

Two-Day Title IX Experiential Training

Ohio Department of Higher Education

September 16-17, 2024

DAY ONE



Disclaimer

- We will cover legal requirements, but these slides primarily focus on best practices. Look to your policy and the regulations to determine what is required at your institution.
- Litigation of the 2024 Final Regulations is ongoing. The SCOTUS ruling in *Cardona v. Tennessee* prohibits the Dept. of Ed. from enforcing any part of the 2024 Final Regulations in Kentucky, Michigan, Ohio, and Tennessee, pending further litigation.
- We cannot give legal advice today, but are happy to address hypotheticals.
- All citations to the Title IX Regulations in this PowerPoint are to the ***2020 version of the Regulations!***
- The allegations for the scenario we will discuss are serious, but intentionally written with a light touch to allow for creativity in the way our actors and actresses portray the characters, and in the way we respond and handle difficult questioning. Use this as an opportunity to explore and ask questions in an intentionally caricatured scenario.

Reminders

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

Agenda – Day 1 – 9:00-3:45

- Introductions
- Title IX Themes
- Sexual Assault, IPV, and Stalking
- Trauma Informed Approaches
- Formal Complaint to Notice of Allegations
- Interviewing our Parties
- Drafting Interview Summaries
- Disputed/Undisputed Facts Exercise
- Prepare for Hearing Tomorrow
- Breaks at 10:30, 12:00 (Lunch), and 1:45

Can We Post These Training Materials?

YES – Post away!

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

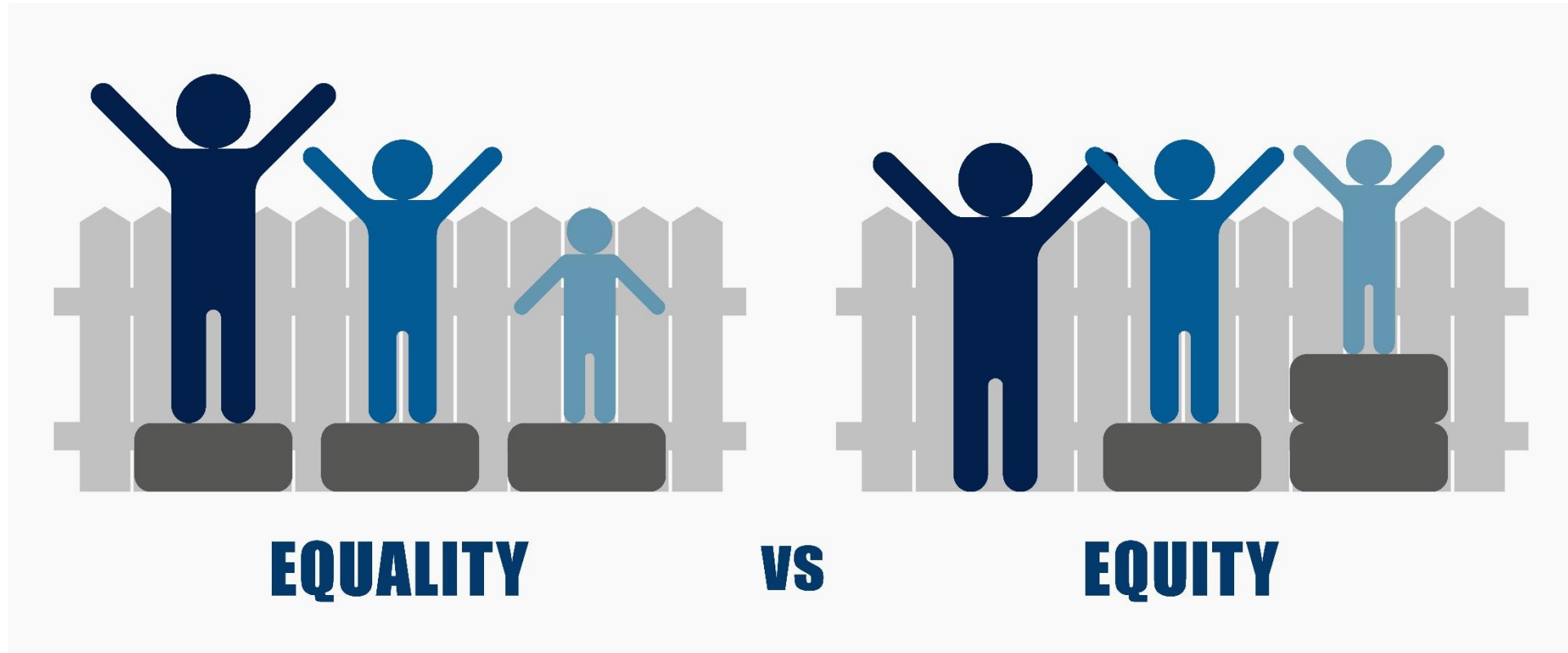


Introductions

- Name
- Institution
- Role(s) on your Title IX team
- Primary job, if you're not full-time in Title IX
- First music you purchased and in what format

TITLE IX TODAY: Themes

Title IX is an Equity Statute



What are Your Institution's Values?

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

Overview of Themes



Access



Protection



Transparency



Evidence



Improvement



No Bias

Themes - Access

What we do for one, we do for the other

- Title IX 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?
 - Can you put your rationale in writing
 - If you can't - reconsider
- Policy considerations related to ACCESS
 - Supportive Measures

Themes – Duty to Protect

All members of your campus community

- Institutions have an obligation to protect their campus
- **“They are all our students.”**
- Policy considerations related to Protection:
 - Supportive measures
 - Training & Education on Campus
- What about interim emergency measures?
 - Any action by a recipient that results in changes or removal of access to education for respondents will require an appeal process for respondents to respond

Themes - Transparency

Help Others Trust the Process

- **TRANSPARENCY** is key to trusting the process.
- Know your grievance process
- Help others understand your process
- Policy considerations related to Transparency:
 - Access to training materials
 - Providing an evidence packet in a case

If participants don't know what is happening, they will assume nothing is happening.

Themes – Evidence Based Decisions

- Outcomes must be based on **EVIDENCE**.
- “Don’t weigh your gut.”
- Make reasonable inferences and credibility determinations, but be mindful of implicit bias, stereotypes, and using our own behavior as a yardstick.
- Policy considerations related to Evidence:
 - Providing an evidence packet

Themes – Always Room for Improvement



- Always be working to **IMPROVE**:
 - Yourself as a neutral
 - Your campus as a healthy and fair place to be
 - Your policy to provide a better process informed by case law, regulations, guidance, and experience
 - Your resources for all involved
- Policy considerations related to Improvement:
 - Training & Education
 - Recognizing the processes that do and do not work for your community

Themes –

Avoiding Conflicts of Interest and Bias



- Always be working to avoid actual or perceived:
 - Conflict of interest
 - Bias
- Institutional Duties and Interests vs. Personal interests
 - Take periodic self-inventories
 - Be mindful of your activities, involvements, social media, etc.
 - Check your biases constantly, and talk with others to gain perspective and ensure you remain neutral
- Policy considerations related to No Bias
 - Training & Education
 - Providing evidence packets

Sexual Assault, Intimate Partner Violence, and Stalking

Data and Statistics - Disclaimer



- More Disclaimers
 - These should not influence your decision in any particular Title IX case
 - We didn't do the research ourselves and can't vouch for it
 - Some of the studies use the terms Offender, Victim, and Rape. Please use policy definitions (complainant, respondent) when you handle Title IX cases.
 - Okay but really, statistics **SHOULD NOT** influence your decision in any particular Title IX case

- “An offense classified as a forcible or nonforcible sex offense under the Uniform Crime Reporting System of the Federal Bureau of Investigation”
 - Forcible: Rape, Sodomy, Sexual Assault with an Object, Fondling
 - Nonforcible: Statutory Rape, Incest

- “The carnal knowledge of a person, without the consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.”

Black's Law Dictionary, 6th ed., defines carnal knowledge as "the act of a man having sexual bodily connections with a woman; sexual intercourse." There is carnal knowledge if there is the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis). However, for UCR purposes, this offense includes the rape of both males and females if at least one of the offenders is the opposite sex of the victim.

- Not a fan of the gendered language in those definitions? Neither are we.
- Dept. of Ed. has previously provided guidance that as long as your policy language encompasses all of the behavior listed in the definitions, you can change it up.

Sexual Assault - Sodomy

- Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

- To 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 unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

- 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 unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

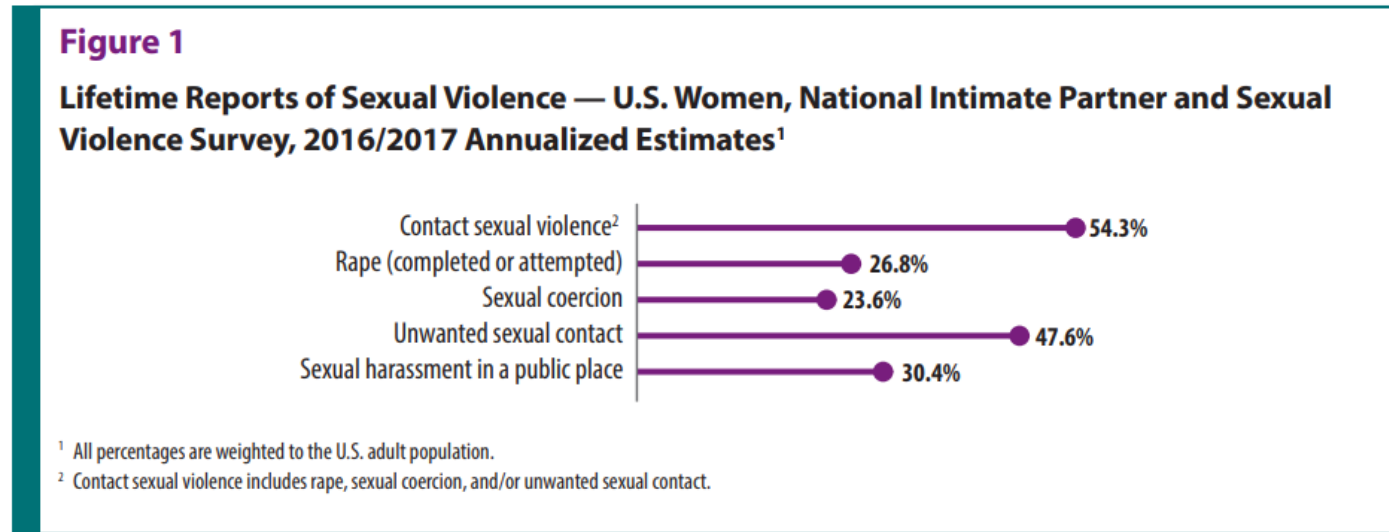
Sexual Assault Data 1 of 3

- Nearly 1 in 2 women and about 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.
- 1 in 4 women and about 1 in 26 men will experience completed or attempted rape during their lifetimes.

Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)

Located at: <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf>

Sexual Assault Data 2 of 3

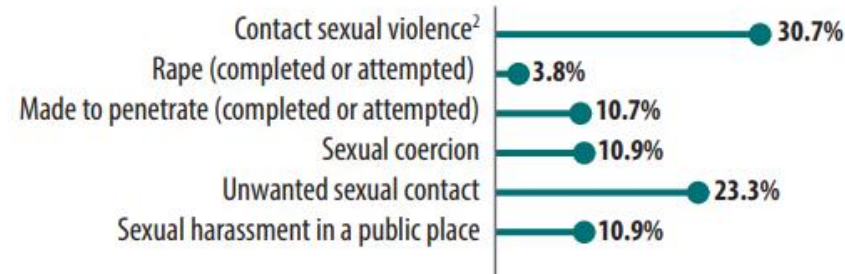


- **Types of Sexual Contact Reported by U.S. Women:**
 - 54.3% reported sexual violence;
 - 26.8% experienced completed or attempted rape;
 - 23.6% experienced sexual coercion;
 - 47.6% reported experiencing some form of unwanted sexual contact other than those specifically identified elsewhere.
-
- Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)
 - Located at: [Link to survey; CDC website](#)

Sexual Assault Data 3 of 3

Figure 2

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

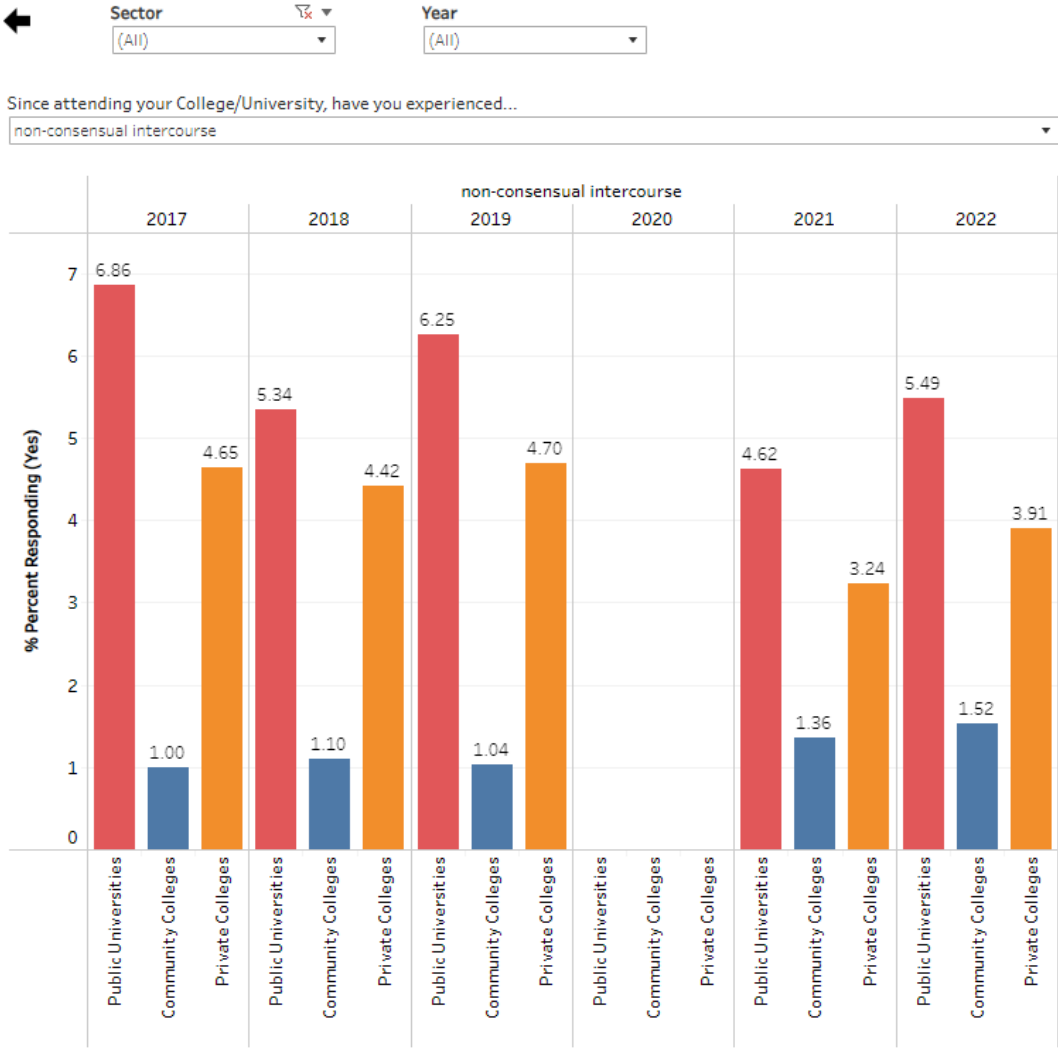


¹ All percentages are weighted to the U.S. adult population.

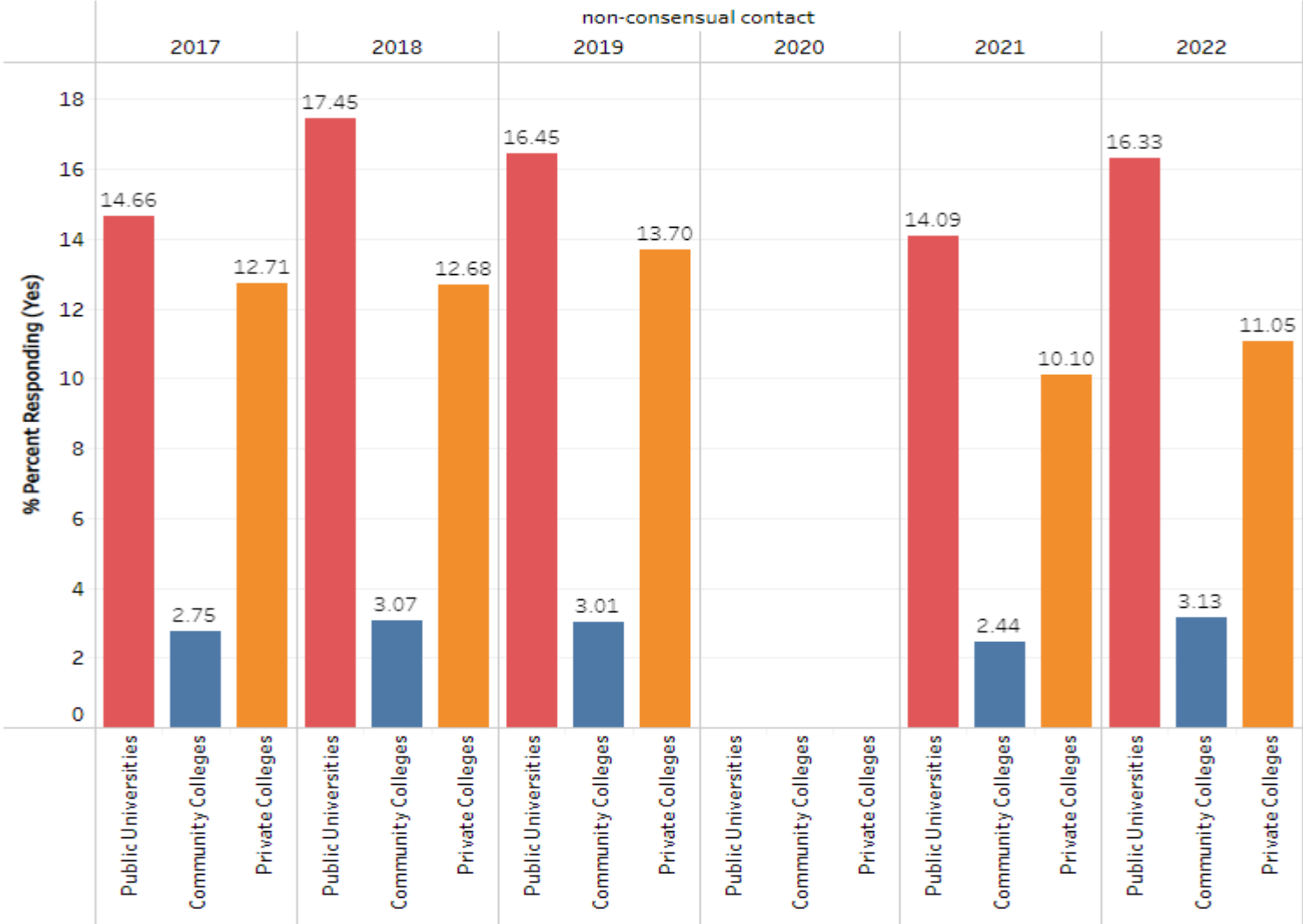
² Contact sexual violence includes rape, being made to penetrate, sexual coercion, and/or unwanted sexual contact.

- Types of Sexual contact reported by U.S. Men:
 - 30.7% reported some form of sexual violence
 - 3.8% experiencing completed or attempted rape,
 - 10.7% made to penetrate, 10.9% experiencing sexual coercion,
 - 23.3% experiencing some other form of unwanted sexual contact.
-
- Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)
 - Located at: <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf>

ODHE – Non-Consensual Intercourse



ODHE – Non-Consensual Sexual Contact



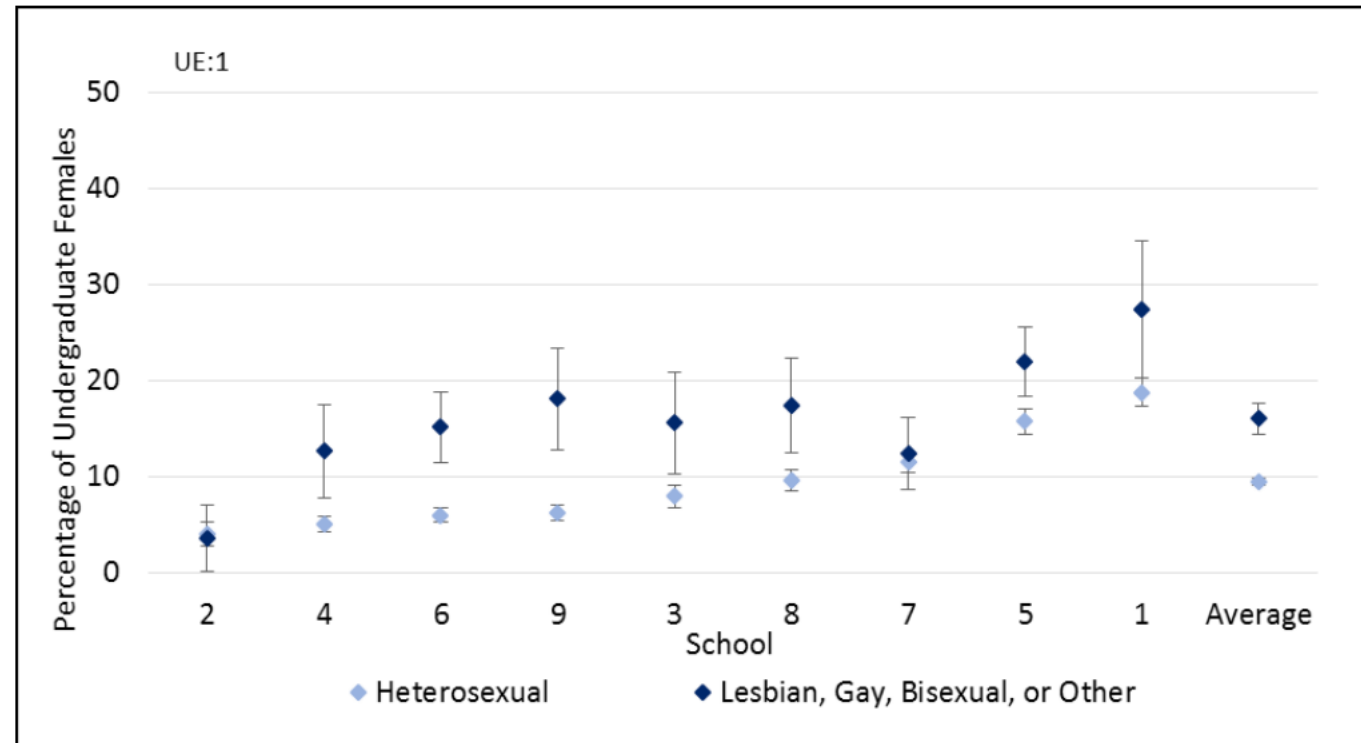
Sexual Assault Data: Prevalence Data in Higher Ed



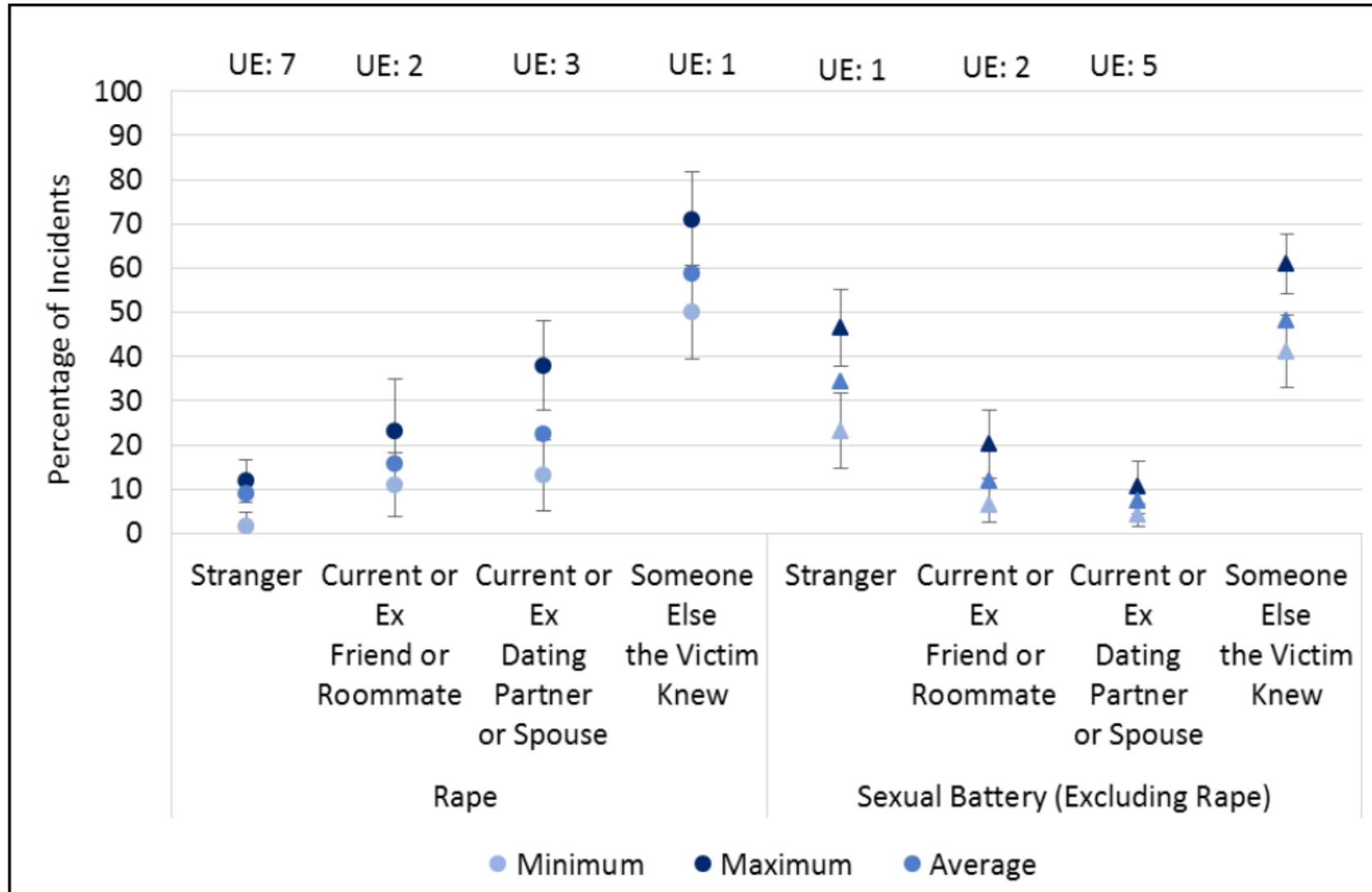
- More than **50 percent** of college sexual assaults occur in **August, September, October, or November**, and students are at an increased risk during the first few months of their first and second semesters in college.
- For the 2014-2015 academic year, a large portion of incidents reported by females occurred in **September or October, particularly for first year students.**
- Statistic one: "Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics.*" RAINN Sourced from: "Campus Sexual Assault Study, 2007; Matthew Kimble, Andrada Neacsiu, et. Al, *Risk of Unwanted Sex for College Women: Evidence for a Red Zone*, Journal of American College Health (2008)."
- Statistic two: Campus Climate Survey Validation Study (CCSVS), 2015

Sexual Assault Data

Prevalence of Sexual Assault reported by Non-heterosexual female students

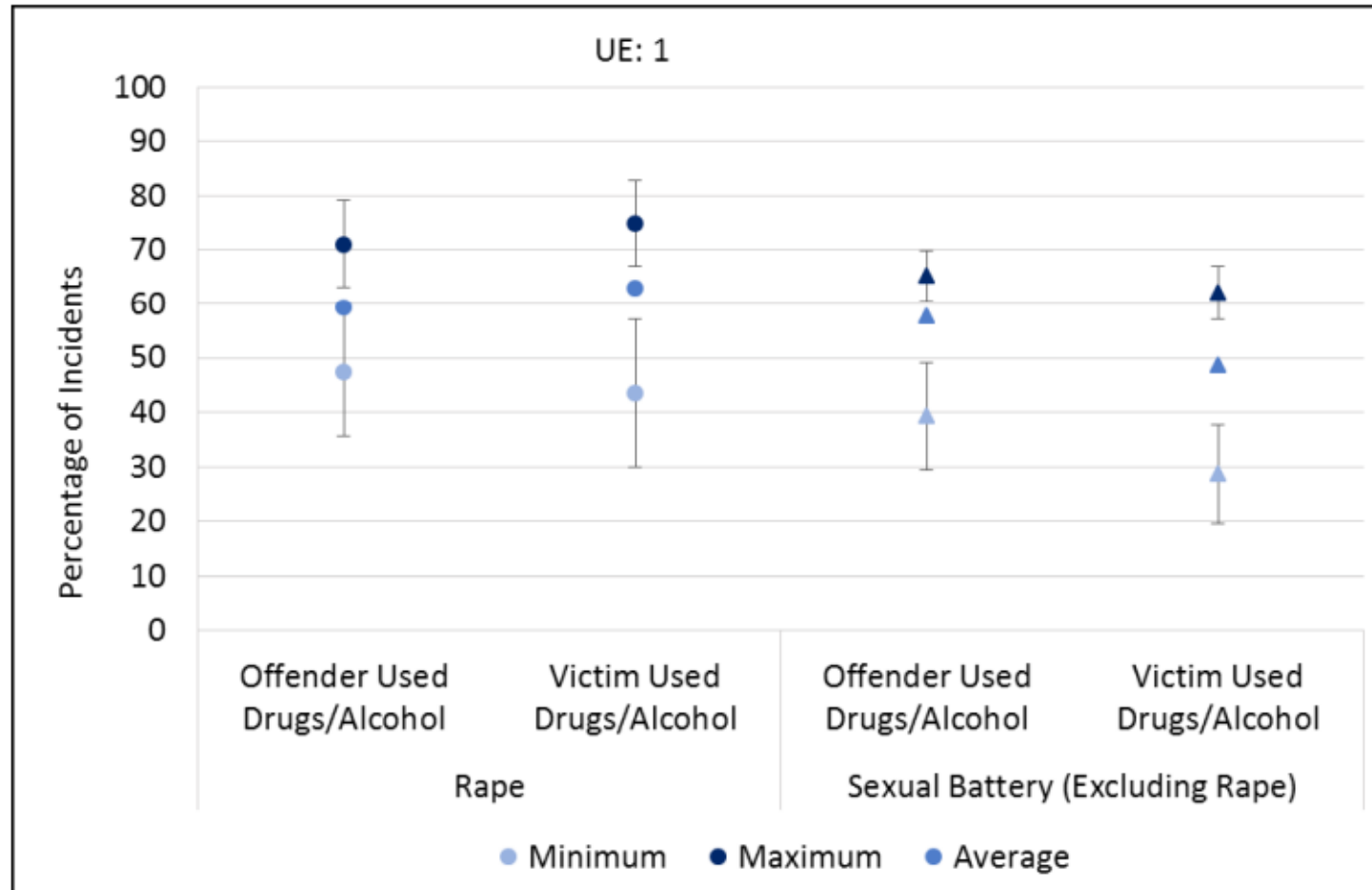


Sexual Assault Data: Identity of Perpetrator



Sexual Assault Data: Alcohol/Drug Use

Figure 28. Minimum, maximum, and overall average estimates of the percentage of rape and sexual battery incidents experienced by undergraduate females that were believed to involve offender and victim alcohol/drug use, 2014–2015 academic year



Sexual Assault Data: Alcohol/Drug Use

- “Survivors impaired by alcohol are more likely to disclose to informal, but not formal support sources than are non-impaired victims.”
- Lorenz, Katherine, and Sarah E Ullman. “Exploring Correlates of Alcohol-Specific Social Reactions in Alcohol-Involved Sexual Assaults.” *Journal of aggression, maltreatment & trauma* vol. 25,10 (2016): 1058-1078. doi:10.1080/10926771.2016.1219801.

Data and Statistics: Reporting Data



- About **65 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.
- 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).

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

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

Sexual Assault: Common Concerns

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

Dating Violence

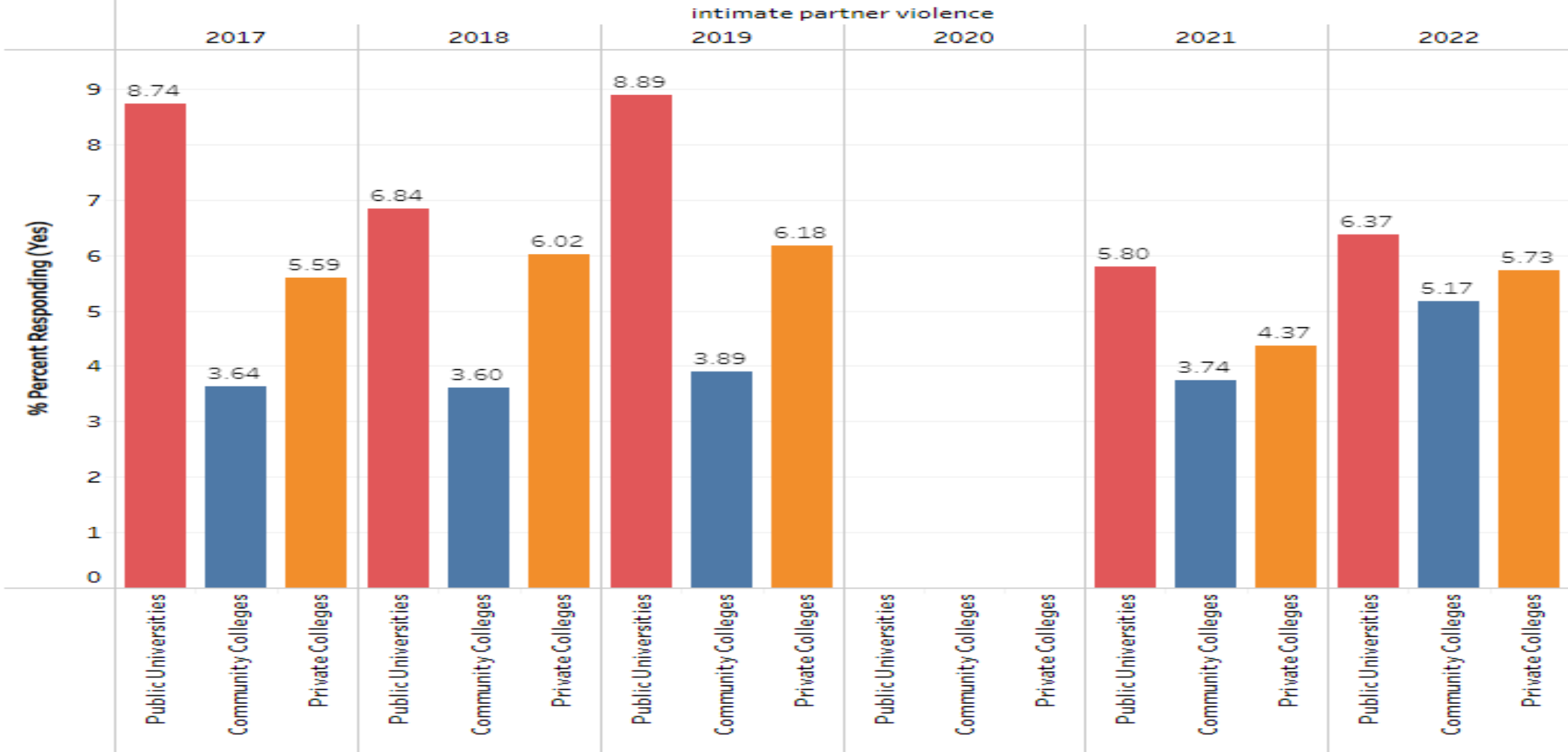
- “Dating Violence” means **an act of violence** committed on the basis of sex by a person who **is or has been in a romantic or intimate relationship with the complainant**. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship,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

- “Domestic violence” is an **act of violence** committed **on the basis of sex** 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

IPV vs. Healthy Relationships

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

ODHE Data - IPV



Common Concerns in IPV Situations

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

IPV: Questions

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

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

Stalking: 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.

Stalking: Reasonable Person

- Under VAWA regulations, for purposes of the stalking definition: means a reasonable person under similar circumstances and with similar identities to the victim.

Stalking: 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.

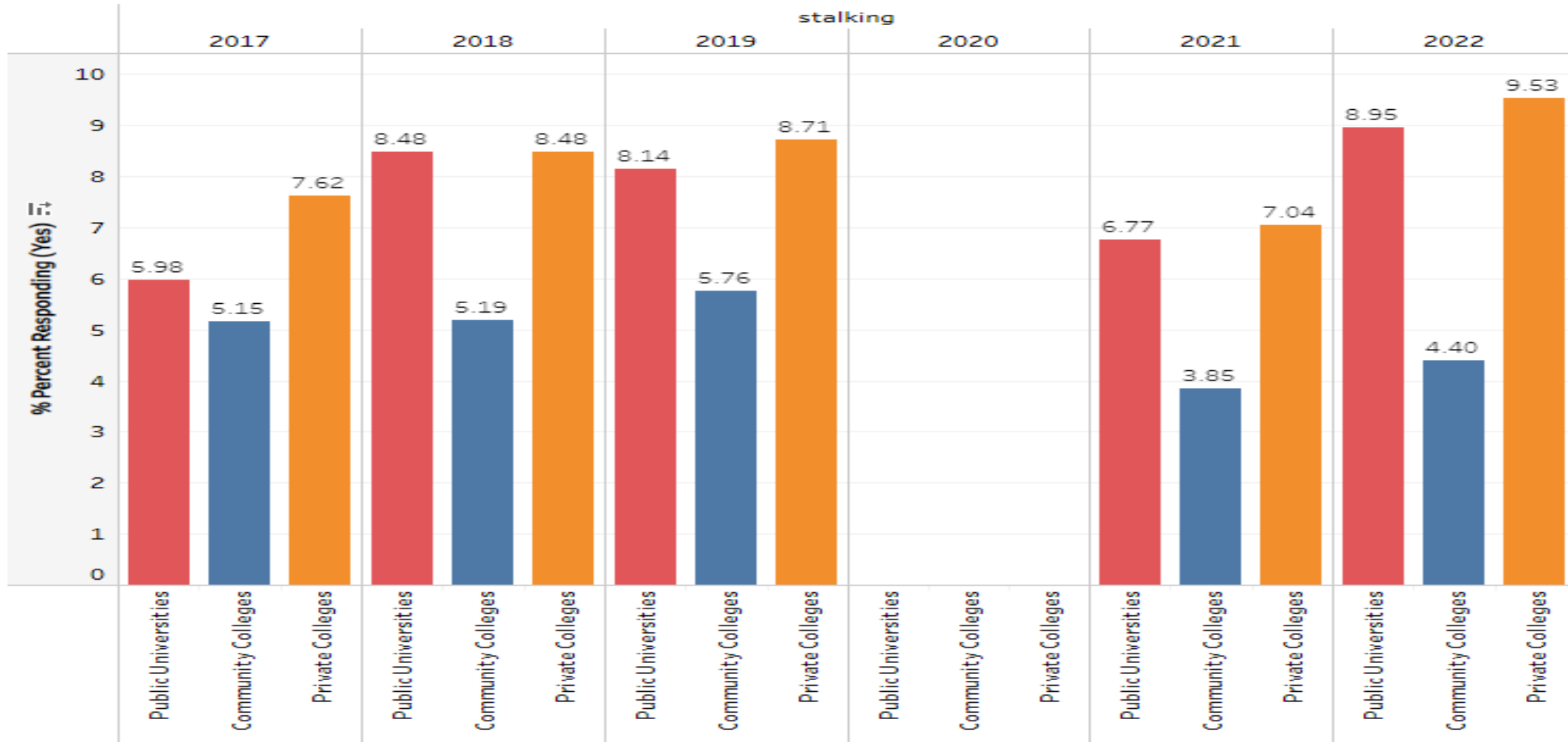
Stalking Data 1 of 2

- **31.2%** of women and **16.1%** of men in the U.S. reported stalking victimization at some point in their lifetime.
- **43.4%** of female victims and **32.4%** of male victims of stalking are stalked by a **current or former intimate partner**.
- Over **85%** of stalking victims are stalked **by someone they know**.
- First and second statistics: Smith, S.G., Basile, K.C., & Kresnow, M. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Stalking — Updated Release*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.
- Third statistic: National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (CDC)

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")]
- Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 63, No. 8 (2014): 7])]
- [Katrina Baum et al., (2009). "Stalking Victimization in the United States," (Washington, DC:BJS, 2009).]

ODHE Data - Stalking



Stalking: Common Concerns

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

Stalking: Considerations

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

Trauma Informed Approaches

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

Goal: Don't Make This Any Harder

- The process is difficult.
- Telling your story is difficult. Telling your story *multiple times* is difficult.
- Reliving trauma is difficult.
- Being accused of something is difficult.
- Everyone brings their own burdens into the process. They also bring their own history into the process—including past trauma that may be triggered.
- Our goal is to get the best evidence on the table for consideration when a decision is made. How can we do that when *everyone* we talk to may be traumatized?

First: Make No Assumptions

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

Second: They Are Not You

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

Third: Neurobiology of Trauma Is A Thing

- Individuals who experience a traumatic event may have difficulty processing the event as it is happening and after it is happening.
- Trauma may make it difficult to sequence events in a chronological order.
- People can have these same issues for many other reasons not related to trauma.
- Signs of trauma ≠ policy violation
- No signs of trauma ≠ no policy violation
- Being aware of the effects of trauma gives us a broader definition of what behavior might be *plausible* in a particular situation.

So... What Does This Mean, Practically?

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

Emotions During Interviews

- Individuals may experience a range of emotions being interviewed, including sadness, frustration, and anger (maybe at you!). It's normal.
- The goal is to keep the emotional temperature turned down to the point that the interviewee feels able to engage and provide information.
- Recognize that certain topics may trigger negative responses (e.g. what someone was wearing, alcohol/drug use). Introduce these topics by explaining why the information is needed in the context of your investigation.
- If an individual's emotions become a barrier, consider taking a break, explaining why you are asking what you are asking, and restarting.
- Main goal: keep people talking and sharing their stories.

First Interview vs. Second Interview

- The first interview is space to tell a person's story. Get all the details. Be curious.
- Often, a second interview may be necessary where other information significantly contradicts that person's story—which can be hard for that person to hear. Again, get all the details and be curious.
- Always walk into an interview assuming there are logical explanations for everything. This keeps you asking questions, and it keeps people answering them (because you don't maintain an accusatory tone!).
- Above all – keep your interviewees talking. The more information they give, the more helpful it will be to your decision maker.

Trauma and Decision Making

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

Formal Complaint to Notice of Investigation/Allegations

Formal Complaint - Definition

- A document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that the college/university investigate the allegation of sexual harassment. See 34 CFR 106.30(a).
- The Complainant must be participating or attempting to participate in the college/university's education program or activity when the Formal Complaint is filed.
- This can be done electronically.
- The Formal Complaint kicks off your grievance process.

Notice of Allegations - Definition

- Upon receipt of a Formal Complaint, your institution must provide written notice to the parties of the grievance process plus:
 - Notice of the allegations of sexual harassment including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.
 - Include:
 - Identities of the parties, if known
 - Conduct allegedly constituting sexual harassment
 - Date and location of the alleged incident, if known
 - Statement that the respondent is presumed not responsible and that the responsibility determination is made at the end of the process
 - Can have an advisor of choice who may be, but is not required to be, an attorney
 - Statement that false statements/information are prohibited, and citing to that prohibition in your policy.

Who Uses the Notice?

- Intake personnel should be conscious of what information is required in the formal complaint and the notice so they can help obtain the information.
- Investigators and decision-makers need it to establish their scope.
- Parties and advisors need it to help define what information is relevant and what information they wish to provide.
- Coordinators need the notice because it documents that they addressed all potential policy violations.

Connect the Dots



Notice

Investigation

Findings

Allegations

- Be specific! Consider attaching the formal complaint.
- Include parties, dates, locations, and conduct.
- “Title IX Sexual Harassment” stated alone is likely too broad to be useful as an allegation. Is it quid pro quo? Stalking?
- What specific sections of the policy might have been violated?
- Make sure to use the policy prohibitions that were in place at the time of the prohibited conduct.
 - You can’t get a ticket for running a stop sign that won’t get put up until tomorrow.

Allegations: Identities

- Can a complainant remain anonymous?
 - Under Title IX, the notice of allegations must include the name of the parties “who are known.”
 - If the institution knows who the complainant is, the name must typically be provided.
- Consider: How can a respondent properly prepare to defend against the allegations if they don’t know who the complainant is?

Allegations: Identities pt. 2

- Consider whether it is helpful to include the relationships of the parties.
 - Relationship to the institution
 - Student, employee, third party? This matters for Title IX jurisdiction.
 - Relationship to each other
 - May be important if there is a power differential underlying the reported conduct

Allegations: Conduct

- Be specific as to the types of sexual activities that are reported as non-consensual or to be violent.
 - Example: Sexual Assault can be anything from unwanted grinding on the dance floor to nonconsensual penetration.
- The allegations should be enough to determine jurisdiction.
- Are you permitted to include allegations of violations of other policies (e.g. Code of Conduct)? If so, include the applicable information here.

Allegations: Date and Location

- Date helps identify which policy language was in effect at the time of the conduct.
- Location helps to identify whether the conduct was in the context of your education program or activity.
 - Title IX: Does it fall within the scope of the regulated conduct?
 - Other policies: If it occurred off-campus, is it within the scope of jurisdiction in your policy?

Allegations: Bad Examples

- Respondent is alleged to have engaged in sexual harassment in violation of the Title IX Policy.
- Respondent is alleged to have engaged in unwanted oral sex with Complainant.
- Respondent is alleged to have engaged in stalking of Complainant between January and June 2022.

Allegations: Good Examples Pt. 1

- Complainant reported that Respondent engaged in the following conduct:
 - On January 21, 2022, in Respondent's residence hall room, Respondent performed oral sex on Complainant without Complainant's consent.
 - On January 28, 2022, Respondent continued to text Complainant after being told to leave Complainant alone.
 - On January 29, 2022, Respondent followed Complainant from her residence hall to her class, then waited outside to talk to her.

Allegations: Good Examples Pt. 2

- If true as reported, Respondent may have violated the following provisions of the 2021-2022 Title IX Policy:
 - Section X.4 – Title IX Sexual Harassment – Sexual Assault
 - Section X.5 – Title IX Sexual Harassment – Stalking
- A copy of the 2021-2022 Policy is attached.

Who Receives Notice?

- To both parties (and their advisors, if known).
- They both need the same information about allegations and policy violations.
- You can write two separate letters, or you can cc: the complainant on the letter to the respondent.
 - The complainant may find it jarring to receive a letter addressed to the respondent.
- Pro tip: Choose a format that facilitates a repeat of the same information in both letters, regardless of recipient.
- Your investigator(s) will need it also!

Incomplete Formal Complaints

- Formal complaints for purposes of Title IX must allege conduct that, if true, would constitute Sexual Harassment.
 - If it's an “unwelcome conduct” prong, or stalking is alleged, the impact is an element of the formal complaint.
 - Initial assessment may require that the formal complaint be amended to include necessary information prior to sending Notice.
- Outside the Title IX context, “formal complaints” aren't necessarily required. Check your policy for specifics.

What if I'm not sure about...

- Be careful of falling into the trap of pre-adjudicating cases before issuing notice.
 - Initial assessment, yes. “This could potentially constitute...”
 - Pre-adjudication, no. “There is no way they will have the evidence to support...”
 - This is an art form, not a science.

Multiple Policies?

- If something could be both Title IX and Non-Title IX, note that in the notice. Respondents should understand that both definitions apply.
- If other policies might apply (e.g. prohibited relationships, acceptable use policy), consider including notice of these as well, even if they may not use the same adjudication process.

Things You Don't *Have* To Include, But...

- How to access supportive measures
- A reminder that retaliation is prohibited, including who to contact if retaliation occurs
- How to request an interpreter* for the party or their advisor
- How to request disability accommodations for the process
- Name of investigator(s) and how to raise concerns about bias or conflict of interest
- Lists of confidential resources
- Information on how to access an institution-appointed advisor if available at this point, in these circumstances

Scenario – Let's Take A Look At Our Notice!

- What do you like about the way this is written?
- What do you not like?
- Do you feel that the allegations are written clearly?
- How would you feel if you were Whit and you received this?
- How would you feel if you were Luna and you received this?

Interviewing Our Parties

Investigators Lay the Foundation

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

Email to Complainant (1 of 4)

- Dear [Complainant],
- My name is _____ and the Title IX Coordinator has assigned me to **investigate your case**. I would like to meet with you to discuss **what you remember** about your encounter. Do you have time to meet with me on **[DATE/TIME] in the Title IX conference room in Tix Hall**? You may bring an **advisor of choice** with you, so if that date and time is not convenient for both of you, please let me know a few times that would work better.

Email to Complainant (2 of 4)

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

Email to Complainant (3 of 4)

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

Email to Complainant (4 of 4)

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

What About Respondent?

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

Email to Respondent (1 of 4)

- Dear [Respondent],
- My name is _____ and the Title IX Coordinator has assigned me to **investigate your case**. My first step will be to meet with the other party in this case to get more information about the formal complaint. I am in the process of setting that meeting up.
- Once I have conducted that interview, I will reach back out to you to set up a time to interview you. You will be permitted to bring an advisor of choice to that interview.

Email to Respondent (2 of 4)

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

Email to Respondent (3 of 4)

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

Email to Respondent (4 of 4)

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

Have it Handy

- Notice of allegations
- Policy – Is the correct version cited in the NOA?
- Notebook/pen
 - To record or not to record?
- Checklist of what to ask
 - Make sure to gather information on all elements of the alleged violation!

Thoughts for Structuring an Interview

- Spiel
- Background info
 - Relationship to Institution – major, year
 - Relationship to other party – how to characterize, how long known
- Tell me about what happened on...
 - Monologue → follow-up clarifications → specific details
 - Can you paraphrase the sequencing back to them?
- Evidence? Witnesses?
- Reminders – No retaliation, supportive measures

“The Spiel”

- Who you are
- What your role is in the process
- What you will do with their information
- Who will see what they say
- No retaliation
- Amnesty?
- If no advisor (for party) – do you want to reschedule when you can have an advisor with you?

Explain Your Role (1 of 2)

- “As the investigator, my job is to gather evidence, interview witnesses, and prepare summaries of those interviews.”
- “Today, I’ll be taking notes so that I can prepare a good summary of our conversation, but I want to make sure it’s accurate, so I’ll send you a copy for your review. You’ll get the opportunity to suggest changes to make sure that it’s complete and truthful, and that I’ve properly captured your side of the story.”

Explain Info Sharing

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

Explain Your Role (2 of 2)

- “In addition to drafting interview summaries, I’ll also draft a report that summarizes what I’ve done to investigate, and the information I’ve collected. **I do not make decisions about what happened or whether the policy was violated.** A hearing officer has that job.”
- “The goal is for me to collect information to help the hearing officer understand what happened so that they can make a good decision in this case, which is why I’m very thankful that we’re speaking today.”

Retaliation Prohibition

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

Retaliation – More Oomph

- “Please don’t do one of these two things:
 - 1) Re-read the policy and decide you don’t need to tell me because you don’t think it rises to the level of a policy violation; or
 - 2) Decide that you are strong enough to handle it and don’t tell me.
- You might be strong, but maybe other witnesses are experiencing the same thing and they might not be strong enough. I’d rather help address things before they get too complicated, so please let me know.”

Amnesty Explanation

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

Handling Advisors

- A knowledgeable advisor can be very helpful in getting the best evidence on the table.
- Must have FERPA release if students are involved and the advisor is not an employee
- Title IX Coordinator can help set expectations for advisors up front
- Communicate with the party and copy the advisor: “Your advisor asked _____, so I wanted to share my response directly with you.”
- If the advisor submits the party’s written statement, make sure the party adopts that statement as their own. Advisors don’t typically get to submit evidence unless they are witnesses.
- Check your policy language for information on how advisors may participate.

Handling Difficult Advisors

- Not every advisor is knowledgeable or helpful to the process. Offer them grace as they learn. They may be processing their own emotions about the situation.
- If an advisor exceeds the bounds of their participation in the policy, be ready to cite the policy language to let them know their role.
- If an advisor becomes abusive or disruptive, end the interview and share your concerns with the Title IX Coordinator.

Going Back to Our Structure

- Spiel
- Background info
 - Relationship to Institution – major, year
 - Relationship to other party – how to characterize, how long known
- Tell me about what happened on...
 - Monologue → follow-up clarifications → specific details
 - Can you paraphrase the sequencing back to them? Prepare a timeline.
- Evidence? Witnesses?
- Reminders – No retaliation, supportive measures

Questions on Explicit Consent

- Who initiated the sexual activity? How?
- “They gave consent” → “What did you say to them, and what did they say to you?”
- Did you have any conversation about sexual activity?

Questions on Implicit Consent

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

Sensory Questions

- What do you remember hearing, smelling, tasting, feeling?
- Where was the other person's hand, leg, body weight, etc.?
- What position were you in? What position were they in?
- If I was a camera in the room, can you describe what I would have seen?

Paraphrase Questions

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

Final Questions

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

Time To Plan

- Please break into your small groups
- You'll be interviewing Whit about his experiences
- What will you ask, and who will be asking? Get a simple structure ready.

Drafting Interview Summaries

- Interview summaries are not literature. They are summaries of the information gathered.
- Virtually every sentence should start with, “Whit stated” or “Whit recalled.” This tells us that the information is from Whit and is not a finding by the investigator.
- Use direct quotes whenever possible and appropriate.
- Don’t use adjectives or adverbs unless they are direct quotes from the witness.
- Avoid pronouns, as they can make a sentence ambiguous.

-
- Do you include your spiel at the beginning? How about at the end?
 - Is it particularly important in a given situation to document that procedural questions were asked and answered?

Investigator's Questions

- Background/Monologue – Your questions are probably not particularly helpful to include.
- Follow-Up Questions – Your questions are probably very helpful to include, as they set the stage for what the interviewee understood the scope of the question to be.
- Final Questions – These can be very important to include, as they show whether evidence/witnesses were requested, whether the person had more information to add, etc.

Demeanor

- Of the interviewee?
- Of the advisor?
- If notes about demeanor are included, ensure that they are included in a neutral manner.

Procedural Oddities

- Is there anything that happened during the interview that was unusual and should be explained?

Prepping to Interview Luna

Notice of Allegations?

- Based on what we learned during our interview with Whit, do we need to amend our Notice of Allegations?
- If so, what shall we include?

Time To Plan (Again)

- Please break into your small groups.
- You'll be interviewing Luna about the allegations.
- What will you ask, and who will be asking? Get a simple structure ready.

Next Steps: Drafting an Investigative Report

Notice of Allegations (Yet Again)

- Based on what we learned during our interview with Luna, do we need to amend our Notice of Allegations?
- If so, what shall we include?

Preparing the Report

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

Sections of the Report

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

Summary of Information

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

Attachments to Report

- Put it in a single PDF
- Make a table of contents
- Bonus: Make the table of contents clickable
- Refer to relevant documents when you write your summary
 - Every sentence should have a citation to the attachments
- Include all relevant evidence
- Include Formal Complaint(s) and Notice(s) of Allegations

- Do you need to conduct follow up interviews or request additional evidence?
- (Do you need to then circle back and do another round of evidence review/response?)
- Integrate relevant portions of the responses into your summaries.
- Attach the responses.
- And speaking of party responses, let's talk more about incorporating feedback!

Opportunities for Feedback (1 of 2)

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

Opportunities for Feedback (2 of 2)

- Mandatory opportunities for feedback per Title IX regs
 - Time for parties/advisors to **review evidence**
 - **10 days** to submit a written response, “which the investigator will consider prior to completion of the investigative report”
 - Time for parties/advisors to **review the investigative report** and respond in writing
 - At least **10 days** prior to hearing
- (34 C.F.R. §106.45(b)(5)(vi) and (vii))

Eliciting, Receiving, & Considering Feedback



Practical Tips for Feedback to Interview Summaries and Preliminary Investigative Reports

• Eliciting:

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

• Receiving:

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

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

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

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

Disputed and Undisputed Facts

Scoping is Important

- What would everyone who has personal information agree with?
- May need to zoom in/out to identify the correct scope
- Not every undisputed fact is important to the outcome. For example, if everyone refers to a witness as “overly dramatic,” that doesn’t mean it is important to include that in the list.
- Not every disputed fact is important to the outcome. For example, if a couple disputes who broke up with whom, that may not be relevant to resolve in making a determination as to whether a policy violation occurred.
 - But – will it give insight into who is more credible?

Exercise: Disputed/Undisputed Facts

- Work with your small groups to write disputed and undisputed facts given the limited statements provided to you in the exercise.
- Write at least three of each, but do more if you think it is appropriate.

Consider: How do the witness statements and other documentary evidence (the social media posts, audio recording, and text messages) fit into this?

Preparing for Day 2

FIRs Being Distributed

- Congratulations! You have finished your investigation.
- Neither party had any responses to any of the evidence.
- On to the hearing!

The Parts You'll Play

- Rebecca and Jessica will play Whit and Luna.
- We need volunteers for the following teams:
 - Team Neutral (Decision-makers)
 - Team Whit (Whit's advisor)
 - Team Luna (Luna's advisor)

Up until this point, all your questioning has remained neutral. Tomorrow, some of you will be shifting to advisors. Watch if it changes your perception of the facts. (Should it?)

Planning for Tomorrow

- Consider your role. Where are your questions intended to shine the light?
- Read the report.
- Note questions in the margin that you will want to ask, given your role.

Two-Day Title IX Experiential Training

Ohio Department of Higher Education

September 16-17, 2024

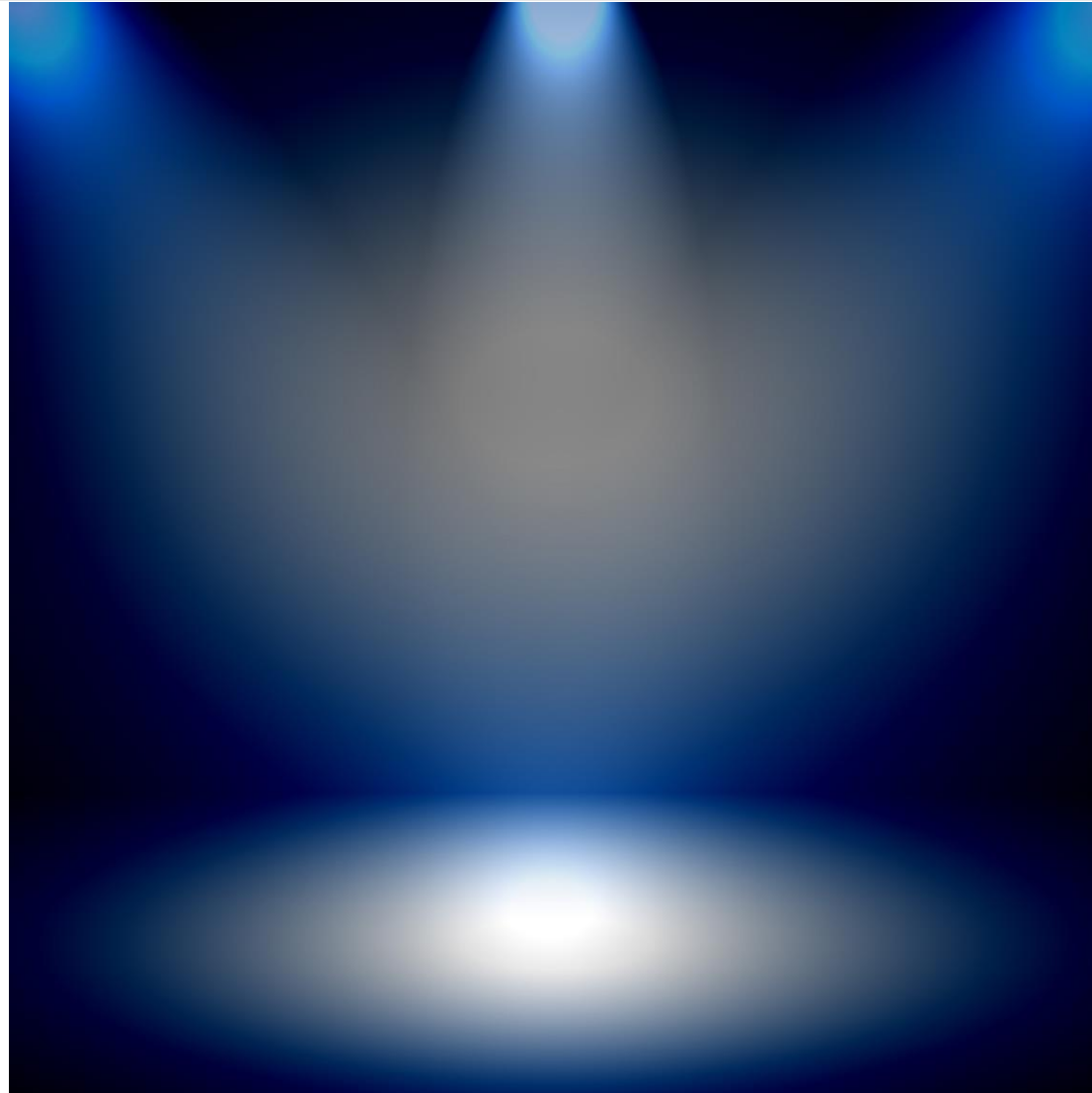
DAY TWO



Agenda – Day 2 – 9:00-3:45

- Roles and Goals
- Small Group Prep
- Questioning our Parties
- Credibility Determinations
- Deciding the Case
- Writing the Decision
- Appeals
- Breaks at 10:15 and 12:30 (Lunch), and as needed

Three Roles: Three Spotlights



Role: Hearing Panel Member

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

Hearing Panel Member: Your Goal

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

Role: Advisor

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

Advisors: Your Goal

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

What Don't You Know?

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

What DO You Know?

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

Disputed Facts?

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

Make Your Plans

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

For Today: Pick a Goal

- Consider choosing a goal for yourself to try to reach through questioning:
 - Luna’s Advisor: “By questioning Whit, I will try to show _____, to corroborate Luna’s story.”
 - Hearing Officer: “In questioning Luna, I will try to better understand what their relationship was like prior to August 17, 2024.”
 - Etc.

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

Remember: Credibility Factors

- Credibility is determined based on a “totality of the circumstances.” Factors to consider:
 - Witness statements
 - Detail and consistency of accounts
 - Corroborating evidence or the lack thereof, if it should logically exist
 - Information about how the reporting person acted following the incident, both immediately and over time
 - Information about whether the complainant told others about the incident soon after it occurred
 - Other contemporaneous evidence of accounts
 - Credible reports of similar incidents by the respondent (careful here!)
 - Whether the reporting person has been shown to make false reports (again, careful here!)

Mock Hearing

Credibility Determinations and Deciding the Case

Credibility, 2001 Guidance Style

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

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

Preamble Considerations

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

The Preamble identifies the following considerations:

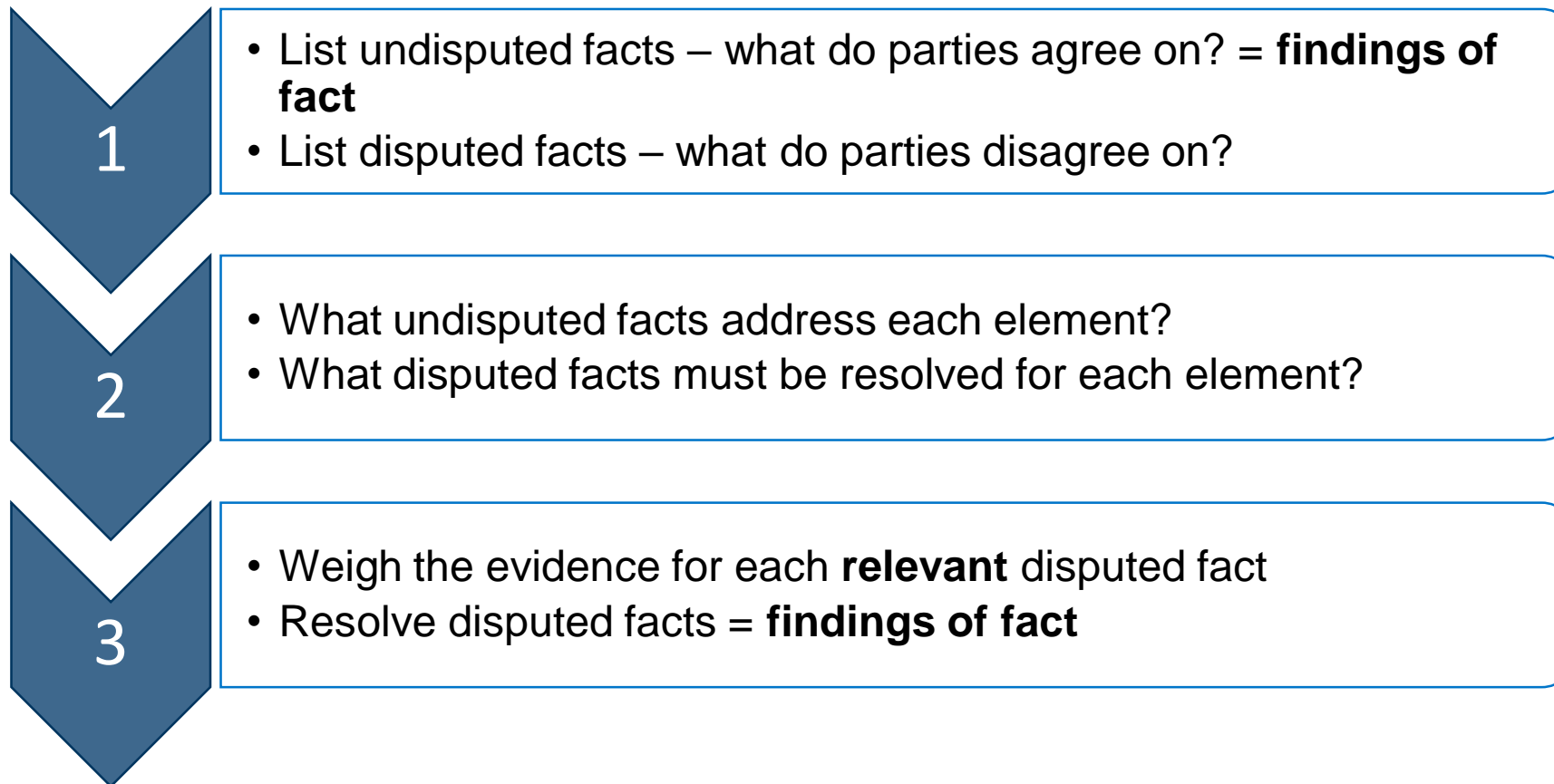
- That parties may benefit from the opportunity to challenge the opposing party’s “consistency, accuracy, memory, and credibility so that the decision-maker can better assess” the narrative to be believed. (Preamble, 30315).
- That parties may direct the decision-maker’s attention to “implausibility,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

Quality Versus Quantity

Weighing the Evidence

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

• Fact Finding Process:



Resolving Factual Disputes

Fact Finding Process Step 1:

- Undisputed vs. Disputed Facts
 - List undisputed facts
 - What do parties agree on? = **findings of fact**
 - List disputed facts
 - What do parties disagree on?

-

Resolving Factual Disputes

Fact Finding Process Step 2:

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

Resolving Factual Disputes

Fact Finding Process Step 3:

Resolve remaining factual disputes:

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

What Goes ON the scale?

Weighing the Evidence in Title IX Cases

- What goes on the scale?
 - Relevant Information
 - Per the most current ED guidance, statements do not have to be tested by cross-examination in order to be considered
 - Remember that a lack of information may affect its weight

What DOESN'T Go On the Scale?

Weighing the Evidence in Title IX Cases

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

#1 Keep An Open Mind

- Keep an open mind until all statements have been tested at the live hearing
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the evidence that can remain (statements in the record might have to be removed from consideration if not tested in live-hearing)

#2 Sound, Reasoned Decision

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

#3 Consider All/Only Evidence

- You must make a decision based solely on the relevant evidence obtained in this matter and only statements in the record that have been tested in cross-examination
- You may consider nothing but this evidence

#4 Be Reasonable and Impartial

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

#5 Weight of Evidence (1 of 2)

- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

#6 Evaluate Witness Credibility (1 of 3)

- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.

#6 Evaluate Witness Credibility (2 of 3)

- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

#6 Evaluate Witness Credibility (3 of 3)

- Credibility is determined fact by fact, not witness by witness
 - The most earnest and honest witness may share information that turns out not to be true

#7 Draw Reasonable Inferences

- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning.

#8 Standard of Evidence (1 of 2)

- Use the your standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.
- Preponderance of the evidence: a fact is more likely than not to be true (30373 fn. 1409)

#8 Standard of Evidence (2 of 2)

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

#9 Don't Consider Impact

- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.
- **Do not consider the impact of your decision.**

Even Weight Distribution

Weighing the Evidence

If nothing tips the scale:

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

Writing the Decision

Required Parts

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

Our Typical Outline

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

Writing Goals

- Be consistent in terminology
- Be clear as to the source of information. Compare:
 - “Bob stated that this happened.”
 - “This happened.”

Unambiguous

- Could someone unfamiliar with the incident pick up the decision and understand what happened?
- Make no assumptions that the reader will understand certain aspects of the community
- Write for a judge and jury to understand with no prior background

Relevancy Check

- Include any decisions made that exclude information as not relevant and the explanation given in hearing
- Check to ensure that your report does not contain any information you are prohibited from including?

Sensitive

- Will the parties feel heard?
- Will the parties feel blamed?
- Will the parties feel vilified?
- Will the tone otherwise inflame the parties unnecessarily?
- Maintain neutral, evidence-driven tone.

Specific

-
- Set the scene visually (will help identify inconsistencies in stories)
 - Use quotation marks carefully
 - Include details to the level that you can thoroughly understand what it looked like
 - Be careful of pronoun usage so that we always know who is saying or doing what

Appeals

Bases for Appeal

1. Procedural integrity that affected the outcome of the matter
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
3. Conflict of interest or bias against a party by the Title IX Coordinator, investigator(s) or decision maker(s) that affected the outcome of the matter
4. Dealer's Choice: Does your institution have other bases for appeal written into the policy?

Process Requirements

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

Does the hypothetical fall into one of the bases of appeal?

Procedural Issue?

- Was there a procedural issue?
- If yes, did it affect the outcome of the matter?

New Evidence?

- Is there new evidence?
- If yes, was the evidence reasonably available at the time of the determination regarding responsibility or dismissal?
- If not, could its inclusion affect the outcome of the matter?

Conflict of Interest or Bias?

- Did the Title IX Coordinator, investigator(s), decision-maker(s) have a conflict of interest or bias?
- If yes, was it for or against a party generally or specifically?
- If yes, did it affect the outcome of the matter?

You Are Deciding the Appeal

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

Written Appeal Decision

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

One More Thing...

- Thanks to all our volunteers today!
- Thanks to our host, Sinclair Community College, and to ODHE, for pulling us all together.

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