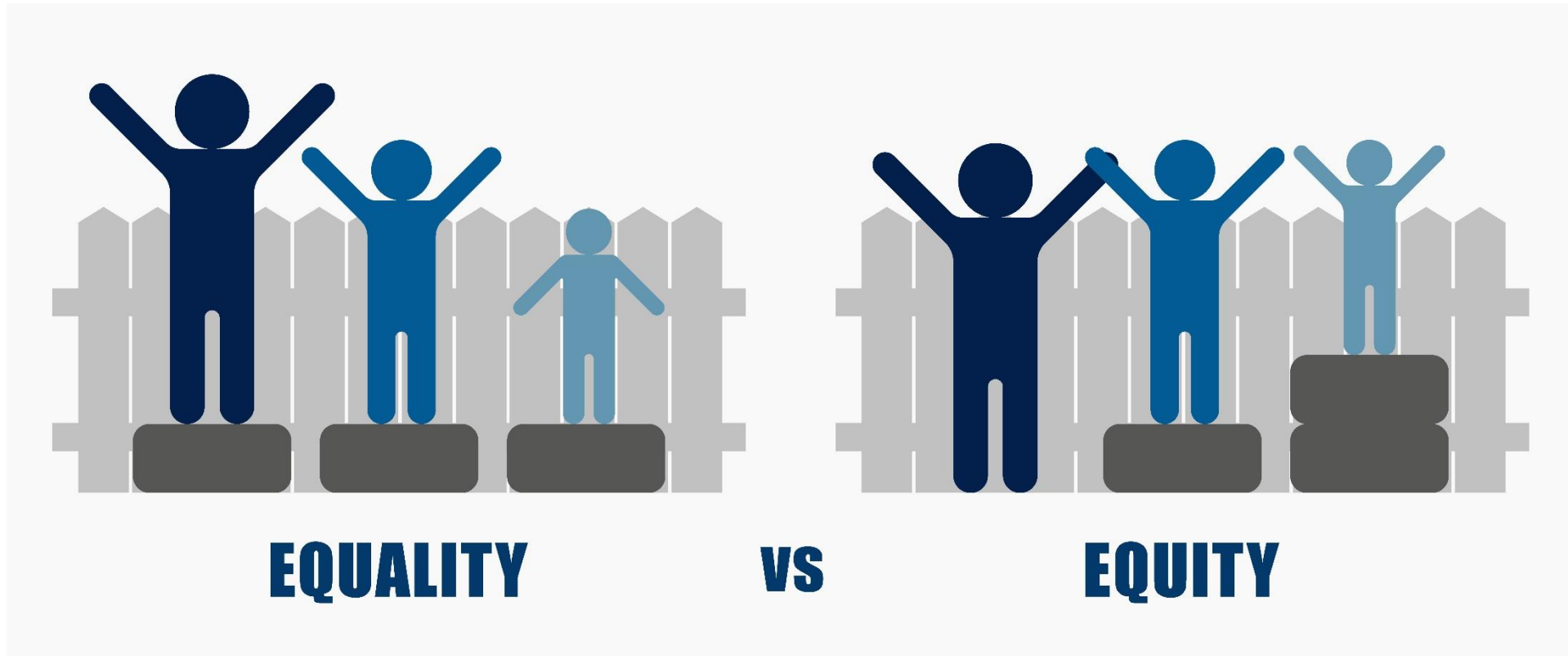
- Institutions shall provide annual survivor-centered and trauma-informed response training to any employee of the higher education institution who is involved in
 - (i) the receipt of a student report of an alleged incident of sexual violence, domestic violence, dating violence, or stalking,
 - (ii) the referral or provision of services to a survivor, or
 - (iii) any campus complaint resolution procedure that results from an alleged incident of sexual violence, domestic violence, dating violence, or stalking.
- Applies to (at a minimum):
 - Title IX Coordinator
 - Campus law enforcement
 - Enrolled Students
 - Contracted service provider with the responsibilities outlined above (Jessica, Rob, and Kylie, for example)

Trauma-Informed Training Requirements – IL PSVHEA (cont.)

110 ILCS 155/30(c)

- Institution shall design the training to improve the trainee's ability to understand:
 - (i) the higher education institution's comprehensive policy;
 - (ii) the relevant federal and State law concerning survivors of sexual violence, domestic violence, dating violence, and stalking at higher education institutions;
 - (iii) the roles of the higher education institution, medical providers, law enforcement, and community agencies in ensuring a coordinator response to a reported incident of sexual violence;
 - (iv) the effects of trauma on a survivor;
 - (v) the types of conduct that constitute sexual violence, domestic violence, dating violence, and stalking, including same-sex violence; and
 - (vi) consent and the role drug and alcohol use can have on the ability to consent
- The trainings shall also seek to improve the trainee's ability to respond with cultural sensitivity; provide services to or assist in locating services for a survivor, as appropriate; and communicate sensitively and compassionately with a survivor of sexual violence, domestic violence, dating violence, or stalking.

Title IX is an Equity Statute



TITLE IX TODAY:

Themes

What are Northwestern's Values?

- Do you think institutional values align between administration, faculty and staff?
- What about students?
- What about the town or city around your institution?

Overview of Themes



Themes - Access

What we do for one, we do for the other

- It is meant to ensure **ACCESS** to your programs and activities, regardless of sex.
- “What we do for one, we do for the other” (or at least consider whether it is appropriate under the circumstances)
- Why are you treating someone differently?

Themes – Duty to Protect

All members of the NU Community

- “They are all our students.”
- Supportive measures
- Any action by a recipient that results in changes or removal of access to education for respondents will require a process to respond
 - Appeal of interim emergency measure
 - Hearing with live cross-examination

Themes - Transparency

Help Others Trust the Process

- **TRANSPARENCY** is key to trusting the process.
 - Know your grievance process
 - Help them understand next steps.
- If participants don't know what's happening, they will assume nothing is happening

Themes – Evidence Based Decisions

- We base decisions on **EVIDENCE**.
 - “**Don’t weigh your gut.**”
 - We can make reasonable inferences and credibility determinations, but be mindful of implicit bias, stereotypes, and using our own behavior as a yardstick.
 - Beware of confirmation bias based on what you *think* may have happened.

Themes – Always Room for Improvement



Always be working to **IMPROVE**:

- Yourself as a neutral
- Your campus as a healthy and fair place to be
- Your policy to provide a better process informed by case law, regulations, guidance, and experience
- Your resources for all involved

Themes –

Avoid Conflicts of Interest, Bias



- Always be working to avoid actual or perceived:
 - Conflict of interest:
 - Bias

Institutional Duties and Interests vs. Personal interests

Your work can impact the lives of others: take periodic self-inventories to be mindful of your activities, involvements, social media, and biases you may have and work to reset them to neutral.

Title IX Process, Definitions, and Jurisdiction



Title IX Terminology - Parties

- “Complainant” – “an individual who is alleged to be the victim of conduct that could constitute sexual harassment.” §106.30
 - Not just students (employees, guests, visitors)
- “Respondent” – “an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.” §106.30
 - Not just students (employees, guests, visitors)

Title IX Terminology - Institution

- “Recipient” – “means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, **any public or private** agency, **institution**, or organization, or other entity, or any person, **to whom Federal financial assistance is extended** directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.”

§106.2

What applies? (1 of 3)

- Law – 20 U.S.C. 1681 et seq.
- Regulations – 34 C.F.R. Part 106
 - Title IX Sexual Harassment
 - Athletics, employment, admissions, housing, etc.
- Clery – 20 U.S.C. 1092(f); 34 C.F.R. 668.46; Clery Appendix
 - The Clery Handbook has been withdrawn but can still be helpful
- IL Preventing Sexual Violence in Higher Education Act

What applies? (2 of 3)

Guidance Documents from US ED:

- Title IX Q&A - July 2021 (Updated June 28, 2022)
- Notice of Interpretation – Gender Identity in Light of Bostock (Enjoined in certain states due to litigation)
- Limiting Use of Statements by Parties and Witnesses Not Subject to Cross-Examination at Live Hearing – 8/24/2021
- OPEN Title IX Q&A Parts 1 and 2 - January 15, 2021

All guidance in effect may be found on USED's Policy Guidance Portal located at:
<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>

What applies? (3 of 3)

- Case Law
 - Supreme Court, federal courts
 - State courts
 - Look to other court decisions for persuasive authority

Rescinded Guidance

- 2017 DCL + Title IX Q&A on Campus Sexual Misconduct
-> Rescinded on 8/26/2020
- 2011 DCL on Sexual Violence
-> Rescinded on 9/22/2017
- 2016 DCL on Transgender Students
-> Rescinded on 2/22/2017

Database of all Rescinded Title IX Guidance available at:
[Dept of Education OCR; Rescinded Guidance website](#)

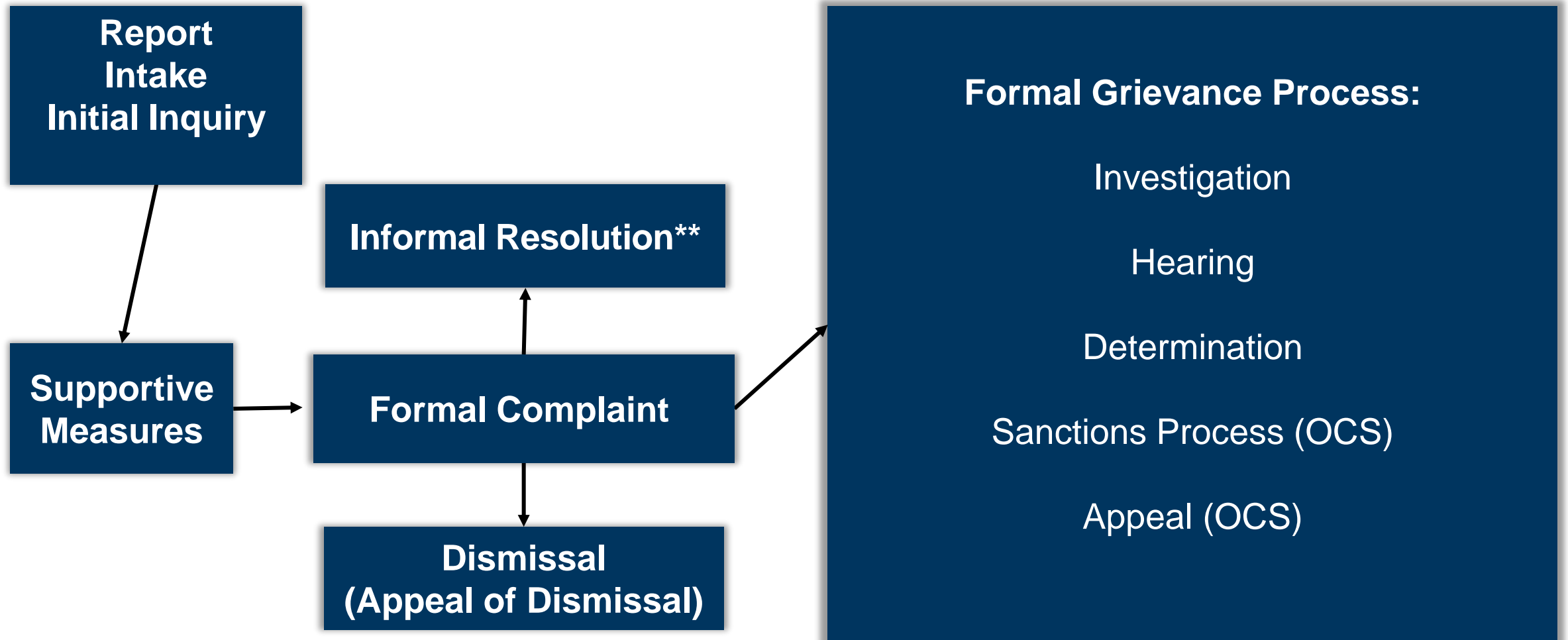
Non-Negotiable Principles

Preamble, p. 30059

- The right of every survivor to be taken seriously, and
- The right of every person accused to know that guilt is not predetermined



Overview of the 2020 Required Processes (updated for Northwestern's Process)



Overview of the TIX Process: Actual Knowledge



Notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient (discretion of the postsecondary institution)

- Notice to employees is no longer enough to trigger actual knowledge (ability or obligation to report not enough)
- Purpose to allow complainants to speak with employees without automatically triggering process
 - See [Northwestern PIE](#) and [Interim Policy on Title IX SH](#) sections titled, "Reporting Obligations"

Overview of the TIX Process:

Formal Complaint



A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the recipient investigate the allegation of sexual harassment

- In response to a formal complaint, a recipient must follow a grievance process (set by 106.45)
- Title IX Coordinator or designee must offer the complainant supportive measures (even if the complainant does not want to file a formal complaint)

Overview of the TIX Process:

Formal Grievance Process (1 of 4)

Any provisions, rules, or practices, other than those in the regulations, must apply equally to both parties.

Basic requirements:

- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed (assuming there is a determination that the policy was violated)

Overview of the TIX Process:

Formal Grievance Process (2 of 4)

- Requires an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- Provide credibility determinations not based upon person's status as complainant, respondent, or witness
- Require an individual designated by recipient as Title IX Coordinator, investigator, decision-maker, informal resolution officer, and/or appeals officer be free from conflict of interest or bias

Overview of the TIX Process:

Formal Grievance Process (3 of 4)

- Include presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process
- Include prompt time frames (some discretion)
- Describes range of possible disciplinary outcomes
- States standard of evidence (preponderance of the evidence or clear and convincing)

Overview of the TIX Process:

Formal Grievance Process (4 of 4)

- Include procedures and bases for complainant and respondent to appeal
- Describe range of supportive measures available to complainants and respondents
- Not require legally privileged evidence absent a voluntary written waiver by the holder of the privilege

Overview of the Process:

Written Notice (1 of 2)

- Recipient's grievance process and informal resolution process**
- Allegations with sufficient time for review with sufficient detail, such as date, location if known
- Respondent presumed not responsible for alleged conduct and determination made at conclusion of grievance process
- Parties may have an advisor of choice

Overview of the TIX Process: Written Notice (2 of 2)

- Any provision in recipient's code of conduct that prohibits knowingly making false statements or providing false information during the grievance process
- Additional notification to parties if new allegations arise as apart of the investigation

Overview of the TIX Process: Dismissal



- Recipient MUST investigate allegations in a formal complaint
- BUT recipient MUST dismiss
 - If conduct alleged would not constitute sexual harassment, even if proven, OR
 - Conduct did not occur within recipient's education program or activity or in the United States, OR
 - Complainant was participating or attempting to participate in the recipient's program or activity??

Overview of the TIX Process: Investigation (1 of 4)



- Only of a formal complaint
- Burden of proof and evidence gathering rests with recipient, not either party
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert)

Overview of the TIX Process: Investigation (2 of 4)

- Provide equal opportunity for parties to present inculpatory and exculpatory evidence
- Not restrict ability of either party to discuss or gather and present relevant evidence
- Provide parties same opportunities to have others present during the grievance process, including advisor of choice

Overview of the TIX Process: Investigation (3 of 4)



- Provide written notice of date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with sufficient time to prepare
- Provide both parties equal opportunity to inspect and review any evidence obtained in the investigation – recipient must send to party and party's advisor with at least 10 days to submit a written response before completion of investigation report

Overview of the TIX Process: Investigation (4 of 4)

- Recipient must make all such evidence subject to inspection and review at any hearing
- Create an investigation report at least 10 days before a hearing that fairly summarizes the relevant evidence and send to each party and party's advisor

Overview of the TIX Process: Hearings



- Must provide a live, cross-examination hearing
- Parties must have an advisor and the recipient must provide an advisor for a party if the party does not have one
- Advisors ask only relevant cross-examination questions—no party-on-party questioning
- May be virtual, but must be recorded or transcribed
- Decision-maker makes live relevancy determinations after each question asked by advisors

Overview of the TIX Process: Determinations (1 of 3)

- Decision-maker (not Title IX Coordinator or investigator) must issue a written determination regarding responsibility
- Must include
 - Allegations
 - Procedural steps taken from receipt of formal complaint

Overview of the TIX Process: Determinations (2 of 3)

- Findings of fact
- Conclusions
- Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will be provided to complainant

Overview of the TIX Process: Determinations (3 of 3)



- Procedures and bases for appeal by both parties
- Provide written determination to parties simultaneously

Overview of the TIX Process:

Appeals (1 of 2)



- Recipient must offer to both parties the following bases of appeal (can offer more by policy):
 - Procedural irregularity that affected outcome
 - New evidence not reasonably available at the time regarding responsibility or dismissal that could affect outcome
 - Conflict of interest or bias by the Title IX Coordinator, investigator, and/or decision-maker that affected the outcome

Overview of the TIX Process:

Appeals (2 of 2)

- The decision-maker for the appeal cannot be the same decision-maker from the hearing, or the Title IX Coordinator or investigator
- Must provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the determination
- Must issue a written decision describing the result of the appeal and rationale and provide the decision simultaneously to the parties

Overview of the TIX Process: Informal Resolution (COMING SOON)



- Informal Resolution is an optional process
- At any time prior to the determination regarding responsibility, the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- Recipient cannot require this and also cannot offer unless a formal complaint is filed

Overview of the TIX Process: Informal Resolution



- Recipient can offer informal resolution if:
 - Provides written notice to the parties
 - Obtains the parties' voluntary, written consent to the informal process
 - Does not offer IR for allegations of employee sexual harassment of a student

Overview of the TIX Process: Retaliation



- Neither recipient nor any other person may retaliate against an individual for purpose of interfering with any right or privilege secured by Title IX or because a person made a report or complaint, or participated or refused to participate in the process

Overview of the TIX Process: Confidentiality



Recipient **must keep confidential the identity of any individual** who has made a report or complaint of sex discrimination, including any individual who made a report, any complainant, any alleged perpetrator, any respondent, and any witness, **unless required by law**, permitted by FERPA, or **for the purposes of carrying out Regulations grievance process**.

Title IX Regs Apply to Employees

Preamble to the 2020 Title IX Regulations:

- “The Department appreciates support for its final regulations, which apply to employees.” (30439)
- No “inherent conflict” between Title VII and Title IX (30439)
- Due Process protections found in § 106.45 (live hearing, advisors, cross-examination) apply to employees, not just students (30440)
- Recipients that are subject to both Title VII and Title IX must comply with both (30440)

Title VII Versus Title IX

- Conflicts between Title VII and Title IX noted by Commenters:
 - Formal complaint requirement
 - Notice requirement
 - Deliberate Indifference Standard (noted above)
 - Definition of Sexual Harassment
 - Live hearing requirement (as opposed to notice and opportunity to respond)



Title IX Jurisdiction: Education Program or Activity

(Includes everything your institution does, plus a bit more)

Jurisdiction for TIX Sexual Harassment

“Education program or activity”

“includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. “

§106.30(a)

Education Program or Activity

Locations, events, or circumstances with substantial control
– the easy ones:

- Residence halls
- Classrooms
- Dining halls

Not an Education Program or Activity

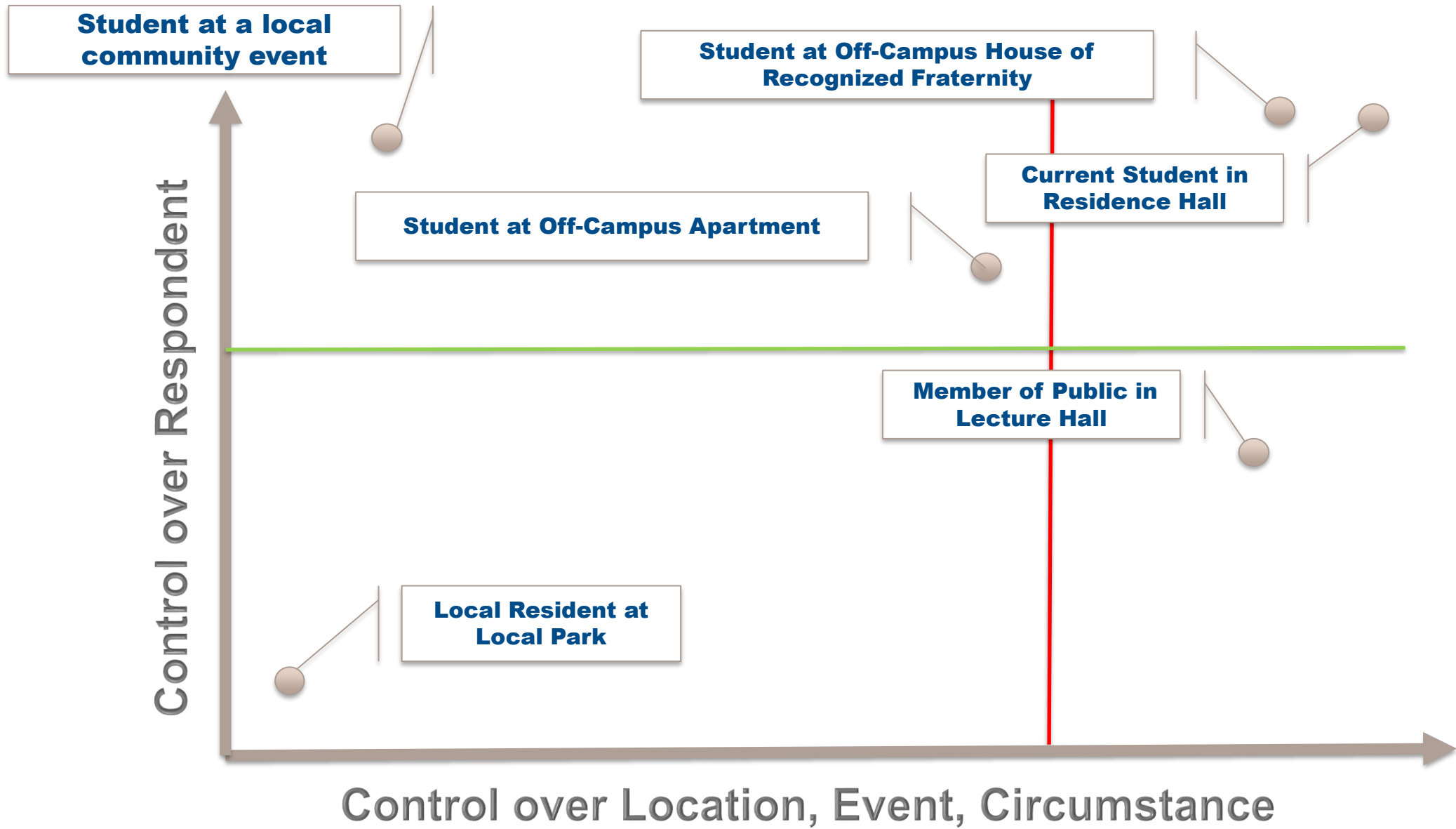
Locations, events, or circumstances without substantial control:

- **Anything** outside of the United States;
- Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

Substantial Control?

Depends on fact-analysis under “substantial control”:

- Conventions in the United States?
- Holiday party for an academic department?
- Professor has students over to house?



Online Study

- “Operations” of the recipient may include computer and online programs and platforms “owned and operated by, or used in the operation of, the recipient.” (30202)
- Still has to occur in your educational program or activity
- And in the United States...

Study Abroad Programs

- Title IX draws a bright line: plain text of Title IX states “no person in the United States” is protected, which means you must dismiss anything that occurred against a person outside the USA. (30205-06)
- Programs of college based in other countries? No jurisdiction and must dismiss.
- Foreign nationals in the United States are covered.

Jurisdiction and Dismissal

Dismissal of a formal complaint— §106.45(b)(3)(i)

The recipient must investigate the allegations in a formal complaint.

(BUT) If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in §106.30 even if proved, did not occur in the recipient's **education program or activity**, or **did not occur against a person in the United States**,

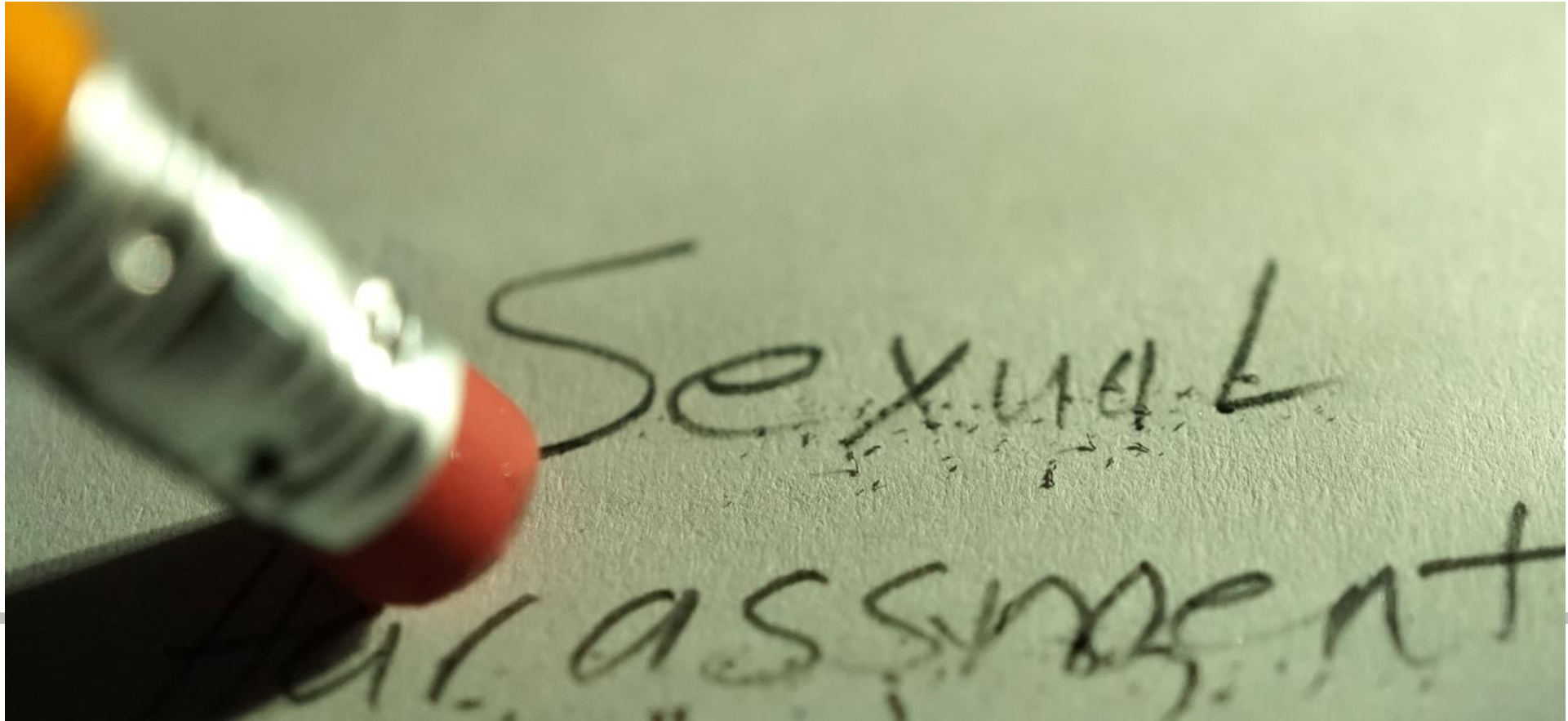
....

“... then the recipient **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient’s code of conduct.**”

PIE v. Title IX at Northwestern

Sexual Misconduct is prohibited by both

- Process and Definitions are different
 - “Exit ramps”
- If the conduct meets the Title IX jurisdictional requirements & definitions – Title IX applies
- If the conduct does NOT meet the Title IX jurisdictional requirements and/or definitions, but DOES fall within PIE jurisdiction and definitions – PIE applies



Title IX Sexual Harassment

34 CFR § 106.30

Title IX Sexual Harassment

- 3 Classifications

- Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
 - [Quid pro quo] 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;
 - [Unwelcome conduct] 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
 - [Clery crimes] Sexual assault, dating violence, domestic violence, or stalking

Title IX Sexual Harassment: *Quid Pro Quo*

- Only applies to employee respondents (can be any complainant)
- USED interprets this broadly to encompass implied *quid pro quo*
- No intent or severe or pervasive requirements, but must be unwelcome
- “[A]buse of authority is the form of even a single instance...is inherently offensive and serious enough to jeopardize educational access.”

Sexual Harassment: “Title IX Hostile Environment”

- The second prong: severe, persistent, and objectively offensive and deny equal access (vs. Title VII: severe, persistent, or pervasive)
- Does not require intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant (30159)

Severe

- Takes into account the circumstances facing a particular complainant
- Examples: age, disability status, sex, and other characteristics/protected classes
- Preamble discussion states that this removes the burden on a complainant to prove severity (30165)

Pervasive

- Preamble indicates pervasive must be more than once or involve multiple individuals if it does not fall into the above (30165-66)
- Preamble reminds us that Quid Pro Quo and Clery/VAWA (domestic violence, dating violence, stalking) terms do not require pervasiveness

Objectively Offensive

Reasonable person is very fact-specific (30167)

- Because so fact-specific, different people could reach different outcomes on similar conduct, but it would not be unreasonable to have these different outcomes
- Preamble notes that nothing in the Regulations prevents institutions from implicit bias training

Sexual Harassment Considerations

The preamble notes that the Regulations do not prohibit postsecondary institutions from:

- Publishing a list of situations that would violate Title IX as “sexual harassment”
- Advising when similar conduct has been found to violate Title IX
- Publishing a list of situations that would violate other policies (30158)
 - Northwestern PIE definition of Sexual Harassment

Definitions Disclaimer

This next section of the presentation uses the terms such as “rape,” “victim,” and “perpetrator”, and “sodomy.”

These are the CRIMINAL terms, not POLICY terms, but they are the definitions that apply according to the 2020 Title IX regulations.

Clery Crimes referenced in Title IX Regs: Sexual Assault, Dating Domestic Violence, & Stalking



Third prong refers to certain statutory definitions for sexual assault, dating violence, domestic violence and stalking

- Sexual assault is defined as forcible and non-forcible sex offenses as defined in the FBI's Uniform Crime Reporting (UCR) database, which you can find in the National Incident-Based Reporting System (NIBRS) manual
- Dating violence, domestic violence, and stalking definitions are from Clery statute (not regulations) as amended by VAWA

Sexual Assault Definition

- FBI UCR & NIBRS



- The FBI UCR provided definitions for Sexual Assault under two different databases, the SRS and the NIBRS.
- The FBI retired the SRS in January of 2021, so the NIBRS database is the best source of Sexual Assault definition available.

Campus Considerations:

- The specific offenses covered in the NIBRS definitions of Sexual Assault must be prohibited by your policy.
- You do not have to track word for word, as long as the behavior is covered.
 - Ex – Sodomy may be viewed as a derogatory term in the LGBTQ Community.

Sexual Harassment: Sexual Assault as Defined in NIBRS

“Sexual Assault” includes:

- Rape (includes substance of def’s below)
- ~~Sodomy~~ Not in Northwestern’s Interim Policy
- ~~Sexual Assault with an Object~~ Not in Northwestern’s Interim Policy
- Fondling
- Incest
- Statutory Rape

Sexual Assault: Rape

- NIBRS Manual 2021

“Rape” means the **carnal knowledge** of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. **Carnal knowledge** is defined as the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis).

Northwestern's Definition of "Rape"

- The penetration, no matter how slight, of the vagina or anus with any body part or object or instrument, or oral penetration by a sex organ of another person, without the consent of the victim or where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.
- Attempted rape is included.
- An "object" or "instrument" is anything used by the offender other than the offender's genitalia.

Title IX Sexual Assault: Sodomy

“Sodomy” means **oral or anal sexual intercourse** with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Title IX Sexual Assault: With an Object

“Sexual Assault with an Object” means use an object or instrument to unlawfully **penetrate**, however slightly, the **genital or anal opening** of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity. An object or instrument is anything used by the offender **other than the offender’s genitalia**, e.g., a finger, bottle, handgun, stick.

Title IX Sexual Assault: Fondling

“Fondling” means the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

- Similar to Northwestern’s definition except for pronouns

Title IX Sexual Assault: Incest

“Incest” means sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

- 720 ILCS 5/11-11

Title IX Sexual Assault: Statutory Rape



“Statutory Rape” means non-forcible sexual intercourse with a person who is under the statutory age of consent.

Title IX Sexual Harassment: Dating Violence (34 USC 12291(a)(10))*



- “Dating Violence” means violence committed by a person -
 - (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and
 - (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - (i) The length of the relationship.
 - (ii) The type of relationship.
 - (iii) The frequency of interaction between the persons involved in the relationship.
- Northwestern uses this definition

*Title IX cites to this provision for its definition of “Dating Violence,” but the Act has since been amended. Subsection 11 now includes the definition of “Dating Violence.”

Northwestern Definition of Sexual Harassment: Domestic Violence



“Domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic violence or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction.

Title IX Sexual Harassment: Stalking

“Stalking” is engaging in a course of conduct directed at a specific person that would cause a reasonable person with similar characteristics under similar circumstances to:

- Fear for the person’s safety or the safety of others; or
- Suffer substantial emotional distress.

As mentioned before, to qualify under Title IX, it must be sex-based stalking (30172 fn. 772)

- Stalking that is **not** based on sex must be prohibited by the institution in order to comply with Clery.
- **Northwestern** OCR investigates and adjudicates both sex-based and non-sex-based stalking

Stalking: Course of Conduct

“Course of Conduct”

- Under VAWA regulations: means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
- Not explicitly included in Northwestern's definition

Stalking: Reasonable Person

“Reasonable person”

- Under VAWA regulations: means a reasonable person under similar circumstances and with similar identities to the victim.
- Not explicitly included in **Northwestern’s** definition

Stalking: Substantial Emotional Distress

“Substantial emotional distress”

- Under VAWA regulations: means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.
- Not explicitly included in Northwestern’s definition

Discretionary Definitions: Consent, Coercion, Incapacitation, Exploitation

- Discretion is left to the institution on consent, coercion, and incapacitation, which, as we will discuss, allows institutional discretion on the extent of these violations, especially under “sexual assault”
- Exploitation/revenge porn: may be pervasive unwelcome conduct depending on widespread dissemination (30166)

Consent: Left to the Institutions to Define (Sort of)

- USED left “consent” and terms that often negate consent to the discretion of the recipients to “reflect the unique values of a recipient’s educational community.” (Preamble, p. 30159, see also 30174)
- IL PSVHE (110 ILCS 155/10(1)) includes minimum elements for a consent definition

“Consent” at Northwestern

- Same definition for PIE and Title IX
- May be withdrawn at any time with clearly understandable words or actions
 - “Consent is present with clearly understandable words or actions manifest in a **knowing, active, voluntary, and present and ongoing** agreement to engage in specific sexual or intimate contact.
- **Knowing**
 - Understanding, awareness, agreement as to the who, what, where, when, and how of the sexual activity
- **Active**
 - “Clearly understandable words or actions”
 - Silence, passivity, submission, or the lack of verbal or physical resistance (include the lack of a “no”) ≠ consent
 - Cannot be inferred from attire, gifts, extension or acceptance of an invitation to go somewhere

“Consent” at Northwestern (cont.)

- Voluntary
 - Must be freely given
 - Cannot be the result of:
 - Intimidation
 - Coercion
 - Force
 - Threats
 - Fraud
- Present and Ongoing
 - Must exist at the time of the activity
 - Consent on a prior occasion and/or consent to another activity ≠ consent

“Incapacitation” at Northwestern

- Refers to the state where a person **does not understand the nature of fact of sexual activity** due to:
 - The effect of drugs or alcohol consumption
 - Medical condition or disability
 - State of unconsciousness or sleep
- **“When alcohol is involved, incapacitation is a state beyond drunkenness or intoxication. When drug use is involved, incapacitation is a state beyond being under the influence or impaired by use of the drug.”** (*Emphasis in **Northwestern** policies*)
- Indications that capacity is lacking:
 - Lack of full control over physical movements
 - Lack of awareness of circumstances or surroundings (who, what, where, when, how)
 - Inability to effectively communicate for any reason

Knew or Should Have Known

- A person may appear to be giving consent but may not have the capacity to do so.
- **When determining whether a person has the capacity to provide consent, the University will consider whether a sober, reasonable person in the same position knew or should have known whether the other party could or could not consent to the sexual activity.** (*Emphasis in Northwestern policy*)
- It is especially important, therefore, that anyone initiating sexual activity to assess another person's capacity to give consent.
 - Respondent intoxication or impairment does not excuse the responsibility to obtain consent.
 - Respondent intoxication or impairment "is never an excuse to commit sexual misconduct."

Productive Questioning on Gauging Intoxication

Not Productive:

- Why did you get that drunk?

Preferable approach:

- Explain why you need the information
- Don't place blame

Productive Questioning on Gauging Intoxication (Cont.)

Difficult to gauge:

- How trashed were you?
- On a scale of 1-10, how drunk were you?

Preferable approach:

- Can you talk about how this felt in relation to other times you've consumed alcohol/drugs?
- In that moment, were you aware of where you were? Who you were with? What was happening?
- Do you know if anyone helped you up the stairs?

Any Drugs?

- Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?
- Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?
- What, how much, and when?
- Remember: can have amnesty in your policy for personal drug and alcohol use (also a good way to avoid institutional retaliation!) at 30536

Blackout ≠ Incapacitation

- Alcohol can interfere with the ability to form memories
- May be a complete lack of memory or fragmentary blackouts
- What did witnesses observe?

“Coercion” at Northwestern

- Refers to “severe or persistent pressure causing fear of significant consequences from Respondent if one does not engage in sexual activity
- Compare:
 - “I will break up with you”
 - “I will kill myself”

- Title IX Regulations:
 - Nothing in the Title IX Regulations precludes the postsecondary institution from providing amnesty to students for personal alcohol and/or drug use when participating in a Title IX investigation
- **Northwestern:**
 - “To encourage reporting, an individual who makes a good faith report of sexual misconduct that was directed at them or another person or participates in an investigation as a witness will not be subject to disciplinary action...unless the University determines that the violation was serious and/or placed the health or safety of others at risk.”

PIE Discrimination Definition

Northwestern:

- “treating someone differently because of their:

Race
Color
Religion
National Origin
Sex
Pregnancy
Sexual Orientation

Gender Identity
Gender Expression
Parental Status
Marital Status
Age
Disability
Citizenship Status

Veteran Status
Genetic Information
Reproductive Health Decision-Making
Other classifications protected by law

- Applies to matters of admissions, employment, housing, or services, or in the educational programs or activities **Northwestern** operates

PIE Discrimination Analysis

In determining whether discrimination occurred, OCR examines the following:

- Whether there was an adverse impact on the individual's work or education environment; and
 - Whether individuals outside of the protected class received more favorable treatment.
 - If the first 2 conditions are met, OCR will consider whether there is a legitimate, non-discriminator reasons for the action.
-
- In practice, OCR considers whether the first 2 conditions are met during initial inquiry
 - If so – OCR will open an investigation to determine, by a POE, point 3

PIE Discrimination Examples

Examples of discrimination at [Northwestern](#) include:

- Refusing to hire or promote someone [because of](#) their membership in a protected class;
- Denying someone a raise or employment benefit [because of](#) their membership in a protected class;
- Reducing someone's job responsibilities [because of](#) their membership in a protected class;
- Denying someone access to an educational program [based on](#) their membership in a protected class; or
- Denying someone access to a University facility [based on](#) their membership in a protected class.

PIE Harassment Definition

Northwestern:

- “verbal or physical conduct or conduct using technology based on a protected class that has the purpose or effect of:
 - Substantially interfering with, limiting or depriving a member of the community from accessing or participating in the academic or employment environment, and/or substantially interfering with an individual’s academic performance or work performance; or
 - Creating an academic or working environment that a reasonable person would consider to be intimidating, hostile, or offensive.

PIE Harassment Analysis

OCR examines the following:

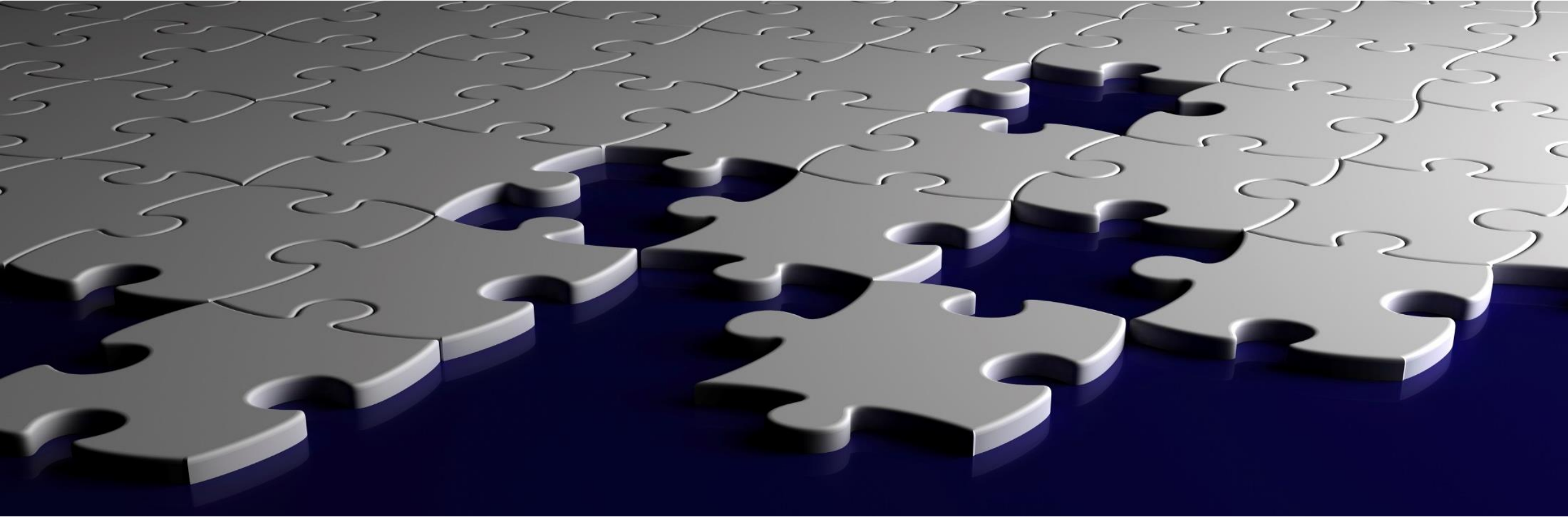
- Context
- Nature
- Scope
- Frequency
- Duration
- Location
- Relationships of the persons involved
- MUST create a hostile environment and/or substantially interfere with access, on an objective basis
- Subjective belief of the impacted party does not make the behavior prohibited harassment

PIE Harassment Examples

- Offensive jokes related to a protected class;
- The use of slurs and stereotypes related to a protected class;
- Name calling related to a protected class;
- Intimidation, ridicule, or mockery connected to a protected class;
- Displaying or circulating offensive objects and pictures that are based on a protected class

What *isn't* harassment at Northwestern:

- General bullying or uncivil behavior that is not based on a protected class
 - However, this type of behavior may violate other Northwestern policies



Trauma-Informed Response





How people mentally process what happened to them affects the way the brain encodes and decodes memories of what occurred

**Why it is
Important to
NOT make
assumptions?**



Why Don't People Tell Right Away

- The Preamble to the Title IX Regulations suggests:
 - Shame
 - Fear of retaliation
 - Fear of not being believed
(30081)



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 drugs or alcohol, or simple fallibility of human memory”
(Preamble, p. 30323)



A Note About Trauma

- Assume all parties and witnesses may be dealing with trauma
 - from this or other incidents
- Meet them where they are
- Help them tell their story as part of the process
- Signs of trauma ≠ policy violation
- No signs of trauma ≠ no policy violation

Jim Hopper

MENU

Sexual Assault & the Brain



Takeaways

- If they didn't act the way you might have, that doesn't mean it isn't true.
- Counterintuitive response has to be measured to another's perspective to be counterintuitive to something. Be careful to use a valid measurement.
- Be mindful of the questions you are asking and, where appropriate, explain why the information is needed:
 - Attire
 - Amount of alcohol consumed
 - Decision to return to a location or person
- What do you know about the setting that might assist in gathering information?
 - Do you remember where you were looking when this occurred?
 - Do you remember any particular sounds or sensations?

Takeaways (cont.)

- Remember:
 - 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 drugs or alcohol, or simple fallibility of human memory” (Preamble, p. 30323)
 - Neutral – “They are all our students”
 - Trained in the area of trauma-informed responses, but not expert witnesses
 - This information teaches us how to ask questions and how to weigh evidence
 - Signs of trauma ≠ policy violation
 - No signs of trauma ≠ no policy violation



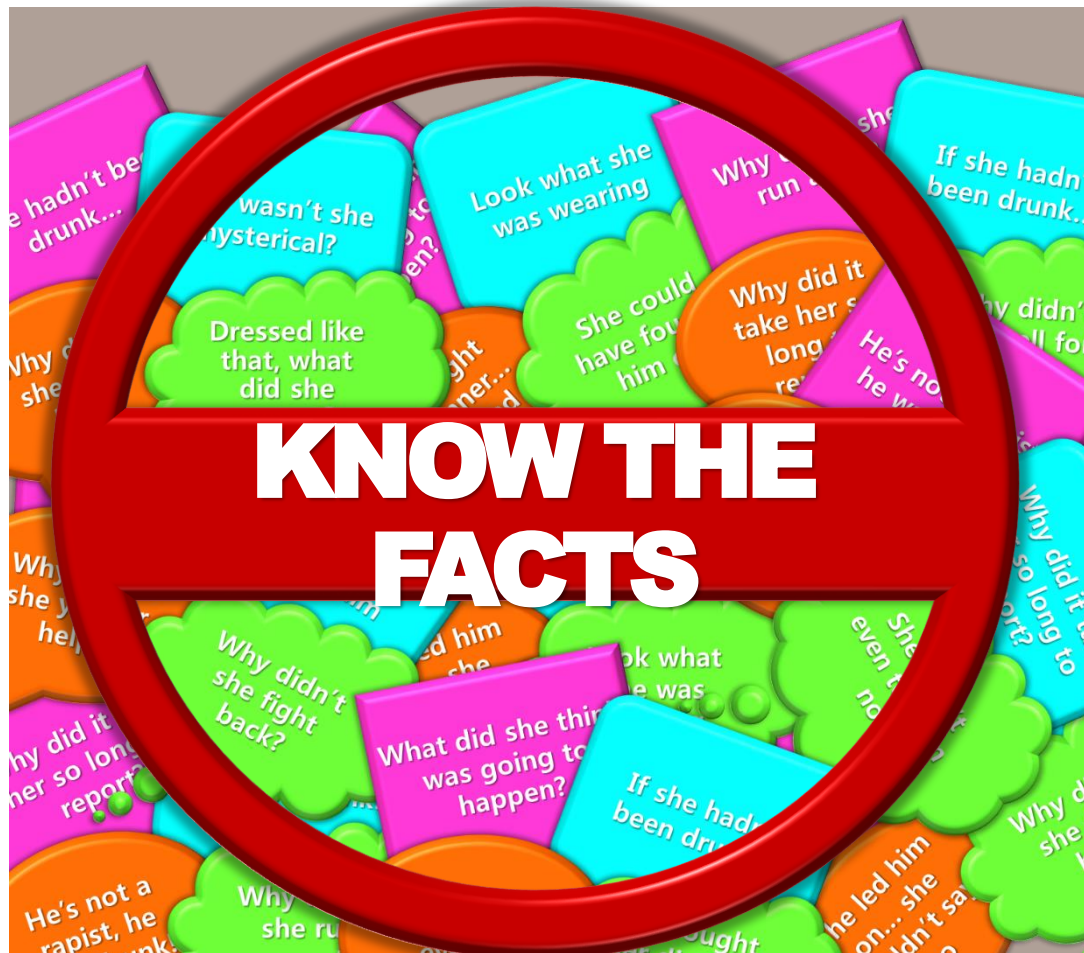
Myths and Stereotypes





**These statements
are common, but
not helpful.**

- “Why wasn’t she hysterical?”
- “It can’t have been rape. She went back to him the next day!”
- “Of course he did it.”
- “If she hadn’t been drunk...”



Know Better

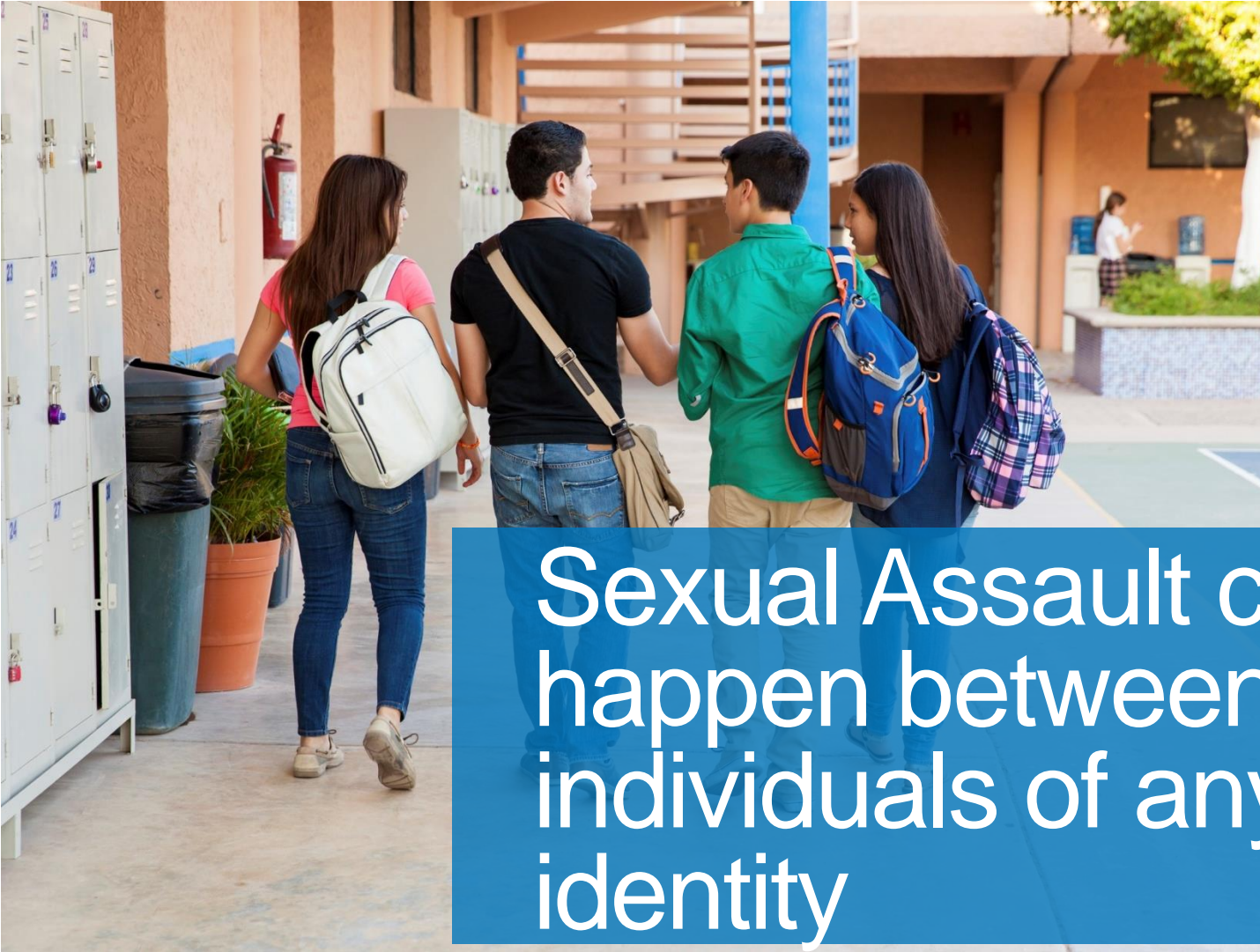
Let's talk about why these statements don't help get the information we need to make a good decision in our process.



Most rapes are committed
by perpetrators that know
their victims

Rape can happen in a
committed relationship






Sexual Assault can
happen between
individuals of any gender
identity

Victims of intimate partner violence may return to their perpetrator for reasons that may not seem rational to others




A photograph of a bar counter with several shot glasses filled with amber liquid. A blue semi-transparent rectangle is overlaid on the top right of the image, containing white text. The background is blurred with warm, bokeh lights.

Drug-facilitated sexual assault is common, and the most common drug used is alcohol

A photograph showing several brown glass beer bottles standing on a wooden surface. In the background, a person's head and shoulders are visible, wearing a purple garment. In the foreground, a clear glass is lying on its side. A blue rectangular overlay is positioned on the left side of the image, containing white text.

Being drunk doesn't excuse
a perpetrator's own behavior



A wide variety of responses are normal for victims: people are different and react differently—don't make assumptions about how they “should act”

Stereotypes Affect Response

Beliefs about people:

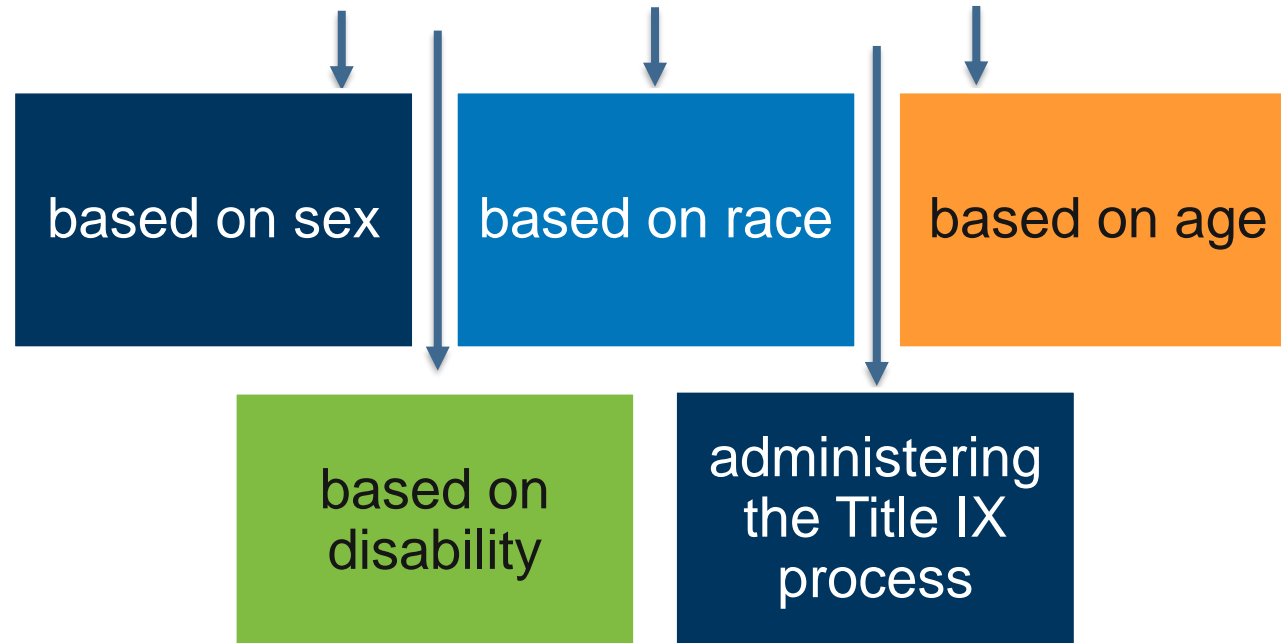
based on sex

based on race

based on age

based on disability

administering
the Title IX
process



Avoiding Sex Stereotypes

- “Must” not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Examples of sex stereotypes in comments (Preamble, p. 30253):
 - Women have regret sex and lie about sexual assaults
 - Men are sexually aggressive or likely to perpetrate sexual assault

Analyzing Sex Stereotypes

- Age of consent
- Dating vs. arranged marriages
- Attitudes towards homosexuality
- Attitudes towards intimate partner violence
- Cooperating with investigations
- Sharing personal information
- Reactions toward authority figures
- Reactions toward male vs. female

Culture Affects Response

- I won't report it if it doesn't feel wrong.
- I'll admit it because I don't understand it's prohibited.
- I won't report it if I would be a snitch.
- It's impolite to look you in the eye, so I'll look down the whole time.
- I deserved it. It's normal.
- Reporting this would result in serious consequences at home.

Process YOUR Response (1 of 2)

- Is your assessment based on your culture, or theirs, or both? (It shouldn't be.)
- Is your assessment based on stereotypes you hold based on sex? Race? Culture? Yours or theirs? (It shouldn't be.)
- Is your assessment based on their role (Complainant or Respondent)? (It shouldn't be.)

Process YOUR Response (2 of 2)

- Is your assessment based on a person you like or someone you identify with? (It shouldn't be.)
- Is your assessment based on a person “acting guiltily” by not making eye contact or fidgeting? (It shouldn't be.)
- Would you have done things differently?
- If so, SO WHAT?

Counterintuitive Response

- If they didn't act the way you might have, that doesn't mean it isn't true.
- Stop and consider carefully before you decide someone is lying because they responded in a way different from how you would have responded.
- Counterintuitive response has to be measured to another's perspective to be counterintuitive to something. Be careful to use a valid measurement.



The Investigator's Role

Bricker
Graydon

No Single-Investigator Model for Title IX

- The roles of investigator and decision-maker MUST be separate
- The investigator does not make decisions



Outcome Letters for Non-Title IX Matters

- **Northwestern:** Investigators are involved with the analysis, in consultation with others at OCR
- Investigators at **Northwestern** do not issue sanctions or review appeals



The Title IX Investigation and Report

- The investigator has the burden of asking the parties for and collecting all relevant evidence.
- “Relevance” may depend on the institution, but we will discuss it further later today.
- Parties have the right to present fact and expert witnesses.
- Issues of relevancy will often not be made until the Title IX decision-maker is involved (after your involvement).
 - Preliminary assessments may sometimes be helpful
 - Pattern evidence issues

The Investigator's Roles



The **GATHERER** of all relevant evidence.



The **ORGANIZER** of all relevant evidence.



Issues of Relevance for Title IX Cases



What is Relevant? (Not spelled out)

The regulations don't really tell us directly.
But, it may include evidence that is:

**“ probative of any material fact
concerning the allegations ”**

- Preamble, 30343

What is Relevant?

The preamble also tells us:

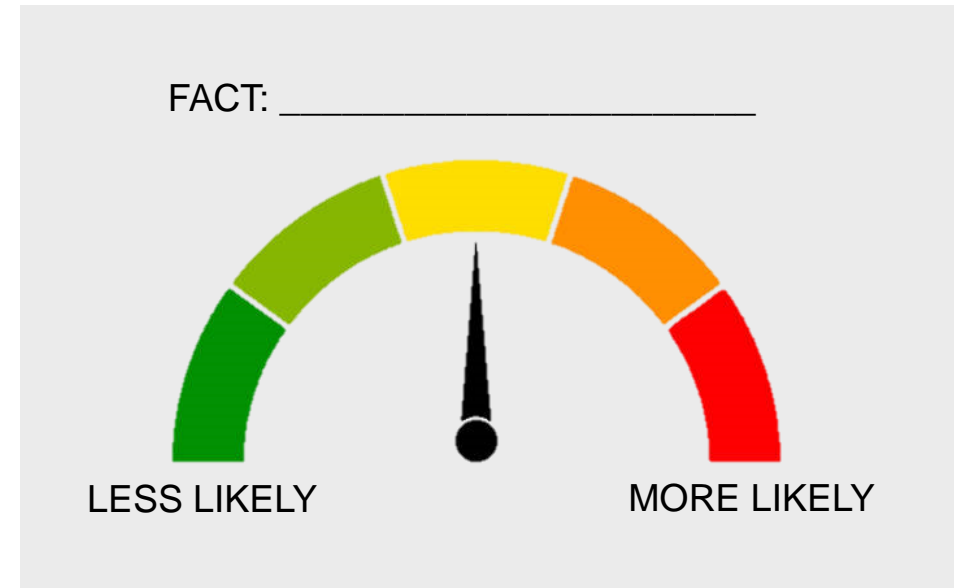
“ evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant)

”

- Preamble, 30294

Gauging Relevance

Does this question, topic, evidence help **move the dial** under the standard of evidence?



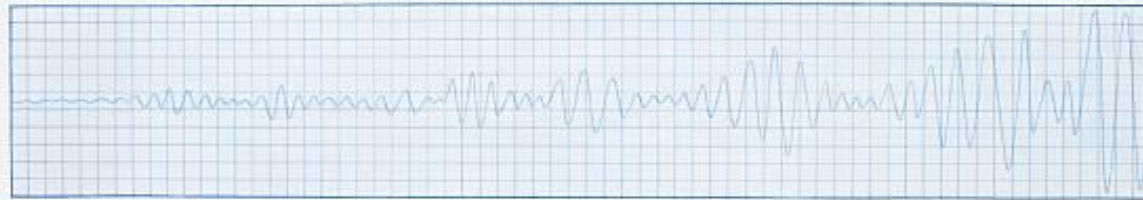
Issues of Relevancy (NOT Rules of Evidence) 1 of 2

- The Rules of Evidence do **NOT** apply and **CANNOT** apply



Issues of Relevancy (NOT Rules of Evidence) 2 of 2

“[A] **recipient** may **not** adopt rules **excluding** certain types of **relevant evidence** (e.g., **lie detector test results**, or rape kits) **where the type of evidence is not either deemed “not relevant”** (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred for use under 106.45 (as is, for instance, information protected by a legally recognized privilege).”



This means...



Cannot exclude character evidence



Cannot exclude hearsay



Cannot exclude evidence where the probative value is substantially outweighed by the danger of unfair prejudice (30294)



Issues of Relevancy: What isn't relevant?



Party's medical,
psychological, and
similar records
(unless voluntary
written consent)



Information
protected by a
legally recognized
privilege

Relevancy: Medical treatment and Investigation



Section 106.45(b)(5)(i): when investigating a formal complaint, recipient:

- “[C]annot access, consider, disclose, or otherwise use a 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 under this section.**”

Relevancy: Legally Privileged Information



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

- A **recipient's** grievance 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 Info – What does this include?



- Preamble identifies medical and treatment records.
- Jurisdiction-dependent
 - 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

Issues of Relevancy: What isn't relevant? – Rape Shield Provision



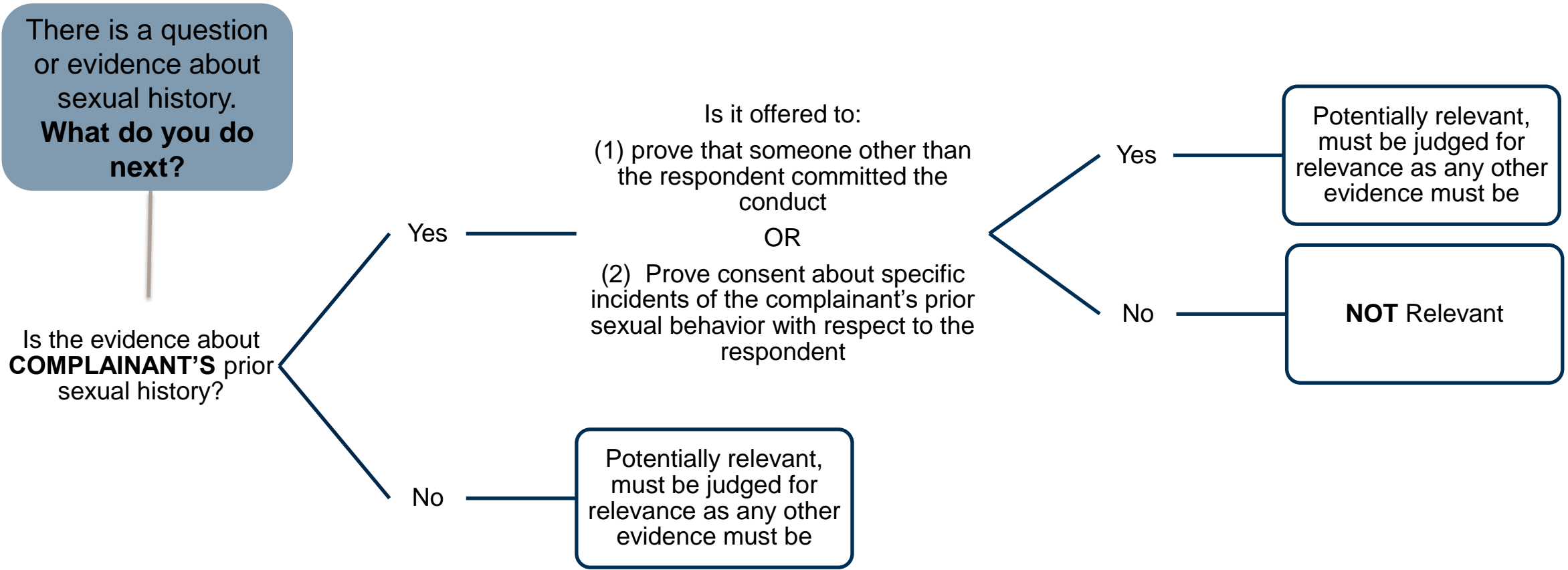
- Evidence about complainant's prior sexual history (must exclude) unless such questions/ evidence:
 - are offered to prove that someone other than the respondent committed the conduct, or
 - if the questions/evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Issues of Relevancy: What isn't relevant? – Rape Shield Provision



- 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.**”
- Guidance from Sept. 2021 Q&A: “Sexual history evidence that is being proffered to show a party’s reputation or character will never be considered relevant on its own.”

Rape Shield Provision Flowchart



Retaliation

- When parties elect not to participate, a recipient cannot retaliate against them (30322)
- It is the right of any party or witness not to participate in the investigation

Relevancy and the Title IX Investigator

The gatherer of all relevant evidence

“

Recipient must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).”

”

- Preamble, 30331

Relevancy and the Title IX Investigation and Report

(cont.)



Summarize



Evaluate



The requirement for **recipients** to **summarize** and evaluate **relevant evidence**, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to section 106.45, appropriately direct **recipients** to **focus investigations** and adjudications **on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true** (i.e., on that is relevant.)



- Preamble, 30294



Investigation: Best Practices

Investigators Lay the Foundation

- Starts the process
- Builds rapport to encourage engagement
- Gathers evidence
- Conducts interviews and prepares written summaries
- Requests records and evidence from other sources (e.g. police reports, security footage)
- Prepares a written report to summarize what you did and what you collected

Email to Complainant (1 of 4)

Dear [Complainant],

My name is _____ and the Title IX Coordinator has assigned me to investigate your case. I would like to meet with you to discuss what you remember about your encounter. Do you have time to meet with me on March 10th at 12:30 in the conference room? You may bring an advisor of choice with you, so if that date and time is not convenient for both of you, please let me know a few times that would work better.

Email to Complainant (2 of 4)

There is nothing you need to do to prepare for our interview, but if you wish, you may want to begin gathering any evidence you may have, such as text messages or videos from the night in question. You may also want to think about potential witnesses that may be helpful for me to talk to. However, this isn't required to complete before we meet.

Email to Complainant (3 of 4)

If you are disabled and need **reasonable accommodations** to participate, or if you speak another language and would like an **interpreter** to be present, please let the Title IX Coordinator know and we can make those arrangements.

Email to Complainant (4 of 4)

When we meet, we can talk through any questions you may have for me about the **process**, and we will discuss the **prohibition against retaliation** against anyone that participates in the process. I am also happy to address any questions beforehand if you'd like. In the meantime, if you need any **supportive measures**, please contact the Title IX Coordinator.

What About Respondent?

- Don't leave the Respondent hanging
- Make contact when you make contact with the Complainant.
- Remember: "What we do for one, we do for the other."

Email to Respondent (1 of 4)

Dear [Respondent],

My name is _____ and the Title IX Coordinator has assigned me to **investigate your case**. My first step will be to meet with the other party in this case to get more information about the formal complaint. I am in the process of setting that meeting up.

Once I have conducted that interview, I will reach back out to you to set up a time to interview you. You will be permitted to bring an advisor of choice to that interview.

Email to Respondent (2 of 4)

There is nothing you need to do to prepare for our interview, but if you wish, you may want to begin gathering any evidence you may have, such as text messages or videos from the night in question. You may also want to think about potential witnesses that may be helpful for me to talk to. However, this isn't required to complete before we meet.

Email to Respondent (3 of 4)

If you are disabled and need **reasonable accommodations** to participate, or if you speak another language and would like an **interpreter** to be present, please let the Title IX Coordinator know and we can make those arrangements.

Email to Respondent (4 of 4)

When we meet, we can talk through any questions you may have for me about the **process**, and we will discuss the **prohibition against retaliation** against anyone that participates in the process. I am also happy to address any questions beforehand if you'd like. In the meantime, if you need any **supportive measures**, please contact the Title IX Coordinator.

The Investigator Spiel

- Explain your role
- Explain how information will be shared in the process
- Explain the prohibition against retaliation
- Explain amnesty provision

Explain Your Role (1 of 2)

“As the investigator, my job is to gather evidence, interview witnesses, and prepare summaries of those interviews.”

“Today, I’ll be taking notes so that I can prepare a good summary of our conversation, but I want to make sure it’s accurate, so I’ll send you a copy for your review. You’ll get the opportunity to suggest changes to make sure that it’s complete and truthful, and that I’ve properly captured your side of the story.”

Explain Info Sharing

“When the summary is finalized, it will go into the case file. Both parties are going to get a chance to look at the case file, so they will see what you tell me today. The summary will also be shared with the hearing officer, so if you get called as a witness to the hearing, it will be what people use to ask you questions.”

Explain Your Role (2 of 2)

“In addition to drafting interview summaries, I’ll also draft a report that summarizes what I’ve done to investigate, and the information I’ve collected. I do not make decisions about what happened or whether the policy was violated. A hearing officer has that job.”

“The goal is for me to collect information to help the hearing officer understand what happened so that they can make a good decision in this case, which is why I’m very thankful that we’re speaking today.”

Retaliation Prohibition

“Our policy prohibits retaliation, and there’s a technical definition for that. But listen – if anyone makes you uncomfortable because you’ve spoken with me or participated in this process, please tell me right away. It may not rise to the level of retaliation under the policy, but there are still things we can do to address it. And if you’re feeling uncomfortable, chances are good that other folks are, too, so you’ll be doing them a favor by reporting it.”

Retaliation – More Oomph

“Please don’t do one of these two things:

- 1) Re-read the policy and decide you don’t need to tell me because you don’t think it rises to the level of a policy violation; or
- 2) Decide that you are strong enough to handle it and don’t tell me.

You might be strong, but maybe other witnesses are experiencing the same thing and they might not be strong enough. I’d rather help address things before they get too complicated, so please let me know.”

Amnesty Explanation

“Our policy gives you amnesty for personal drug and alcohol use, and it gives amnesty for other witnesses and the parties also. So, if any part of your story involves people using drugs or alcohol, please know that we’re not going to bring student conduct charges in this situation. We want you to feel comfortable telling us the whole truth about the evening, and this is more important than underage drinking or drug use.”

Northwestern:

“To encourage reporting, an individual who makes a good faith report of sexual misconduct that was directed at them or another person or participates in an investigation as a witness will not be subject to disciplinary action...unless the University determines that the violation was serious and/or placed the health or safety of others at risk.”

Handling Advisors

- Must have FERPA release if students are involved and the advisor is not an employee
- Title IX Coordinator can help set expectations for advisors up front
- Communicate with the party and copy the advisor: “Your advisor asked _____, so I wanted to share my response directly with you.”
- If the advisor submits the party’s written statement, make sure the party adopts that statement as their own. Advisors don’t typically get to submit evidence unless they are witnesses.

Handling Difficult Advisors

- Be prepared with appropriate policy language if an advisor attempts to actively participate in an investigation meeting by answering fact-based questions
 - What about procedural questions?
 - “What we do for one, we do for the other” with respect to advisors
- End the interview and share your concerns with office leadership

Northwestern: An advisor may not speak, write, or otherwise communicate with an investigator, panelist, or appeal reviewer on behalf of the Complainant or Respondent. Advisors may not engage in behavior or advocacy that harasses, abuses, or intimidates either party, a witness, or individuals involved in resolving the complaint. Advisors who do not abide by these guidelines may be excluded from the process.



Interviewing Skills

Preparation, Attention to Detail, and Being Human

Start with your Scope

- This should be documented in the Notice of Allegations
- The NOA should also include information about which policies are at issue
 - Double-check – is the correct policy cited?
- Break down the provisions to elements.

Elementary, My Dear Watson

- For example:
 - ✓ Unwelcome conduct
 - ✓ On the basis of sex
 - ✓ That a reasonable person would determine to be:
 - ✓ So severe, pervasive, and objectively offensive that
 - ✓ It effectively denies a person equal access to the recipient's education program or activity.

Elements as Questions: Brainstorm

- For example:
 - ✓ Unwelcome conduct
 - How did that make you feel?
 - One of the elements in the definition of Title IX Sexual Harassment looks at whether the conduct is “welcome” or “unwelcome.” Can you tell me whether the conduct was “welcome” to you?
 - ✓ On the basis of sex
 - Tell me about your relationship with this person?
 - Do you believe they were romantically interested in you?
 - Did you consider this to be a sexual advance?
 - ✓ That a reasonable person would determine to be:
 - ✓ So severe, pervasive, and objectively offensive that
 - How many times did this happen?
 - Were others around at the time? Did they observe this behavior? Was this material shared with others?
 - ✓ It effectively denies a person equal access to the recipient’s education program or activity.
 - How did this impact you? Did you miss any class because of this? Did you continue to participate in this RSO?

Outline Your Thoughts

- Prepare a bullet point list of things you want to explain at the outset
- Have your policy language at the ready
- Bring any evidence that you may want them to review and comment on
- Prepare an outline of questions
 - Don't forget to ask the complainant about impact if it's an element of your policy language!

Setting the Stage

- Private location – be cautious of windows, traffic in the area, distractions
- Comfortable seating that provides equal positioning for interviewee, interviewer, and advisor (if any)

Start with Relationships

- What year are you? Where are you from originally? What is your major? Where do you live on campus?
- What is your title/position here? How long have you worked here?
- Who did you meet first, Complainant or Respondent? How? When?
- Relationships with other key people in the case (to help assess potential bias)

Get a Timeline

- “What do you remember regarding this situation?”
 - Give them a starting point or let them choose
 - “And then what happened? And what happened next?”
 - Let them deliver a monologue
- Think in terms of a timeline for your report
 - What section headings will help you tell the story chronologically?
 - Are you clear as to which parts of their monologue fit under which section?

Ask Follow-Up Questions

- Go back to each incident on your timeline and flesh out the details.
- If the witness was alleged to have done or said something in particular, check to see if that's accurate
- Cover every element that the individual could have information about
 - Remember: is impact an element in my case?

Consent – Explicit?

- “They gave consent” → “What did you say to them, and what did they say to you?”
- Did you have any conversation about sexual activity?
- Did the other person say anything to you that suggested they were consenting?
- Did the other person do anything that suggested they were consenting?
- Who initiated the sexual activity?

Consent – Implicit?

- Who took off your clothes? Who took off the other person's clothes?
- Was there a condom? Who provided it? Was there any conversation about using protection?
- Did you touch the other person? If so, where?
- Did they touch you? If so, where?

Questions for Respondent

- What did the other person say to you to show consent?
- What actions did the other person do to show consent?
- Were they making any noises during the encounter?
- Did they help position their body during the encounter?
- Did they move your hands during the encounter?

Groundwork for Incapacitation Questions

- Remember: amnesty
- “I want to understand the role that drugs or alcohol may have played in this situation.”
- “I want to understand whether you were capable of giving consent, or whether you were incapacitated due to drugs or alcohol.”
- “I want to understand whether the other person was sober enough to understand and consent.”
- “I am trying to get a sense of how intoxicated the person may have been when you saw them.”

Incapacitation Questions (1 of 2)

- How much alcohol? Any drugs?
- Any medications that may have affected your ability to stay awake, or that might have interacted with alcohol?
- “They were drunk” → What did “drunk” look like?
 - Slurring? Clumsy? Uncoordinated?
 - Able to walk on their own? Need assistance to navigate or complete tasks?
 - Vomiting?
 - Able to carry on a conversation?
 - Oriented to who/what/where/when/why?

Incapacitation Questions (2 of 2)

- Was it a cup or a CUP?
- How many “fingers” of alcohol on the solo cup?
- What type of alcohol was consumed?
- What did they eat? When?

Respondent's Awareness

- Was Respondent there?
- Did Respondent see when Complainant was [fill in symptom]?
- Did Respondent bring Complainant any alcohol/drugs?
- Did Respondent say anything about Complainant's level of intoxication?
- Was any planning done to take care of Complainant? Was Respondent part of that conversation or plan?

Incapacitation: Timeline

- Drinks
- Drugs
- Food
- Complainant's own recall
- Behavioral observations from other
- Electronic information – texts, videos, audio files
- Security footage
- Cards swipes

Sensory Questions

- What do you remember hearing, smelling, tasting, feeling?
- Where was the other person's hand, leg, body weight, etc.?

Paraphrase Questions

- “So, what I heard you saying is...”
- “Let me make sure I understand...”
- “It sounds like... do I have that right?”

Strategic Questions

- “Would it surprise you to learn...”
- “Witness X said.... Do you agree?”
- “Here you said X, but today, you said Not X. Can you help me reconcile those things?”
- “Witness X said this and Witness Y said that. Can you help me understand why they might have different information?”
- “Let’s look at this [evidence] together so I can get a better understanding...”

Final Questions

- Is there anything you thought I would ask you about that we haven't discussed?
- Is there anything else you'd like to tell me?
- Is there anything else you think I should know?

Drafting Interview Summaries

- Virtually every sentence should start with, “Jessica stated...” or “Jessica recalled...” OR
 - Introductory language to reflect that the statement is written from the perspective of the speaker
- Use direct quotes whenever possible and appropriate.
- Don’t use adjectives or adverbs unless they are direct quotes from the witness.
- Avoid pronouns, as they can make a sentence ambiguous.



Capturing Feedback

Opportunities for Feedback (1 of 2)

- Discretionary opportunities
 - After interviews
 - Not required, but may address issues earlier in the process and can help build trust
 - Be consistent
 - Within individual cases (“What we do for one, we do for the other”)
 - Across your caseload

Opportunities for Feedback (2 of 2)

- Mandatory opportunities for feedback per Title IX regs
 - Time for parties/advisors to **review evidence**
 - **10 days** to submit a written response, “which the investigator will consider prior to completion of the investigative report”
 - Time for parties/advisors to **review the investigative report** and respond in writing
 - At least **10 days** prior to hearing

(34 C.F.R. §106.45(b)(5)(vi) and (vii))

Eliciting, Receiving, & Considering Feedback



Practical Tips for Feedback to Interview Summaries and Preliminary Investigative Reports

Eliciting:

- Allow for track changes?
- Send as PDFs?
- Watermarks?

Receiving:

- Track changes (preserve the full document as a pdf)
- Edits via text message
- A separate document or email with edits

Considering:

“Prior to completion of the investigation report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, **which the investigator will consider prior to completion of the investigative report.”**

- **Required for Title IX**
- **Best practice for all other cases**

- Just change the interview summary/PIR?
 - Be careful
 - Depends on the feedback
 - Minor clarifications v.
 - Additional or revised information v.
 - A different account entirely
 - Document your edits and reasons therefor within the summary or report

- Track changes
 - See prior slide for caveats
 - Save red-line version as a pdf?
 - Incorporate by reference
- Text message
 - Take a Screenshot and save to the file
 - Incorporate by reference

- A separate document or email
 - Save document or email as a pdf
 - Incorporate into your version via footnotes?
 - Make sure to incorporate by reference – so add a note to the summary or report – don't just attach it without referencing
 - Don't let this separate document get lost in your file! It may be critically important at the hearing or in drafting an outcome letter.

Managing the Evidence Review & Feedback Process

(1 of 5)



- **System for Sharing Evidence and the Report**
 - Electronic format or hard copy
 - Method to limit ability to copy, print, save, download?
- **Northwestern** uses Maxient for student cases and OneDrive for non-student cases
 - Records shared via OneDrive must be added to Maxient file later

Managing the Evidence Review & Feedback Process

(2 of 5)



- **New information and requests for further investigation**
 - Will be a fact-specific analysis
 - Work with your TIXC, Director, AVP and maybe legal counsel
 - If the question involves issues of relevance – make sure investigators are at the table

Managing the Evidence Review & Feedback Process

(3 of 5)



- **New information and requests for further investigation (Cont.)**
 - Balancing the concerns of a thorough investigation against concerns of timing and process
 - No easy answers
 - Document your decisions
 - Be transparent and “show your work” in the report

Managing the Evidence Review & Feedback Process

(4 of 5)



- **For Title IX cases, tie up as many loose ends as possible before the hearing**
 - Remember – you may have blind spots that already require some attention in the hearing
 - Issues of credibility should be saved for the hearing, but
 - Remember that you are the **gatherer** of all relevant evidence
 - Don't leave the “gathering” part to your Decision-Maker



Preparing the Case File

Redactions

- Sexual predisposition or prior sexual behavior of complainant
- Privileged information where privilege has not been waived
- Medical records where no consent has been granted

What do you include?

- Interview summaries
- Evidence gathered
- Do you prepare a draft report to go with the evidence for review?

How do you share it?

- Technology – can limit ability to print, share, download, screenshot?
- Use watermarks for Complainant/Respondent file?
- In-person review?
- Non-disclosure agreements for technological access?
- How can advisors access it?

Title IX PIR

- Title IX Requirement for Investigation Reports
 - “Fairly summarizes relevant evidence”
 - What you summarize is likely narrower than what you include in the file for review

Sections of the Report

- Procedural History
- Allegations from Notice of Investigation
- Relevant Policy Language
- Investigation Overview
 - Witnesses – Who you spoke with, who declined to participate, who never responded, who was requested wasn't relevant (and why)
 - Evidence – What you gathered, what you tried to gather but couldn't, what you were asked to gather but didn't (and why)

Summary of Information

- Do you want to detail what each witness said?
- Do you want to synthesize and summarize undisputed facts?
- Do you want to do a combination, depending on whether a particular issue is disputed or undisputed?
- Do you want to intersperse evidence, or make it a separate section?
- Do you organize it chronologically or by source?
- Do you organize it chronologically by story or gathered date?
- Do you use complete sentences or bullet points?

Report Attachment

- Put it in a single PDF
- Make a table of contents
- Bonus: Make the table of contents clickable
- Refer to relevant documents when you write your summary
 - Every sentence should have a citation to the attachments

Party Responses

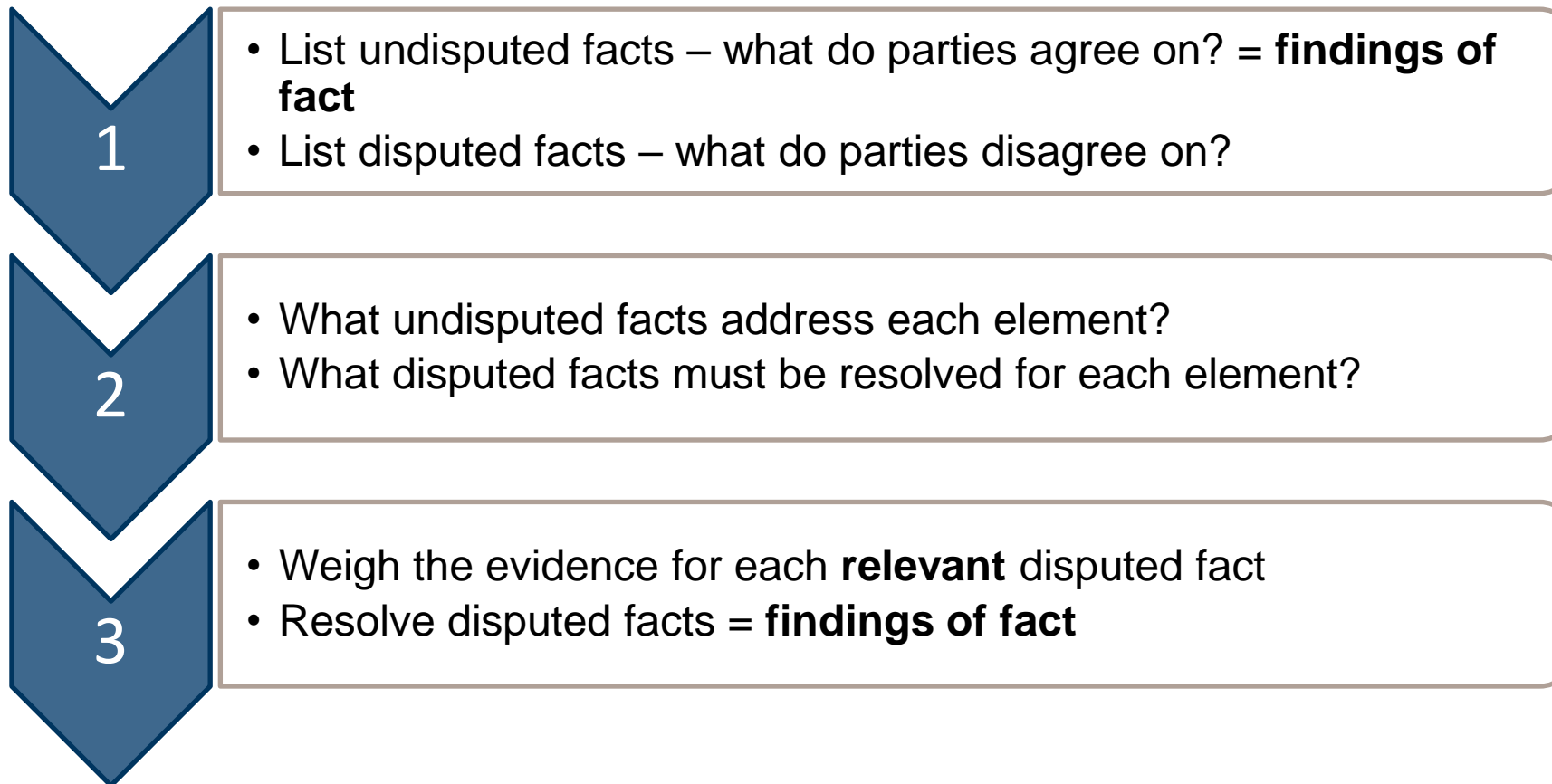
- Do you need to conduct follow up interviews or request additional evidence?
- (Do you need to then circle back and do another round of evidence review/response?)
- Integrate relevant portions of the responses into your summaries.
- Attach the responses.



Weighing the Evidence in Non-Title IX Cases



Fact Finding Process:



Resolving Factual Disputes

Fact Finding Process Step 1:

Undisputed vs. Disputed Facts

- List undisputed facts
 - What do parties agree on? = **findings of fact**
- List disputed facts
 - What do parties disagree on?

Resolving Factual Disputes

Fact Finding Process Step 2:

How do the facts fit the elements?

- What **undisputed** facts address each element?
 - These will be findings of fact that MUST be included
- What **disputed** facts must be resolved for each element?
 - Resolve in next step
 - These will be findings of fact that MUST be included

Resolving Factual Disputes

Fact Finding Process Step 3:

Resolve remaining factual disputes:

- Weigh the evidence for each **relevant** disputed fact
 - Remember the funnel – your list of relevant disputed facts should be pared down by this point

What Goes ON the scale?

Weighing the Evidence in Title IX Cases

- What goes on the scale?
 - Relevant Information
 - Per **Northwestern's** Interim Title IX Policy, statements do not have to be tested by cross-examination in order to be considered
 - Remember that a lack of information may affect its weight

What DOESN'T Go On the Scale?

Weighing the Evidence in Title IX Cases

- What doesn't go on the scale?
 - Rape Shield
 - 34 C.F.R. § 106.45(b)(6)(i)
 - Legally Privileged Information
 - 34 C.F.R. § 106.45(b)(1)(x)
 - Treatment Records
 - 34 C.F.R. § 106.45(b)(5)(i)

#1 Keep An Open Mind

- Keep an open mind until you have completed all party and witness interviews
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence

#2 Sound, Reasoned Decision

- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

#3 Consider All/Only Evidence

- You must make a decision based solely on the relevant evidence obtained in this matter
- You may consider nothing but this evidence

#4 Be Reasonable and Impartial

- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any actual or perceived conflict of interest

#5 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 judgment.

#6 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.

#6 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?

#6 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

#7 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 participating

#8 Standard of Evidence (1 of 2)

Use the your standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.

- Preponderance of the evidence: a fact is more likely than not to be true (30373 fn. 1409)

#8 Standard of Evidence (2 of 2)

- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

#9 Don't Consider Impact

- Don't consider the potential impact of 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.
- **Do not consider the impact of your decision.**

Preamble Considerations

Weighing the Evidence in Title IX Cases (and beyond?)

The Preamble identifies the following considerations:

- That parties may benefit from the opportunity to challenge the opposing party’s “consistency, accuracy, memory, and credibility so that the decision-maker can better assess” the narrative to be believed. (Preamble, 30315).
- That parties may direct the decision-maker’s attention to “implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility” in a party’s statements. (Preamble, 30330).

Quality Versus Quantity

Weighing the Evidence

- It is the weight of the evidence, or its strength in tending to prove the issue at stake, that is important
- The quality of the evidence is not determined by its quantity
 - Don't compare 1 witness to 3 witnesses and make assumptions
 - Quantity *can* be a factor, but it should not be automatic

Even Weight Distribution

Weighing the Evidence

If nothing tips the scale:

- No finding of violation
- Remember your standard of evidence
 - Preponderance of the Evidence at **Northwestern**

Things to Keep in Mind

Structuring Your Outcome Letter in Non-Title IX Cases

- Each case includes at least TWO stories, maybe more
- Set the scene visually
- Be clear as to the source of information. Compare:
 - “Bob stated this happened.”
 - “This happened.”
- Make sure it is readable
 - Could someone unfamiliar with the incident pick up the decision and understand what happened?

Story One of (at least) Two

The Underlying Case

Each case includes at least TWO stories in one:

(1) The facts of the underlying case

- On August 25, 2020, Complainant and Respondent attended a party together at Thompson Point Residence Hall
- Complainant reports A, B, and C
- Respondent reports X, Y, and Z

Story Two of (at least) Two

The Investigation of the Underlying Case

Each case includes at least TWO stories in one:

(2) The investigation of the underlying case

- On August 30, 2020, Complainant filed a formal complaint
- On September 5, 2020, Complainant spoke with Investigator
- On December 10, 2020, Complainant shared the Investigation Report with Witnesses 1, 2, and 3

Different Ways to Tell These Stories

Structural Considerations

- Template
 - Bullet points for student cases
- Typical practice for your institution
- Common structural tools
 - Chronology
 - Subject Matter
 - IRAC or CRAC

Where to Begin?

Structuring Your Decision - Introduction

Introduction

- Should preview both stories
 - How did the underlying story get to OCR?
 - What about the underlying story was reported?
 - What are the **allegations**?
 - Remember to use the names of violations as they existed when the conduct is reported to have occurred

Structuring Your Decision – Procedural History

Procedural Steps must be included

- **(B)** A description of the **procedural steps** taken from the receipt of 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 held (34 C.F.R. 106.45(b)(7)(ii)(B))
 - Works well between the introduction and discussion of facts
 - Pieces of this description may need to be repeated later
 - This is a logical place to discuss determinations re: relevance

Explaining the Facts

Structuring Your Decision – What Happened?

Telling two or more stories

- Infinite ways to structure a decision
 - We are providing suggestions *ONLY*
- Structure may need to change depending on the type of case and information presented
 - Think about this early in the writing process
- Remember – you are telling at least TWO stories to anyone reading your decision
 - Both must be readable

Structuring Your Facts

Remember – Suggestions Only

- Use the structure that works for your institution
- Use the structure that works for the particular case
 - Your structure may change depending on the case
 - Think about the following:
 - Chronology
 - When does synthesizing facts help the reader?
 - When does separating facts help the reader?
 - Where does hearing testimony fit?

Look for opportunities to logically combine related facts

- Undisputed facts at the beginning
 - May give a framework without creating repetition
- Disputed facts
 - Facts may be related by:
 - Timing
 - Source
 - Topic

Synthesis Example – Subject Matter/ Chronologically

Logically combine related facts to tell a story

Pre-Gaming at Apartment B

Complainant and Witnesses A, B, and C, reported that they each took 3 shots of vodka when they arrived at Apartment B. Report, pp. 3, 6-7. This was largely consistent with their hearing testimony, except for Witness C who said they misspoke during their Title IX interview. Hearing Transcript, p. 4. At the hearing, Witness C testified that they only took one shot of vodka at the party. Hearing Transcript, p. 4. Later in the evening, approximately two hours after Complainant and Witnesses A, B, and C arrived and took vodka shots, Respondent arrived at Apartment B with Witness D. During his Title IX interview and at the hearing, Respondent reported that he did not take any shots of vodka and had a clear memory of the night. Report, p. 4; Hearing Transcript, p. 6. Respondent also reported in his interview and at the hearing that he did not observe Complainant take any shots of vodka that night, did not see Complainant stumbling when she walked around the apartment, and did not hear Complainant slur her speech at any time. Report, p. 4; Hearing Transcript, p. 6.

Synthesis Example #1 – Takeaways

Can you apply these takeaways in your cases?

Several things worth noting in this example:

- The information is presented under a topic heading
 - "Pre-Gaming at Apartment B"
- Information comes from different people and is blended together
 - Parties and witnesses
- Information comes from different documents and is blended together
 - The Investigation Report and the Hearing Transcript

Synthesis Example #1 – Takeaways (cont).

More takeaways

Several things worth noting in this example:

- Discrepancies between the investigation and hearing testimony are noted
 - Witness C
- Transitions to demonstrate shifts in time or topic
 - "Later in the evening, approximately two hours after Complainant and Witnesses A, B, and C arrived and took vodka shots, Respondent arrived at Apartment B with Witness D."

Synthesis Example – Individual Factual Allegations

Can you apply these takeaways in your cases?

Report that Respondent choked Complainant

As previously mentioned, Complainant reported four separate acts that might rise to the level of a policy violation. First, Complainant reported that Respondent choked her during their argument on September 1, 2020. Report, p. 1. When Complainant described this incident to the Title IX investigator, she said that Respondent used his hand to encircle her throat and then squeeze, preventing her from breathing or talking. Report, p. 4. Under cross-examination at the hearing, Complainant stated that Respondent used his left hand only, but that his hand was large enough to wrap entirely around Complainant's neck. Hearing Transcript, p. 10. Complainant submitted photographs of her neck during the Title IX investigation, which were included in the investigation report on pages 10 and 11. Two witnesses, Witness A and Witness B, reported to the Title IX investigator that they observed bruising on the Complainant's neck when they saw the Complainant the morning of September 2, 2020. Report, p. 6. Both witnesses provided testimony at the hearing that was consistent with their prior statements to investigators. Hearing Transcript, p. 12.

Respondent has consistently denied that he choked Complainant. In his statement to the Title IX Investigator...

Synthesis Example #2 - Takeaways

Can you apply these takeaways in your cases?

Several things worth noting in this example:

- The information is presented under a topic heading
 - “Report that Respondent Choked Complainant”
- Information comes from different people and is blended together
 - Parties and witnesses
- Information comes from different documents and is blended together
 - The Investigation Report and the Hearing Transcript

Synthesis Example #2 – Takeaways (cont.)

More takeaways

Several things worth noting in this example:

- Discrepancies between the investigation and hearing testimony are noted
 - Complainant's description of the choking
- Transitions to demonstrate shift from individual factual allegation to the response to that allegation
 - First discussing information supportive of Complainant's report
 - New paragraph to discuss response from Respondent

Rationale and Result

“Show Your Work”

Application of Policy to Findings of Fact

- IRAC or CRAC
 - Issue/Conclusion
 - Rule
 - Application
 - Conclusion
- “Rule” = your policy provisions
- “Application” = your explanation of whether the findings of fact amount to a policy violation
- Conclusion = the result of your analysis for each allegations

IRAC Example #1

Applying your Findings of Fact to the Policy

Finding of Fact on a Relevant and Disputed Issue:

A preponderance of the evidence supports a finding that Respondent choked Complainant during their argument on September 1, 2020.

- Issue:** Does Respondent's act of choking Complainant rise to the level of dating violence under Section B of the Title IX Policy?
- Rule:** [Insert definition of Dating Violence from your policy]
- Application:** Explain whether choking during an argument amounts to dating violence under the policy definition
- Conclusion:** "For these reasons, Respondent's act of choking Complainant during their argument on September 1, 2020 amounts to a violation of the Section B of the Title IX Policy, which prohibits dating violence."

IRAC Example #2

Applying your Findings of Fact to the Policy

Finding of Fact on a Relevant and Disputed Issue:

A preponderance of the evidence supports a finding that Complainant was aware of her name, aware that she was having conversations with her roommate and with Respondent, aware of her surroundings, and aware of Respondent's physical advances

Issue: Was Complainant incapacitated at the time of the sexual encounter?

Rule: [Insert definition of Incapacitation from your policy]

Application: Explain whether the information above means that Complainant was incapacitated under your policy.

Conclusion: “For these reasons, Complainant was not incapacitated as that term is defined in the Title IX Policy. However, this does not end the inquiry on consent because Complainant further reported...”

Common Writing Mistakes

Consistent and Precise Language

Inconsistent Terminology

- Referring to individuals or locations differently in different places in the report
- May leave the reader with the impression that you are talking about different places or people
 - Tom, Tom Smith, Mr. Smith, Thomas
 - Tom's room, Room 4A, Hubbard Hall

Word choice

- Be as precise as possible
- This can add time to the writing process, but can pay off in terms of clarity
- Avoid charged language

Common Writing Mistakes

Empathy and Tone

Empathy

- Stay away from charged words of advocacy
 - Clearly/obviously
 - Innocent/guilty
 - Victim/perpetrator
- Watch your use of adjectives and adverbs – unless they are in a quote
 - “really drunk”
 - “forcefully pushed”

Tone

- Be non-judgmental
- Recognize the impact of your words

Common Writing Mistakes

Cite Your Source

Failing to include sources of information

- If explaining this in every sentence weighs down your writing, use footnotes to add clarity. (“Bob stated this happened.”)
- Citing the source of your information helps the reader and underscores your neutrality

Confusing Quotation Marks

- Is the quoted language from the interviewee or the interviewer?
- Did someone else put the language in quotation marks?
- Footnote 4: The quoted language was attributed to Respondent on page 6 of the Investigation report.
- Footnote 10: The quoted language was attributed to Respondent by Claimant during Claimant’s October 10, 2020 Title IX interview.

Common Writing Mistakes Structure

Topic sentences and transitions

- Provide a roadmap in your introduction and under new headings
- Sentences should flow from one-to-another
- Remember – telling two or more stories to someone unfamiliar with the case

Pronouns

- Be careful of pronoun usage so that the reader always knows who is saying or doing what
- When using pronouns, make sure you are using the right pronouns for the individual

Common Writing Mistakes

Miscellaneous

Typos

- They happen to everyone, but
- Typos in every sentence undermine the integrity of a decision

Run-on sentences/Sentence fragments

- Make sure each sentence has a subject and a verb
- If combining multiple independent clauses, consider whether to separate sentences

Editing Exercise #1

Respondent engaged in sexual intercourse with Complainant from behind.

Issues:

- No source of the information
- From behind what? Complainant?
- Word choice

Fix:

According to Complainant, Respondent and Complainant were both standing near the pool table at the time that Respondent began to sexually penetrate Complainant's vagina with his penis. Complainant reported that her body was facing away from Respondent at the time, towards the table, and that Respondent pushed her forward...

Editing Exercise #2

Complainant couldn't explain why she was sitting on the couch by herself.

Issues:

- Pronouns are not clear

Fix:

At the hearing, Complainant testified that she observed Witness A sitting on the couch by herself. Complainant said that she could not explain why Witness A was sitting alone.

Editing Exercise #3

Respondent stated that he was uncomfortable cuddling with women that he was not close with during his freshman year.

Issues:

- Confusing
- Misplaced modifier (to what part of the sentence does “during his freshman year” refer?)

Fix:

Respondent explained that during his freshman year, he was uncomfortable cuddling with women with whom he did not have a close relationship.

Editing Exercise #4

There was no evidence to support Complainant's allegation that the activity occurred without her consent.

Issues:

- Sounds judgmental because the “allegation” is being disregarded
- If Complainant's assertion was not tested by cross-examination, make that clear

Fix:

Complainant told investigators that the sexual activity occurred without her consent. This assertion must be weighed against the statements of two eyewitnesses, both of whom provided consistent accounts of their observations, and the statement of Respondent.

Before You Begin to Write

Plan ahead

Before you begin to write

- Watch the hearing or review the transcript
- Think about how to structure your decision
- Review relevant policies and identify elements of each allegation
- Identify both factual and procedural issues that need to be addressed
- Consider drafting an outline
- Consider writing out your Fact Finding Process

As You Are Writing

Be flexible

As you write

- Don't stick with a structure or outline that fails
- If working with a template, consider talking to others who have used it (if possible)
- Use a checklist to make sure you are addressing the required components
- If you get stuck, put it aside and come back to it
- If you can think out loud with others, do it
 - But not with anyone else playing a role in the case

When You Have a Draft

Critique your work

When you have a draft

- If you have time, set it aside and come back to it later
- Remember to review it from the viewpoint of someone who is unfamiliar with the case
- If possible, have someone else proofread
- Put yourself in the position of the parties
 - Do you feel heard?
 - Do you feel judged?
 - What issues might come up on appeal? Can/Should those issues be addressed now?



Title IX Hearings

Cross-Examination, Relevance Determinations, Breaks, Decorum, and Decisions

- Northwestern uses an external Title IX Decision-Maker
- Hearings are through Zoom and are audio/video recorded
- “[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)
- **“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)

Hearing Presentation Debrief

- Questions?

Upcoming: www.bricker.com/events




- Higher Education **Free** Webinar Series:
 - May 17, 11:00 CT – Title IX Litigation Update
 - June 6, 11:00 CT – Whistleblowers and Retaliation Claims
 - Stay tuned for webinars on the finalized Title IX procedural regulations
- Bricker Graydon & SIU School of Law CLE Webinar Series (also **Free**):
 - June 1, 12:00 CT – Affirmative Action Update
 - June 8, 12:00 CT – Technology Issues in Higher Education
 - June 15, 12:00 CT – Pregnancy and Parenting Update
 - June 22, 12:0 CT – Athletics Compliance Update

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