



February 24, 2022

Title IX Team Training (Day 1)



Bricker & Eckler
ATTORNEYS AT LAW

Disclaimer #1



- Change is constant in this field.
- Expect new guidance and case law to be issued regularly after this training.
- Check with legal counsel regarding specific situations in light of the dynamic nature of requirements.

Disclaimer #2



- Clery Act language is centered on language used in criminal situations – e.g. “victim”
- We have included such language here for accuracy, but we recommend that you use terminology from your policies instead, and treat both parties equitably.
- We will talk about the Violence Against Women Act and its amendments to Clery, but know that Clery requirements apply regardless of the gender of either party.

2

Posting These Materials



- Yes, you have permission to post these materials on your website as required by 34 C.F.R. 106.45(b)(10)(i)(D).

3

Today's Agenda



- 9:00-9:10 Introduction
- 9:10-9:30 Themes and the Importance of Neutrality
- 9:30-10:00 New Definition of Sexual Harassment; Issues relating to Sexual Assault, Dating Violence, Domestic Violence, and Stalking
- 10:00-10:30 BREAK
- 10:30-10:45 Scope of your Education Program/Activity
- 10:45-11:00 Overview of your Policy/Process
- 11:00-11:30 Intake and Investigation
- 11:30-12:00 Conducting a Hearing
- 12:00-12:15 Prepare for Day 2 (in person, February 28th at 1:00 p.m.)

4

A Brief History of IX



- 2001 – OCR issues guidance indicating that institutions must address sexual harassment, including between students
- 2011 – Dear Colleague Letter (withdrawn) includes sexual assault as sexual harassment; provides protections for victims (and therefore both parties)
- 2014 – Q&A (withdrawn) addresses issues raised by 2011 DCL
- 2018 – Proposed regulations
- 2020 – Adoption of new regulations
- 2021 – New DCL withdraws “suppression rule” in regulations

5

Clery Act in Context



- April 5, 1986 – Jeanne Clery is raped and murdered at Lehigh University
- 1990 - Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act – tied to Higher Education Act funding
- 2013 – Violence Against Women Act amends the Clery Act with regard to sexual assault, dating violence, domestic violence, and stalking procedures
- July 1, 2015 – Current regulations go into effect
- 2016 Handbook – Issued to give detailed guidance on compliance
- October 9, 2020 – 2016 Handbook is rescinded; new Appendix put in place; updated January 19, 2021

6

Where does Clery fit?



- Title IX policies handle sexual assault, dating violence, domestic violence, and stalking when:
 - The complainant is currently participating or attempting to participate in your education program or activity and
 - The conduct occurred in your education program or activity and
 - The conduct occurred against a person in the United States

If any one of these things is not true, the case is subject to “mandatory dismissal” from the Title IX process (and likely into your Equity Compliance Resolution Process) – but if the case is addressed through another policy, the Clery Act still applies.

7

Training Requirements – Title IX



“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 - Clery



From the Clery regulations:

Proceedings involving sexual assault, dating violence, domestic violence, and stalking must –

- “Be conducted by officials who, at minimum, receive **annual** training on the issues related to dating violence, domestic violence, sexual assault, and stalking, and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability”

We will discuss safety for all parties – not just victims – and our community.

Overarching Themes (1)



- Follow your policies. Follow your process.
- Treat everyone equitably throughout the process, regardless of sex/gender, and regardless of whether they are complainant or respondent.
- Consider the need for supportive and protective measures for both parties and the campus community.
- Transparency in the process encourages participation, reduces stress, and increases trust in the outcome

10

Overarching Themes (2)



- Use language of the policy (complainant, respondent), not language of criminal law (victim/survivor, perpetrator).
- Be incredibly mindful not to prejudge the outcome of the case.
- Base decisions on evidence, not your “gut.”
- Provide regular updates. Remember that if they don’t hear from you, they will assume you are doing nothing or actively working against them.

11



The Importance of Neutrality

Avoiding Bias, Conflicts of Interest, and Predetermination

Regulations



Title IX Team must be trained on “how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.” 34 CFR 106.45(b)(1)(iii)

Being Impartial



A decision-maker needs 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)

14

Bias: Response of Department to Perceived v. Actual Bias



- Department declined to determine whether bias has to be actual or if perceived is sufficient to create an issue
- Each specific bias issue requires a fact-specific analysis

(30252)

15

Bias: How the Department tried to minimize bias



No single-investigator model for Title IX SH

- Decision-maker (or makers if a panel) cannot have been the same person who served as the Title IX Coordinator or investigator (30367)
- Prevents the decision-maker from **improperly gleaning information from the investigation** that isn't relevant that an investigator might be aware of from gathering evidence (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

16

Preamble Discussion: Bias and Conflict of Interest (1 of 2)



- No *per se* prohibited conflicts of interest from using employees and administrative staff, including supervisory hierarchies (30352)
 - but see portion about decision-makers and Title IX Coordinator as supervisor
- No *per se* conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process (30353)

17

Preamble Discussion: Bias and Conflict of Interest (2 of 2)



The preamble discussion:

- Provides as an example that it is **not a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence** (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead recommends **using a reasonable-person test** to determine whether bias exists

18

Example in Discussion for Unreasonable Conclusion that Bias Exist



“[F]or example, **assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents” is **unreasonable** (30252)**

19

Discussion Regarding Training's Role



“[T]he **very training required by 106.45(b)(1)(iii)** [that you are sitting in right now] is intended to

- provide Title IX personnel with the tools needed to serve impartially and without bias
- such that the prior professional experience of a person whom a recipient would like to have in a Title IX role
- need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.”

(30252)

20

Examples in Discussion for Unreasonable Conclusion that Bias Exist: Review of Outcomes



- Department also **cautioned** parties and recipients from **concluding bias** or possible bias “based **solely on the outcomes of grievance processes** decided under the final regulations.”
- Explained that this means, **the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.”**

(30252)

21

Examples of Bias



- Situations where a decision-maker has already heard from a witness or party in a prior case and has made a credibility determination re: that person;
- Situations where information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

22

Avoiding Pre-Judgment of Facts at Issue



A good way to avoid bias and ensure impartiality: avoiding prejudgment of facts

Remember:

- **Keep an open mind** as a decision-maker and actively listen to all the facts presented as subjected to cross-examination
- If a party or witness does not submit to cross-examination, statements may or may not be entitled to as much weight
- Each case is unique and different

23

Concerned?



If you believe you are biased or a conflict of interest, you should recuse yourself immediately.

If you believe that you may be *perceived* to have such a bias or conflict of interest by one or both parties (but you actually do not), talk with the Title IX Coordinator to consider next steps.

24



The New Definition of Sexual Harassment Under Title IX

Plus Issues relating to Sexual Assault, Dating Violence, Domestic Violence, and Stalking

Sexual Harassment - IX



- **Sexual harassment** means conduct **on the basis of sex** that satisfies one or more of the following:
 - [**Quid pro quo**] An employee conditioning the provision of an aid, benefit, or service 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 University's education program or activity; or
 - [**Clery crimes**] Sexual assault, dating violence, domestic violence, or stalking [**when on the basis of sex**]

26

Sexual Harassment: *Quid Pro Quo*



- Only applies to employee and student respondents (can be any complainant)
- 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.”

Sexual Harassment: Davis/Gebser



- The second prong: severe, persistent, 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)

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)

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

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

SH – IX (continued)



- Sexual Assault

Rape (non-consensual penile/vaginal penetration)

Sodomy (non-consensual oral/anal penetration)

Sexual Assault with an Object (penetration with object or body part other than genitalia)

Fondling – Must be done “for the purpose of sexual gratification”

Incest – Closer in kin than second cousins

Statutory rape – Complainant is under age 13, or under age 16 and the respondent is 18 or older

32

Remember Title VII



- Title VII still applies to protect employees from sexual harassment
- Title VII definition:

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (a) submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, or (b) unreasonably interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment.

33

Impact Matters



- Collect information on the impact the behavior has had on the reporting party, particularly with regard to how they are able to interface with your educational program or activity
- This impact on the reporting party goes directly to the elements of certain types of sexual harassment and is a necessary part of your analysis
- Don't forget to ask about impact!
- The impact on a responding party is not an element of any policy violation and typically is not relevant for purposes of our analysis.

34

Data and Statistics



- 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

35

Sexual Assault Data Women and Men



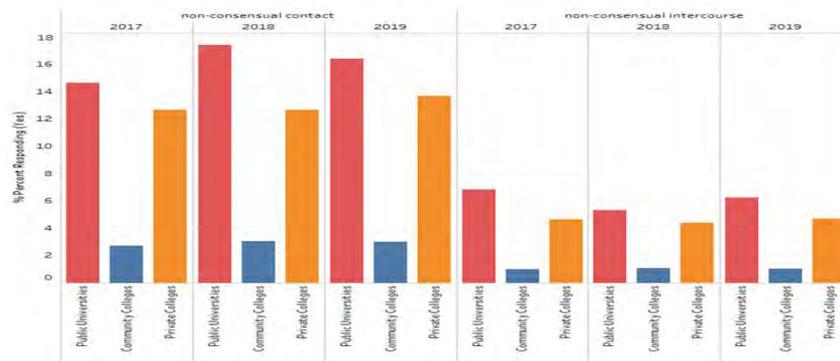
More than 1 in 3 women and 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.

Nearly 1 in 5 women and 1 in 38 men will experience completed or attempted rape during their lifetimes.

Nearly 1 in 14 men was made to penetrate someone (completed or attempted) during his lifetime.

Statistics from [CDC.gov/violenceprevention/sexualviolence/fastfact.html](https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html) (last accessed July 13, 2021)

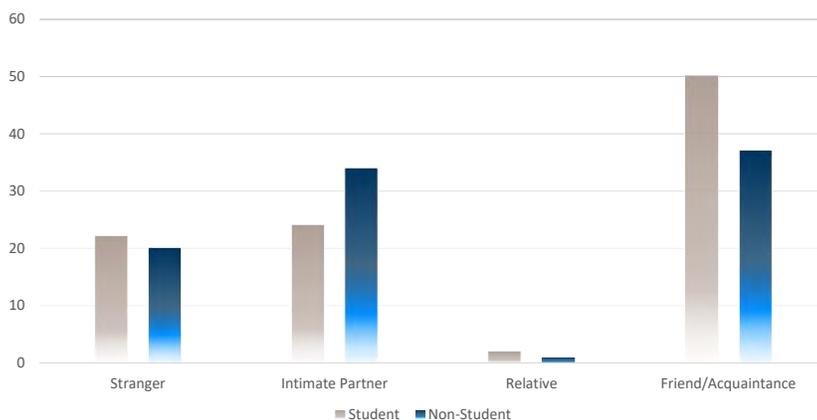
Sexual Assault Data ODHE Survey



Statistics from ODHE Changing Campus Culture Benchmark Data (last accessed July 13, 2021)



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).

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>."

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.

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).

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).*

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).

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.

44

Sexual Harassment: 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.

45

Sexual Harassment: Domestic Violence



“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

46

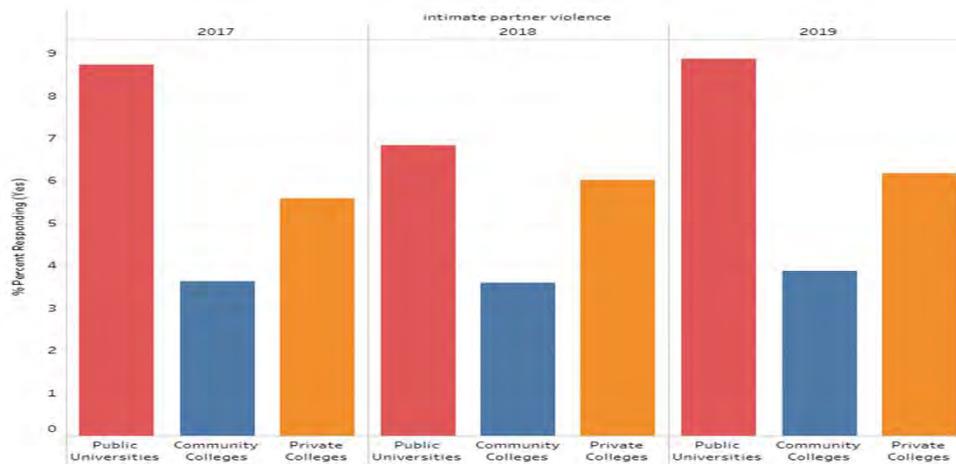
IPV vs. Healthy Relationships



- 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 domestic violence shelter to ensure consistent messaging with regard to the policy?

47

ODHE Data



48

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.

49

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?

50

Sexual Harassment: Stalking



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

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

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

51

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.

52

Stalking: Reasonable Person



“Reasonable person”

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

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.

Stalking Data



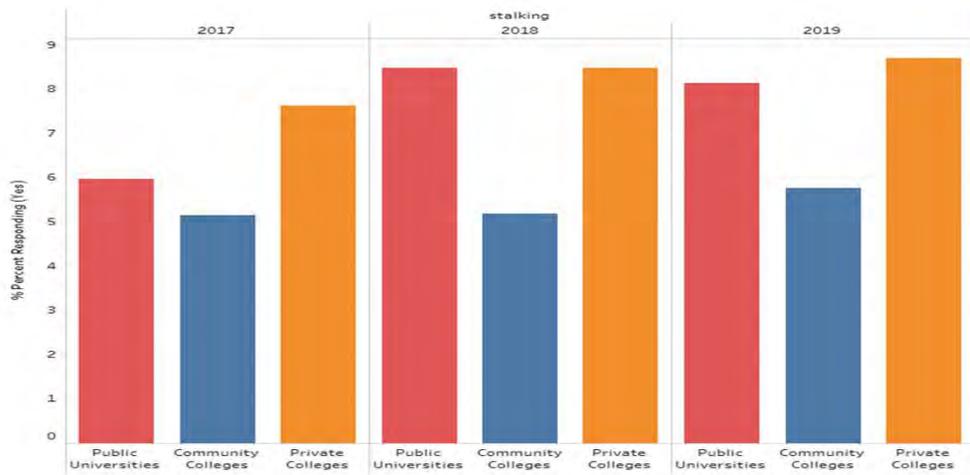
4.5 million women and **2.1 million** men are stalked in one year in the United States.

1 in 6 women and **1 in 17** men have been stalked at some point in their lives.

Nearly **54%** of female victims and **41%** of male victims experienced stalking before the age of 25.

- First statistic: National Intimate Partner and Sexual Violence Survey: 2015 Data Brief (CDC)
- Second and third statistics: CDC "Preventing Stalking" fact sheet, accessed July 13, 2021.

ODHE Stalking Data



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.]

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.]

58

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.

59

Stalking: Considerations



- Outline a timeline of the “course of conduct”
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered

60



Scope of your Education Program/Activity

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

Jurisdiction



“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)

62

Education Program or Activity



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

- Residence halls
- Classrooms
- Dining halls

63

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 University's "operations"

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

64

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)

65

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)

66

Education Program or Activity



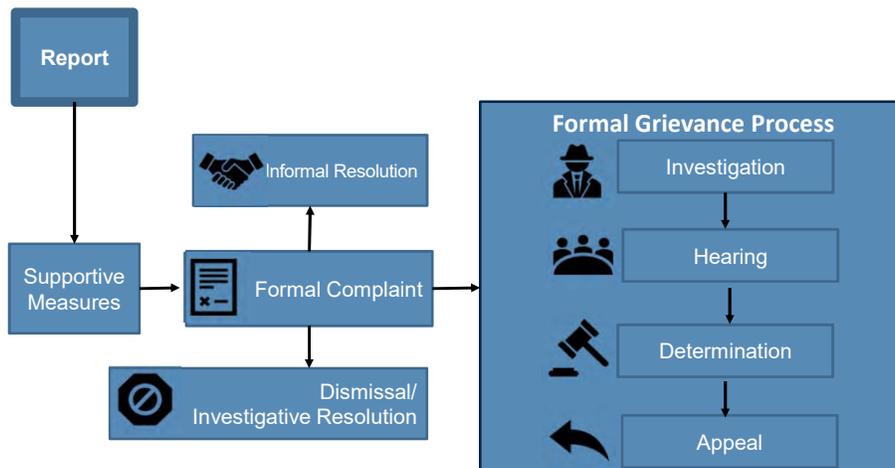
Depends on fact-analysis under “substantial control”:

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



Overview of Your Policy/Process

Overview of the Process



A Report versus a Formal Complaint



- Report – Any information received regarding potential policy violation
 - Result of report: Coordinator sends an email to the potential reporting party, inviting further discussion
 - Supportive measures are offered
- Formal complaint – A written document that:
 - Is filed by the reporting party or signed by the Title IX Coordinator
 - Alleges sexual harassment against a responding party
 - Requests that University investigate the allegation of sexual harassment

70

Overview of the Process: Supportive Measures (1 of 5)



- Non-disciplinary and non-punitive
- Individualized
- “As reasonably available”
- Without fee or charge to either party
- Available at any time (regardless of whether a formal complaint is filed)

71

Overview of the Process: Supportive Measures (2 of 5)



Designed to:

- ***restore or preserve access*** to University’s education program or activity, without unreasonably burdening the other party;
- protect the safety of all parties and University’s educational environment; and
- deter sexual harassment

72

Overview of the Process: Supportive Measures (3 of 5)



- | | |
|---|--|
| • Counseling | locations |
| • Extensions of deadlines (course-related adjustments) | • Leaves of absence |
| • Modifications of work/class schedules | • Increased security and monitoring of certain areas of the campus |
| • Campus escort services | • “and other similar measures” |
| • Mutual contact restrictions | |
| • Changes in work or housing | |

Overview of the Process: Supportive Measures (4 of 5)



Role of the TIXC upon receiving a report:

- promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,
- consider the complainant's wishes with respect to supportive measures,
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint

74

Overview of the Process: Supportive Measures (5 of 5)



- Must maintain confidentiality to the greatest extent possible
- Note: Title IX Coordinator may ask you to help with accommodations and may not be able to tell you all the details as to *why*.

Dismissal from Title IX

- University may dismiss a formal complaint from the Title IX process in certain circumstances detailed on the next few slides
- If a dismissal occurs, University may proceed with another process (student conduct, employee discipline, etc.)

Mandatory Dismissal from Title IX

- Complainant was not participating/attempting to participate in education program/activity at the time complaint was filed
- Conduct not alleged to have occurred within education program/activity
- Conduct did not occur in the United States
- Complaint, if proved, does not constitute a potential violation of Title IX Sexual Harassment

Discretionary Dismissal from Title IX

These are in the regulations.

- Complainant withdraws complaint in writing
- Respondent is no longer enrolled in/employed by University
- “Specific circumstances prevent [University] from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein”

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



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

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



- University can offer informal resolution if:
 - Provides written notice to the parties
 - Obtains the parties' voluntary, written consent to the informal process

University **cannot** offer this option in cases of employee Title IX sexual harassment of a student

80



Intake

Choices in the process help reduce anxiety about the process

Goals of Intake



1. Give a copy of the policy.
2. Explain the process.
3. Explain options.
4. Notify of the ability to obtain supportive measures.
5. Notify of the ability to report to law enforcement, University, or both (if applicable based on allegations).
6. Notify of the prohibition against retaliation.

82

Choices for Intake – Reporting Party



1. Party can choose not to respond to outreach.
2. Make a report for information only; no request to pursue at this time. (Can change their mind)
3. Obtain supportive measures.
4. Report to law enforcement if criminal in nature.
5. File a formal complaint.
 - a. Informal resolution
 - b. Formal resolution
6. Can choose to participate in the process or not, and if so, how much.

83

Choices for Intake – Responding Party



Typically, not notified until supportive measures require it or formal complaint is filed.

1. Can choose to participate in the process or not, and if so, how much.
2. Can obtain supportive measures.
3. Can request informal resolution.

84

Choices for Intake – Both Parties



- Bring an advisor to this and every meeting, discussion, interview, proceeding, etc.
 - Advisor of choice, including an attorney if they wish
- They can talk about the case with others, provided doing so does not constitute a policy violation. No “gag orders.”
- They can choose to disengage from the process and reengage later.

85

Notice of Allegations to Respondent

34 C.F.R § 106.45(b)(2) 1 of 3

- Must include sufficient details known at the time, and with sufficient time to prepare a response before any initial interview
- Sufficient details include:
 - Identities of the parties
 - Conduct allegedly constituting sexual harassment
 - Date/location of alleged incident

Consider attaching the formal complaint.

Notice of Allegations to Respondent

34 C.F.R § 106.45(b)(2) 2 of 3

- Needs to be supplemented if new allegations are to be included
- Must include statement that respondent is **presumed not responsible** for alleged conduct and that determination regarding responsibility is made at the conclusion of the grievance process
- Must inform the parties that they may have advisor of their choice who may be an attorney and who may inspect and review evidence

Notice of Allegations to Respondent

34 C.F.R § 106.45(b)(2) 3 of 3

- Must inform parties of any provision in the code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the formal process



Investigating Formal Complaints

Overview of the Process: Investigation (1 of 4)



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

90

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

91

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 – University must send to party and party's advisor with at least **10 days to submit a written response before completion of investigation report**



92

Overview of the Process: Investigation (4 of 4)



- University 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
- The parties get a chance to submit a written response within 10 days of receiving the finalized report

93

Set the Stage

- Make introductions
- Be hospitable – snacks, tissues, water, Zoom?
- Give overview of why they are being interviewed
- What information will be shared, and with whom?
- Explain retaliation policy
- Invite questions

Begin Broadly

- Elicit a monologue about the incident
 - What happened earlier that day before the incident?
 - What happened with regard to the incident?
 - What happened next?

Freeze Frames – Important for Consent

- Ask the witness to “freeze” on the moment and describe details
 - What could they see? Feel? Smell? Taste? Hear?
 - Where was the other person? How were they positioned?
 - Where were you? How positioned?
 - What did you say to the other person? Them to you?
 - Describe other person’s tone, demeanor, body language

Ask Follow-Up Questions

- Re-review your notes
- Re-review the elements of each charge
 - Have you elicited all of the information this witness might have about each element?
 - Do you have an understanding of how the witness obtained the information they shared?

Credibility

- Gather facts to assist decision-maker
- Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by both parties and all witnesses (related to the case, or not)

Consent: University Definition (1 of 2)

- See Policy, page 3
- “Agreement to do something, or permission for something to happen or be done”
- Must be “informed, voluntary, and mutual.”
- “Consent does not exist when there is *any* expressed or implied force, coercion, intimidation, threats, or duress.”
 - “Coercion: the application of pressure by the respondent that unreasonably interferes with the complainant’s ability to exercise free will.”

Consent: University Definition (2 of 2)

- Silence or absence of resistance \neq consent
- Past consent \neq current consent
- Incapacitated individuals cannot give consent
 - Definition on page 4

When Consent is at Issue

- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent

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?)

102

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?

103

Incapacitation: University Definition (1 of 3)



See Policy, page 4

“A state in which someone cannot make rational, reasonable decisions because the person lacks the capacity to give knowing consent (e.g., to understand the ‘who, what, when, where, why or how’ of their sexual interaction).”

“Incapacitation is determined through consideration of all relevant indicators of an individual’s state and **is not synonymous with intoxication, impairment, blackout, and/or being drunk.**”

104

Incapacitation: University Definition (2 of 3)



- “Incapacity results from a temporary or permanent physical or mental health condition, involuntary physical restraint, and/or the consumption of incapacitating drugs.”
- “It is a defense to a sexual assault policy violation that the respondent neither knew nor should have known the complainant to be physically or mentally incapacitated. ‘Should have known’ is an objective, reasonable person standard which assumes that a reasonable person is both sober and exercising sound judgment.”

105

Incapacitation: University Definition (3 of 3)



- “It is not an excuse that the responding party was intoxicated and, therefore, did not realize the incapacity of the complainant. The question of whether the responding party should have known the incapacity is an objective question about what a reasonable person, exercising sober, good judgment, would have known, in the same or similar circumstances.”

106

Incapacitation: Key Issues



- Timeline:
 - What did complainant ingest and when?
 - What did respondent know about what complainant ingested?
 - Who saw complainant and when, and what symptoms of incapacitation did complainant show at the time?
 - What did respondent have the opportunity to witness regarding symptoms of incapacitation shown by complainant?

107

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
- "They were drunk." → "What did drunk look like?"
- "Were you having any difficulties [insert activity]?"

108

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?

[Does University offer amnesty?]

109

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?

110

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?

111

Data for your Timeline



- Text messages unrelated to the incident itself, but that give time stamps and other valuable information
- Videos/pictures of parties with time stamps
- Card swipes for the parties and anyone with the parties on the evening of the incident
- Security footage

112

Create Investigative Report (1 of 2)

- Must fairly summarize all relevant evidence
- Include a procedural history. Summarize what you have done to investigate:
 - Who you talked to
 - Who declined to participate or didn't respond
 - What evidence you gathered
 - What evidence you tried to gather but couldn't
 - Whether there is any evidence that you were provided but do not believe is relevant and why

Create Investigative Report (2 of 2)

- Summarize interviews and evidence gathered
 - Chronologically?
 - By source?
- Helpful to identify disputed and undisputed facts
- Attach all relevant evidence (with a good table of contents!)
- No findings, recommendations, or determinations in the report
- Investigators should show their work.

“10 & 10”

- 10 days to review and submit written response prior to finalization of report
 - Opportunity for parties and advisors to review all evidence gathered and all information obtained
 - Many institutions submit a draft report at this time to facilitate review of the file, but this is not required by the regulations
- 10 days to review and submit written response after finalization of report
 - This should integrate information provided in response above



Conducting a Hearing

Overview of the Process: Hearings



- Must provide a live, cross-examination hearing
- Parties must have an advisor and University 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

The Setup



- Can have in one room if a party doesn't request separate rooms and recipient chooses to do so.
- Separate rooms with technology allowing live cross examination at the request of either party
- "At recipient's discretion, can allow any or all participants to participate in the live hearing virtually" (30332, see also 30333, 30346) explaining 106.45(b)(6)(i)

Process (1 of 2)



- Discretion to provide opportunity for opening or closing statements
- Discretion to provide direct questioning (open-ended, non-cross questions) by party's advisor to the party
- Cross-examination must to be done by the party's "advisor of choice and never by a party personally."

Process (2 of 2)



- An advisor of choice may be an attorney or a parent (or witness) (30319)
- Discretion to require advisors to be “potted plants” outside of their roles cross-examining parties and witnesses. (30312)

Advisors



If a party does not have an advisor present at the live hearing, the recipient **must provide** without fee or charge to that party, an advisor **of the recipient's choice**, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party. (106.45(b)(6)(i) and preamble 30339)

Advisors: But Other Support People?



- Not in the hearing, unless required by law (30339)
- “These confidentiality obligations may affect a recipient’s ability to offer parties a recipient-provided advisor to conduct cross-examination in addition to allowing the parties’ advisors of choice to appear at the hearing.”
- ADA accommodations-required by law
- CBA require advisor and attorney?

Recording the Hearing



- Now required to be audio, audio visual, or in transcript form
- Decision-makers have to know how to use any technology you have

The Hearing



- Order of Hearing (Policy, page 19)
 - Call to order by Chairperson
 - Summary of formal complaint/investigation report
 - Statement by Complainant
 - Statement by Respondent
 - Evidence presented by the complainant
 - Evidence presented by the respondent
 - Statement by Complainant
 - Statement by Respondent
 - Deliberation/Decision (Board only)

Questioning by the Decision-Maker (1 of 2)



- The neutrality of the decision-maker role is and the role of the advisor to ask adversarial questions, protects the decision-maker from having to be neutral while also taking on an adversarial role (30330)
- “[P]recisely because the recipient must provide a neutral, impartial decision-maker, the function of adversarial questioning must be undertaken by persons who owe no duty of impartiality to the parties” (30330)

Questioning by the Decision-Maker (2 of 2)



- BUT “the decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-makers own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party’s unique perspective about the evidence.”
(30331)

The Hearing (1 of 2)



- Ruling on relevancy between every question and answer by a witness or party
 - Set expectation that party or witness cannot answer question before decision-maker decides if relevant.

The Hearing (2 of 2)



- Confidentiality appears to preclude support persons other than the advisor from participating in the live-cross examination hearing
 - Perhaps allow support person to meet in waiting rooms or before and after hearing
 - Consistent with providing supportive services to both parties – hearings can be very stressful for both parties

128

Live Cross-Examination: Theory



According to the Department, the process in 106.45 best achieves the purposes of:

- (1) effectuating Title IX's non-discrimination mandate by ensuring **fair, reliable outcomes** viewed as **legitimate** in resolution of formal complaints of sexual harassment so that victims receive remedies
- (2) **reducing and preventing sex bias** from affecting outcomes; and
- (3) ensuring that Title IX regulations are consistent with **constitutional due process and fundamental fairness** (30327)

129

Live Cross-Examination: How it should look



“[C]onducting cross-examination consists simply of posing questions intended to advance the asking party’s perspective with respect to the specific allegation at issue.”
(30319)

130

Live Cross-Examination: Regulations (1 of 2)



In this process:

- Decision-maker must permit each party’s advisor to ask the other party and any witnesses **all relevant** questions and follow-up questions, including those challenging **credibility**
- Must be conducted directly, orally, and in real time by the party’s advisor, but never party personally
- Only relevant cross-examination and other questions may be asked of a party or witness

131

Live Cross-Examination: Regulations (2 of 2)



- Before a party or witness may answer a question, the decision-maker must first determine whether the question is relevant and explain the reason if not relevant
- Must audio record, audio-video record or provide a transcript of the hearing

132

Role of Decision-Maker/questioning by



The preamble discussion provides some additional information on protecting neutrality of the **decision-maker**:

“To the extent that **a party wants the other party questioned in an adversarial manner** in order to further the asking party’s views and interests, that questioning is conducted by the party’s own advisor, **and not by the recipient**. Thus, no complainant (or respondent) need feel as though the recipient is “taking sides” or otherwise engaging in cross-examination to make a complainant feel as though the recipient is blaming or disbelieving the complainant.” (30316)

133

Relevancy



- Per 34 C.F.R. 106. 45(b)(6)(i):
 - “Only **relevant** cross-examination and other questions may be asked of a party or witness.”

“[C]ross examination must focus only on questions that are **relevant** to the allegations in dispute.” (30319)

134

Relevancy - Pause



Party or witness **cannot** answer a question until the decision-maker determines whether it is relevant.

- Requires decision-makers to make “on the spot” determinations and explain the “why” if a question or evidence is not relevant (30343)

135

What is Relevant? (1 of 3)



Decisions regarding relevancy do not have to be lengthy or complicated:

“... it is sufficient... to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, **or because the question asks about a detail that is not probative of any material fact concerning the allegations.**” (30343)

136

What is Relevant? (2 of 3)



Questions to consider:

- Does this question, topic, evidence help move the dial under the standard of evidence?
 - **Preponderance of the evidence:** a fact is more likely than not to be true (30373 fn. 1409)

137

What is Relevant? (3 of 3)



Under the **preponderance of the evidence** standard:

- Does this help me in deciding if there was more likely than not a violation?
- Does it make it more or less likely?
- Why or why not?

If it doesn't move this dial: likely not relevant.

138

Not Governed by Rules of Evidence (1 of 2)



The Rules of Evidence do NOT apply and CANNOT apply

“[T]he decision-maker’s only evidentiary threshold for admissibility or exclusion of questions and evidence is **not whether it would then still be excluded under the myriad of other evidentiary rules and exceptions that apply under, for example, the Federal Rules of Evidence.**” (30343)

139

Not Governed by Rules of Evidence (2 of 2)



Examples:

- No reliance of statement against a party interest (30345)
- No reliance on statement of deceased party (30348)
- A recipient may not adopt a rule excluding relevant evidence whose **probative value is substantially outweighed by the danger of unfair prejudice** (30294)

140

Relevancy Exclusions



Recipient must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (30331)

- A **recipient** may **not** adopt rules excluding certain types of relevant evidence (**lie detector** or rape kits) where that type of evidence is not labeled irrelevant in the regulations (e.g., sexual history) or otherwise barred for use under 106.56 (privileged) and must allow fact and **expert witnesses**. (30294)

141

Relevancy: Not Relevant



The Department has determined that recipients must consider relevant evidence with the following exceptions:

- (1) Complainant's sexual behavior (except for two narrow exceptions)
- (2) information protected by a legal privilege
- (3) party's treatment records (absent voluntary written waiver by the party) (30337)

142

Relevancy: Regulations' Rape Shield Law-Complainants



- According to 34 C.F.R. 106. 45(b)(6)(i), Cross-examination **must exclude** evidence of the Complainant's "sexual behavior or predisposition" **UNLESS**
 - its use is to prove that someone other than the Respondent committed the conduct, OR
 - it concerns specific incidents of the complainant's sexual behavior with respect to the respondent and is offered to prove consent

143

Relevancy: Regulations' Rape Shield Law - Respondents



- Rape shield protections **do not apply to Respondents**
- “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

144

Relevancy: Treatment Records



“[C]annot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and **which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent** to do so for a grievance process under this section.”

Section 106.45(b)(5)(i) (see also 30317).

145

Relevancy: Legally Privileged Information (1 of 2)



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

A recipient's grievance process ***must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of***, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

146

Relevancy: Legally Privileged Information (2 of 2)



Other typical privileges recognized across jurisdictions but with variations (will want to **involve your legal counsel for definitions in your jurisdiction**):

- Attorney-client communications
- Implicating oneself in a crime
- Confessions to a clergy member or other religious figures
- Spousal testimony in criminal matters
- Some confidentiality/trade secrets

147

Relevancy: Improper Inference



When parties do not participate:

- “If a party or witness does not submit to cross-examination at the live hearing...the decision-maker(s) cannot draw an inference about the determination regarding responsibility ***based solely*** on a party’s or witness’s absence from the live hearing or refusal to answer cross-examination or other questions.” 34 C.F.R. 106.45(b)(6)(i).

148

Relevancy: Reliance on Prior Statements



When parties elect not to participate, a recipient cannot retaliate against them (30322)

What if a party or witness gave a statement during the investigation but is not participating in cross-examination?

- Regulations say that you cannot rely on these previous statements, but a court recently invalidated this requirement and a new DCL adopts that reading. That case is currently on appeal.
- Your policy does not permit such statements to be considered. (If you don’t board the plane, your luggage does not go to the final destination.)

149

Relevancy: When Parties or Witnesses Do Not Participate



The preamble recognizes that there are many reasons a party or witness may not elect not to participate in the live cross-examination hearing or answer a question or set of questions

- The decision-maker cannot make inferences from non-participation or compel participation (retaliation) (30322)
- Relevant questioning by advisor along these lines?

150

Advisors for Non-Appearing Parties



“[A] party’s advisor may appear and conduct cross-examination **even when the party whom they are advising does not appear.**” (30346)

“Similarly, where one party does not appear and that party’s advisor does not appear, **a recipient-provided advisor must still cross-examine the other, appearing party,** resulting in consideration of the appearing party’s statements (without any inference being drawn based on the non-appearance).” (30346)

151

Issues of Relevancy



“[D]oes not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by recipient’s decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with 106.45 and apply equally to both parties.” (30294)

BUT

“[I]f a recipient trains Title IX personnel to evaluate, credit, or assign weight to types of relevant, admissible evidence, that topic will be reflected in the recipient’s training materials.” (30293)

152

Decorum (1 of 5)



The preamble to the Title IX Regulations contains many discussions of an institution’s discretion to set rules to maintain decorum throughout hearings and to remove non-complying advisors, parties, or witnesses.

153

Decorum (2 of 5)



“Recipients may adopt rules that govern the **conduct and decorum of participants at live hearings** so long as such rules comply with these final regulations and **apply equally to both parties**... These final regulations aim to ensure that the truth-seeking value and function of cross-examination applies for the benefit of both parties while minimizing the discomfort or traumatic impact of answer questions about sexual harassment.” (30315)

154

Decorum (3 of 5)



“[W]here the **substance of a question is relevant**, but the manner in which an advisor attempts to ask the question is **harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically ‘leans in’ to the witness’s personal space)**, the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.” (30331)

155

Decorum (4 of 5)



“The Department acknowledges that predictions of **harsh, aggressive, victim-blaming** cross-examination may dissuade complainants from pursuing a formal complaint out of fear of undergoing questioning that could be perceived as interrogation. However, recipients retain discretion under the final regulations to educate a recipient’s community about what cross-examination during a Title IX grievance process will look like, including developing rules and practices (**that apply equally to both parties**) to oversee cross-examination to **ensure that questioning is relevant, respectful, and non-abusive.**” (30316 see also 30315; 30340)

156

Decorum (5 of 5)



- “[T]he essential function of cross-examination is **not to embarrass, blame, humiliate, or emotionally berate a party**, but rather to ask questions that probe a party’s narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue.” (30319)
- Nothing in this rule prevents recipient from enforcing decorum rules in the hearing and “the recipient may require the party to use a different advisor” if the advisor does not comply and may provide a different advisor to conduct cross examination on behalf of that party (30320)

157

Reminders



- **Withhold pre-judgment:** The parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases
- Your evaluation of demeanor likely involves personal biases, so tread carefully when using it to assess credibility

158

More Reminders



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

159

Prep for Next Time!



- Need volunteers:
 - Hearing panelists
 - Complainant (Tessa Tasker)
 - Advisor for Complainant
 - Respondent (Michael Murphy)
 - Advisor for Respondent
 - Witness Sarah Shade

Review report. Prepare questions in advance.