

Title IX Decision-maker Annual Training

JULY 16, 2025

Agenda

- Title IX Overview
- Title VI Overview
- The Title IX Process: What happened prior to the hearing?
- Hearing Basics
- Hearing Preparation & Evidence Review
- Assessing Credibility
- Trauma-Informed Considerations
- The Hearing
- Making a Determination
- Appeals & Process Wrap-Up



Title IX Overview

Title IX Basics

Prohibits sex
discrimination in
education programs
and activities

Applies to students,
employees,
volunteers, etc.

Includes sexual
harassment

Key terms

- **Reporting party/Complainant:** individual who experienced the sexual harassment
 - **Third-party Report:** A report from someone else about an individual who experienced sexual harassment
 - **Witness:** An individual who may have knowledge about the incident
- **Responding party/Respondent:** individual accused of sexually harassing someone
- **Grievance process:** the investigation process and/or informal process used by an institution to address formal complaints of sexual harassment
- **Formal complaint:** document requesting the institution to move forward with the grievance process. Can be filed by either the reporting party or the Title IX Coordinator.
- **Supportive measures:** resources or accommodations that help either party in the aftermath of a report and/or during a grievance process. Access to supportive measures is not contingent upon pursuing a grievance process.

Institutions must:

- Respond promptly in a manner that is not “deliberately indifferent”
- Investigate formal complaints
- Follow and publish the grievance process outlined in the regulations
- Take action to *stop the harassment, prevent the recurrence, and remedy the effects*
- Designate a Title IX Coordinator
- Publish a Notice of Nondiscrimination
- Disseminate a policy prohibiting sex discrimination
- Offer supportive measures
- Conduct training for Title IX personnel and those with heightened responsibilities
- Train students and employees

Training Mandates

DEFINITIONS

- Sexual harassment
- Education program or activity

OTHER

- Institutional policies and procedures
- Any technology for live hearings
- Training materials must be posted on institution's website and maintained for seven years
- Training cannot rely on sex stereotypes

CONCEPTS

- Conducting an impartial investigation and hearing process
 - ... While protecting the safety of complainants and promoting accountability
- Serving impartially, without bias, and without conflicts of interest
- Relevance regarding questions, evidence, and the investigation report
- Dynamics of sexual assault, dating violence, domestic violence, and stalking

Office for Civil Rights (OCR)

ROLE

- Establishes compliance standards and guidance
- Enforces Title IX through investigations and compliance reviews

GUIDANCE

- Regulatory and sub-regulatory guidance
- Dear Colleague Letters, Amendments to Title IX Regulations, Q&As, Notices of Interpretation

The Clery Act and the Violence Against Women Act (VAWA)

CLERY

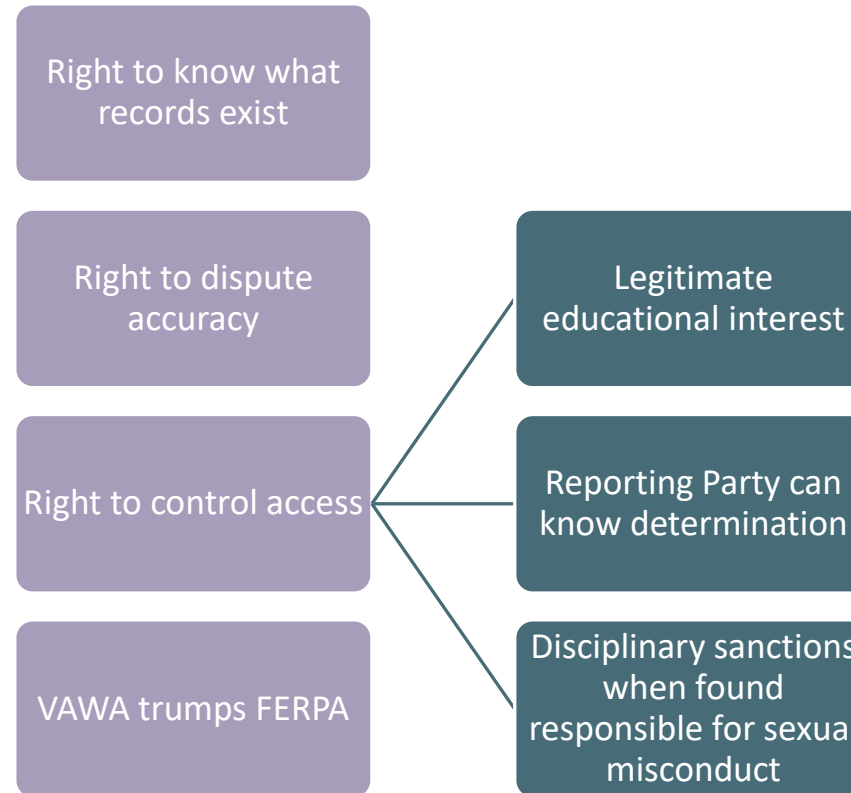
- Consumer protection law
- Institutions must provide accurate, timely, and complete information on specific types of crimes that occur on or adjacent to campus, including sexual assault
- Clery Act violations come with significant fines
- Policy, procedure, prevention, and training requirements for
 - Dating violence
 - Domestic violence
 - Stalking
 - Sexual assault
- Requires Annual Security Report including institution's policies and crime statistics

VAWA

Institutions must:

- Prohibit sexual assault, dating violence, domestic violence, and stalking
- Provide clear definitions for the above misconduct and for consent
- Incorporate training and prevention programs for administrators, students, and employees

What about FERPA?



Minn. Stat. § 135A.15

INSTITUTIONS MUST:

- Incorporate sexual harassment policy requirements
- Inform victims of their rights
- Include reporting procedures and disciplinary processes in their policy
- Incorporate an amnesty policy
- Coordinate with law enforcement
- Health services must be confidential and screen for sexual violence and harassment
- Provide an online reporting system that permits anonymous reports
- Report annual statistics on **sexual misconduct**
- Data privacy stipulations
- Training requirements for administrators, campus security, and students
- Allow advisors to make opening and closing statements during a hearing
- [Full Statute Link](#)

Minn. Stat. § 135A.15

“Sexual misconduct” includes:

- Sexual Assault, Dating Violence, Domestic Violence and Stalking
- Sexual Extortion
- Sex Trafficking
- Nonconsensual Dissemination of Sexual Images and Deepfake Sexual Images



When does Title IX apply?

Quid Pro Quo

- Employee conditions an outcome on an individual's participation in unwelcome sexual conduct

Hostile Environment

- Unwelcome conduct that is **so severe, pervasive, and objectively offensive** that it denies a person equal access to a program or activity

VAWA Crimes

- Sexual assault
- Dating Violence
- Domestic Violence
- Stalking

Sexual harassment =
conduct on the basis of sex that satisfies at least one of the above

Hostile Environment Considerations

- Perspective of a “reasonable person” (consider age, abilities, positions of authority, etc.)
- Is it “severe, pervasive, **and** objectively offensive”?
- Does the conduct deny “equal access”? Does not need to be a total or complete loss of access, but **equal**?
- Consider the type of misconduct, how often it happened, where it took place, etc.

Sexual Assault

Any sexual act directed against another person, without the consent of that person, including instances where the individual is incapable of giving consent.

Rape: Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without their consent, including instances where they are incapable of giving consent because of age or temporary or permanent mental or physical incapacity.

Fondling: The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

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

Sexual Assault contd.

Any sexual act directed against another person, without the consent of that person, including instances where the individual is incapable of giving consent.

Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent

Sexual assault with an object: The use of an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Sodomy: Oral or anal sexual intercourse with another person, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity

Sexual Misconduct

Remember policy must also address **sexual extortion**, **sex trafficking** and **deepfake images**.

MN Law changed sexual **assault** to sexual **misconduct**, which is defined to include:

- Sexual assault
- Domestic violence
- Dating violence
- Stalking
- Nonconsensual distribution of sexual images including deepfakes depicting intimate parts or sex acts
- Sexual extortion
- Sex trafficking

Interacting with Complainants: *Dynamics of Sexual Violence*

- Most victims know the perpetrator.
- The vast majority of incidents go unreported to law enforcement.
- Alcohol and/or drugs are involved in many instances of assault (particularly on college and university campuses).
- Most sexual assaults are committed without severe physical violence and without a weapon.
- Most victims do not physically resist during an assault.

https://evawintl.org/wp-content/uploads/Module-2_Dynamics-11.9.2020.pdf

<https://rainn.org/effects-sexual-violence>

Nonconsensual
distribution of sexual
images...

... including deepfakes depicting
intimate parts or sex acts.

Could include “revenge porn”

Deepfake = “an image or recording that has been convincingly altered and manipulated to misrepresent someone as doing or saying something that was not actually done or said” (Merriam Webster definition)

Extortion

Subdivision 1. **Crime defined.** (a) A person who engages in sexual contact with another person and compels the other person to submit to the contact by making any of the following threats, directly or indirectly, is guilty of sexual extortion:

- (1) a threat to withhold or harm the complainant's trade, business, profession, position, employment, or calling;
- (2) a threat to make or cause to be made a criminal charge against the complainant, whether true or false;
- (3) a threat to report the complainant's immigration status to immigration or law enforcement authorities;
- (4) a threat to disseminate private sexual images of the complainant as specified in section 617.261, nonconsensual dissemination of private sexual images;
- (5) a threat to expose information that the actor knows the complainant wishes to keep confidential; or
- (6) a threat to withhold complainant's housing, or to cause complainant a loss or disadvantage in the complainant's housing, or a change in the cost of complainant's housing.

Sex Trafficking

Subd. 7a. **Sex trafficking.** "Sex trafficking" means:

(1) receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual; or

(2) receiving profit or anything of value, knowing or having reason to know it is derived from an act described in clause (1).

Consent

Institutions are not required to maintain a particular definition of consent; however, they should include a definition in their policy.

Consent is words or overt actions by a person clearly and affirmatively communicating a freely-given, present agreement to engage in a particular form of sexual contact.

Incapacitation

- An individual's physical and/or mental inability to make informed, rational judgments
- Incapacitated individuals cannot give consent to sexual contact
- Intoxication vs. Incapacitation
- Examples include sleep, unconsciousness, or intermittent consciousness
- Signs could include slurred speech, difficulty walking, vomiting
- May also exist due to mental or developmental disability
- **Frequent decision point for adjudicators:** *1) Was the complainant incapacitated; and 2) did or should the respondent (or a reasonable person) know/have known?*

Dating Violence

Violence 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.

- 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.

Domestic Violence

A felony or misdemeanor crime of violence committed:

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

Power & Control Wheel for Teen Dating Violence

This tool explains some of the ways an abusive partner may use power and control to manipulate a relationship.



**Violence
Intervention
Program**

If you would like to speak to a counselor about your relationship or someone you know please call our confidential hotline at

1-800-664-5880

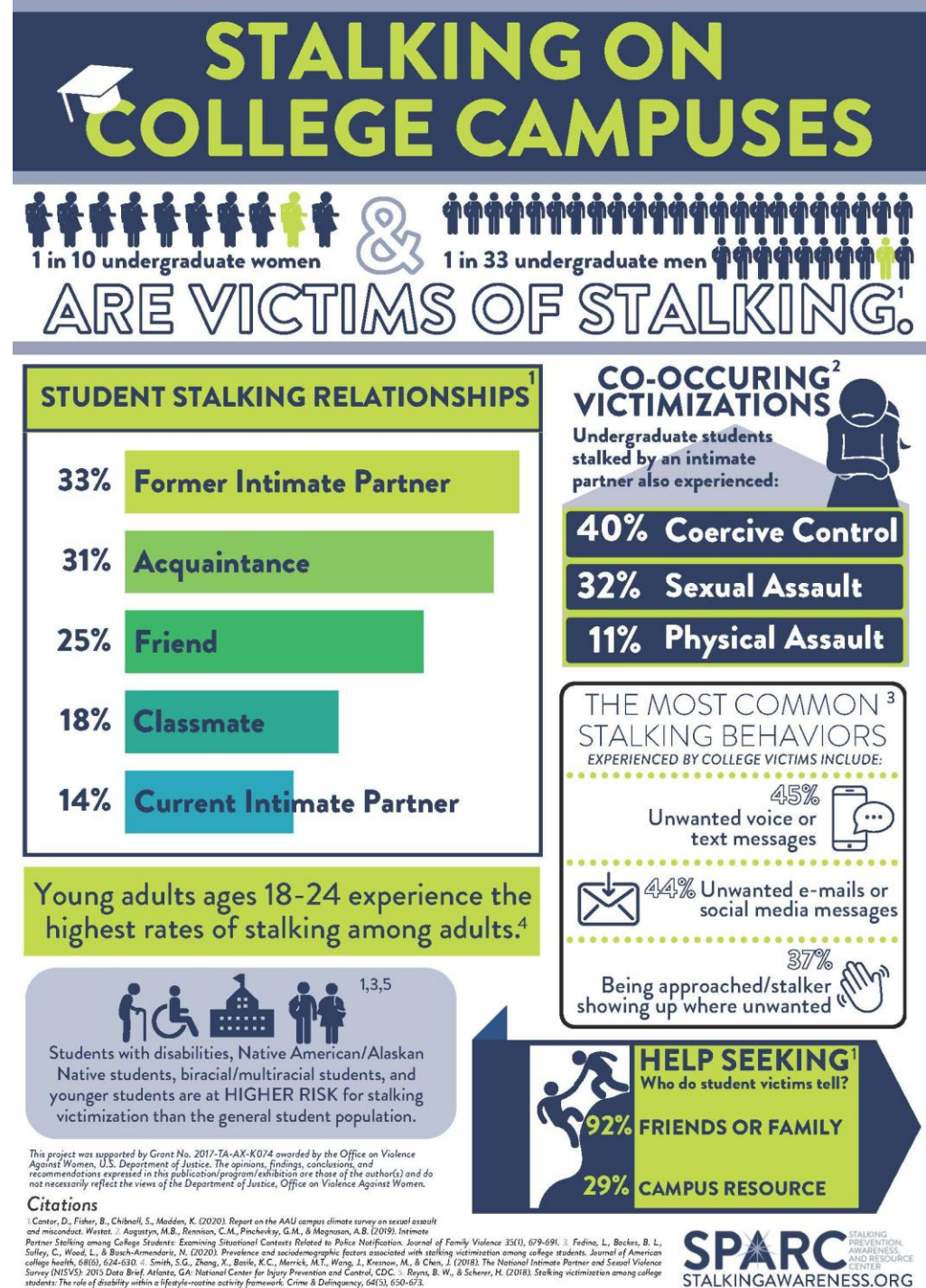
<https://www.wafwc.org/tdv>

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others; or suffer substantial emotional distress.

Course of conduct 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.

<https://www.stalkingawareness.org/fact-sheets-and-infographics/>



Sexual exploitation

A form of sexual harassment that involves one or more of the following behaviors committed for any purpose, including sexual arousal or gratification, financial gain, or other personal benefit:

- taking sexual advantage of another person without consent;
- taking advantage of another's sexuality; or
- extending the bounds of consensual sexual contact without the knowledge of the other individual.



Retaliation

Any intimidation, threats, coercion, or discrimination against any individual because the individual has made a report, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.

Education Program or Activity under Title IX

WHAT DOES IT MEAN?

- Locations, events, or circumstances...
- On or off campus...
- Over which the institution exercises substantial control over the context in which the harassment took place.

ADDITIONAL REQUIREMENTS:

- Must have occurred within the United States.
- Includes conduct that occurred in any building owned or controlled by an officially recognized student organization.
- Institution must also have exercised substantial control over the responding party.

Parties' relationship with the institution

REPORTING PARTY

Must be participating or attempting to participate in the institution's education program or activity at the time of filing a Formal Complaint.

**Broad interpretation of "participating or attempting to participate in"*

RESPONDING PARTY

An institution's ability to take disciplinary action under Title IX is limited when the Responding Party is not affiliated with the institution.

**But... should still consider appropriate action steps to facilitate reporting party's participation in education programs and activities.*

Which process should we use?

Does the allegation fit under Title IX?
If not Title IX, what about VAWA?



Consider:

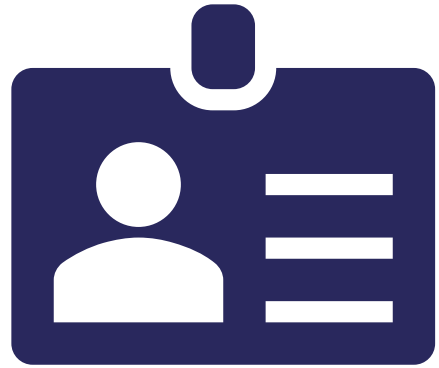
The severity of the allegation (severe, pervasive, AND objectively offensive?)

Where it occurred (on/off campus, US or abroad, etc.)

The roles of the involved parties (students, visitors, employees, alumni, etc.)

A Note about Sex-Based Discrimination

Discrimination based on sex or gender (i.e., adverse or preferential treatment based on someone's sex, gender identity, sexual orientation, etc.) is still prohibited under Title IX; however, institutions are not obligated to implement all the same Grievance Process requirements as stated in the regulations in order to address and/or investigate those types of concerns.



Title IX Personnel Roles & Responsibilities

Title IX Coordinator: Role and Responsibilities

Must designate at least one Title IX Coordinator

Should have significant autonomy and seniority

May be housed in various departments/divisions, depending on the institution

- Creates and implements legally compliant policy and procedures
- Oversees response to reports and formal complaints as well as informal and grievance procedures
- Implements supportive measures and facilitates connection to resources
- Ensures sanction and remedy compliance
- Training oversight
- Recordkeeping

Investigator: Role and Responsibilities

- Can be internal or external
- Burden to collect sufficient evidence
- Conducts fair, prompt, and impartial investigations
 - Identifies witnesses and evidence
 - Provides parties opportunity to submit evidence
 - Identifies factual issues
 - Maintains records, recordings, etc.
 - Creates an investigation report
- Works in coordination with the Title IX Coordinator, particularly around evidence and report review
- Maintains impartiality and avoids bias
- Receives annual training



Decision-makers: Role and Responsibilities

HEARING PANEL MEMBERS & ADJUDICATOR(S)

- Attends and conducts a live hearing
- Determines whether the institution's policy has been violated under the appropriate standard of evidence
- Determines sanctions, if necessary
- Writes a Notice of Decision that includes a rationale for the finding
- Avoids bias and conflicts of interest
- Receives annual training

APPEAL OFFICER(S)

- Determines a ruling on a party's appeal by reviewing appropriate investigation/hearing materials
 - Not a "re-do" of the investigation
- May meet with parties
- Writes a Notice of Decision that includes a rationale for the outcome
- Avoids bias and conflicts of interest
- Receives annual training

Conflicts of Interest



Biases *for* or *against* reporting or responding parties individually or generally



A material connection to the parties, witnesses, or issues that would cause a reasonable person to question partiality



Immediately disclose any potential conflicts of interest to the Title IX Coordinator



Conflicts of interest may be raised on appeal



Incorporate an avenue for parties to raise potential conflicts of interest early in the process

Avoiding Bias

Bias = tendency to like or dislike; may involve stereotypes

Might be implicit

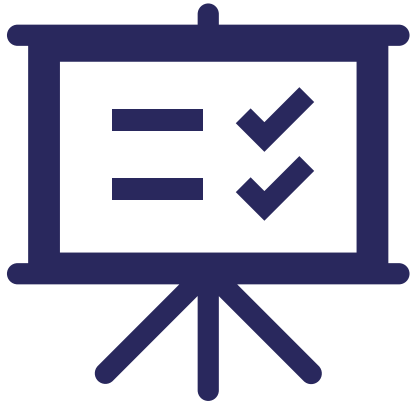
Avoid prejudgment of the facts

Frequent implicit biases

- Race
- Gender
- Gender identity
- Gender expression
- Sexual orientation
- Religion
- National origin
- Ethnicity
- Age
- Disability
- Marital status
- Veteran status

Advisors

- Advisors assist parties throughout the process; can be attorneys, advocates, friends, family members, mentors, etc.
- Parties have the right to an advisor of their choice
- Advisors may attend meetings and interviews with the party
- If a party does not have an advisor, the institution must provide an advisor to conduct cross-examination on the party's behalf **during the hearing**. These advisors are not required to be trained
- In Minnesota, advisors may make opening and closing statements on behalf of their party at the hearing
- Institutions might have Advisor Guidelines for both the general process as well as the hearing



Title VI Overview

Title VI

Protects all students and employees from discrimination based on race, color, or national origin in programs (including schools) that receive federal financial assistance.

- National origin includes shared ancestry (including shared Jewish, Palestinian, Arab, or Muslim ancestry) and/or association with these national origins/shared ancestry.

Focus is on ensuring institutions provide equal opportunities so that everyone has full access to all the benefits and programs within the institution.

The reach is vast when considering an institution's "programs and activities" – admissions, employment, financial aid, grading, athletics, conduct, housing, etc.

Retaliation also prohibited under Title VI.

Title VI Prohibitions

DISPARATE TREATMENT

- Intentional discrimination (intentionally treating persons differently because of their **actual or perceived** race, color, or national origin)
- Intent to discriminate need not be malicious
- Legitimate non-discriminatory purpose?

DISPARATE IMPACT

- Discriminatory effect, regardless of intent
- Otherwise neutral policy or practice that has a disproportionate and adverse effect on individuals of a certain race, color, or national origin
- Focus is on result, not intent

Title VI – Hostile Environment Theory

To establish a violation of Title VI under the hostile environment theory, must find:

1. A hostile environment based on a protected classification existed;
2. Institution had actual or constructive notice of it; and
3. Failed to take prompt and effective action to:
 - a. End the harassment;
 - b. Eliminate the environment and its effects; and
 - c. Prevent the harassment from recurring.

Title VI – Hostile Environment Theory

OCR historically interprets Title VI to mean that the following types of harassment creates a hostile environment:

Unwelcome conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from a recipient's education program or activity.

Harassing acts need not be targeted at the complainant to create a hostile environment.

Procedural Steps for Title VI and Title IX

1. Report / Intake

- Who is the best person for this? Make this clear to your community.
 - Consider job descriptions, conflicts of interest, status of the reporter, etc.
 - If it's a Title IX concern, route through Title IX Coordinator.
- Offer resources (confidential resources, campus resources, local resources, law enforcement if applicable, etc.)
- Offer accommodations as applicable (academic, housing, employment, etc.)
- Offer options to address the concern (formal grievance process, informal resolution, restorative justice process, no-contact directive, educational conversation, report to law enforcement, etc.)
 - Clarify at what point the institution has a duty to proceed, even against reporting party's wishes

Procedural Steps for Title VI and Title IX

2. Investigation

- Not nearly as many requirements for Title VI as for Title IX
- May use internal or external investigator, depending on your policy
- Institutional burden to collect sufficient evidence
- Title IX requires institutions to allow parties to have an advisor of their choice
- Title VI does not have the same formal complaint or notice requirements as Title IX
- After investigating, Title IX requires evidence/report review and response periods (FERPA exception)
 - Consider what information Title VI parties will have access to, if any

Procedural Steps for Title VI and Title IX

3. Adjudication

- Title IX requires a live hearing with cross-examination for adjudication purposes, and must provide an advisor to a party who doesn't have one
- Title VI has flexibility for adjudication – could utilize the investigator as the decision-maker, a hearing, a single decision-maker who is not the investigator, etc.

4. Determinations

- Title IX requires written determinations sent to both parties that include a rationale for the decision (FERPA exception)
- Title VI does not require a written rationale. Consider limitations on what you can share with each party. Typically cannot share outcome with reporting party.

Current Federal Landscape

Increased enforcement post Israel/Hamas even under Biden Administration

In high-profile resolution agreements, OCR found:

- Schools failed to promptly respond to incidents of Title VI harassment
- Often premature classification of incidents as “free speech”
- School offices had inconsistent responses to reports
 - Including responding differently to incidents that occurred in-person versus online
- Some responsive processes were terminated if a reporting party did not reply to initial outreach email

Current Federal Landscape

- In these resolution agreements, schools were required to:
 - Conduct annual training that includes Title VI and national origin examples.
 - Conduct proactive climate assessments.
 - Conduct reviews of responses to incidents.
 - Review or revise policies that address discrimination/harassment standards and distinguish between protected speech and harassment.
 - Provide consistent and transparent procedures for responding.

Current Federal Landscape

Under Trump Administration:

- DCL interpreting *Harvard* decision—targeting “DEI”(among other things) and threatening federal funding.
- What does/will OCR enforcement look like—regional offices slashed.
- Enforcement via high-profile acts against high-profile targets. Remains to be seen what will be done beyond this.
- Enforcement focused on preferred subjects.

Current Federal Landscape

What enforcement is supposed to look like:

- Termination of funding limited to “particular program or part thereof” and only after:
 - Express finding on the record
 - Opportunity for a hearing
 - Continued failure to comply
 - Determination that compliance cannot be secured voluntarily
 - Notice to House & Senate Committees and 30 days pass



Title IX Process:

What happened prior to the hearing?

Rights of the Parties throughout the Process

Notice of policies,
meetings, investigation,
outcome, etc.

Supportive measures
*(cannot penalize
responding party in any
way unless and until they
are found responsible)*

Impartial Title IX
personnel

Ability to discuss
allegations

Advisor of choice

Opportunity to identify
witnesses and provide
evidence

Ability to review
evidence and
investigation report

Ability to appeal

Initial Conversation with a Reporting Party

PROCESS OPTIONS:

- Law enforcement report
- Grievance Process
 - Informal Process
- Taking time to decide what to do next, if anything
- Potential for TIXC Formal Complaint
- Preservation of evidence
- Other options permitted by your policy, if not Title IX?

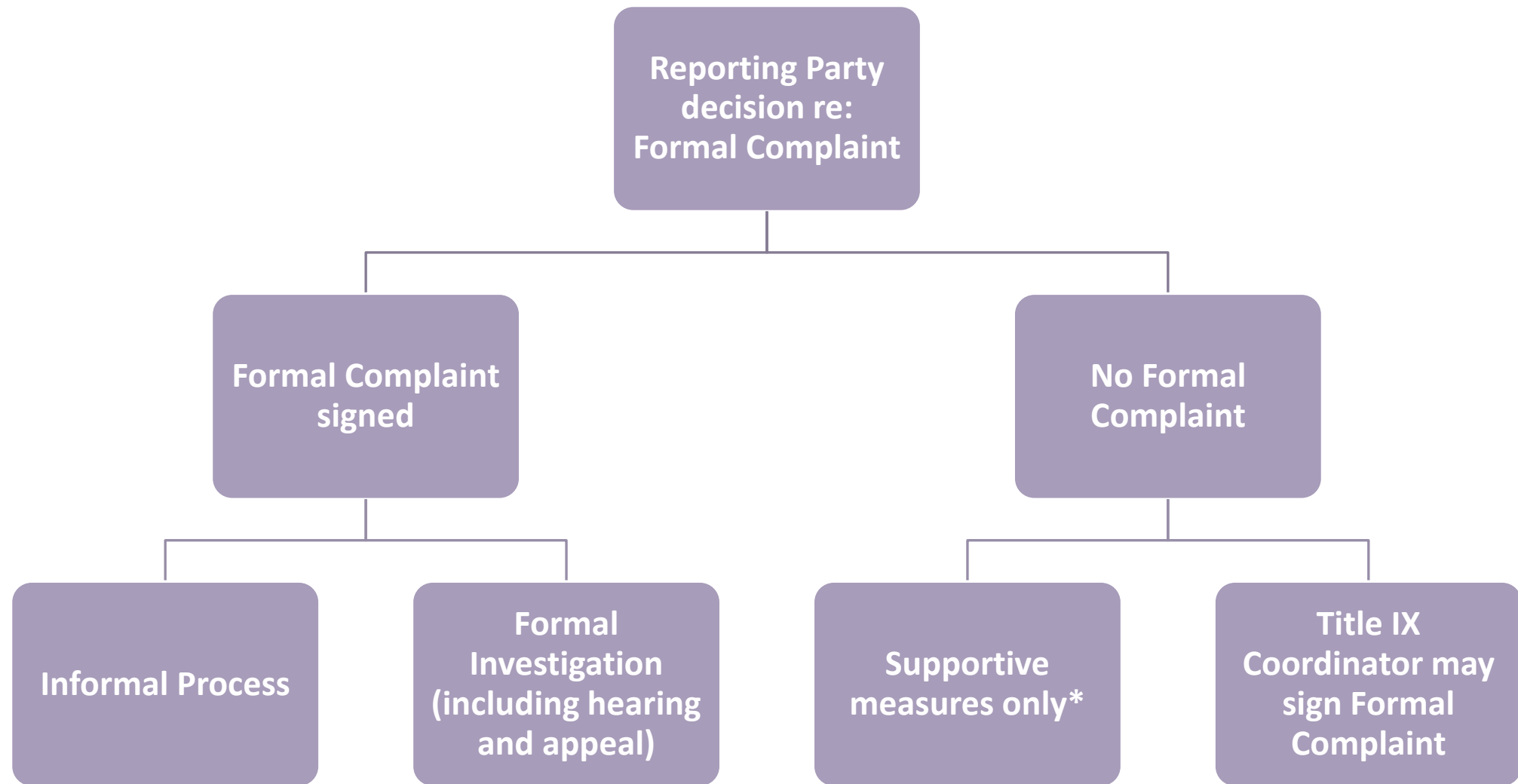
SUPPORTIVE MEASURES

- Cannot be punitive
- No-contact directives
- Accommodations for housing, classes, etc.
- Confidential resources
- Community resources
- Campus security escorts
- Etc.

**Explain that access to these resources is not contingent upon moving forward with a formal complaint*

NEXT STEPS FOR TIXC:

- Does the reported incident fall within the scope of institution's policy? If so, which process would apply?
- Notify others at the institution who need to know?
- Timely warning?
- Emergency removal?
- TIXC Formal Complaint if reporting party declines Grievance Process?



**Reporting party may initiate Formal Complaint in the future.*

Starting the Grievance Process

FORMAL COMPLAINT INITIATED BY REPORTING PARTY

- Can initiate at any time
- Requests an investigation
- Must be signed and in writing, but can be on paper or electronic (i.e., via email)

FORMAL COMPLAINT INITIATED BY TIXC

TIXC should consider:

- Egregiousness of allegations?
- Use of weapon?
- Risk? Threat?
- Availability of evidence?

Discuss with Deputies or Title IX Team

If proceeding, notify reporting party.

A Note about “Dismissed” Formal Complaints

Institutions may dismiss Formal Complaints or allegations within Complaints either because it's required under the current regulations or due to institutional discretion.

Institutions must offer the party/parties the option to appeal the dismissal decision.

Decision-makers could be called upon to make a determination about an appeal of a dismissal decision.

Dismissal

REQUIRED DISMISSAL

TIXC is required to dismiss a formal complaint if:

- At the time of the complaint, the reporting party is not participating/attempting to participate in the institution's program/activity
- The alleged conduct, even if proved, would not meet the sexual harassment definition
- The alleged conduct did not occur in the institution's program or activity
- The alleged conduct happened outside the U.S.

PERMISSIVE DISMISSAL

TIXC may dismiss a formal complaint prior to a final decision if:

- Reporting party withdraws from the process (needs to be in writing)
- Responding party is no longer a student/employee at the institution
- Circumstances prevent the institution from collecting sufficient evidence

Dismissal Cont'd

IF DISMISSING:

- Must notify the parties in writing and include rationale for dismissal
- Appeals of dismissals are permitted
- Consider initiating a different disciplinary process under a separate policy (Code of Conduct? Was the allegation a VAWA offense?)

Notice of Allegations

- Notice of grievance process and the informal process
- Information about the allegations known at the time (names, conduct constituting sexual harassment, date and location of incident)
- Responding party presumed not responsible, and that the determination of responsibility occurs at conclusion of the process
- Rights of parties to an advisor, to review evidence, etc.
- Any code of conduct provision prohibiting knowingly making false statements/submitting false information
- Provide with sufficient time for parties to prepare a response
- **If additional allegations arise during the process, provide an amended or additional notice to both parties*

Informal Process

REQUIREMENTS

- Must be voluntary; parties must provide written consent to participate
- Formal complaint required
- Allowed at any time prior to final decision being made
- Title IX Coordinator has discretion
- Unavailable when responding party is an employee and reporting party is a student

VARIOUS APPROACHES

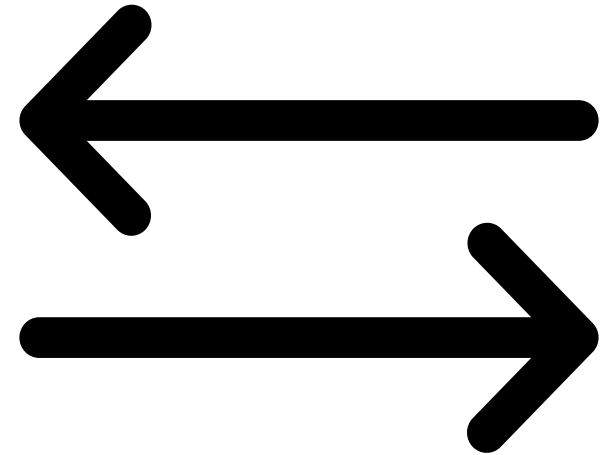
- Alternative resolution (i.e., restorative justice, dialogue facilitation, etc.)
- Shuttle diplomacy or negotiation
- Responding party does not need to accept responsibility to access informal process, but that can be written into your policy if desired

Consolidation of Complaints

“An institution may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, ***where the allegations of sexual harassment arise out of the same facts or circumstances.***”

Cross-Complaints

How does your institution handle situations where both parties have complaints against the other?



The Investigation

Title IX Coordinator determines who the investigator will be

Investigator determines investigation strategy (in coordination with TIXC)

Witness and party interviews

Evidence collection

What does “prompt” mean?



Regs require reasonably prompt timeframes



Temporary delays for “good cause” are ok, as long as they’re accompanied with written notice of the delay to the parties



Incorporate grievance process timeframes into your policy, but build in opportunity for discretion (case complexity, law enforcement investigation, breaks, etc.)



Consider incorporating weekly updates to the parties

Intersections with Law Enforcement

- Potential for evidence from law enforcement to be incorporated into Title IX investigation (police reports, medical forensic exam reports, etc.)
- Even with concurrent processes, it is oftentimes difficult to get evidence from open law enforcement cases
- Investigations are sometimes delayed in order to accommodate law enforcement investigations

Directly Related Evidence Review

MUST:

- Provide review of evidence “directly related” to the allegations for parties and their advisors
- Include inculpatory and exculpatory evidence
- Include evidence upon which the institution does not intend to rely upon in making a decision
- Allow at least 10 days for review and submission of a response
- Provide copies of evidence directly to parties/advisors in electronic or hard copy format
- Evidence must be made available for review at the hearing

NEXT STEPS:

- If responses are submitted, investigator considers them prior to completing the Investigation Report
- Additional evidence collection needed? Other action?

Investigative Report



Report will be the primary basis for the decision.



Report must be detailed—include all relevant evidence.



Investigator makes decisions about relevance of information. Parties can challenge.



Investigator will finalize report after considering parties' responses to report and evidence.

Investigation Report Review



- Must be made available for parties and advisors to review (in hard copy or electronic format) 10 days prior to hearing
- Written responses to the report are permitted and provided to the hearing panel



Hearing Basics

The Hearing

Needs to be live but can be virtual (must include video)

Provides opportunity for parties' advisors to ask questions of the other party and witnesses

Institutions must provide an advisor to parties who do not have an advisor during the hearing specifically for the questioning portion

Can have a single decision-maker or multiple, but someone must make relevancy determinations during the hearing

TIXC or another individual may be present to enforce hearing decorum and process

Must be recorded

Standards of Evidence

Preponderance of the evidence: “more likely than not” that the policy was violated (50.1% and above).

Clear and convincing standard: highly and substantially more likely to be true than untrue.

Who attends the hearing?

- Decision-maker(s) / Hearing Panel members
- The parties and their advisors
- Witnesses who the parties or the decision-makers have identified as needing to be present for questioning
- Title IX Coordinator may attend (to help with logistics, decorum issues, hearing process, etc.)
- General counsel may attend (or be on standby for questions)
- Investigator may attend

Role of the Hearing Panel Chair (or sole Decision-Maker)

- May facilitate the hearing, with assistance from TIXC.
- Make relevancy determinations for all questions asked during the hearing.
- Make determinations about appropriateness of questions or information provided (cannot be irrelevant, abusive, or overly repetitive).
- Ensure advisors stay in line with hearing decorum guidelines.

Hearing technology



This will vary depending on the institution.



Decision-makers need to be trained in how to use their institution's hearing technology.



Remember that hearings need to be recorded.

Hearing Decorum and Other Rules



OK for hearing panel to take breaks to deliberate or to confer with general counsel.



Be professional at all times. Maintain an awareness of tone, body language, facial expressions, etc.



Expectation that all individuals present at the hearing demonstrate respect towards others.



Advisors only speak during questioning and may also providing opening and closing remarks on behalf of the party, if desired.



Others?



Hearing Preparation & Evidence Review

Scenario

We will be taking you through a scenario involving an alleged sexual assault reported by a student, Avery, at Heartland College. Avery alleges that Kai, another student, assaulted her after they had been drinking at a party a few weekends ago.

After discussing each step in the hearing process, we will talk about issues the decision makers might need to resolve and what might happen next.

Hearing Preparation

- Get familiar with hearing format and structure (breaks, length, etc.) in coordination with TIXC
- Homework: review the institution's policy, the Notice of Investigation/Allegation, and the Investigation Report
- What questions do you plan to ask parties/witnesses during the hearing?
- Which witnesses do you want present, if any, during the hearing?
- Which witnesses do the parties want present, if any, during the hearing?
- Who will make relevance determinations?
- Does either party need a school-appointed advisor?
- Consider conducting pre-hearing meetings with each party and their advisor

Report Review Process & Developing Questions

- Review *and re-review* the Investigation Report, Notice of Allegations, and relevant policy definitions
 - If needed, go back to any specific evidence relating to areas in the Report that could provide useful clarity for you
- Note areas of consistency and undisputed facts and information
- Note areas of inconsistency and disputed facts and information
- Consider lingering questions you have after reviewing the evidence and whether to raise those during the hearing
- Ensure the answer to your potential question isn't already available in the report/evidence

Review of Hearing Process

- What are the steps/phases of the hearing, and in what order?
- Will hearing panel members be in the same room? Separate rooms?
- How long do you expect the hearing to take? Should there be a time limit? What about breaks?
- What if something goes wrong?
- Who is responsible for starting/stopping the recording?

Scenario

Riley, the Title IX Coordinator at Heartland College has contacted you about being the hearing officer/decision maker in a sexual assault case at Heartland.

In your first conversation with Riley, what information do you want to collect about the case?

What information do you want to share with Riley about your process as a hearing officer?

Pre-hearing meetings

- Not required, but could be good practice to meet with each party and their advisor in advance of the hearing to discuss:
 - The hearing process and what to expect
 - Expectations regarding decorum, Advisors' participation, how any technology will be used during the hearing
 - Review the cross-examination phase of the hearing
 - Whether the parties want any witnesses present at the hearing
- Can be facilitated by the Chair, Decision-maker, or the TIXC

Scenario

You meet with the parties in separate prehearing meetings. Riley is present in both meetings, as are the parties' advisors.

In the meeting with Avery, the complainant, Avery's advisor asks if she (the advisor) can read Avery's opening and closing statements because Avery is just too nervous to speak in the hearing and is afraid she will cry.

What is your response?

Evidence Review: Types of Evidence

Direct or
testimonial
evidence

Documentary
evidence

Real evidence

Circumstantial
evidence

Hearsay
evidence

Character
evidence

Evidence Examples

- Interviews or statements
- Texts
- Emails
- Social media posts
- Journal entries or letters
- Dating apps
- Voicemails
- Wi-Fi pings
- Phone records
- Polygraph results
- Clothing
- Physical items (weapons, trash, etc.)
- Videos
- Photographs
- Public Safety reports
- Expert reports
- Medical reports
- Keycard swipes

Evidence Guidelines

All relevant evidence – both inculpatory and exculpatory – must be objectively evaluated and considered.

No “gag-orders”

No restriction on parties gathering evidence

Equal opportunity to present witnesses and evidence, and to review all evidence

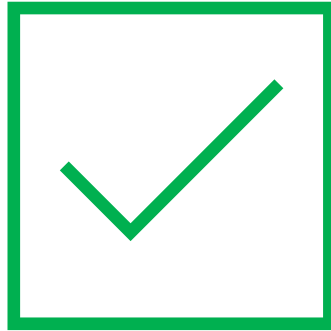
No limits to the types or amount of evidence which may be offered by parties

Under the Regs, a school must exclude:



- A party's treatment records (unless the party gives prior written consent)
- Information protected by a legally recognized privilege
- Questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior, unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent

Under the Regs, a school must accept:



- Expert witness testimony, reports, or findings
- Evidence related to character
- Evidence related to the findings of a polygraph examination
- Evidence gathered by law enforcement during a concurrent criminal investigation, if available

BUT ...

- Admissibility of relevant evidence is different from weight, reliability, and/or persuasiveness of that evidence.
 - No rules on how relevant evidence must be evaluated for weight or reliability.
 - School may adopt rules on weight, reliability, credibility if rules do not conflict with the Regs and apply to both parties.



“

Weight of evidence is the believability or persuasiveness of evidence in probative value, not the quantity or amount of evidence. Weight of evidence is not determined by mathematics but depends on its effect in inducing belief.

”

Legal Information Institute, Cornell Law School
https://www.law.cornell.edu/wex/weight_of_evidence

Remember...

Schools can make rules about how much weight decision makers should afford certain kinds of evidence.

Examples:

- Polygraphs
- Character evidence

Parties may argue about the weight of certain evidence during the hearing or in written statement.

Which kinds of evidence carry the most weight?

Direct or testimonial evidence

Documentary evidence

Real evidence

Hearsay evidence

Character evidence

Scenario

In the prehearing meeting with Kai and his advisor, Kai tells you that during the investigation, he asked his high school principal to write him a character reference, but he did not receive it until yesterday. He now wants to include it with the investigation report.

What considerations do you take into account when you respond to Kai?

How will you proceed?

Relevant vs. Related Evidence

Evidence is considered **relevant** “if it has the tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action.”

Federal Rules of Evidence 401

Directly related evidence “includes evidence that the institution does not intend to rely upon in reaching a determination regarding responsibility, including inculpatory and exculpatory evidence, whether obtained from a party or other source.”

34 C.F.R. § 106.45(b)(5)(vi)

Relevant Evidence

Tends to prove a fact at issue in the hearing, such as

- whether a disputed incident occurred;
- witness credibility;
- the impact of any misconduct on the complainant (e.g. mental or emotional distress, physical injury, or academic difficulty); and
- what sanctions or remedies might be appropriate.



Relevant Evidence

In summary:

Does the evidence tend to **prove** or **disprove** the allegations?

A determination regarding relevancy can rely on logic, experience, or science.

FED. R. EVID. (401), Legal Information Institute, Cornell Law School,
https://www.law.cornell.edu/rules/fre/rule_401

Directly Related Evidence

No given
definition.

Common
sense
evaluation.

Arguably a
very wide
net.

Scenario

During the prehearing meeting with Avery, she tells you that the investigator did not include information in the investigation report about Kai's "toxic" relationships with other students on campus. She says she objected to this omission during the evidence review process, but the investigator still did not include it in the report. She asks you to take that information into account when you are making a decision.

How do you respond?



Assessing Credibility



Assessing Credibility

Credibility: The extent to which the decision-maker can rely on a witness's testimony to be accurate and helpful in their understanding of the case.

EEOC Statement on credibility in Sexual Harassment Cases (1999)

Demeanor: Did the person seem to be telling the truth or lying?

Inherent plausibility: Is the testimony believable on its face? Does it make sense?

Motive to falsify: Did the person have a reason to lie?

Past record: Did the alleged harasser have a history of similar behavior in the past?

Corroboration: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with them at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

Remember!

None of these factors are determinative as to credibility.

For example:

- the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility.
- the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that they did so again.

Assessing Credibility

Possible/Recommended Considerations:

- Logic/Consistency of information provided
- Corroborating evidence
- Consistency of information– substance of statements
- Plausibility of all information given
- Amount of detail provided. Factual detail assessed against assertions that have no supporting detail. (But consider whether there may be other reasons.)

A Note about Demeanor

Be careful about relying on demeanor when it comes to credibility.

Much of what you hear about “how to tell if someone is lying” is not based on actual research and has been debunked or is considered pseudoscience.



A Note about Past Record

Also be careful about relying on a party's past record.

Determinations should be made (mostly) based on the evidence in front of you.



A Note about Memory

Memory errors do not necessarily destroy credibility

Most people's memories are not that great

Trauma affects memory

Substance use may affect memory



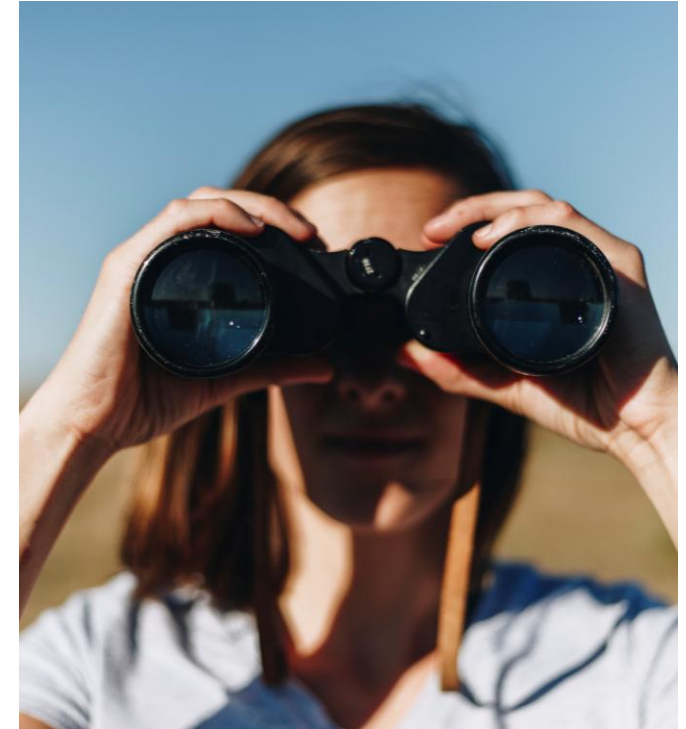
A Note about Eyewitness Accounts

Can be powerful.

BUT

Well-intentioned eyewitness testimony can be problematic because our brains are not always great at accurately interpreting and remembering what we see.

And eyewitness testimony can be “contaminated.”



Assessing Credibility: Final Thoughts

It's important to have **reasons** supporting credibility decisions.

Remember that **unlikable** is not the same as **not credible**.

Credibility determinations should not be based on gender, sexual orientation, race, ethnicity, nationality, ability, religion, etc.

Reach conclusions based on the evidence/information provided, **NOT** based on speculation, rumors, character assessment, etc.

Scenario

The investigation report states that in the first interview with the investigator, Avery stated that she was blacked out during the party where she met Kai. She said she drank 4 or 5 shots of vodka at the dorm before going to the party, and she does not remember how much she drank at the party. In her evidence review response statement, she says she drank 6 to 8 shots of vodka at the dorm, then drank 3 beers at the party.

Avery also states that she did not initiate any physical interactions with Kai, but Kai's roommate submitted a video showing her dancing with Kai at the party, and while they were dancing, she put her hands on his buttocks.

How do these discrepancies affect your evaluation of Avery's credibility?

What follow-up questions might you ask her during the hearing about these discrepancies?



Trauma-Informed Considerations



The Impact of Trauma on the Body and Brain

Trauma overwhelms our normal coping responses, which provide a sense of control and safety.

Trauma can impact individuals in multiple, significant ways:

- Neurologically
- Emotionally
- Psychologically
- Socially
- Biologically

Neurobiology of Trauma

- Growing body of research on this, specifically within the context of sexual violence
- During a traumatic event, an individual's ability to control their physical movements, to think rationally, and to encode memories may be significantly impaired
- This is a hard-wired response that is meant to offer protection
- This mainly has to do with the release of specific hormones during a traumatic event

Interviewing through a trauma- informed lens

- Helps you be a better investigator
- Puts interviewees at ease
- May provide context for counterintuitive reactions or occurrences
- Does NOT mean that you don't probe for credibility

Tips for being trauma-informed

- Be an authentic, non-judgmental human. Work on fostering trust, especially during an initial interview
- Slow down; silence is ok. Remember that memory recall may be slow or out of order.
- Be thoughtful about the language you use and phrasing of questions (avoid “why?” questions)
- Emphasize transparency to the extent you are able
- Help parties understand what to expect, ideally in advance
- Consider the physical (or virtual) environment of the interview
- Don’t automatically draw negative inferences based on a behavior or reaction that may be related to trauma
- Don’t use evidence of trauma as evidence that a policy violation occurred
- A trauma-informed approach should not unfairly favor the complainant OR prejudice you against the respondent

Cultural Implications

- Cultural norms and background may impact the way parties react to an incident and how they present during the investigation process
- Be aware of these potential influences; however...
- Beware of biases and stereotypes
- Consider additional training or seeking out appropriate expertise if necessary



The Hearing

Day of the hearing



BE. ON. TIME.
Block your schedule
accordingly.



Look professional. Be
cognizant of potential
distractions.



Consider internet
speed and reliability.



Bring snacks/water.



Bring pen, notepad,
etc.



Silence cell phones
and other devices.

Scenario

The hearing is scheduled for 10 a.m. on Zoom. At 10:10, Avery's advisor joins the Zoom and reports that Avery is having a "dysregulated episode" and is unable to join the Zoom.

What do you do?



Hearing Panel Questioning

- Questions should help clarify any vague details or fill in gaps
- Remember to stay focused on the information that matters and have a purpose for every question
- Don't assume an answer in how question is phrased
- Consider your approach with the question: How will you phrase it? Who is it directed towards? Should another panel member be the one to ask the question?
- Ensure your question is clear, neutral, and easily understood

Cross-examination and advisors

Cross-Examination

- Parties, through their advisors, are permitted to ask questions of the other party and any witnesses

Direct-Examination

- Advisors may also question their own advisee

Relevancy Decision

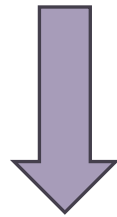
- The Hearing Panel Chair or Decision-maker is responsible for determining whether each question asked is relevant

Questioning Process Mechanics

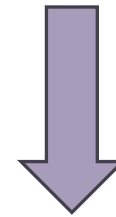
- Advisor states question

❖ Pause

- Decision maker decides if question is relevant/allowable
- Decision maker indicates that party may answer (or not)

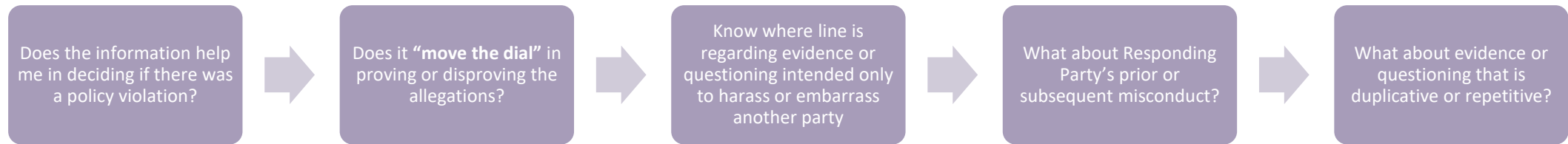


If yes, party answers
question



If no, DM
explains decision

Relevancy Determinations



Off limits:

- Medical or treatment records without voluntary, written consent
 - Reporting party's prior sexual history (with two exceptions)
 - Legally privileged information unless party waives privilege

Questioning Skills & Tips

Even if you hear something surprising, try to remain neutral.

Stay flexible, both in terms of your questioning but also regarding the flow of the hearing.

**Practice active listening.
What does this mean?**

Others?

Remember! Don't ask about:



- A party's treatment records (unless the party gives prior written consent)
- Information protected by a legally recognized privilege
- Questions or evidence about a complainant's sexual predisposition, and questions or evidence about a complainant's prior sexual behavior, unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent

Scenario

During the hearing, Kai's advisor wants to ask Avery the following questions:

How much did you drink before the party?

What exactly do you remember from the party?

Isn't it true that you also brought a Title IX complaint against a different person last year?

What is your decision about whether they can ask these questions? What factors do you take into account?

Difficult situations

- What if a party doesn't show up to the hearing?
- What if a party refuses to answer a question?
- What if an advisor starts violating one of your hearing guidelines?
- Other difficult situations you've encountered? How did you handle them?





Making a Determination

The Decision-making Process

STANDARD OF EVIDENCE

Preponderance of the evidence (“more likely than not” / 50.1% likely) OR the clear and convincing standard

PROCESS

Apply the applicable policy definitions to the evidence provided.

Must provide a detailed, written rationale for your decision; must include evidence supporting the conclusions.

Questions to think through

- What are the undisputed facts and what are the disputed facts?
- What does the evidence show regarding the disputed facts? Which evidence is most credible? Why?
- What is the weight of the different pieces of evidence provided?
- Using the appropriate standard of evidence, did a policy violation occur?
- Analyze each element of a policy definition under the evidence standard.
- What is the rationale for your decision?

The Deliberation Process

- Must provide a detailed, written rationale for the Hearing Panel's decision; must include evidence supporting the conclusions.
- Have the policy definitions close at hand for reference.
- Assess the weight of evidence provided.
- First determine your finding(s) about the allegation(s); then move on to sanctioning if applicable.
 - Provide a rationale for each finding/allegation.
 - Impact statements may be helpful when considering sanctions.

Scenario

During the investigation, Kai submitted detailed information, including from his therapist, about his neurodivergence, which includes atypical abilities around discerning social cues. In his closing statement during the hearing, Kai spends several minutes talking about his neurodivergence and how it impacts his social functioning. He asks you to take that into account when reaching conclusions about responsibility.

Should you take this into account? If so, in what way?

Sanctions & Remedies

Determining Sanctions as the Decision-Maker

- First determine your finding(s) about the allegation(s); then move on to sanctioning if applicable.
 - Provide a rationale for each finding/allegation.
 - Impact statements may be helpful when considering sanctions.

Sanctions & Remedies

Need to stop, prevent,
and remedy!

Consider educational
and developmental
sanctions

Engage in a risk
assessment to help
determine appropriate
sanctions

Sanctions should reflect
the severity of the
behavior (consider prior
misconduct)

Consider any
loss/injuries to the
Reporting Party or the
institution and how to
rectify those, if possible

Can consider past cases
of similar misconduct
with assistance from
Title IX Coordinator

Common Sanctions & Remedies

STUDENTS

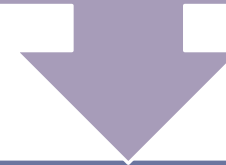
- Probation
- Loss of leadership positions
- Loss of privileges
- Housing changes
- Limited access to campus
- Counseling or required education
- Suspension
- Expulsion

EMPLOYEES

- Loss of leadership positions
- Loss of privileges
- Required education
- Disciplinary letter
- Unpaid suspension
- Demotion
- Termination

Scenario

You determine that Kai is responsible for a sexual assault policy violation. You find that Avery was incapable of consent because of incapacitation and that a reasonable person should have known that Avery was incapacitated.



What factors will you take into account when determining sanctions?



What is your process for deciding what the sanctions should be?

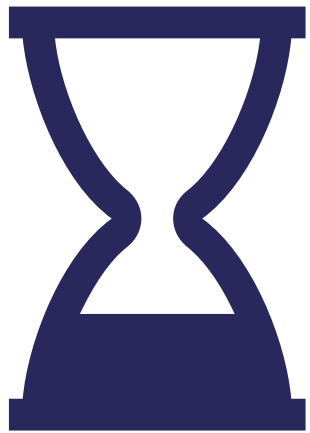
Notice of Decision

Needs to include:

- Allegations
- Procedural steps
- Findings of fact
- Decision(s) regarding responsibility
- Rationale for each allegation/decision
- Sanctions, if applicable, and rationale
- Whether remedies will be provided
- Appeal process information

Other requirements:

- Deliver notice simultaneously to the parties
- Decision/sanctions become final when parties are notified of the appeal decision OR when the deadline to submit an appeal has passed



Appeals and Process Wrap-Up

The Appeal Process

An appeal is available to both parties for final determination of responsibility and dismissal of formal complaints.

The Appeal Process

Required Bases for Appeal

1. Procedural irregularity that affected the outcome

2. New evidence that was not reasonably available at the time the decision was made that could affect the outcome

3. Conflict of interest or bias from an official involved in the case that affected the outcome

Can allow additional grounds for appeal if desired

Appeal Process contd.

REQUIREMENTS

- Appeal decision-maker cannot have been previously involved in the process
 - No conflict of interest or bias
 - Required training
 - Cannot be TIXC, Investigator, or decision-makers from hearing
- Timeframe for accepting appeals?
- Let parties know if an appeal was received and that the other party has an opportunity to respond
- Must send appeal decision and rationale to parties simultaneously

POSSIBLE APPEAL DETERMINATIONS

- Hearing Panel/Dismissal decision stands
- Hearing Panel/Dismissal decision overturned
- Sanction adjusted
- Remand
 - New investigation
 - New hearing or re-hearing
 - Sanctions-only re-hearing

Wrapping up the process

No Appeal?

- Send a notice once the appeal deadline has passed notifying both parties that no one appealed, and that the hearing panel's decision is now final.

Appeal?


- You will have sent the final notice to both parties simultaneously notifying them that the process is over and what the appeal determination was.

Either way..

- TIXC to follow up with responding party regarding any sanctions requiring additional steps or involvement.
- TIXC - consider setting calendar reminders to check in on parties once the process is over.
- Consider requesting feedback from the parties about their experience during the process.

Recordkeeping

Records must be retained for at least **seven years.**



Records to maintain:

- Actions taken and responses to reports
- Investigation and adjudication documents, recordings, etc.
- Training materials for decision-makers, investigators, Title IX Coordinators/Deputies, and informal resolution facilitators

Thank you!



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