Level 1
Higher education
Annual Clery Training and Introduction to Title IX Basics

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Disclaimer

- *We can't help ourselves. We're lawyers.*
- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- This training satisfies both annual Clery training and Title IX regulations training.*
- Use the chat function to ask general questions and hypotheticals, or raise your hand—this is a meeting setting so we can discuss issues.
- This training is not being recorded, but we will provide you with a packet of the training to post on your websites for Title IX compliance.

Presentation Rules

- Questions are encouraged
- "For the sake of argument…" questions help to challenge the group, consider other perspectives, and move the conversation forward
- Be aware of your own responses and experiences
- Follow-up with someone if you have any questions or concerns
- Take breaks as needed

Aspirational Agenda

- Level 1: Clery Training, Title IX Training on "Education Program or Activity," Sexual Harassment Definitions, and Avoiding Sex Stereotypes

- 10:00-10:10 Introduction: Overview of Training Requirements
- 10:10-10:20 Ethic of Care and Themes of Title IX
- 10:20-10:45 Sexual Violence Data
- 10:45-11:00 Break (Q&A with presenters available during break)
- 11:00-12:00 Law & Regulation: Overview of law, existing guidance, and new Title IX regulations
- 12:00-12:30 Lunch Break
- 12:30-1:00 Law & Regulation (continued)
- 1:00-2:00 Sexual Harassment Definitions
- 2:00-2:15 Break (Q&A with presenters available during break)
- 2:15-3:00 Sexual Harassment Definitions
- 3:00-4:00 Avoiding Sex/Cultural Stereotypes

Posting these Training Materials

- Yes!
- The "recipient" is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website
- We know this and will make this packet available to you electronically to post.

Training Requirements

(1 of 4)

- "A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training of sexual harassment in §106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution process, as applicable, and how to serve impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias." §106.45(b)(1)(iii)

Training Requirements (2 of 4)

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

Training Requirements (3 of 4)

- Additional specific training requirements may apply to each of these categories. All require training on the definition of "sexual harassment" under the Regulations.
- Today's training covers:
  - "educational program or activity,"
  - the definitions under §106.30 for "sexual harassment,"
    annual Clery training, and
  - avoiding cultural and sex stereotypes.

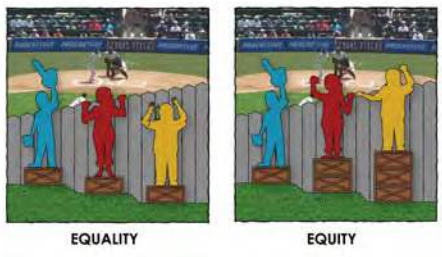
Training Requirements (4 of 4)

- Today will also cover an overview of the process that will have more specialized coverage in relevant Level 2 courses

TITLE IX TODAY:

Themes

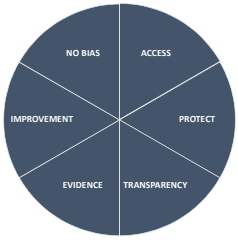
Title IX is an Equity Statute



Ethic of Care

- What do you think are the top values of your institution's community?
- Do you think institutional values align between administration, faculty and staff?
- What about students?
- What about the town or city around your institution?

Overview of Themes



Themes - ACCESS

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

Themes - PROTECT

- We have an obligation to **PROTECT** our campus.
  - **"They are all our students."**
  - Supportive measures
  - Any action by a recipient that results in changes or removal of access to education for respondents require a process to respond (if interim emergency measure) or engage in live cross-examination (if formal process that could lead to disciplinary action).

Themes - TRANSPARENCY

- **TRANSPARENCY** is key to trusting the process.
  - Know your grievance process
  - Help them understand next steps.

Themes - EVIDENCE

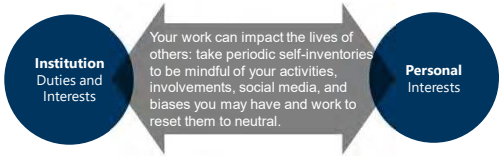
- We base decisions on **EVIDENCE**.
  - **"Don't weigh your gut."**
  - We can make reasonable inferences and credibility determinations, but be mindful of implicit bias, stereotypes, and using our own behavior as a yardstick.

Themes - IMPROVE

- 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- NO BIAS

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



SEXUAL VIOLENCE:

Data and statistics

Data and Statistics

Disclaimers

- More Disclaimers
  - Should not influence your decision in any particular Title IX case
  - Included in the Preamble, but with caveats
  - We didn't do the research ourselves and can't vouch for it
  - Okay but really, this SHOULD NOT influence your decision in any particular Title IX case

Data and Statistics Caveats

- Caveats:
  - "The Department references statistics, data, research, and studies throughout this preamble. Such references to or summarization of these items does not indicate that the Department independently has determined that the entirety of each item is accurate." Preamble, p. 30031 (Official).

Data and Statistics More Caveats

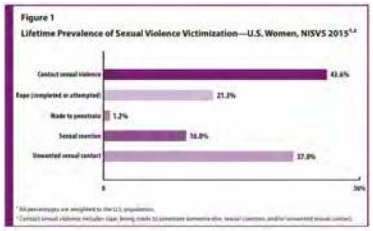
- More Caveats:
  - "Statistical findings can be instructive but not dispositive, and statistics cannot by themselves justify or rationalize procedural protections in a process designed to determine the truth of particular allegations involving specific individuals." Preamble, p. 30262 (Official)

Sexual Assault Data Women and Men

- 43.6% of women and 24.8% of men experienced some form of contact sexual violence in their lifetime, with 4.7% and 3.5% experiencing such violence in the 12 months preceding the survey.

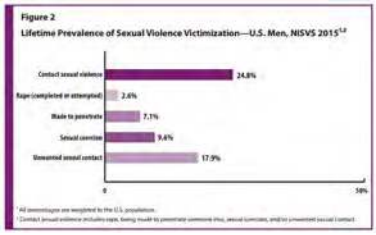
Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, available online at cdc.gov/violencepreventiondata (last visited June 2020).

Sexual Assault Data
Women



- Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, available online at cdc.gov/violencepreventiondata

Sexual Assault Data
Men



- Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, available online at cdc.gov/violencepreventiondata

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Sexual Assault Data: Timing
Prevalence Data for Postsecondary Institutions

- More than 50 percent 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.

- Preamble, p. 30076 (Official) notes that "Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence."

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Sexual Assault Data:
Prevalence Data for Postsecondary Institutions

- Additional Data referenced in the Preamble for:
  - Postsecondary Institutions, p. 30076 (Official)
  - Women, p. 30077 (Official)
  - Men, p. 30077 (Official)
  - LGBTQ Persons, p. 30077 (Official)
  - Persons of Color, p. 30078 (Official)
  - Individuals with Disabilities, p. 30079 (Official)
  - Immigrants, p. 30079 (Official)

Preamble, p. 30076 (Official) notes that "Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*, https://www.rainn.org/statistics/campus-sexual-violence.

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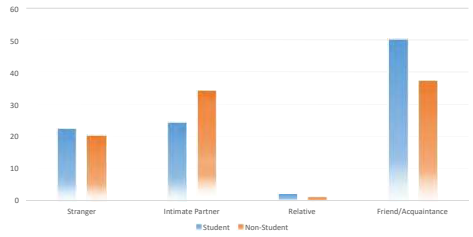
Sexual Assault Data:
Identity of Perpetrator (BJS 2014)



Preamble, p. 300767(Official) notes that "Commenters cited: U.S. Dep't of Justice, Office of Justice Programs, *Bureau of Justice Statistics Special Report: Rape and Sexual Assault Victimization of College Age Females, 1995-2013* (2014).

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Sexual Assault Data:
Alcohol/Drug Use

- "About half of sexual assaults involve survivors drinking alcohol before the assault."
- "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.

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Data and Statistics: Reporting Data

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

Preamble, p. 30082 (Official) notes that "Commenters cited: U.S. Dep't 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).

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Data and Statistics: Impact Data (1 of 2)

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

Preamble, p. 30080 (Official) notes that "Commenters cited: U.S. Dep't of Justice, Bureau of Justice Statistics, *Special Report: Socio-emotional impact of violent crime (2014).*

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Data and Statistics: Impact Data (2 of 2)

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

Preamble, p. 30080 (Official) notes that "Commenters cited: 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).

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Sexual Harassment Data

	Female gender	Male gender
Sexual harassment	62%	61%
Sexual comments	57%	48%
Grabbed	28%	22%
Called homophobic name	13%	37%
Cornered sexually	13%	10%
Forced to kiss	7%	8%
Sexual postings	6%	12%

Preamble, p. 30076 (Official) notes that "Commenters cited: American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005)."

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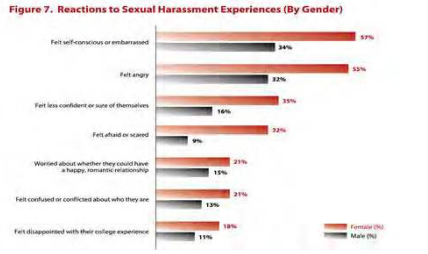
Sexual harassment has a statistically significant heavier toll on female students



Preamble, p. 30076 (Official) notes that "Commenters cited: American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005)."

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Sexual Harassment Data (1 of 2)

- LGBT students are more likely to be sexually harassed and have negative emotional and behavioral responses to harassment.
- 73% of the LGBT students report harassment (versus 62% of heterosexual students).

Preamble, p. 30076 (Official) notes that "Commenters cited: American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005)."

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Sexual Harassment Data (2 of 2)

- LGBT students **are more likely to be harassed "often"** – 18% versus 7% of heterosexual students.
  - LGBT students are **more likely** than heterosexual students to be **angry** (76% versus 42%)
  - LGBT students are **more likely** than heterosexual students to be **embarrassed** (61% versus 49%)
  - LGBT students are **more likely** than heterosexual students to be **less confident** (42% versus 25%)
  - LGBT students are **more likely** than heterosexual students to be **afraid** (32% versus 20%)

Preamble, p. 30076 (Official) notes that "Commenters cited: American Association of University Women Educational Foundation, *Drawing the Line: Sexual Harassment on Campus* (2005)."

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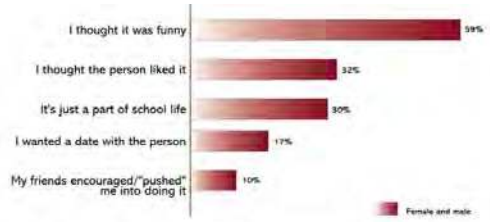
The most common rationale for harassment (59%) is "I thought it was funny."



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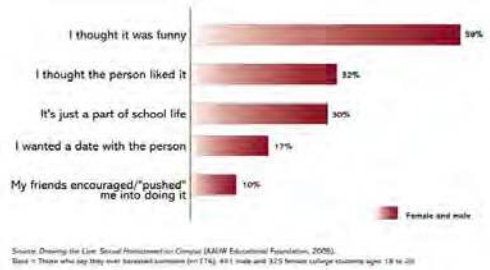
Less than one-fifth (17%) admitted to harassing others *because they wanted a date with the person*



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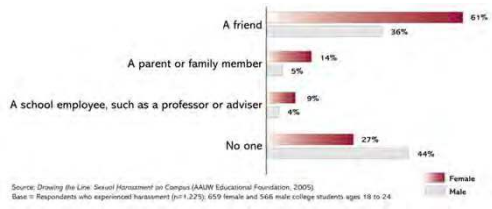
Many students do not report to anyone that they have been harassed



Source: *Drawing the Line: Sexual Harassment on Campus* (AAUW Educational Foundation, 2005).
Base = Respondents who experienced harassment (n=1,225): 659 female and 566 male college students ages 18 to 24.

Why are males less likely to report?

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Data and Statistics: Deterred Reporting?

- Research shows that students are deterred from reporting sexual harassment and assault for the following reasons:

Policies that compromise or restrict the victim's ability to make informed choices about how to proceed;	A desire to avoid public disclosure	Concerns about confidentiality
Uncertainty as to whether they can prove the sexual violence or whether the perpetrator will be punished	Campus policies on drug and alcohol use	Policies requiring victims to participate in adjudication
Trauma response	The desire to avoid the perceived or real stigma of having been victimized	

Preamble, p. 30082 (Official) notes that "Commenters cited: U.S. Dep't of Justice, Office of Justice Programs, National Institute of Justice, *Sexual Assault on Campus: What Colleges and Universities are Doing About It* (2005)."

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Stalking Data (1 of 2)

- 4.5 million women and 2.1 million men are stalked in one year in the United States.
- Over 85% of stalking victims are stalked **by someone they know**.
- **61%** of female victims and **44%** of male victims of stalking are stalked by a **current or former intimate partner**.

- First statistic: National Intimate Partner and Sexual Violence Survey: 2015 Data Brief (CDC)
- Second and third statistics: National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (CDC)

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Stalking Data (2 of 2)

- **11%** of stalking victims have been **stalked for 5 years or more**.
- **46%** of stalking victims experience **at least one unwanted contact per week**.

[Matthew J. Breiding et al., "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011", (referenced in Preamble, p. 30079 fn 366 (Official))

Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 63, No. 8 (2014): 7] (referenced in Preamble, p. 30079 fn 366 (Official))

[Katrina Baum et al., (2009). "Stalking Victimization in the United States," (Washington, DC:BJS, 2009).]

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Impact of Stalking on Victims (1 of 2)

- **46%** of stalking victims fear not knowing what will happen next.
- [Baum et al., (2009). "Stalking Victimization in the United States." BJS.]
- **29%** of stalking victims fear the stalking will never stop.
- [Baum et al.]

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Impact of Stalking on Victims (2 of 2)

- **1 in 8** employed stalking victims **lose time from work** as a result of their victimization and **more than half** lose **5 days of work or more**.
- 1 in 7 stalking victims move as a result of their victimization.
- [Baum et al.]
- The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims.
- [Eric Blauuw et al. "The Toll of Stalking," Journal of Interpersonal Violence 17, no. 1(2002):50-63.]

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LAW AND REGULATION

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Terminology (1 of 3)

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

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Terminology (2 of 3)

- "Recipient" – "means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, **any public or private** agency, **institution**, or organization, or other entity, or any person, **to whom Federal financial assistance is extended** directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof. " §106.2

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Terminology (3 of 3)

- "Post-secondary institution"- "an institution of graduate higher education as defined in §106.2(l), and institution of undergraduate higher education as defined in §106.2(m), an institution of professional education as defined in §106.2(n), or an institution of vocational education as defined in §106.2(o)." §106.30(b)

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What applies? (1 of 3)

- Law – 20 U.S.C. 1681 et seq.
- Regulations – 34 C.F.R. Part 106
  - Athletics, employment, admissions, housing, etc.
- Clery – 20 U.S.C. 1092(f); 34 C.F.R. 668.46; Clery Handbook

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What applies? (2 of 3)

- Post-Regulation Guidance, such as:
  - Guidance from the OPEN Center at the U.S. Department of Education
  - Other guidance documents posted by OCR
  - OCR's blog?

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What applies? (3 of 3)

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

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And of course…

•The New Title IX Regulations!!

• (and Title VII and your student conduct code, as discussed more throughout)

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New Regulations

• "Non-negotiable principles" include the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined. (30059 and throughout)

- Training requirements
- Different definitions
- Different processes

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Overview of the Process (1 of 2)

- Not every employee has to be a mandatory reporter in the postsecondary institution
- This is so complainants can talk to employees without having to initiate the Title IX process

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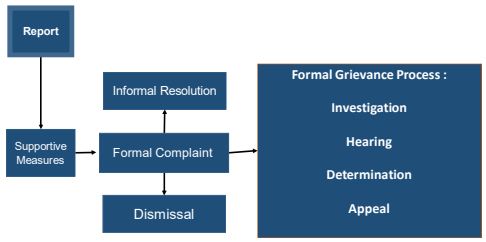
Overview of the Process (2 of 2)



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Overview of the Process: Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment **to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient** (discretion of the postsecondary institution)
- Notice to employees is no longer enough to trigger actual knowledge (ability or obligation to report not enough)
- Purpose to allow complainants to speak with employees without automatically triggering process

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Overview of the Process: Formal Complaint

- A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the recipient investigate the allegation of sexual harassment
- In response to a formal complaint, a recipient must follow a grievance process (set by 106.45)
- Title IX Coordinator must offer complainant supportive measures (regardless if files formal complaint – if complainant does not want to file a formal complaint)

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Overview of the Process: Formal Grievance Process (1 of 4)

- Any provisions, rules, or practices, other than those in the regulations, must apply equally to both parties.
- Basic requirements:
- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed

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Overview of the Process: Formal Grievance Process (2 of 4)

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

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Overview of the Process: Formal Grievance Process (3 of 4)

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

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Overview of the Process: Formal Grievance Process (4 of 4)

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

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Overview of the Process: Written Notice (1 of 2)

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

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

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

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Overview of the Process: Dismissal

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

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Overview of the Process: Investigation (1 of 4)

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

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Overview of the Process: Investigation (2 of 4)

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

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Overview of the Process: Investigation (3 of 4)

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

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Overview of the Process: Investigation (4 of 4)

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

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Overview of the Process: Hearings

- Must provide a live, cross-examination hearing
- Parties must have an advisor and the recipient must provide an advisor for a party if the party does not have one
- Advisors ask only relevant cross-examination questions—no party-on-party questioning
- May be virtual, but must be recorded or transcribed

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Overview of the Process: Determinations (1 of 3)

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

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Overview of the Process: Determinations (2 of 3)

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

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Overview of the Process: Determinations (3 of 3)

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

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Overview of the Process: Appeals (1 of 2)

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

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Overview of the Process: Appeals (2 of 2)

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

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Overview of the Process: Informal Resolution (1 of 2)

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

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Overview of the Process: Informal Resolution (2 of 2)

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

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Overview of the Process: Retaliation

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

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Overview of the Process: Confidentiality

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

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Jurisdictional Changes

- No obligation to address off-campus conduct that does not involve a program or activity of school BUT
- "Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities."

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Jurisdiction (1 of 2)

- A recipient with **actual knowledge** of sexual harassment in an educational program or activity of the recipient against **a person in the United States, must respond promptly in a manner that is not deliberately indifferent**.
- A recipient is only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

81

Jurisdiction (2 of 2)

"Education program or activity"

"includes **locations, events, or circumstances** over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. " §106.30(a)

82

Education Program or Activity

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

- Residence halls
- Classrooms
- Dining halls

83

Off Campus? (1 of 2)

Any of the three conditions must apply to extend Title IX jurisdiction off campus:

(1) Incident occurs as part of the recipient's "operations" (meaning as a "recipient" as defined in the Title IX statute or the Regs 106.2(h));

(2) If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

84

Off Campus? (2 of 2)

(3) Incident occurred in an off-campus building owned or controlled by a student organization officially recognized by a post secondary institution

- Discussion specifically addresses off campus sorority and fraternity housing and, as long as **owned by or under control of organization that is recognized by the postsecondary institution**, it falls within Title IX jurisdiction
- Must investigate in these locations (30196-97)

85

Not an Education Program or Activity

- Locations, events, or circumstances without substantial control:
  - **Anything** outside of the United States;
  - Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

86

Education Program or Activity

Depends on fact-analysis under "substantial control":

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

87

Jurisdiction and Mandatory Dismissal (1 of 3)

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

The recipient **must** investigate the allegations in a formal complaint.

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

88

Jurisdiction and Mandatory Dismissal (2 of 3)

or **did not occur against a person in the United States**, ….

89

Jurisdiction and Mandatory Dismissal (3 of 3)

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

90

Study Abroad Programs

- Draws a bright line-not outside of the United States: plain text of Title IX "no person in the United States," means no extraterritorial application. Must dismiss. (30205-06)
- Programs of college based in other countries? No jurisdiction and must dismiss.
- Foreign nationals in the United States covered.

91

Online Study

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

92

Jurisdictional Hypotheticals

"In an educational program or activity"?

93

Jurisdictional Hypotheticals Disclaimer

⚠ *Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.*

94

Hypothetical 1

Sarah, a student, informs the Title IX Coordinator or designee that she was sexually assaulted at a party over the weekend, by another student she knows, James. Sarah states that the party and assault occurred at Terrance Manor apartments. Sarah believes this is part of campus. Terrance Manor apartments is a complex directly behind the university and sits in between two university-owned senior apartment complexes, but Terrance Manor is owned by a private landlord.

95

Hypothetical 2

Jessi, a student, informs the Title IX Coordinator or designee that a stranger sexually assaulted him at a fraternity party over the weekend. The fraternity house is affiliated with the university, but the university does not own the house and the house is located off-campus.

96

Hypothetical 3

The university has partnered with the city for an improvement district along the main street that runs through campus. The improvement district removes and rebuilds buildings on the street, oversees the cleanliness of the sidewalks, and has a task force that patrols the area on bicycles to deter crime. Alex, a student, informs the Title IX Coordinator or designee that a stranger sexually assaulted her on the main street in front of campus over the weekend.

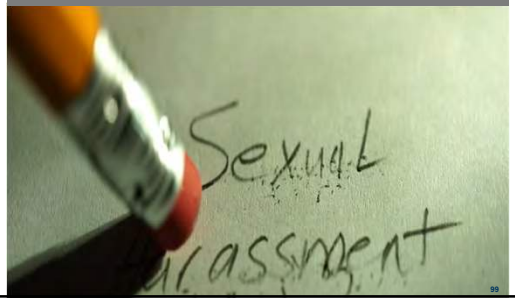
97

Hypothetical 4

Enrique, a student, calls the Title IX Coordinator or designee frantically from Italy, where he is enrolled in the university's "Italy Program," in which professors and students from the university hold courses at a sister university in Italy. Enrique states that one of the university's professor's told Enrique that he could only get an A in the course if he slept with the professor.

98

Sexual Harassment



99

Sexual Harassment Definition

- **Sexual harassment** means conduct on the basis of sex that satisfies one or more of the following:
  - [***Quid pro quo***] An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
  - [**Unwelcome conduct**] Unwelcome conduct [on the basis of sex] determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
  - [**Clery crimes**] Sexual assault, dating violence, domestic violence, or stalking

100

Sexual Harassment: *Quid Pro Quo*

- Only applies to employee respondents who condition aid, benefit, or service on unwelcome sexual conduct
- No restriction on complainant's status – can be student, employee, etc.
- DOE interprets this broadly to encompass implied *quid pro quo*
- No intent or severe or pervasive requirements, but must be unwelcome
- "[A]buse of authority is the form of even a single instance…is inherently offensive and serious enough to jeopardize educational access."

101

Sexual Harassment: Davis/Gebser

- The second prong: severe, pervasive, and objectively offensive and deny equal access (which is not the same as under Title VII)
- Does not require intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant (30159)

102

Severe

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

103

Pervasive

- Preamble indicates pervasive must be more than once if it does not fall into the above (30165-66)
- Preamble reminds us that quid pro quo and Clery/VAWA (domestic violence, dating violence, stalking) terms do not require pervasiveness

104

Objectively Offensive

- Reasonable person is very fact-specific (30167)
- Because so fact-specific, different people could reach different outcomes on similar conduct, but it would not be unreasonable to have these different outcomes
- Preamble notes that nothing in the Regulations prevents institutions from implicit bias training

105

Sexual Harassment Considerations

- The preamble notes that the Regulations do not prohibit postsecondary institutions from:
- Publishing a list of situations that would violate Title IX as "sexual harassment"
- Advising when similar conduct has been found to violate Title IX
- Publishing a list of situations that would violate code of conduct (30158)

106

Applies to Employees (1 of 5)

- This was unsettled in most Circuits
- Enter Title VII
  - Commentary notes that "severe or pervasive" definition (Title VII) shouldn't apply because elementary, secondary, and postsecondary schools are unlike the adult workplace. (Pages 43-44)
    - Davis – 5th grade students
    - Instead - "severe, pervasive, and objectively offensive"

107

Applies to Employees (2 of 5)

- Near the beginning of the preamble, the Department noted:
  - "The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application **would equate workplaces with educational environments**, whereas both the Supreme Court and Congress have noted the unique differences of educational environments from workplaces and the importance of respecting the unique nature and purpose of educational environments." (30037 of preamble).

108

Applies to Employees (3 of 5)

- But towards the end of the preamble, the Department clarified:
- "The Department appreciates support for its final regulations, which apply to employees." (30439)
- No "inherent conflict" between Title VII and Title IX (30439)
- Due Process protections found in § 106.45 (live hearing, advisors, cross-examination) apply to employees, not just students (30440)

109

Applies to Employees (4 of 5)

- The preamble clarified:
- Recipients that are subject to both Title VII and Title IX must comply with both (30440)
- "Deliberate Indifference" standard "most appropriate" for both Title VII and Title IX (30440)
- Because Title IX recipients are "in the business of education"
- "Marketplace of ideas" makes postsecondary institutions special

110

Applies to Employees (5 of 5)

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

111

Disclaimer on Terminology

This section uses the terms “rape,” “victim,” and “perpetrator” -- CRIMINAL, not POLICY, from FBI Criminal Definitions (what Clery and VAWA refer to for their definitions)

112

Mandatory: Sexual Assault, Dating Violence, Domestic Violence, & Stalking

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

113

Sexual Harassment: Sexual Assault

- “Sexual Assault” includes:
  - Rape
  - Sodomy
  - Sexual Assault with an Object
  - Fondling
  - Incest
  - Statutory Rape

114

Sexual Assault: Rape

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

115

Sexual Assault: Sodomy

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

116

Sexual Assault: With an Object

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

117

Sexual Assault: Fondling

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

118

Sexual Assault: Incest

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

119

Sexual Assault: Statutory Rape

- "Statutory Rape" means sexual intercourse with a person who is under the statutory age of consent.
- For example, in Ohio:
  - Under 13 → can't consent
  - Under 16 → can't consent to those older than 18

120

Sexual Harassment: Dating Violence

- "Dating Violence" means an act of violence committed by a person who is or has been in a romantic or intimate relationship with the complainant. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

121

Sexual Harassment: Domestic Violence

- "Domestic violence" is an act of violence 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 the jurisdiction

122

Sexual Harassment: Stalking

- "Stalking" is engaging in a course of conduct directed at a specific person that would cause a reasonable person with similar characteristics under similar circumstances to:
  - Fear for the person's safety or the safety of others; or
  - Suffer substantial emotional distress.
- As mentioned before, to qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)

123

Stalking: On the basis of sex

- The preamble distinguishes between stalking and stalking on the basis of sex (only the latter of which falls under Title IX):
- Recognition that stalking does not always relate to sex and therefore do not always fall under Title IX (ex. celebrity stalking)
- See footnote 772 on 30172– "Stalking that does not constitute sexual harassment because it is not 'on the basis of sex' may be prohibited and addressed under a recipient's non-Title IX codes of conduct"

124

Stalking: Course of Conduct

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

125

Stalking: Reasonable Person

- "Reasonable person"
- Under VAWA regulations: means a reasonable person under similar circumstances and with similar identities to the victim.

126

Stalking: Substantial Emotional Distress

- "Substantial emotional distress"
- Under VAWA regulations: means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

127

CONSIDERATIONS FOR CODES OF CONDUCT

128

Codes of Conduct

- Discretion to address what falls outside of Title IX in Student or Employee or Faculty Codes of Conduct
- "Nothing in the final regulations precludes a recipient from applying the 106.45 grievance process to address sexual assaults that the recipient is not required to address under Title IX." (30065 and similar throughout preamble)

129

Codes of Conduct Considerations

- Also be aware of retaliation pursuant § 106.71 (definition of retaliation):
- "Intimidation, threats, coercion, or discrimination, **including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances** as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation."

130

Jurisdiction and Code of Conduct Considerations

- Practical effects of pursuing a complaint under the conduct code
- Example: Will students face a drastically different process based on the location of the alleged incident?
- What will this look like?
- How will the community respond?
- Should the student conduct process change to meet the Title IX process?
- What about hybrid cases? (30198)

131

Sexual Harassment Hypotheticals

Is this "sexual harassment" under Title IX?

132

Sexual Harassment Hypotheticals Disclaimer

⚠ *Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.*

133

Hypo 1

Complainant tells the Title IX Coordinator that Respondent, a fellow student in Complainant's art history class, referred to women in a painting as "fat women" in his answer about the painting. Complainant stated that this was devastating to her because she considers herself overweight and interpreted this as an attack on her and other overweight women in the class.

134

Hypo 2

Complainant tells the Title IX Coordinator that her boyfriend hit her in the face and wants to file a complaint against him. Complainant states that he hit her six months ago, but they just broke up and she felt she should report it.

135

Hypo 3

An anonymous letter to the Title IX Coordinator states that a video is circulating among students of Respondent, a student, having sex with Complainant, another student, who appears to be unresponsive.

136

Hypo 4

Complainant, a student, alleges that his boyfriend, another student, secretly took a video of them engaged in sexual intercourse. Complainant stated that he just found out about the video when a friend informed him about it.

137

Hypo 5

Complainant, an employee, tells the Title IX Coordinator that Respondent, an unknown person on campus who may be a student, has been following Complainant around campus. Whoever it is has key card access to buildings. Complainant states that she often catches Respondent staring at her. Complainant states she is scared because she is often alone at night on campus.

138

Combining mandatory regulation language With discretionary policy language

139

Discretionary: Consent, Coercion, Incapacitation, Exploitation

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

140

Consent: Left to the Institutions to Define

- DOE left "consent" and terms that often negate consent to the discretion of the recipients to "reflect the unique values of a recipient's educational community." (30159, see also 30174)
- No required definition in law, regs, or guidance
- Policy language is going to be critical to your analysis
- We will use standard language for discussion purposes

141

Who Can *NEVER* Give Consent?

- Those who are unable to consent by law (ex. minors, incarcerated persons)
- Severely cognitively disabled persons
- Those who are incapacitated

142

Consent

- Some policies require:
  - Clear - verbal (or non-verbal?) communication
  - Knowing - Mutually understood as willingness to participate in a sexual activity and the conditions of that sexual activity
  - Voluntary - Freely and actively given

143

More Consent

- Some policies include:
  - May be withdrawn with clear communication
  - Consent for one activity is not consent for everything
  - Silence or failure to resist does not constitute consent
  - Previous consent does not constitute consent for future activities

144

When Does Consent *NOT* Exist?

- Use of physical force or threats of physical force,
  - Many policies also include physically intimidating behavior or coercion
- Individual from whom consent is required is incapacitated

145

Evidence of Consent?

- What words or actions did complainant use to convey consent/non-consent?
  - Must examine sexual contacts, acts in detail
- Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

146

More Evidence of Consent?

- Who took off what clothes?
- Who provided the condom?
- Who initiated physical contact?
- Who touched who where?
- "They gave consent" = What did you say to them, and what did they say to you?

147

Not Evidence of Consent?

Some institutions include evidence that they do not consider evidence of consent:

- What a complainant was wearing
- Whether complainant had given prior consent in other sexual activities

148

Coercion: Left to Institution to Define

- Is this in your policy?
  - Does your TIX team, your preventive education team, and your local rape crisis center agree on a definition when working with your community?
- Often defined as unreasonable pressure for sexual activity
- Compare: "I will break up with you" versus "I will kill myself"

149

Incapacitation: Left to Institution to Define

- State of being unconscious, asleep, or under the influence of drugs and/or alcohol to such an extent that the person cannot appreciate the nature or consequences of their actions
- Intoxicated people **can** consent. Incapacitated people **cannot** consent.

150

Incapacitation: Amnesty?

- Nothing in the Regulations precludes the postsecondary institution from providing amnesty to students for personal alcohol and/or drug use when participating in a Title IX investigation
- (Your institution may also be offering amnesty for COVID-19 related violations…)

151

Incapacitation

- Determined by how the alcohol (or drugs) consumed impacts a person's decision-making capacity, awareness of consequences, and ability to make informed judgments
- Beyond mere intoxication
- No requirement for incapacitation to be voluntary or involuntary on the part of the complainant

152

More Incapacitation

- To be responsible where a complainant is incapacitated, policies typically require that the **respondent knew or reasonably should have known about the incapacitation**
- Incapacitation of the respondent is not a defense

153

Productive Questioning on Gauging Intoxication

- Difficult to gauge:
  - How trashed were you?
  - On a scale of 1-10, how drunk were you?
  - Why did you get that drunk?
- Preferable approach:
  - Explain why you need the information
  - Don't place blame

154

Any Drugs?

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

155

Physical Effects

- Some policies list physical effects that are not solely indicative of, but may indicate incapacitation:
- Conscious or unconscious?
- Vomiting?
- Slurred speech
- Difficulty walking
- Difficulty holding a coherent conversation

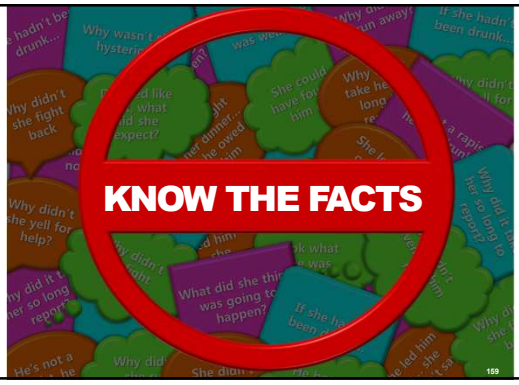
156

Blackout ≠ Incapacitation

- Alcohol can interfere with the ability to form memories
- May be a complete lack of memory or fragmentary blackouts
- Listen carefully to the way they describe what they remember. Does it fit with what you know about intoxication and recall?

157

158



159

Most rapes are committed by perpetrators that know their victims
160

Rape can happen in a committed relationship
161

Rape can happen between individuals of any gender
162

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

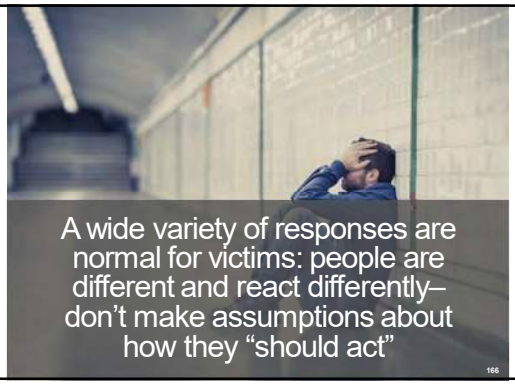
163

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

164

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

165



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

166

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

167

Why Don't People Tell Right Away

168

Why Don't People Tell Right Away

- The Regulations tell us:
  - Fear of retaliation
  - Fear of not being believed

169

Why Don't People Always Remember

- Also need to recognize that a party should not be "unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory" (30323)

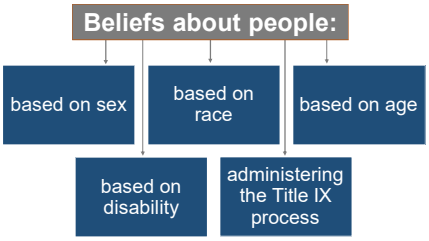
170

A Note About Trauma

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

171

Stereotypes Affect Response



172

Avoiding Sex Stereotypes

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

173

Sex Stereotypes Concerns in Preamble

- Examples of concerns from commentators:
  - More likely to punish pregnant women, people of color, people with disabilities, people from different cultures, and LGBTQ students because of harmful stereotypes
  - (30259-30260)

174

Avoiding Sex Stereotypes (2 of 2)

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

175

Culture Affects Response

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

176

Process ***YOUR*** Response

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

177

Process *YOUR* Response (2 of 2)

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

178

Counterintuitive Response

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

179

Be Human

&

Be a Blank Slate

180

Questions?

181