




University of Cincinnati
May 1, 2024



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Disclaimer



- We will cover compliance requirements and use the University's policy for definitions, but these slides also include best practices.
- 2024 Regulations will go into effect on August 1, 2024, necessitating a revised policy and process for your University—unless a court stays the rules or Congress passes a conflicting law.
- New case law and guidance is being issued all the time.
- Today, we are focusing on skills that will apply regardless of whether you are using the 2020 or 2024 process.

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Disclaimer



- We cannot give legal advice today, but are happy to address hypotheticals.
- The allegations for the scenario we will discuss are serious, but intentionally written with a light touch to allow for creativity in the way our actors and actresses portray the characters, and in the way we respond and handle difficult questioning.
- Use this as an opportunity to explore and ask questions in an intentionally caricatured scenario.

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Reminders



- If you need to step away for any reason, feel free to do so.
- If you have questions or concerns, feel free to chat with us. There will be plenty of opportunities to do so.
- We will be engaging in lots of discussion. If you want to push the group, use a "For the sake of argument..." question format. This makes sure we are considering many perspectives – even ones that may seem counterintuitive.

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Agenda



- Introductions
- Title IX Themes
- Sexual Assault, IPV, and Stalking
- Trauma Informed Approaches
- A Walk Through of our Report
- Roles and Goals
- Small Group Prep
- Questioning our Parties
- Credibility Determinations
- Deciding the Case
- Writing the Decision

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Can We Post These Training Materials?



YES – Post away!


Under the 2020 regulations,

- 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.



Under the 2024 regulations,

- posting will no longer be required but you must still keep training records.


Introductions 


- Name
- Role(s) on the Title IX team
- Primary job, if you're not full-time in Title IX
- The fictional character you think would make the best investigative buddy

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TITLE IX TODAY:
Themes

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Title IX is an Equity Statute 



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What are Your Institution's Values?



Consider your ethic of care.

- When you think about what your community expects in terms of addressing sexual misconduct, what values do they want your team to display?
- Do you think institutional values align between administration, faculty and staff?
- What about students?
- What about the town or city around your institution?

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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?

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Themes – Duty to Protect



All members of your campus 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*

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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 is happening, they will assume nothing is happening

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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.

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Themes – Continuous 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 ensure you remain neutral.

Confidentiality Foundations



- Information learned in a Title IX case is protected as private and can only be shared on a “need to know” basis.
- Disclosing info with those who don’t need to know may be retaliation.
- Who needs to know – and what do they need?
 - Roxy wants to move to new residence hall as a supportive measure.
 - Matthew wants a midterm rescheduled so he can sit for his interview when his advisor is available.
 - Roxy is distraught and needs a counseling appointment.
- What are some other common scenarios?

FERPA Foundations



FERPA protects education records from disclosure without consent, except in certain cases such as:

- To another school official with a legitimate educational interest (e.g. need to know)
- Health and safety emergency
- To facilitate transfer to another institution
- To the parent of a tax dependent student
- Disclosure is required pursuant to a subpoena (may have to notify the student)

Sexual Assault, Intimate Partner Violence, and Stalking

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Data and Statistics



More Disclaimers

- Data/statistics should not influence your decision in any particular Title IX case
- We didn't do the research ourselves and can't vouch for it
- Some of the studies use the terms "offender, victim, and rape." Please use policy definitions (complainant, respondent) when you handle Title IX cases
- Okay but really, statistics SHOULD NOT influence your decision in any particular Title IX case

Sexual Assault Data 1 of 3



- Over half of women and almost 1 in 3 men have experienced sexual violence involving physical contact during their lifetimes.
- 1 in 4 women and about 1 in 26 men have experienced completed or attempted rape.

CDC.Gov Fast Facts: Preventing Sexual Violence, available at <https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html> (last accessed April 29, 2024)

Sexual Assault Data

- Types of sexual contact reported by U.S. women

Figure 1

Lifetime Reports of Sexual Violence — U.S. Women, National Intimate Partner and Sexual Violence Survey, 2016/2017 Annualized Estimates¹



¹ All percentages are weighted to the U.S. adult population.
² Contact sexual violence includes rape, sexual coercion, and/or unwanted sexual contact.

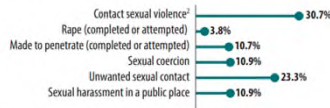
Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023). Located at: [Link to survey: CDC website](https://www.cdc.gov/violenceprevention/pdfs/nisvs/nisvsreportonsexualviolence.pdf).

Sexual Assault Data

-Types of sexual contact reported by U.S. men

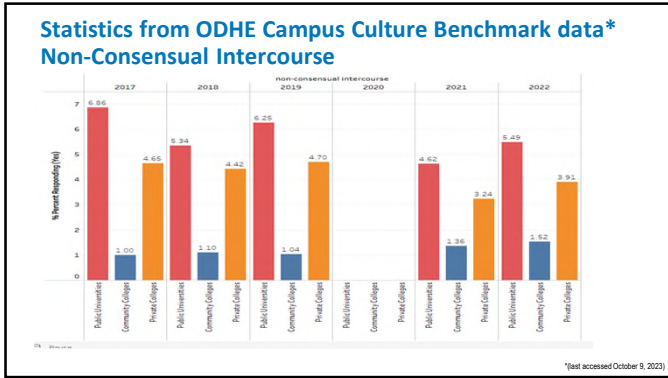
Figure 2

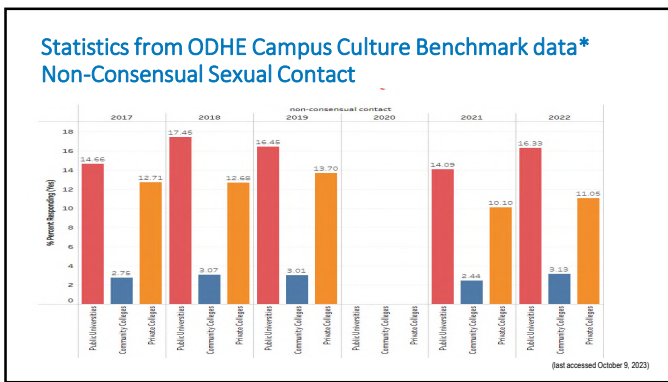
Lifetime Reports of Sexual Violence — U.S. Men, National Intimate Partner and Sexual Violence Survey, 2016/2017 Annualized Estimates¹



¹ All percentages are weighted to the U.S. adult population.
² Contact sexual violence includes rape, being made to penetrate, sexual coercion, and/or unwanted sexual contact.

Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023). located at: <https://www.cdc.gov/violenceprevention/pdfs/nisvs/nisvsreportonsexualviolence.pdf>





Sexual Assault Data: Prevalence INCompliance

- More than 50 % of college sexual assaults occur in August, September, October, or November, and students are at an increased risk during the first few months of their first and second semesters in college.
- For the 2014-2015 academic year, a large portion of incidents reported by females occurred in September or October, particularly for first year students.

• Statistic one: "Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics.*" RAINN sourced from: "Campus Sexual Assault Study, 2007; Matthew Kimble, Andrada Neacsu, et. Al, *Risk of Unwanted Sex for College Women: Evidence for a Red Zone.* Journal of American College Health (2008)."
• Statistic two: Campus Climate Survey Validation Study (CCSVS), 2015

Sexual Assault Data: Alcohol/Drug Use 

- “Survivors impaired by alcohol are more likely to disclose to informal, but not formal support sources than are non-impaired victims.”

Lorenz, Katherine, and Sarah E Ullman. “Exploring Correlates of Alcohol-Specific Social Reactions in Alcohol-Involved Sexual Assaults.” *Journal of aggression, maltreatment & trauma* vol. 25,10 (2016): 1058-1078. doi:10.1080/10926771.2016.1219801.

Data and Statistics: Reporting Data 

- About **65 %** of surveyed rape victims reported the incident to a friend, a family member, or roommate but only **10 %** reported to police or campus officials.

U.S. Dept of Justice, Office of Justice Programs, Office for Victims of Crime, 2017 National Crime Victims' Rights Week Resource Guide: Crime and Victimization Fact Sheets (2017).

Data and Statistics - Impact 

- Approximately **70 %** of rape or sexual assault victims experience moderate to severe distress, a larger percentage than for any other violent crime.

U.S. Dep't of Justice, Bureau of Justice Statistics, *Special Report: Socio-emotional impact of violent crime* (2014).

- **81%** of women and **35%** of men report significant short- or long-term impacts of sexual assault, such as post-traumatic stress disorder (PTSD).

Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, The National Intimate Partner and Sexual Violence Survey (NISVS); 2010 Summary Report (Nov. 2011).

Sexual Assault: Common Concerns



- Be cautious of questions that appear to blame the party for what happened or they will shut down and stop engaging.
- Better options:
 - Explain why you need information on alcohol/drug use, what the party was wearing, etc. before you ask the questions.
 - Explain the concept of consent to the parties so that they can understand why you need detailed information on the sexual encounter.
 - Check your tone constantly so as to encourage continued sharing of information.

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Dating Violence – UC Definition



Violence, on the basis of sex, committed by a person who is or has been in a social **relationship of a romantic or intimate nature** with the complainant.

The existence of such a relationship shall be determined based on the complainant's statement, and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

For the purposes of this definition, dating violence **includes**, but is not limited to, **sexual or physical abuse or the threat** of such abuse.

Dating violence **does not include** acts covered under the definition of **domestic violence**.

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Domestic Violence – UC Definition



Violence, on the basis of sex, committed by:

- A current or former spouse or intimate partner of the complainant;
- A person with whom the complainant shares a child in common;
- A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
- A person similarly situated to a spouse of the victim under the domestic/family violence laws of the jurisdiction;
- Any other person against an adult or youth victim who is protected from that person's acts under the domestic/family violence laws of Ohio

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IPV vs. Healthy Relationships



- Counseling individuals on healthy and unhealthy relationships will teach them about warning signs and how to handle problematic behavior.
- The line between healthy and unhealthy is not typically where your policy draws the line for disciplinary purposes.
- How do you partner with your counseling center and local domestic violence shelter to ensure consistent messaging with regard to the policy, as opposed to healthy relationship dynamics?

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Common Concerns in IPV Situations



- Supportive measures to ensure the parties can be separate and feel safe
- Retaliation is often a critical concern – parties may still have a relationship
- Consider whether parties need contingency plans as part of their supportive measures if safety concerns arise
- Balancing third-party reports of violence and safety concerns with complainant's refusal to participate in the process
- No contact order violations as continued evidence of underlying policy violation allegation
- It is not uncommon for both parties to be complainants and respondents. Watch for this scenario and ensure you provide appropriate intake for both.

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IPV: Questions



- What is the relationship between the parties? Do they agree?
- What is the act of violence described?
- Under what circumstances did the act of violence occur?
- If the situation involved mutual combat:
 - Was one person the initiator and the other acting in self defense?
 - Should an investigation be opened against the complainant as well, if there was violence alleged to have been completed by the complainant?

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Stalking Data



- **3.4 million** individuals aged 16 or older (1.3%) were stalked during 2019. This represents a slight drop from 2016 (1.5%). Females were stalked more than twice as often as males.
- **1 in 6** women and **1 in 17** men have been stalked at some point in their lives.
- Nearly **54%** of female victims and **41%** of male victims experienced stalking before the age of 25.
- First statistic: U.S. Department of Justice, Bureau of Justice Statistics, "Stalking Victimization, 2019" published February 2022.
- Second and third statistics: CDC "Preventing Stalking" fact sheet, accessed October 29, 2022.

ODHE Stalking Data



Stalking



- "Stalking" is engaging in a course of conduct directed at a specific person on the basis of sex 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.
- To qualify under Title IX, it must be sex-based stalking.

Stalking: VAWA Elements



“Course of Conduct”

- 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.

“Reasonable Person”

- A reasonable person under similar circumstances and with similar identities to the victim.

“Substantial emotional distress”

- Significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

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Stalking: Common Concerns



- Clearly defined no-contact orders can be helpful to keep the parties apart and help calm the situation.
- Complainants often fear the respondent won't honor no-contact orders, especially if they have already asked the respondent to stand down. Think of ways to help address this concern through supportive measures.
- Stalking after a no contact order may constitute additional instances of the underlying alleged policy violation, which may mean you need to run it through your Title IX process.

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Stalking: Considerations




- Outline a timeline of the “course of conduct” aspect of the allegations
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered
- Have you asked questions of parties and witnesses regarding the potential impact of the conduct on the complainant?

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Trauma Informed Approaches

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Role Reminders 

- If your friend tells you something terrible happened to them, it's not your job to interrogate them or figure out what happened.
 - In this situation, be supportive and listen.
- If you are in your role as a Title IX team member and someone tells you something terrible happened to them, it might actually be your job to ask detailed questions and make a determination regarding a policy violation.
 - The institution still provides support to people during the process.
 - That being said, you may still be required to ask tough questions and make tough decisions.

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Goal: Don't Make This Any Harder 

- The process is difficult.
- Telling your story is difficult.
(and telling your story *multiple times* can makes it more difficult)
- Reliving trauma is difficult.
- Being accused of something is difficult.
- Everyone brings their own burdens, history, and past trauma, which may be triggered by the process.

Consider: How can we get the best evidence for consideration when *everyone* we talk to may be traumatized?

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First: Make No Assumptions



- Treat everyone as though they may be traumatized, so you aren't picking and choosing who you *think* may be responding to trauma—and then subconsciously holding them to different standards.
- Different people who undergo trauma may present and behave differently.
 - Some may cry, or be angry, or appear calm.
 - This makes demeanor a poor indicator as whether someone is traumatized, particularly because people can display all of these traits for other reasons.
 - So don't assume only those who are crying or angry need supportive measures!

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Second: They Are Not You



- There is no "right way" to behave.
 - If you disagree with that statement, consider if you are imposing your own values and judgments—informed by your background—on others, when you should be neutral.
- A value judgment is different than evaluating the *plausibility* of behavior. Compare:
 - Complainant cried during the sexual encounter. (plausible)
 - Complainant said nothing during the sexual encounter. (plausible)
 - Complainant had a Facetime conversation with a third party during the sexual encounter, but that person had no indication that Complainant was engaged in performing oral sex on the Respondent. (Huh? We have questions.)

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Third: Neurobiology of Trauma Is A Thing



- Those who experience a traumatic event may have difficulty processing the event as it is happening and after.
- Trauma may make it difficult to sequence events in a chronological order.
- Difficulty processing and sequencing can result from other reasons not related to trauma.
- Signs of trauma ≠ policy violation
- No signs of trauma ≠ no policy violation

Being aware of the effects of trauma gives us a broader definition of what behavior might be *plausible* in a particular situation.

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So... What Does This Mean, Practically? 

- Make interviewees comfortable and offer to take breaks when needed.
- Give *everyone* the space to tell their own narrative in their own way.
 - "What happened? And then what happened? What happened next?"
 - "Tell me more about..."
- Once the person has completed their monologue, ask follow-up questions for clarification.
- If details are still unclear, ask specific yes/no questions. (Write down the question and the answer.)
- When someone has trouble giving details, sensory cues are sometimes helpful.

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Emotions During Interviews 

- Individuals may experience a range of emotions, including sadness, frustration, and anger (maybe at you!). It's normal.
- Try to keep emotions from preventing the interviewee from engaging. Strategies:
 - Anticipate the topics that may trigger negative responses (e.g. what someone was wearing, alcohol/drug use).
 - Introduce these topics by explaining why the information is needed in the context of your investigation.
 - If an emotions become a barrier, consider taking a break, explaining why you are asking what you are asking, and restarting.
- Main goal: keep people talking and sharing their stories.

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First Interview vs. Second Interview 

- The 1st interview provides space to tell a person's story. Get all the details. Be curious.
- A 2nd interview may be necessary where
 - New information is obtained
 - You need to follow up because other information is obtained that contradicts that person's story. Again, get all the details, be curious, and don't take an accusatory tone.
- Always walk into an interview assuming there are logical explanations for everything. This keeps you asking questions, and it keeps people answering them.

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Trauma and Decision Making



- Focus on **corroboration, consistency, plausibility, and reliability.**
 - Is there anything else in the file that backs up this assertion?
 - Has the person been consistent over time (recognizing that it is hard to say exactly the same words when telling the story multiple times)?
 - Is the person's story plausible?
 - Was the person in a reasonable position/state of mind to properly observe and remember?
- Avoid making decisions based on demeanor, as there are too many reasons—including cultural norms—that may affect how some people behave and how you perceive it.
- These are good practices regardless of whether anyone may be traumatized.

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A Walk-Through of our Report

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Overview of Procedure



- The report should "fairly summarize relevant evidence" collected during the investigation.
 - What you summarize is likely narrower than what you include in the file for review.
- Parties get 10 days to review evidence (and draft?) and provide written feedback.
- Investigators then prepare final report.

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Sections of the Report



- Procedural History
- Allegations (from Notice of Investigation)
- Investigation Overview
 - Witnesses – Who you spoke with, who declined to participate, who never responded, who was requested but 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)
- Relevant Policy Language (Definitions)

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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?

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Attachments to Report



- 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
- Include all relevant evidence
- Include Formal Complaint(s) and Notice(s) of Allegations

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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.
- And speaking of party responses, let's talk more about incorporating feedback!

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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

<p><u>Eliciting:</u></p> <ul style="list-style-type: none"> • Allow for track changes? • Send as PDFs? • Watermarks? 	<p><u>Receiving:</u></p> <ul style="list-style-type: none"> • Track changes (preserve the full document as a pdf) • Edits via text message • A separate document or email with edits
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Capturing Feedback (1 of 3) 

- 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

Capturing Feedback (2 of 3) 

- 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

Capturing Feedback

(3 of 3)



- 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.

Roles and Goals


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The Parts You'll Play



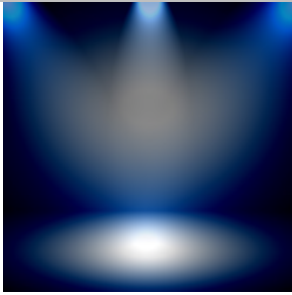
- Need volunteers for Roxy and Matthew
- We must split into three teams:
 - Team Roxy
 - Team Matthew
 - Team Hearing Panel
- We will break for small group preparation in a moment. But first, let's talk about the roles we'll play.

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Three Roles: Three Spotlights 

The central spotlight is neutral, but it does not fully illuminate the person onstage.

Only by adding spotlights that come from different angles can we fully illuminate the person.




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Role: Hearing Panel Member 


- Reviews the evidence file, final investigation report, and responses of the parties
- Considers what is missing, what is unclear, and what elements are disputed
- Asks relevant questions at hearing, adjusting as other questions are asked
- Is neutral in both the manner they act and the questions they asked

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Hearing Panel Member: Your Goal 


- Have enough information on every element of every charge so that you can render a decision by a preponderance of the evidence
- Have enough information to make decisions regarding the credibility of the parties and witnesses
- Make relevancy determinations after every question asked by the advisors
- Maintain decorum at all times, by all participants

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Role: Advisor 


- Reviews the evidence file, final investigation report, and responses of the parties
- Assists their party with preparation of relevant questions for hearing
 - Goals is to assist the Decision-Makers with understanding the case from their party's perspective
- Asks relevant questions at hearing, adjusting as other questions are asked
- Is not neutral, as the role is inherently biased towards their party, but still maintains decorum standards at all times

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Advisors: Your Goal 

- The role of the advisor is to help the Panel understand your party's perspective by:
- Highlighting important evidence to help your party prove that the elements are met/not met
- Highlighting discrepancies in the evidence that disprove the other party's story
- Highlighting credibility issues of the other party and witnesses where they are testifying against your party

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What Don't You Know? 

- Hearing Officers: If you need to know it to make a determination, you have the obligation to ask the question.
- Advisors: If you don't know the answer to the question before you ask it, it may harm your party. Weigh the benefits of asking carefully before proceeding.

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What DO You Know?



- Hearing Officers: It can be helpful to ask questions when you think you already know the answer, to ensure that you are able to sequence events correctly and that you understand nuances in the testimony.
- Advisors: If the testimony is going to help tell your party's story, it can be helpful to bring it to the forefront of the Hearing Officer's mind.

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Disputed Facts?



- Hearing Officers: Question on disputed facts so that you can weigh credibility, make a determination, and explain your rationale.
- Advisors: Highlight areas for the Hearing Officer where the other party's story doesn't make sense by asking questions to discredit the witness, or to provide corroborating evidence for your party's story.

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Make Your Plans



- Hearing Officers:
 - What facts do you wish to nail down?
 - What disputed points do you need information on?
 - Who will cover which topics?
 - Which questions will be asked?
- Advisors:
 - Use this discussion to help frame your questions. What key points do you think need to be addressed to highlight your party's story?
 - What information is most critical of your party's story, and what can help highlight the weaknesses in that information as compared to the strengths in your information?
- Each group gets a limited time to conduct questioning – be efficient!

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For Today: Pick a Goal



- Consider choosing a goal for yourself to try to reach through questioning:
 - Advisor: "By questioning Roxy, I will try to show that she was feeling guilty for not going out, to corroborate Matthew's story."
 - Hearing Officer: "In questioning Matthew, I will try to better understand what the relationship was like between April 8th and their breakup."
 - Etc.

Coordinate with team members to make sure you are covering all needed areas.

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Mock Hearing

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Credibility Determinations and Deciding the Case

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Credibility, 2001 Guidance



- The guidance was rescinded but the list of factors to consider is still relevant:
 - Level of detail and consistency of accounts
 - See if corroborative evidence is lacking where it should logically exist
 - Pattern of behavior by the respondent
 - Evidence of the complainant’s reaction or behavior after the encounter*
 - Evidence of whether the complainant took action to protest the conduct soon after the alleged incident*
 - Other contemporaneous evidence – writing a journal, telling a friend

*The Department noted that counterintuitive responses and delayed reaction may be normal.

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Preamble Considerations



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

The 2020 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).

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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

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Resolving Factual Disputes 


• Fact Finding Process:

- 1
 - List undisputed facts – what do parties agree on? = **findings of fact**
 - List disputed facts – what do parties disagree on?
- 2
 - What undisputed facts address each element?
 - What disputed facts must be resolved for each element?
- 3
 - Weigh the evidence for each **relevant** disputed fact
 - Resolve disputed facts = **findings of fact**

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 the most current ED guidance, 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




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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)



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#1 Keep An Open Mind



- Keep an open mind until all statements have been tested at the live hearing
- 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 AND considered only the evidence that can remain (statements in the record might have to be removed from consideration if not tested in live-hearing)

#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 and only statements in the record that have been tested in cross-examination
- 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 and consider whether recusal is appropriate

#5 Weight of Evidence



- 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



- Weigh the evidence
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.
- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?
- 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 cross-examination or questioning.

#8 Standard of Evidence




- 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 means it is more likely than not that something occurred.
- 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.

#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.
- *It bears repeating*, do not consider the impact of your decision.

Even Weight Distribution 

Weighing the Evidence


If nothing tips the scale:

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

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After the Hearing

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The Decision: Required Parts 

Within ten business days, the panel must issue its written determination simultaneously to both parties, including:


- Identification of the allegations
- Procedural steps taken from Formal Complaint through hearing, including notifications to the parties, interviews with parties/witnesses, site visits, methods used to gather other evidence, and hearings held
- Findings of fact supporting the determination
- Conclusions regarding the application of your policy to the facts
- Statement of, and rationale for, the result as to each allegation, including a determination of responsibility and sanctions
- Whether remedies should be provided to the complainant
- Appeal rights

Our Typical Outline 

- Allegations
- Summary of Findings
- Standard of Review
- Coverage/Jurisdiction
- Procedural History
- Findings of Fact
- Applicable Policy Language
- Analysis and Rationale
- Conclusion

Appeals

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Bases for Appeal at UC 

1. Procedural irregularity that affected the outcome of the matter.
2. New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter.
3. The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.
4. A sanction is not commensurate with the violation.

Process Requirements



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

You Are Deciding the Appeal



- I will deliver the appeal based on the decision reached by the workshop participants
- How does your group decide on each?
- Refer to the previous slides for reminders on the standard.

Written Appeal Decision



- Regulations are clear that you must describe the result and rationale for the result.
- Address each basis for appeal individually, with a result and rationale for that result.
- Refer back to the policy for support.
- Be clear and transparent in the rationale for the result
- Appeal decisions are typically much shorter than the original report or decision.

Last Thoughts



- Thanks to all our volunteers today!
- Upcoming free webinars:
 - May 10th, 12:00 ET – Higher Education Title IX Litigation Update
 - May 15th, 3:00 ET – Title IX Regulations Update for Trustees
 - August 29th, 1:00 ET – Trauma-Informed Resolution Process

We will be offering trainings all summer and into the fall on the new Title IX regulations. Watch for policy bootcamps and in-depth sessions on particular topics.

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