



September 11, 2023

John Carroll University
Title IX Training

Bricker Graydon

Disclaimer #1

Bricker Graydon

- 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

Bricker Graydon

- 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.

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).

Today's Agenda



- 8:30 Check in
- 9:00 Themes and the Importance of Neutrality
Sexual Assault, Dating Violence, Domestic Violence, and Stalking
Scope of your Education Program/Activity
Overview of your Policy/Process
- 10:00-10:15 Break**
- 10:15- Intake (overview)
Conducting an Investigation (overview)
Conducting a Hearing (overview)
Overview of Advisor role in hearings
Overview of Hypothetical to review during working lunch
- Noon – Break/Working lunch**
- 12:30 Separate into group by roles
Plan for hearing
- 2:00 Conduct Mock Hearing
- 3:30 Making a Decision and Writing Report



Training Requirements? Clery Act and Title IX

What's required?

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.

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 prejudice 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.

Overarching Themes (2)



- Use language of the policy (reporting party, responding party), 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.



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)

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)

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)

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)

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

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.)

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

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.



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 of the College conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct;
 - **[Unwelcome conduct]** Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education program or activity; or
 - **[Clery crimes]** Sexual assault, dating violence, domestic violence, or stalking

**Sexual Harassment:
Quid Pro Quo**



- Only applies to employee 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 (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

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.

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.

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

Sexual Assault Data

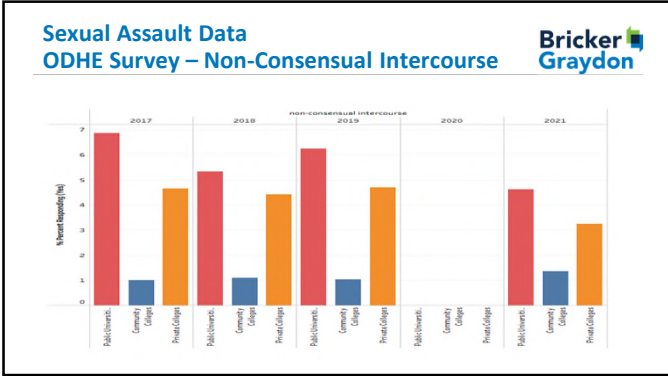


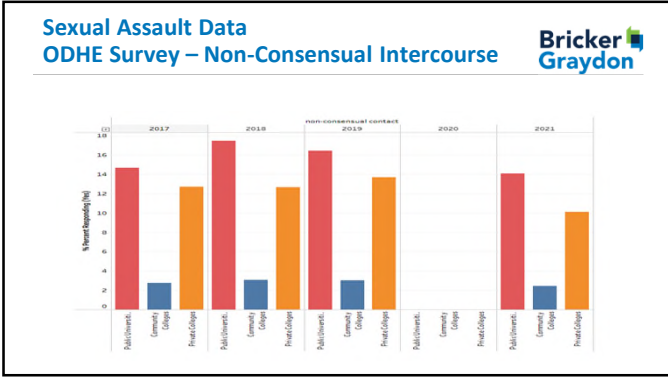
More than 1 in 3 women and 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.

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/factsheet.html](https://www.cdc.gov/violenceprevention/sexualviolence/factsheet.html) (last accessed July 13, 2021)





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/>."

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).

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.

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.

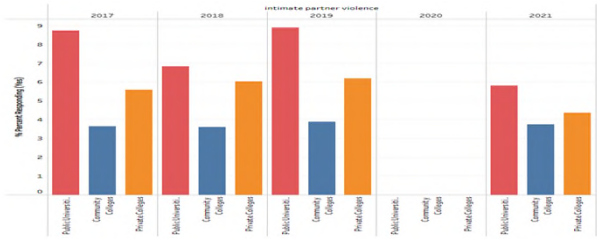
Sexual Harassment: Domestic Violence



“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

ODHE Data



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?

**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)

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.

Stalking: Reasonable Person



“Reasonable person”

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

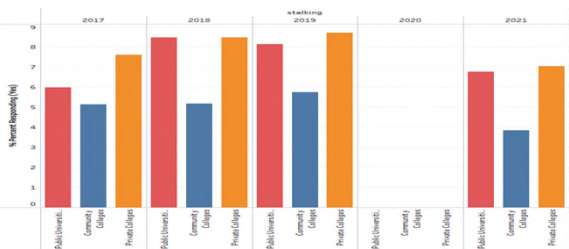
Stalking: Substantial Emotional Distress



“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.

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.]

Stalking: Common Concerns

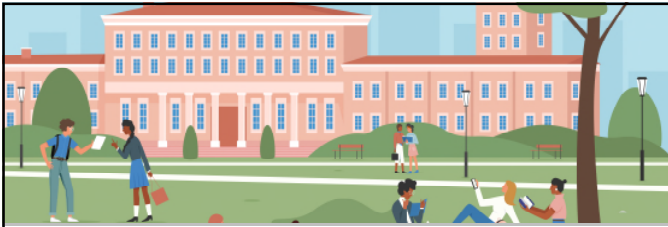


- Clearly defined no-contact orders can be helpful to keep the parties apart and help calm the situation.
- Complainants are often concerned that the respondent may not respect no-contact orders, especially if they have already asked the respondent to stand down. Think of ways to help address this concern 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”
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered



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)

Education Program or Activity



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

- Residence halls
- Classrooms
- Dining halls

Off Campus? (1 of 2)



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

- (1) Incident occurs as part of the College’s “operations”
- (2) If the College exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

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
 - o 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
 - o Must investigate in these locations (30196-97)

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)

Education Program or Activity

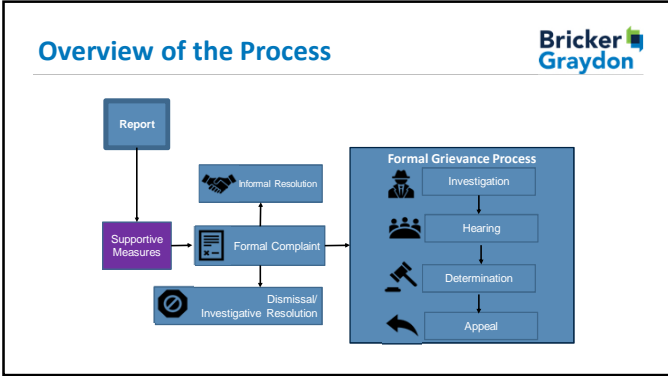


Depends on fact-analysis under "substantial control":

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



Overview of Your Policy/Process



A Report versus a Formal Complaint **Bricker Graydon**

- 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 the College investigate the allegation of sexual harassment

Overview of the Process: Supportive Measures (1 of 5) **Bricker Graydon**

- 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)

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



Designed to:

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

**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

**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



- The College may dismiss a formal complaint from the Title IX process in certain circumstances detailed on the next few slides
- If a dismissal occurs, the College 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



- Complainant withdraws complaint in writing
- Respondent is no longer enrolled in/employed by College
- "Specific circumstances prevent [the College] 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, the College may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- College cannot require this and also cannot offer **unless a formal complaint is filed**

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



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

College **cannot** offer this option with regard to reports of employee Title IX sexual harassment of a student



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, the College, or both (if applicable based on allegations).
6. Notify of the prohibition against retaliation.

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.

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.

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.

Notice of Allegations to Both Parties

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 Both Parties
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 Both Parties 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 College
- 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)

**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

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



**Overview of the Process:
Investigation (4 of 4)**



- College 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

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
- Explain amnesty policy, if relevant
- 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

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: Hiram Definition



- See Policy, pages 21-22
- “Affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during the sexual encounter.
- Can be withdrawn if “outwardly demonstrated by words or actions”
- Consent for one activity is not consent for another activity

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?

- o Must examine sexual contacts, acts in detail

Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

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?

Incapacitation: Hiram Definition (Page 23) 

“Means the lack of the ability to make rational reasonable judgments as a result of alcohol consumption, other drug use, sleep, etc.”

- “lacks the ability to fully understand the who, what, where, or how...”
- “A state beyond drunkenness or intoxication”
- Did the Respondent know or should have known of the other individual’s incapacitated state?

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?

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 _____?”

Any Drugs?



Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?

Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?

What, how much, and when?

Remember: amnesty

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?

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?

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

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 the College 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

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)

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 questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

**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

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

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

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)

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)

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)

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.

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)

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

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."

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).

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.

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

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).

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.
- You **may** give these statements appropriate weight under the circumstances.

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?

Decorum



“[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)

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

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



Scenario Overview

Charlie and Jesse – Intimate Partner Violence?
Credibility Assessment Scenario

Outline of Evening



- Dinner
- Walk – Argument?
- In the car – Violence?
- Aftermath

Definition of Dating Violence



- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

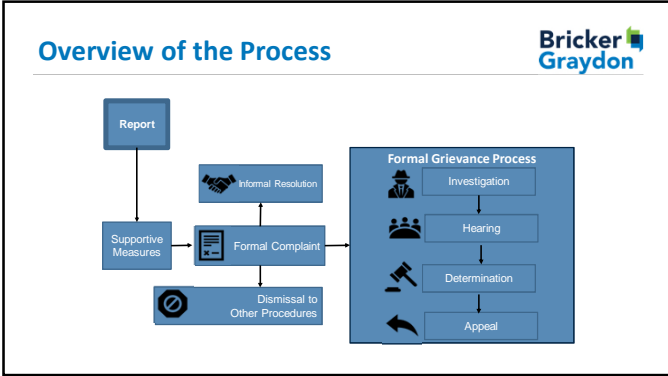
Brainstorm



- What are the elements of dating violence?
- What are the key things that will need to be decided to determine if a policy violation occurred?
- What other things may help with a credibility assessment?



Conducting a Process That Protects and Holds Accountable



Split Roles

Team Charlie
 Team Jesse
 Panel & Volunteers

Need volunteers for three parts:

- Complainant Charlie Chaste
- Respondent Jesse Jacobs
- Witness Whitney Wildcat



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

How Do You Choose Questions?

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 themes do you wish to draw out?
 - 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 with each witness 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?

Pick a Goal



- Consider choosing a goal for yourself to try to reach through questioning:
- Advisor: "By questioning Sarah, I will try to show that Respondent was more aware of Complainant's intoxication level than the report suggests."
- Hearing Officer: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
- Etc.

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!)

Plan Your Strategy



- Pick a goal for the questions you will ask
 - Example: I will try to get Charlie to admit that the bruise could have been from something else.
- Coordinate among team members to ensure goals cover the key points in the case

Mock Hearing





How to Make a Good Decision

Use your Policy and Follow your Process

Reminders (1 of 3)



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- 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

Reminders (2 of 3)



- **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

Reminders (3 of 3)



- Burden of gathering the evidence on the recipient, not the parties (30333)
 - Don't penalize a party for the questions no one asked them.

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the Hearing Officer should evaluate:
- **“consistency, accuracy, memory, and credibility”** (30315)
- **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence
 - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly "50-50," the tie goes to the Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- "Studies demonstrate that inconsistency is correlated with deception" (30321)
- Credibility decisions consider "plausibility and consistency" (30322)

Resolving Disputes (1 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant’s reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes (3 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

#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

#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.

#5 Weight of Evidence (2 of 2)



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

#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 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)
- Clear and convincing: a fact is highly probable 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.**



Writing the Decision

Show your work, and get credit for your good thinking!

Written Determination in 106.45(b)(7)(ii) (1 of 9)



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii)

(2 of 9)



Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

Written Determination in 106.45(b)(7)(ii)

(3 of 9)



Purpose of key elements of procedural steps “so the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions.” (30389)

Written Determination in 106.45(b)(7)(ii)

(4 of 9)



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

Written Determination in 106.45(b)(7)(ii)
(5 of 9)



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii)
(6 of 9)



- Institution’s procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii)
(7 of 9)



- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii)
(8 of 9)



Reference to code of conduct not prohibited:

“Recipients **retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only. (30389)

Written Determination in 106.45(b)(7)(ii)
(9 of 9)



The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.



Finalizing Our Case

How Do We Decide?

Making OUR Decision



- Questions to consider:
 - Were they dating at the time of the incident?
 - Did Jesse grab Charlie’s arms?
 - If so, was this “violence”?
 - Did Jesse slap Charlie’s face?
 - If so, was this “violence”?

If you are having trouble



- Consider making a list of what you are sure about that relates to the question you are considering.
- Make a list of what facts are disputed.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.

Additional information available at:



Title IX Resource Center at www.bricker.com/titleix

Free upcoming webinars at www.bricker.com/events

Find us on [Twitter](#) at [@BrickerHigherEd](#)



September 11, 2023

John Carroll University
Title IX Training

Bricker Graydon

Disclaimer #1

Bricker Graydon

- 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

Bricker Graydon

- 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.

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).

Today's Agenda



- 8:30 Check in
- 9:00 Themes and the Importance of Neutrality
Sexual Assault, Dating Violence, Domestic Violence, and Stalking
Scope of your Education Program/Activity
Overview of your Policy/Process
- 10:00-10:15 Break**
- 10:15- Intake (overview)
Conducting an Investigation (overview)
Conducting a Hearing (overview)
Overview of Advisor role in hearings
Overview of Hypothetical to review during working lunch
- Noon – Break/Working lunch**
- 12:30 Separate into group by roles
Plan for hearing
- 2:00 Conduct Mock Hearing
- 3:30 Making a Decision and Writing Report



Training Requirements? Clery Act and Title IX

What's required?

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.

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.

Overarching Themes (2)



- Use language of the policy (reporting party, responding party), 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.



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)

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)

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)

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)

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

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.)

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

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.



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 of the College conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct;
 - **[Unwelcome conduct]** Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education program or activity; or
 - **[Clery crimes]** Sexual assault, dating violence, domestic violence, or stalking

**Sexual Harassment:
Quid Pro Quo**



- Only applies to employee 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 (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

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.

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.

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

Sexual Assault Data

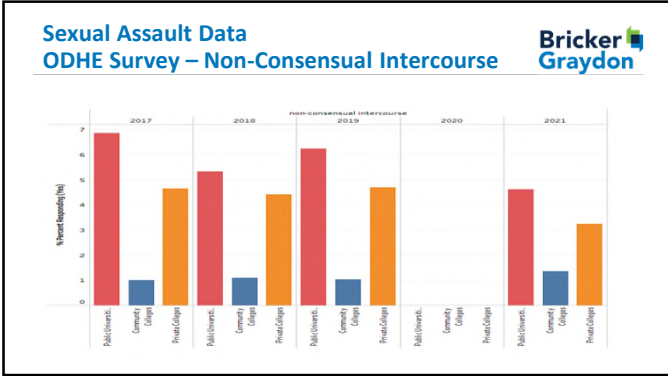


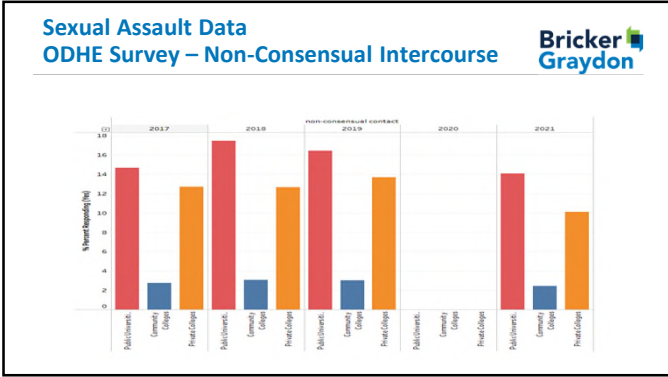
More than 1 in 3 women and 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.

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/factsheet.html](https://www.cdc.gov/violenceprevention/sexualviolence/factsheet.html) (last accessed July 13, 2021)





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/>"

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).

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.

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.

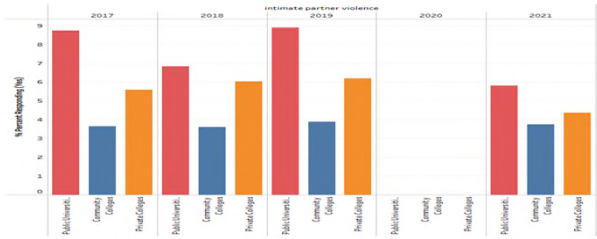
Sexual Harassment: Domestic Violence



“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

ODHE Data



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?

**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)

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.

Stalking: Reasonable Person



“Reasonable person”

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

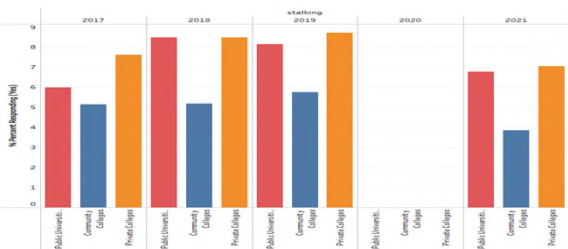
Stalking: Substantial Emotional Distress



“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.

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.]

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”
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered



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)

Education Program or Activity



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

- Residence halls
- Classrooms
- Dining halls

Off Campus? (1 of 2)



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

- (1) Incident occurs as part of the College’s “operations”
- (2) If the College exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

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
 - o 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
 - o Must investigate in these locations (30196-97)

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)

Education Program or Activity

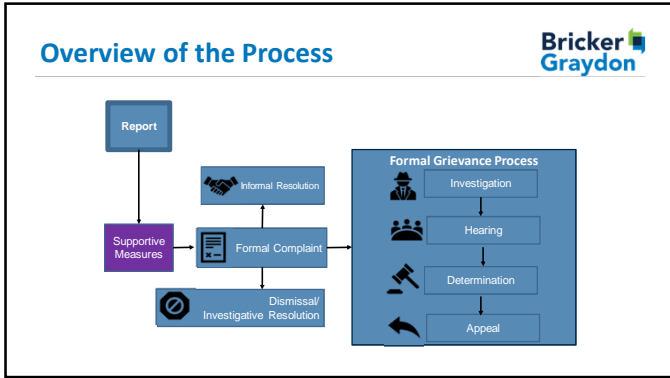


Depends on fact-analysis under "substantial control":

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



Overview of Your Policy/Process



A Report versus a Formal Complaint **Bricker Graydon**

- 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 the College investigate the allegation of sexual harassment

Overview of the Process: Supportive Measures (1 of 5) **Bricker Graydon**

- 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)

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



Designed to:

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

**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

**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



- The College may dismiss a formal complaint from the Title IX process in certain circumstances detailed on the next few slides
- If a dismissal occurs, the College 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



- Complainant withdraws complaint in writing
- Respondent is no longer enrolled in/employed by College
- "Specific circumstances prevent [the College] 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, the College may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- College cannot require this and also cannot offer **unless a formal complaint is filed**

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



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

College **cannot** offer this option with regard to reports of employee Title IX sexual harassment of a student



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, the College, or both (if applicable based on allegations).
6. Notify of the prohibition against retaliation.

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.

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.

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.

Notice of Allegations to Both Parties

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 Both Parties
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 Both Parties 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 College
- 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)

**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

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



**Overview of the Process:
Investigation (4 of 4)**



- College 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

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
- Explain amnesty policy, if relevant
- 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

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: Hiram Definition



- See Policy, pages 21-22
- “Affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during the sexual encounter.
- Can be withdrawn if “outwardly demonstrated by words or actions”
- Consent for one activity is not consent for another activity

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?

- o Must examine sexual contacts, acts in detail

Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

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?

Incapacitation: Hiram Definition (Page 23) 

“Means the lack of the ability to make rational reasonable judgments as a result of alcohol consumption, other drug use, sleep, etc.”

- “lacks the ability to fully understand the who, what, where, or how...”
- “A state beyond drunkenness or intoxication”
- Did the Respondent know or should have known of the other individual’s incapacitated state?

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?

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 _____?”

Any Drugs?



Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?

Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?

What, how much, and when?

Remember: amnesty

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?

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?

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

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 the College 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

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)

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 questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

**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

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

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

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)

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)

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)

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.

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)

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

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."

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).

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.

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

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).

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.
- You **may** give these statements appropriate weight under the circumstances.

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?

Decorum



“[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)

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

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



Scenario Overview

Charlie and Jesse – Intimate Partner Violence?
Credibility Assessment Scenario

Outline of Evening



- Dinner
- Walk – Argument?
- In the car – Violence?
- Aftermath

Definition of Dating Violence



- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

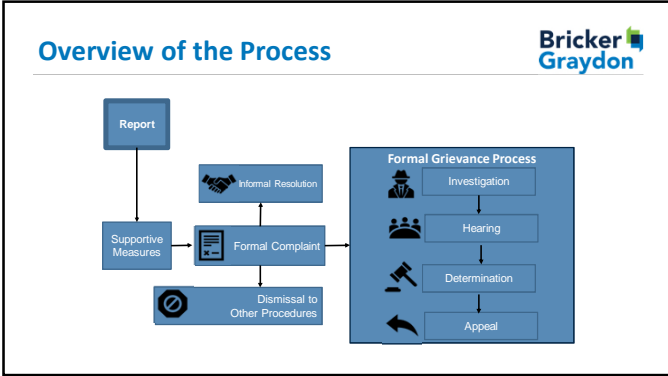
Brainstorm



- What are the elements of dating violence?
- What are the key things that will need to be decided to determine if a policy violation occurred?
- What other things may help with a credibility assessment?



Conducting a Process That Protects and Holds Accountable



Split Roles

Team Charlie
 Team Jesse
 Panel & Volunteers

Need volunteers for three parts:

- Complainant Charlie Chaste
- Respondent Jesse Jacobs
- Witness Whitney Wildcat

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

How Do You Choose Questions?

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 themes do you wish to draw out?
 - 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 with each witness 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?

Pick a Goal



- Consider choosing a goal for yourself to try to reach through questioning:
- Advisor: "By questioning Sarah, I will try to show that Respondent was more aware of Complainant's intoxication level than the report suggests."
- Hearing Officer: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
- Etc.

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!)

Plan Your Strategy



- Pick a goal for the questions you will ask
 - Example: I will try to get Charlie to admit that the bruise could have been from something else.
- Coordinate among team members to ensure goals cover the key points in the case

Mock Hearing





How to Make a Good Decision

Use your Policy and Follow your Process

Reminders (1 of 3)



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- 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

Reminders (2 of 3)



- **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

Reminders (3 of 3)



- Burden of gathering the evidence on the recipient, not the parties (30333)
 - Don't penalize a party for the questions no one asked them.

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the Hearing Officer should evaluate:
- **“consistency, accuracy, memory, and credibility”** (30315)
- **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence
 - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly "50-50," the tie goes to the Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- "Studies demonstrate that inconsistency is correlated with deception" (30321)
- Credibility decisions consider "plausibility and consistency" (30322)

Resolving Disputes (1 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant’s reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes (3 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

#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

#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.

#5 Weight of Evidence (2 of 2)



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

#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 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)
- Clear and convincing: a fact is highly probable to be true (30373 fn. 1409)

#8 Standard of Evidence (2 of 2)

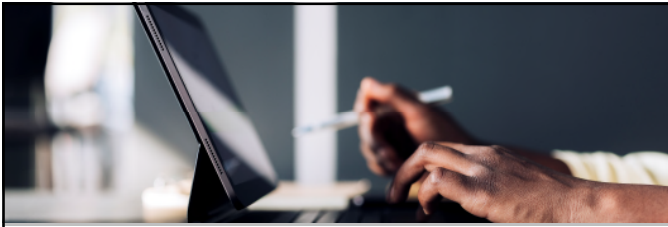


- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

#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.**



Writing the Decision

Show your work, and get credit for your good thinking!

Written Determination in 106.45(b)(7)(ii) (1 of 9)



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii)

(2 of 9)



Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

Written Determination in 106.45(b)(7)(ii)

(3 of 9)



Purpose of key elements of procedural steps “so the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions.” (30389)

Written Determination in 106.45(b)(7)(ii)

(4 of 9)



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

Written Determination in 106.45(b)(7)(ii)
(5 of 9)



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii)
(6 of 9)



- Institution’s procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii)
(7 of 9)



- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii)
(8 of 9)



Reference to code of conduct not prohibited:

“Recipients **retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only. (30389)

Written Determination in 106.45(b)(7)(ii)
(9 of 9)



The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.



Finalizing Our Case

How Do We Decide?

Making OUR Decision



- Questions to consider:
 - Were they dating at the time of the incident?
 - Did Jesse grab Charlie’s arms?
 - If so, was this “violence”?
 - Did Jesse slap Charlie’s face?
 - If so, was this “violence”?

If you are having trouble



- Consider making a list of what you are sure about that relates to the question you are considering.
- Make a list of what facts are disputed.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.

Additional information available at:



Title IX Resource Center at www.bricker.com/titleix

Free upcoming webinars at www.bricker.com/events

Find us on [Twitter](#) at [@BrickerHigherEd](#)



September 11, 2023

John Carroll University
Title IX Training

Bricker Graydon

Disclaimer #1

Bricker Graydon

- 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

Bricker Graydon

- 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.

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).

Today's Agenda



- 8:30 Check in
- 9:00 Themes and the Importance of Neutrality
Sexual Assault, Dating Violence, Domestic Violence, and Stalking
Scope of your Education Program/Activity
Overview of your Policy/Process
- 10:00-10:15 Break**
- 10:15- Intake (overview)
Conducting an Investigation (overview)
Conducting a Hearing (overview)
Overview of Advisor role in hearings
Overview of Hypothetical to review during working lunch
- Noon – Break/Working lunch**
- 12:30 Separate into group by roles
Plan for hearing
- 2:00 Conduct Mock Hearing
- 3:30 Making a Decision and Writing Report



Training Requirements? Clery Act and Title IX

What's required?

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.

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 prejudice 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.

Overarching Themes (2)



- Use language of the policy (reporting party, responding party), 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.



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)

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)

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)

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)

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

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.)

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

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.



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 of the College conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct;
 - **[Unwelcome conduct]** Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education program or activity; or
 - **[Clery crimes]** Sexual assault, dating violence, domestic violence, or stalking

**Sexual Harassment:
Quid Pro Quo**



- Only applies to employee 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 (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

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.

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.

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

Sexual Assault Data

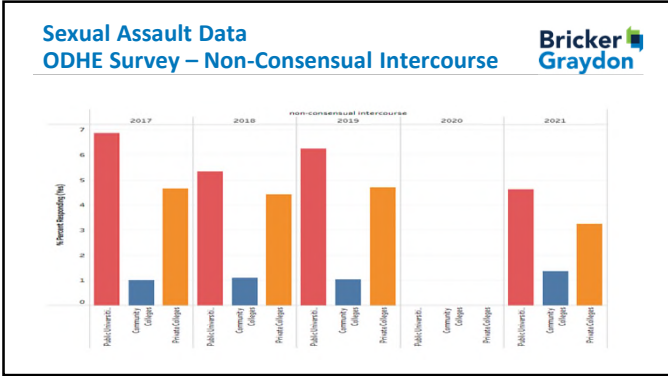


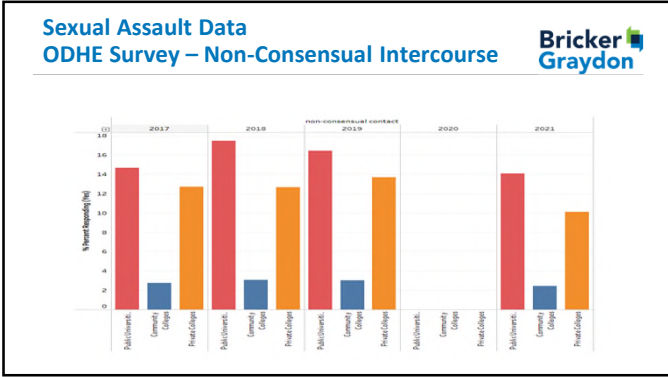
More than 1 in 3 women and 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.

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/factsheet.html](https://www.cdc.gov/violenceprevention/sexualviolence/factsheet.html) (last accessed July 13, 2021)





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/>."

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).

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.

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.

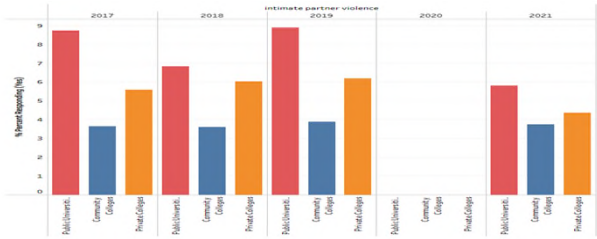
Sexual Harassment: Domestic Violence



“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

ODHE Data



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?

**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)

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.

Stalking: Reasonable Person



“Reasonable person”

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

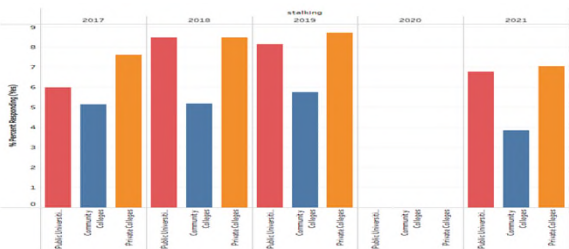
Stalking: Substantial Emotional Distress



“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.

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.]

Stalking: Common Concerns

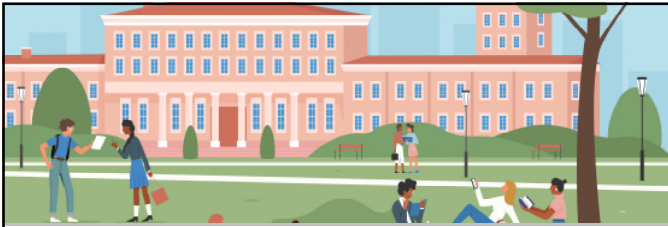


- Clearly defined no-contact orders can be helpful to keep the parties apart and help calm the situation.
- Complainants are often concerned that the respondent may not respect no-contact orders, especially if they have already asked the respondent to stand down. Think of ways to help address this concern 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”
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered



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)

Education Program or Activity



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

- Residence halls
- Classrooms
- Dining halls

Off Campus? (1 of 2)



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

- (1) Incident occurs as part of the College’s “operations”
- (2) If the College exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

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
 - o 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
 - o Must investigate in these locations (30196-97)

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)

Education Program or Activity

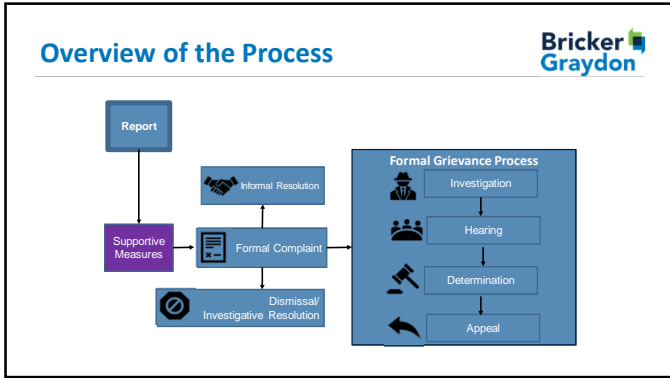


Depends on fact-analysis under "substantial control":

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



Overview of Your Policy/Process



A Report versus a Formal Complaint **Bricker Graydon**

- 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 the College investigate the allegation of sexual harassment

Overview of the Process: Supportive Measures (1 of 5) **Bricker Graydon**

- 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)

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



Designed to:

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

**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

**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



- The College may dismiss a formal complaint from the Title IX process in certain circumstances detailed on the next few slides
- If a dismissal occurs, the College 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



- Complainant withdraws complaint in writing
- Respondent is no longer enrolled in/employed by College
- "Specific circumstances prevent [the College] 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, the College may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- College cannot require this and also cannot offer **unless a formal complaint is filed**

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



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

College **cannot** offer this option with regard to reports of employee Title IX sexual harassment of a student



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, the College, or both (if applicable based on allegations).
6. Notify of the prohibition against retaliation.

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.

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.

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.

Notice of Allegations to Both Parties

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 Both Parties
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 Both Parties 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 College
- 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)

**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

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



**Overview of the Process:
Investigation (4 of 4)**



- College 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

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
- Explain amnesty policy, if relevant
- 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

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: Hiram Definition



- See Policy, pages 21-22
- “Affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during the sexual encounter.
- Can be withdrawn if “outwardly demonstrated by words or actions”
- Consent for one activity is not consent for another activity

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?

- o Must examine sexual contacts, acts in detail

Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

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?

Incapacitation: Hiram Definition (Page 23) 

“Means the lack of the ability to make rational reasonable judgments as a result of alcohol consumption, other drug use, sleep, etc.”

- “lacks the ability to fully understand the who, what, where, or how...”
- “A state beyond drunkenness or intoxication”
- Did the Respondent know or should have known of the other individual’s incapacitated state?

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?

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 _____?”

Any Drugs?



Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?

Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?

What, how much, and when?

Remember: amnesty

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?

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?

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

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 the College 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

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)

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 questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

**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

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

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

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)

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)

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)

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.

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)

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

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.**"

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).

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.

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

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).

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.
- You **may** give these statements appropriate weight under the circumstances.

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?

Decorum



“[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)

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

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



Scenario Overview

Charlie and Jesse – Intimate Partner Violence?
Credibility Assessment Scenario

Outline of Evening



- Dinner
- Walk – Argument?
- In the car – Violence?
- Aftermath

Definition of Dating Violence



- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined based on the reporting party’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

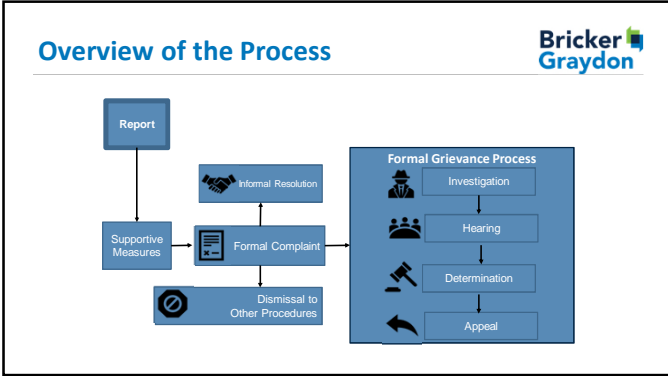
Brainstorm



- What are the elements of dating violence?
- What are the key things that will need to be decided to determine if a policy violation occurred?
- What other things may help with a credibility assessment?



Conducting a Process That Protects and Holds Accountable



Split Roles

Team Charlie
 Team Jesse
 Panel & Volunteers

Need volunteers for three parts:

- Complainant Charlie Chaste
- Respondent Jesse Jacobs
- Witness Whitney Wildcat



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

How Do You Choose Questions?

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 themes do you wish to draw out?
 - 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 with each witness 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?

Pick a Goal



- Consider choosing a goal for yourself to try to reach through questioning:
- Advisor: "By questioning Sarah, I will try to show that Respondent was more aware of Complainant's intoxication level than the report suggests."
- Hearing Officer: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
- Etc.

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!)

Plan Your Strategy



- Pick a goal for the questions you will ask
 - Example: I will try to get Charlie to admit that the bruise could have been from something else.
- Coordinate among team members to ensure goals cover the key points in the case

Mock Hearing





How to Make a Good Decision

Use your Policy and Follow your Process

Reminders (1 of 3)



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- 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

Reminders (2 of 3)



- **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

Reminders (3 of 3)



- Burden of gathering the evidence on the recipient, not the parties (30333)
 - Don't penalize a party for the questions no one asked them.

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the Hearing Officer should evaluate:
- **“consistency, accuracy, memory, and credibility”** (30315)
- **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence
 - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly "50-50," the tie goes to the Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- "Studies demonstrate that inconsistency is correlated with deception" (30321)
- Credibility decisions consider "plausibility and consistency" (30322)

Resolving Disputes (1 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant’s reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes (3 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

#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

#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.

#5 Weight of Evidence (2 of 2)



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

#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 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)
- Clear and convincing: a fact is highly probable to be true (30373 fn. 1409)

#8 Standard of Evidence (2 of 2)

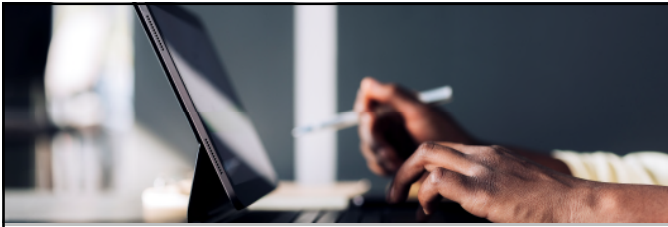


- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

#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.**



Writing the Decision

Show your work, and get credit for your good thinking!

Written Determination in 106.45(b)(7)(ii) (1 of 9)



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii)

(2 of 9)



Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

Written Determination in 106.45(b)(7)(ii)

(3 of 9)



Purpose of key elements of procedural steps “so the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions.” (30389)

Written Determination in 106.45(b)(7)(ii)

(4 of 9)



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

Written Determination in 106.45(b)(7)(ii)
(5 of 9)



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii)
(6 of 9)



- Institution’s procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii)
(7 of 9)



- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii)
(8 of 9)



Reference to code of conduct not prohibited:

“Recipients **retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only. (30389)

Written Determination in 106.45(b)(7)(ii)
(9 of 9)



The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.



Finalizing Our Case

How Do We Decide?

Making OUR Decision



- Questions to consider:
 - Were they dating at the time of the incident?
 - Did Jesse grab Charlie’s arms?
 - If so, was this “violence”?
 - Did Jesse slap Charlie’s face?
 - If so, was this “violence”?

If you are having trouble



- Consider making a list of what you are sure about that relates to the question you are considering.
- Make a list of what facts are disputed.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.

Additional information available at:



Title IX Resource Center at www.bricker.com/titleix

Free upcoming webinars at www.bricker.com/events

Find us on [Twitter](#) at [@BrickerHigherEd](#)



September 11, 2023

John Carroll University
Title IX Training

Bricker Graydon

Disclaimer #1

Bricker Graydon

- 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

Bricker Graydon

- 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.

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).

Today's Agenda



- 8:30 Check in
- 9:00 Themes and the Importance of Neutrality
Sexual Assault, Dating Violence, Domestic Violence, and Stalking
Scope of your Education Program/Activity
Overview of your Policy/Process
- 10:00-10:15 Break**
- 10:15- Intake (overview)
Conducting an Investigation (overview)
Conducting a Hearing (overview)
Overview of Advisor role in hearings
Overview of Hypothetical to review during working lunch
- Noon – Break/Working lunch**
- 12:30 Separate into group by roles
Plan for hearing
- 2:00 Conduct Mock Hearing
- 3:30 Making a Decision and Writing Report



Training Requirements? Clery Act and Title IX

What's required?

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.

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 prejudice 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.

Overarching Themes (2)



- Use language of the policy (reporting party, responding party), 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.



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)

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)

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)

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)

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

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.)

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

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.



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 of the College conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct;
 - **[Unwelcome conduct]** Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education program or activity; or
 - **[Clery crimes]** Sexual assault, dating violence, domestic violence, or stalking

**Sexual Harassment:
Quid Pro Quo**



- Only applies to employee 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 (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

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.

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.

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

Sexual Assault Data

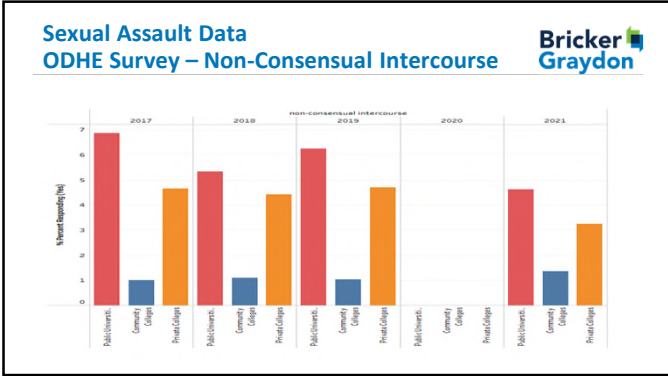


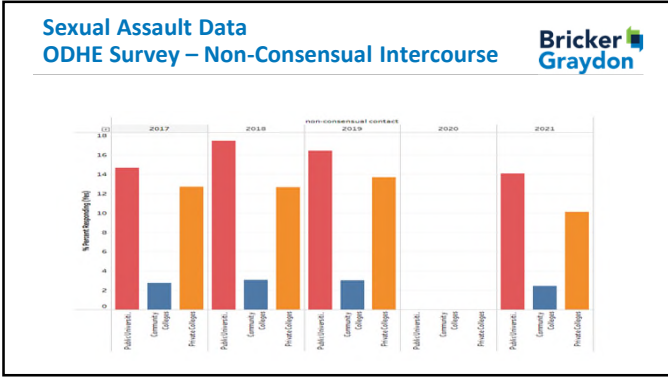
More than 1 in 3 women and 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.

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/factsheet.html](https://www.cdc.gov/violenceprevention/sexualviolence/factsheet.html) (last accessed July 13, 2021)





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/>."

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).

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.

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.

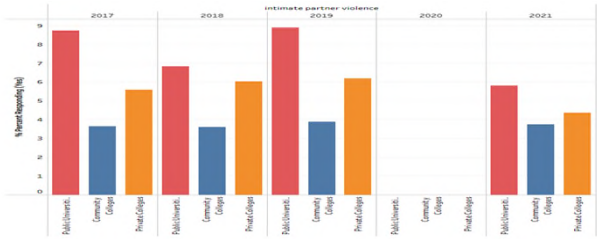
Sexual Harassment: Domestic Violence



“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

ODHE Data



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?

**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)

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.

Stalking: Reasonable Person



“Reasonable person”

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

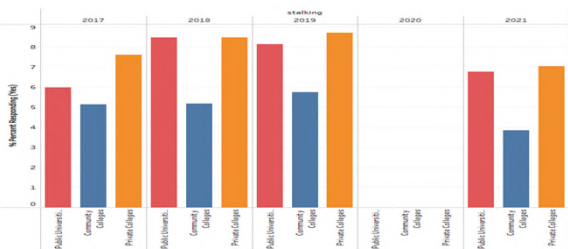
Stalking: Substantial Emotional Distress



“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.

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 Blaauw et al. "The Toll of Stalking," Journal of Interpersonal Violence 17, no. 1(2002):50-63.]

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”
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered



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)

Education Program or Activity



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

- Residence halls
- Classrooms
- Dining halls

Off Campus? (1 of 2)



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

- (1) Incident occurs as part of the College’s “operations”
- (2) If the College exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

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
 - o 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
 - o Must investigate in these locations (30196-97)

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)

Education Program or Activity

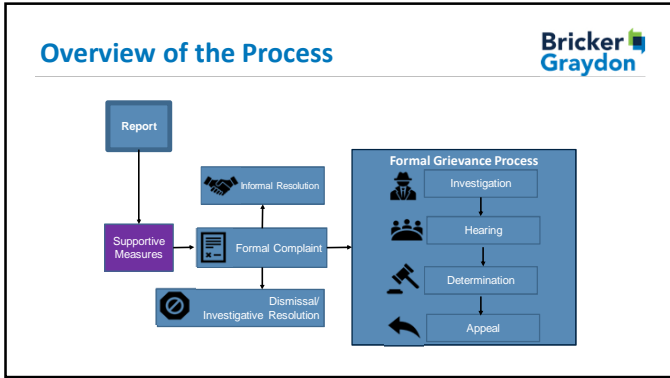


Depends on fact-analysis under "substantial control":

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



Overview of Your Policy/Process



A Report versus a Formal Complaint **Bricker Graydon**

- 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 the College investigate the allegation of sexual harassment

Overview of the Process: Supportive Measures (1 of 5) **Bricker Graydon**

- 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)

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



Designed to:

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

**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

**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



- The College may dismiss a formal complaint from the Title IX process in certain circumstances detailed on the next few slides
- If a dismissal occurs, the College 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



- Complainant withdraws complaint in writing
- Respondent is no longer enrolled in/employed by College
- "Specific circumstances prevent [the College] 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, the College may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- College cannot require this and also cannot offer **unless a formal complaint is filed**

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



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

College **cannot** offer this option with regard to reports of employee Title IX sexual harassment of a student



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, the College, or both (if applicable based on allegations).
6. Notify of the prohibition against retaliation.

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.

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.

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.

Notice of Allegations to Both Parties

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 Both Parties
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 Both Parties 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 College
- 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)

**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

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



**Overview of the Process:
Investigation (4 of 4)**



- College 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

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
- Explain amnesty policy, if relevant
- 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

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: Hiram Definition



- See Policy, pages 21-22
- “Affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during the sexual encounter.
- Can be withdrawn if “outwardly demonstrated by words or actions”
- Consent for one activity is not consent for another activity

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?

- o Must examine sexual contacts, acts in detail

Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

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?

Incapacitation: Hiram Definition (Page 23) 

“Means the lack of the ability to make rational reasonable judgments as a result of alcohol consumption, other drug use, sleep, etc.”

- “lacks the ability to fully understand the who, what, where, or how...”
- “A state beyond drunkenness or intoxication”
- Did the Respondent know or should have known of the other individual’s incapacitated state?

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?

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 _____?”

Any Drugs?



Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?

Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?

What, how much, and when?

Remember: amnesty

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?

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?

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

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 the College 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

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)

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 questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

**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
 - o 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

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

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

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)

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)

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)

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.

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)

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

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."

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).

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.

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

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).

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.
- You **may** give these statements appropriate weight under the circumstances.

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?

Decorum



“[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)

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

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



Scenario Overview

Charlie and Jesse – Intimate Partner Violence?
Credibility Assessment Scenario

Outline of Evening



- Dinner
- Walk – Argument?
- In the car – Violence?
- Aftermath

Definition of Dating Violence



- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined based on the reporting party’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

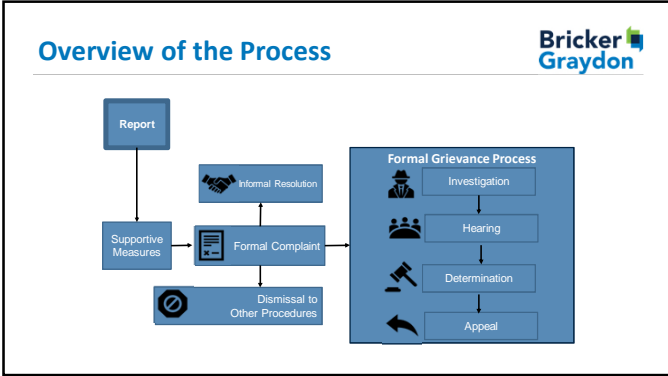
Brainstorm



- What are the elements of dating violence?
- What are the key things that will need to be decided to determine if a policy violation occurred?
- What other things may help with a credibility assessment?



Conducting a Process That Protects and Holds Accountable



Split Roles

Team Charlie
 Team Jesse
 Panel & Volunteers

Need volunteers for three parts:

- Complainant Charlie Chaste
- Respondent Jesse Jacobs
- Witness Whitney Wildcat



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

How Do You Choose Questions?

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 themes do you wish to draw out?
 - 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 with each witness 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?

Pick a Goal



- Consider choosing a goal for yourself to try to reach through questioning:
- Advisor: "By questioning Sarah, I will try to show that Respondent was more aware of Complainant's intoxication level than the report suggests."
- Hearing Officer: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
- Etc.

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!)

Plan Your Strategy



- Pick a goal for the questions you will ask
 - Example: I will try to get Charlie to admit that the bruise could have been from something else.
- Coordinate among team members to ensure goals cover the key points in the case

Mock Hearing






How to Make a Good Decision

Use your Policy and Follow your Process

Reminders (1 of 3)



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- 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

Reminders (2 of 3)



- **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

Reminders (3 of 3)



- Burden of gathering the evidence on the recipient, not the parties (30333)
 - Don't penalize a party for the questions no one asked them.

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the Hearing Officer should evaluate:
- **“consistency, accuracy, memory, and credibility”** (30315)
- **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence
 - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly "50-50," the tie goes to the Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- "Studies demonstrate that inconsistency is correlated with deception" (30321)
- Credibility decisions consider "plausibility and consistency" (30322)

Resolving Disputes (1 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant’s reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes (3 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

#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

#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.

#5 Weight of Evidence (2 of 2)



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

#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 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)
- Clear and convincing: a fact is highly probable 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.**



Writing the Decision

Show your work, and get credit for your good thinking!

Written Determination in 106.45(b)(7)(ii) (1 of 9)



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii)

(2 of 9)



Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

Written Determination in 106.45(b)(7)(ii)

(3 of 9)



Purpose of key elements of procedural steps “so the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions.” (30389)

Written Determination in 106.45(b)(7)(ii)

(4 of 9)



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

Written Determination in 106.45(b)(7)(ii)
(5 of 9)



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii)
(6 of 9)



- Institution’s procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii)
(7 of 9)



- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii)
(8 of 9)



Reference to code of conduct not prohibited:

“Recipients **retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only. (30389)

Written Determination in 106.45(b)(7)(ii)
(9 of 9)



The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.



Finalizing Our Case

How Do We Decide?

Making OUR Decision



- Questions to consider:
 - Were they dating at the time of the incident?
 - Did Jesse grab Charlie’s arms?
 - If so, was this “violence”?
 - Did Jesse slap Charlie’s face?
 - If so, was this “violence”?

If you are having trouble



- Consider making a list of what you are sure about that relates to the question you are considering.
- Make a list of what facts are disputed.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.

Additional information available at:



Title IX Resource Center at www.bricker.com/titleix

Free upcoming webinars at www.bricker.com/events

Find us on [Twitter](#) at [@BrickerHigherEd](#)



September 11, 2023

John Carroll University
Title IX Training

Bricker Graydon

Disclaimer #1

Bricker Graydon

- 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

Bricker Graydon

- 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.

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).

Today's Agenda



- 8:30 Check in
- 9:00 Themes and the Importance of Neutrality
Sexual Assault, Dating Violence, Domestic Violence, and Stalking
Scope of your Education Program/Activity
Overview of your Policy/Process
- 10:00-10:15 Break**
- 10:15- Intake (overview)
Conducting an Investigation (overview)
Conducting a Hearing (overview)
Overview of Advisor role in hearings
Overview of Hypothetical to review during working lunch
- Noon – Break/Working lunch**
- 12:30 Separate into group by roles
Plan for hearing
- 2:00 Conduct Mock Hearing
- 3:30 Making a Decision and Writing Report



Training Requirements? Clery Act and Title IX

What's required?

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.

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 prejudice 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.

Overarching Themes (2)



- Use language of the policy (reporting party, responding party), 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.



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)

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)

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)

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)

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

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.)

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

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.



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 of the College conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct;
 - **[Unwelcome conduct]** Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education program or activity; or
 - **[Clery crimes]** Sexual assault, dating violence, domestic violence, or stalking

**Sexual Harassment:
Quid Pro Quo**



- Only applies to employee 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 (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

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.

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.

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

Sexual Assault Data

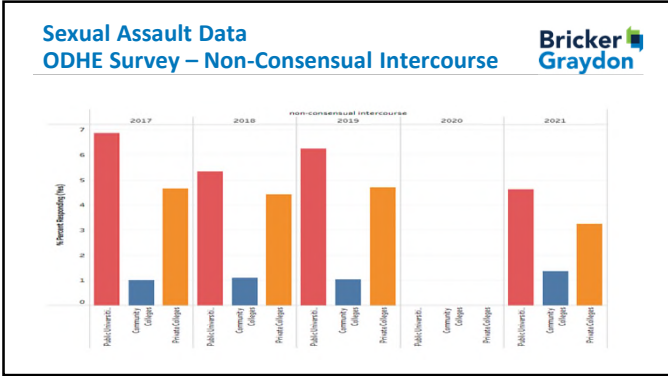


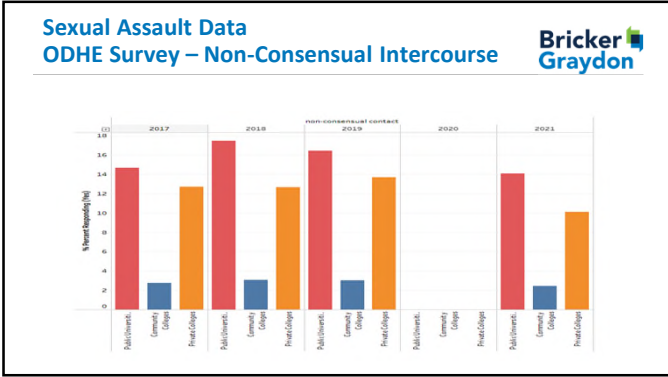
More than 1 in 3 women and 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.

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/factsheet.html](https://www.cdc.gov/violenceprevention/sexualviolence/factsheet.html) (last accessed July 13, 2021)





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/>."

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).

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.

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.

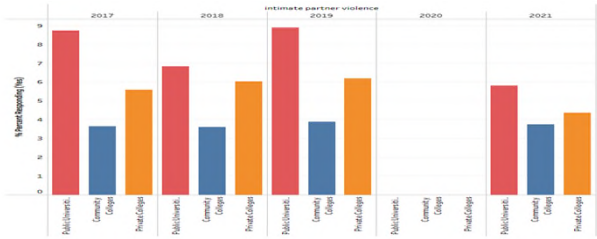
Sexual Harassment: Domestic Violence



“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

ODHE Data



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?

**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)

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.

Stalking: Reasonable Person



“Reasonable person”

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

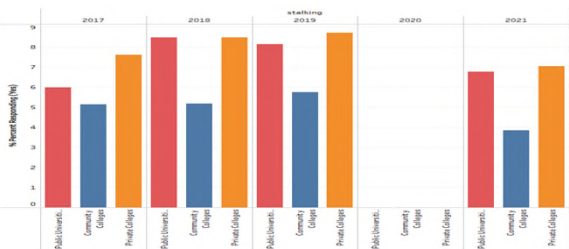
Stalking: Substantial Emotional Distress



“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.

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.]

Stalking: Common Concerns

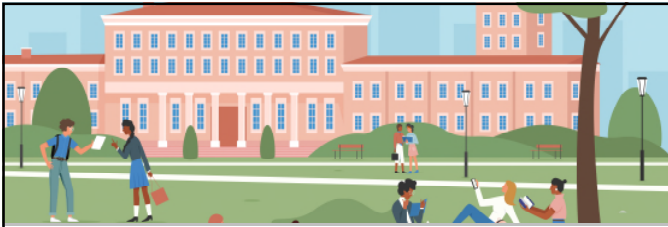


- Clearly defined no-contact orders can be helpful to keep the parties apart and help calm the situation.
- Complainants are often concerned that the respondent may not respect no-contact orders, especially if they have already asked the respondent to stand down. Think of ways to help address this concern 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”
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered



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)

Education Program or Activity



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

- Residence halls
- Classrooms
- Dining halls

Off Campus? (1 of 2)



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

- (1) Incident occurs as part of the College’s “operations”
- (2) If the College exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

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
 - o 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
 - o Must investigate in these locations (30196-97)

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)

Education Program or Activity

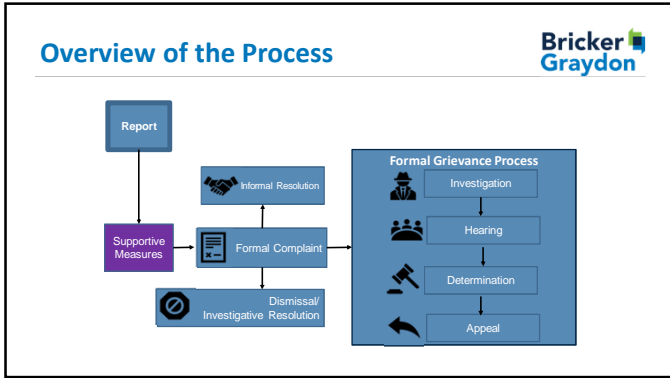


Depends on fact-analysis under "substantial control":

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



Overview of Your Policy/Process



A Report versus a Formal Complaint **Bricker Graydon**

- 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 the College investigate the allegation of sexual harassment

Overview of the Process: Supportive Measures (1 of 5) **Bricker Graydon**

- 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)

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



Designed to:

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

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



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

**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

**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



- The College may dismiss a formal complaint from the Title IX process in certain circumstances detailed on the next few slides
- If a dismissal occurs, the College 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



- Complainant withdraws complaint in writing
- Respondent is no longer enrolled in/employed by College
- "Specific circumstances prevent [the College] 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, the College may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- College cannot require this and also cannot offer **unless a formal complaint is filed**

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



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

College **cannot** offer this option with regard to reports of employee Title IX sexual harassment of a student



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, the College, or both (if applicable based on allegations).
6. Notify of the prohibition against retaliation.

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.

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.

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.

Notice of Allegations to Both Parties

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 Both Parties
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 Both Parties 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 College
- 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)

**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

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



**Overview of the Process:
Investigation (4 of 4)**



- College 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

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
- Explain amnesty policy, if relevant
- 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

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: Hiram Definition



- See Policy, pages 21-22
- “Affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during the sexual encounter.
- Can be withdrawn if “outwardly demonstrated by words or actions”
- Consent for one activity is not consent for another activity

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?

- o Must examine sexual contacts, acts in detail

Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

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?

Incapacitation: Hiram Definition (Page 23) 

“Means the lack of the ability to make rational reasonable judgments as a result of alcohol consumption, other drug use, sleep, etc.”

- “lacks the ability to fully understand the who, what, where, or how...”
- “A state beyond drunkenness or intoxication”
- Did the Respondent know or should have known of the other individual’s incapacitated state?

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?

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 _____?”

Any Drugs?



Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?

Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?

What, how much, and when?

Remember: amnesty

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?

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?

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

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 the College 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

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)

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 questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

**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

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

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

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)

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)

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)

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.

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)

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

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.”

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).

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.

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

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).

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.
- You **may** give these statements appropriate weight under the circumstances.

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?

Decorum



“[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)

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

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



Scenario Overview

Charlie and Jesse – Intimate Partner Violence?
Credibility Assessment Scenario

Outline of Evening



- Dinner
- Walk – Argument?
- In the car – Violence?
- Aftermath

Definition of Dating Violence



- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined based on the reporting party’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

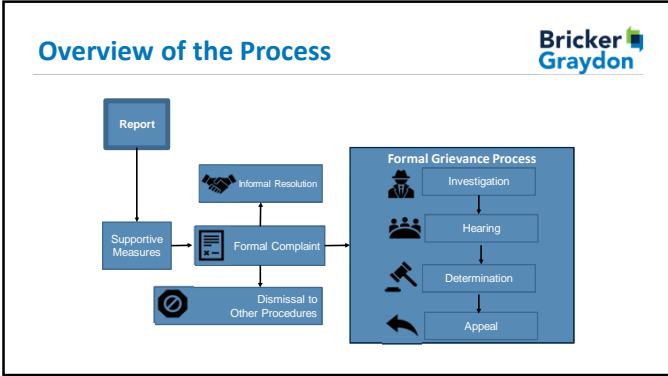
Brainstorm



- What are the elements of dating violence?
- What are the key things that will need to be decided to determine if a policy violation occurred?
- What other things may help with a credibility assessment?



Conducting a Process That Protects and Holds Accountable



Split Roles

Team Charlie
 Team Jesse
 Panel & Volunteers

Need volunteers for three parts:

- Complainant Charlie Chaste
- Respondent Jesse Jacobs
- Witness Whitney Wildcat



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

How Do You Choose Questions?

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 themes do you wish to draw out?
 - 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 with each witness 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?

Pick a Goal



- Consider choosing a goal for yourself to try to reach through questioning:
- Advisor: "By questioning Sarah, I will try to show that Respondent was more aware of Complainant's intoxication level than the report suggests."
- Hearing Officer: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
- Etc.

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!)

Plan Your Strategy



- Pick a goal for the questions you will ask
 - Example: I will try to get Charlie to admit that the bruise could have been from something else.
- Coordinate among team members to ensure goals cover the key points in the case

Mock Hearing





How to Make a Good Decision

Use your Policy and Follow your Process

Reminders (1 of 3)



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- 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

Reminders (2 of 3)



- **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

Reminders (3 of 3)



- Burden of gathering the evidence on the recipient, not the parties (30333)
 - Don't penalize a party for the questions no one asked them.

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the Hearing Officer should evaluate:
- **“consistency, accuracy, memory, and credibility”** (30315)
- **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence
 - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly "50-50," the tie goes to the Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- "Studies demonstrate that inconsistency is correlated with deception" (30321)
- Credibility decisions consider "plausibility and consistency" (30322)

Resolving Disputes (1 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant’s reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes (3 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

#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

#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.

#5 Weight of Evidence (2 of 2)



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

#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 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)
- Clear and convincing: a fact is highly probable to be true (30373 fn. 1409)

#8 Standard of Evidence (2 of 2)

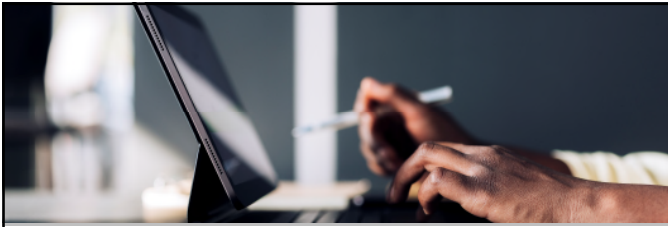


- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

#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.**



Writing the Decision

Show your work, and get credit for your good thinking!

Written Determination in 106.45(b)(7)(ii) (1 of 9)



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii)

(2 of 9)



Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

Written Determination in 106.45(b)(7)(ii)

(3 of 9)



Purpose of key elements of procedural steps “so the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions.” (30389)

Written Determination in 106.45(b)(7)(ii)

(4 of 9)



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

Written Determination in 106.45(b)(7)(ii)
(5 of 9)



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii)
(6 of 9)



- Institution’s procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii)
(7 of 9)



- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii)
(8 of 9)



Reference to code of conduct not prohibited:

“Recipients **retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only. (30389)

Written Determination in 106.45(b)(7)(ii)
(9 of 9)



The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.



Finalizing Our Case

How Do We Decide?

Making OUR Decision



- Questions to consider:
 - Were they dating at the time of the incident?
 - Did Jesse grab Charlie’s arms?
 - If so, was this “violence”?
 - Did Jesse slap Charlie’s face?
 - If so, was this “violence”?

If you are having trouble



- Consider making a list of what you are sure about that relates to the question you are considering.
- Make a list of what facts are disputed.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.

Additional information available at:



Title IX Resource Center at www.bricker.com/titleix

Free upcoming webinars at www.bricker.com/events

Find us on **Twitter** at [@BrickerHigherEd](https://twitter.com/BrickerHigherEd)



September 11, 2023

John Carroll University
Title IX Training

Bricker Graydon

Disclaimer #1

Bricker Graydon

- 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

Bricker Graydon

- 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.

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).

Today's Agenda



- 8:30 Check in
- 9:00 Themes and the Importance of Neutrality
Sexual Assault, Dating Violence, Domestic Violence, and Stalking
Scope of your Education Program/Activity
Overview of your Policy/Process
- 10:00-10:15 Break**
- 10:15- Intake (overview)
Conducting an Investigation (overview)
Conducting a Hearing (overview)
Overview of Advisor role in hearings
Overview of Hypothetical to review during working lunch
- Noon – Break/Working lunch**
- 12:30 Separate into group by roles
Plan for hearing
- 2:00 Conduct Mock Hearing
- 3:30 Making a Decision and Writing Report



Training Requirements? Clery Act and Title IX

What's required?

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.

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.

Overarching Themes (2)



- Use language of the policy (reporting party, responding party), 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.



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)

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)

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)

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)

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

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.)

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

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.



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 of the College conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct;
 - **[Unwelcome conduct]** Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education program or activity; or
 - **[Clery crimes]** Sexual assault, dating violence, domestic violence, or stalking

**Sexual Harassment:
Quid Pro Quo**



- Only applies to employee 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 (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

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.

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.

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

Sexual Assault Data

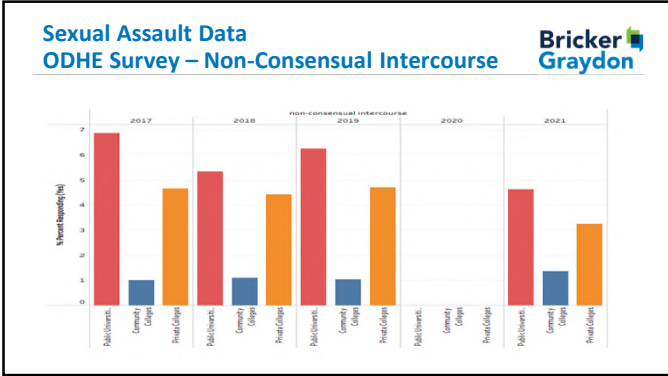


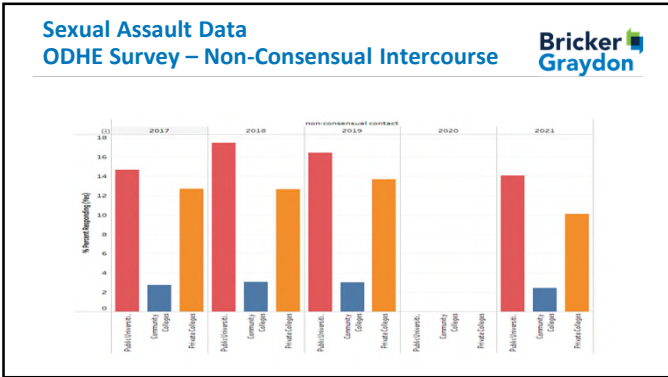
More than 1 in 3 women and 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.

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/factsheet.html](https://www.cdc.gov/violenceprevention/sexualviolence/factsheet.html) (last accessed July 13, 2021)





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/>."

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).

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.

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.

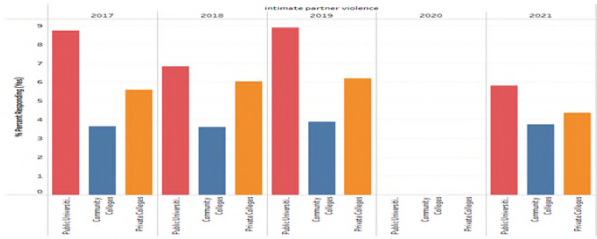
Sexual Harassment: Domestic Violence



“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

ODHE Data



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?

**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)

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.

Stalking: Reasonable Person



“Reasonable person”

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

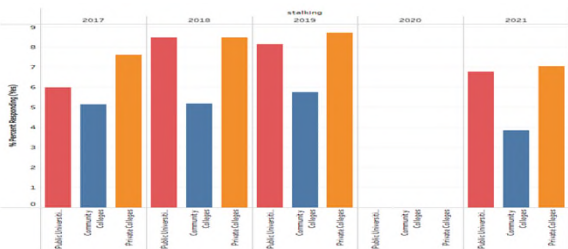
Stalking: Substantial Emotional Distress



“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.

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.]

Stalking: Common Concerns

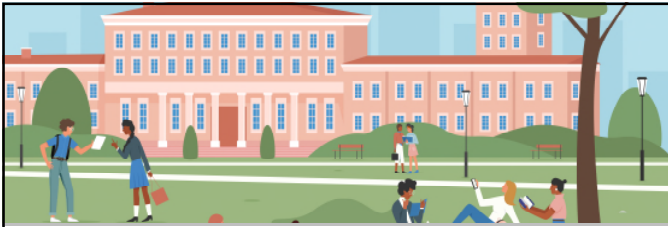


- Clearly defined no-contact orders can be helpful to keep the parties apart and help calm the situation.
- Complainants are often concerned that the respondent may not respect no-contact orders, especially if they have already asked the respondent to stand down. Think of ways to help address this concern 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”
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered



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)

Education Program or Activity



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

- Residence halls
- Classrooms
- Dining halls

Off Campus? (1 of 2)



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

- (1) Incident occurs as part of the College’s “operations”
- (2) If the College exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

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
 - o 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
 - o Must investigate in these locations (30196-97)

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)

Education Program or Activity

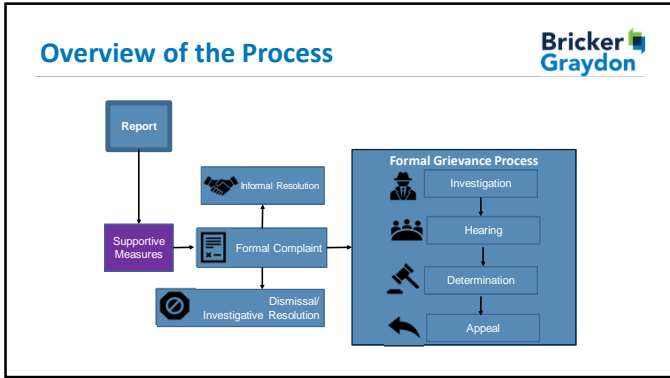


Depends on fact-analysis under "substantial control":

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



Overview of Your Policy/Process



A Report versus a Formal Complaint **Bricker Graydon**

- 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 the College investigate the allegation of sexual harassment

Overview of the Process: Supportive Measures (1 of 5) **Bricker Graydon**

- 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)

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



Designed to:

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

**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

**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



- The College may dismiss a formal complaint from the Title IX process in certain circumstances detailed on the next few slides
- If a dismissal occurs, the College 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



- Complainant withdraws complaint in writing
- Respondent is no longer enrolled in/employed by College
- "Specific circumstances prevent [the College] 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, the College may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- College cannot require this and also cannot offer **unless a formal complaint is filed**

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



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

College **cannot** offer this option with regard to reports of employee Title IX sexual harassment of a student



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, the College, or both (if applicable based on allegations).
6. Notify of the prohibition against retaliation.

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.

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.

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.

Notice of Allegations to Both Parties

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 Both Parties
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 Both Parties 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 College
- 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)

**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

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



**Overview of the Process:
Investigation (4 of 4)**



- College 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

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
- Explain amnesty policy, if relevant
- 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

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: Hiram Definition



- See Policy, pages 21-22
- “Affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during the sexual encounter.
- Can be withdrawn if “outwardly demonstrated by words or actions”
- Consent for one activity is not consent for another activity

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?

- o Must examine sexual contacts, acts in detail

Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

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?

Incapacitation: Hiram Definition (Page 23) 

“Means the lack of the ability to make rational reasonable judgments as a result of alcohol consumption, other drug use, sleep, etc.”

- “lacks the ability to fully understand the who, what, where, or how...”
- “A state beyond drunkenness or intoxication”
- Did the Respondent know or should have known of the other individual’s incapacitated state?

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?

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 _____?”

Any Drugs?



Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?

Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?

What, how much, and when?

Remember: amnesty

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?

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?

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

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 the College 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

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)

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 questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

**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

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

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

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)

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)

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)

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.

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)

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

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.**”

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).

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.

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

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).

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.
- You **may** give these statements appropriate weight under the circumstances.

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?

Decorum



“[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)

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

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



Scenario Overview

Charlie and Jesse – Intimate Partner Violence?
Credibility Assessment Scenario

Outline of Evening



- Dinner
- Walk – Argument?
- In the car – Violence?
- Aftermath

Definition of Dating Violence



- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

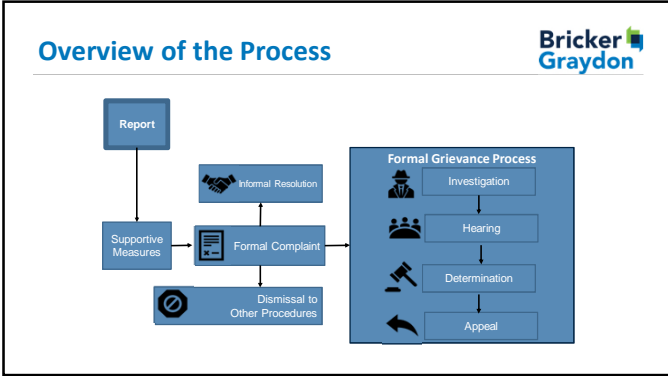
Brainstorm



- What are the elements of dating violence?
- What are the key things that will need to be decided to determine if a policy violation occurred?
- What other things may help with a credibility assessment?



Conducting a Process That Protects and Holds Accountable



Split Roles

Team Charlie
 Team Jesse
 Panel & Volunteers

Need volunteers for three parts:

- Complainant Charlie Chaste
- Respondent Jesse Jacobs
- Witness Whitney Wildcat



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

How Do You Choose Questions?

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 themes do you wish to draw out?
 - 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 with each witness 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?

Pick a Goal



- Consider choosing a goal for yourself to try to reach through questioning:
- Advisor: "By questioning Sarah, I will try to show that Respondent was more aware of Complainant's intoxication level than the report suggests."
- Hearing Officer: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
- Etc.

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!)

Plan Your Strategy



- Pick a goal for the questions you will ask
 - Example: I will try to get Charlie to admit that the bruise could have been from something else.
- Coordinate among team members to ensure goals cover the key points in the case

Mock Hearing





How to Make a Good Decision

Use your Policy and Follow your Process

Reminders (1 of 3)



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- 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

Reminders (2 of 3)



- **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

Reminders (3 of 3)



- Burden of gathering the evidence on the recipient, not the parties (30333)
 - Don't penalize a party for the questions no one asked them.

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the Hearing Officer should evaluate:
- **“consistency, accuracy, memory, and credibility”** (30315)
- **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence
 - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly "50-50," the tie goes to the Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- "Studies demonstrate that inconsistency is correlated with deception" (30321)
- Credibility decisions consider "plausibility and consistency" (30322)

Resolving Disputes (1 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant’s reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes (3 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

#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

#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.

#5 Weight of Evidence (2 of 2)



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

#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 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)
- Clear and convincing: a fact is highly probable 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.**



Writing the Decision

Show your work, and get credit for your good thinking!

Written Determination in 106.45(b)(7)(ii) (1 of 9)



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii)

(2 of 9)



Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

Written Determination in 106.45(b)(7)(ii)

(3 of 9)



Purpose of key elements of procedural steps “so the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions.” (30389)

Written Determination in 106.45(b)(7)(ii)

(4 of 9)



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

Written Determination in 106.45(b)(7)(ii)
(5 of 9)



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii)
(6 of 9)



- Institution’s procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii)
(7 of 9)



- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii)
(8 of 9)



Reference to code of conduct not prohibited:

“Recipients **retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only. (30389)

Written Determination in 106.45(b)(7)(ii)
(9 of 9)



The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.



Finalizing Our Case

How Do We Decide?

Making OUR Decision



- Questions to consider:
 - Were they dating at the time of the incident?
 - Did Jesse grab Charlie’s arms?
 - If so, was this “violence”?
 - Did Jesse slap Charlie’s face?
 - If so, was this “violence”?

If you are having trouble



- Consider making a list of what you are sure about that relates to the question you are considering.
- Make a list of what facts are disputed.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.

Additional information available at:



Title IX Resource Center at www.bricker.com/titleix

Free upcoming webinars at www.bricker.com/events

Find us on [Twitter](#) at [@BrickerHigherEd](#)



September 11, 2023

John Carroll University
Title IX Training

Bricker Graydon

Disclaimer #1

Bricker Graydon

- 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

Bricker Graydon

- 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.

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).

Today's Agenda



- 8:30 Check in
- 9:00 Themes and the Importance of Neutrality
Sexual Assault, Dating Violence, Domestic Violence, and Stalking
Scope of your Education Program/Activity
Overview of your Policy/Process
- 10:00-10:15 Break**
- 10:15- Intake (overview)
Conducting an Investigation (overview)
Conducting a Hearing (overview)
Overview of Advisor role in hearings
Overview of Hypothetical to review during working lunch
- Noon – Break/Working lunch**
- 12:30 Separate into group by roles
Plan for hearing
- 2:00 Conduct Mock Hearing
- 3:30 Making a Decision and Writing Report



Training Requirements? Clery Act and Title IX

What's required?

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.

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 prejudice 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.

Overarching Themes (2)



- Use language of the policy (reporting party, responding party), 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.



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)

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)

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)

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)

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

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.)

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

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.



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 of the College conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct;
 - **[Unwelcome conduct]** Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education program or activity; or
 - **[Clery crimes]** Sexual assault, dating violence, domestic violence, or stalking

**Sexual Harassment:
Quid Pro Quo**



- Only applies to employee 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 (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

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.

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.

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

Sexual Assault Data

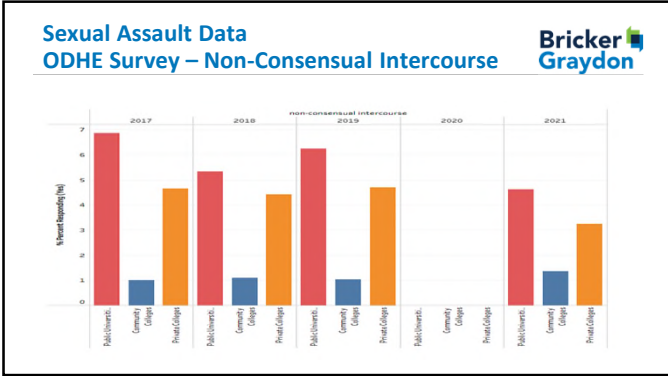


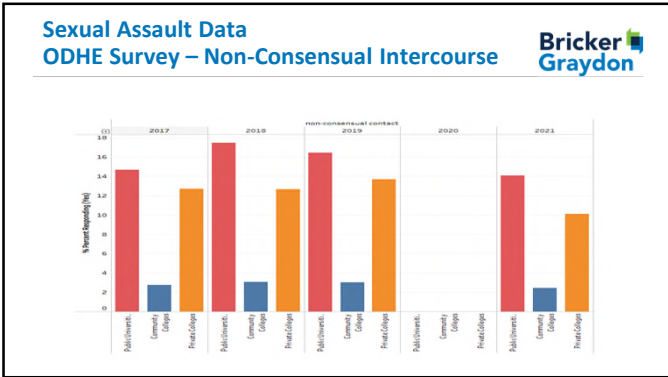
More than 1 in 3 women and 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.

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/factsheet.html](https://www.cdc.gov/violenceprevention/sexualviolence/factsheet.html) (last accessed July 13, 2021)





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/>."

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).

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.

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.

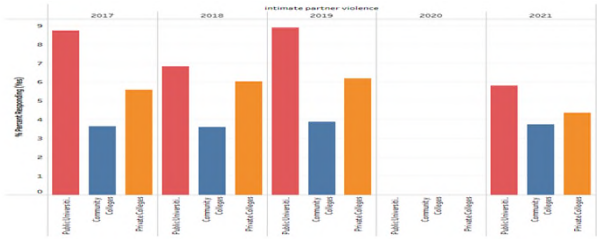
Sexual Harassment: Domestic Violence



“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

ODHE Data



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?

**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)

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.

Stalking: Reasonable Person



“Reasonable person”

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

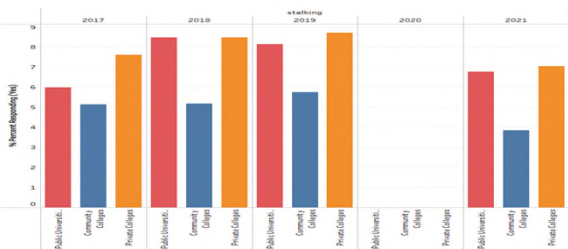
Stalking: Substantial Emotional Distress



“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.

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.]

Stalking: Common Concerns

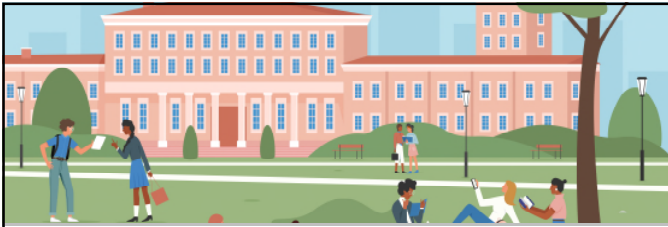


- Clearly defined no-contact orders can be helpful to keep the parties apart and help calm the situation.
- Complainants are often concerned that the respondent may not respect no-contact orders, especially if they have already asked the respondent to stand down. Think of ways to help address this concern 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”
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered



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)

Education Program or Activity



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

- Residence halls
- Classrooms
- Dining halls

Off Campus? (1 of 2)



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

- (1) Incident occurs as part of the College’s “operations”
- (2) If the College exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

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
 - o 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
 - o Must investigate in these locations (30196-97)

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)

Education Program or Activity

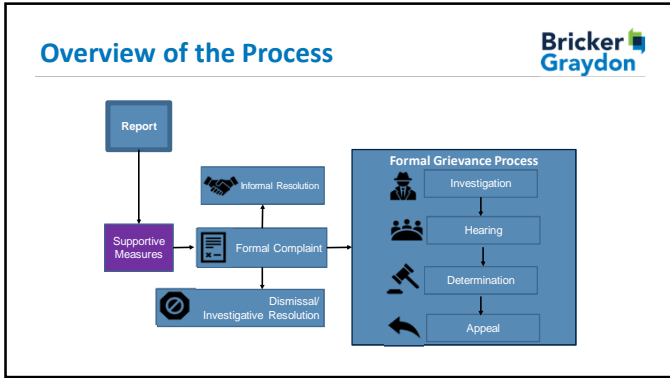


Depends on fact-analysis under "substantial control":

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



Overview of Your Policy/Process



A Report versus a Formal Complaint **Bricker Graydon**

- 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 the College investigate the allegation of sexual harassment

Overview of the Process: Supportive Measures (1 of 5) **Bricker Graydon**

- 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)

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



Designed to:

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

**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

**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



- The College may dismiss a formal complaint from the Title IX process in certain circumstances detailed on the next few slides
- If a dismissal occurs, the College 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



- Complainant withdraws complaint in writing
- Respondent is no longer enrolled in/employed by College
- "Specific circumstances prevent [the College] 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, the College may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- College cannot require this and also cannot offer **unless a formal complaint is filed**

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



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

College **cannot** offer this option with regard to reports of employee Title IX sexual harassment of a student



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, the College, or both (if applicable based on allegations).
6. Notify of the prohibition against retaliation.

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.

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.

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.

Notice of Allegations to Both Parties

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 Both Parties
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 Both Parties 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 College
- 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)

**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

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



**Overview of the Process:
Investigation (4 of 4)**



- College 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

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
- Explain amnesty policy, if relevant
- 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

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: Hiram Definition



- See Policy, pages 21-22
- “Affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during the sexual encounter.
- Can be withdrawn if “outwardly demonstrated by words or actions”
- Consent for one activity is not consent for another activity

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?

- o Must examine sexual contacts, acts in detail

Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

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?

Incapacitation: Hiram Definition (Page 23) 

“Means the lack of the ability to make rational reasonable judgments as a result of alcohol consumption, other drug use, sleep, etc.”

- “lacks the ability to fully understand the who, what, where, or how...”
- “A state beyond drunkenness or intoxication”
- Did the Respondent know or should have known of the other individual’s incapacitated state?

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?

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 _____?”

Any Drugs?



Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?

Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?

What, how much, and when?

Remember: amnesty

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?

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?

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

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 the College 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

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)

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 questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

**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

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

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

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)

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)

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)

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.

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)

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

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.”

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).

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.

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

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).

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.
- You **may** give these statements appropriate weight under the circumstances.

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?

Decorum



“[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)

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

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



Scenario Overview

Charlie and Jesse – Intimate Partner Violence?
Credibility Assessment Scenario

Outline of Evening



- Dinner
- Walk – Argument?
- In the car – Violence?
- Aftermath

Definition of Dating Violence



- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

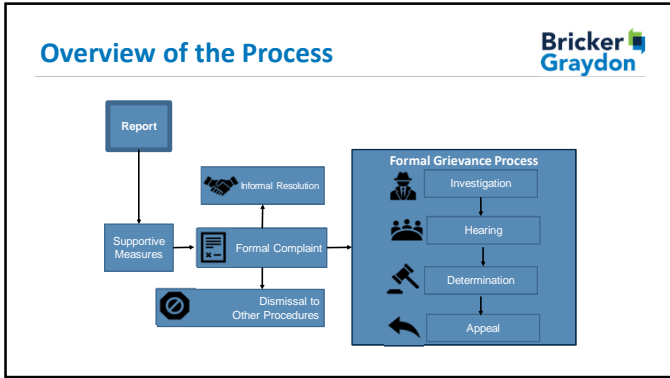
Brainstorm



- What are the elements of dating violence?
- What are the key things that will need to be decided to determine if a policy violation occurred?
- What other things may help with a credibility assessment?



Conducting a Process That Protects and Holds Accountable



Split Roles

Team Charlie
 Team Jesse
 Panel & Volunteers

Need volunteers for three parts:

- Complainant Charlie Chaste
- Respondent Jesse Jacobs
- Witness Whitney Wildcat



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

How Do You Choose Questions?

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 themes do you wish to draw out?
 - 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 with each witness 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?

Pick a Goal



- Consider choosing a goal for yourself to try to reach through questioning:
- Advisor: "By questioning Sarah, I will try to show that Respondent was more aware of Complainant's intoxication level than the report suggests."
- Hearing Officer: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
- Etc.

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!)

Plan Your Strategy



- Pick a goal for the questions you will ask
 - Example: I will try to get Charlie to admit that the bruise could have been from something else.
- Coordinate among team members to ensure goals cover the key points in the case

Mock Hearing





How to Make a Good Decision

Use your Policy and Follow your Process

Reminders (1 of 3)



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- 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

Reminders (2 of 3)



- **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

Reminders (3 of 3)



- Burden of gathering the evidence on the recipient, not the parties (30333)
 - Don't penalize a party for the questions no one asked them.

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the Hearing Officer should evaluate:
- **“consistency, accuracy, memory, and credibility”** (30315)
- **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence
 - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly "50-50," the tie goes to the Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- "Studies demonstrate that inconsistency is correlated with deception" (30321)
- Credibility decisions consider "plausibility and consistency" (30322)

Resolving Disputes (1 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant’s reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes (3 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

#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

#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.

#5 Weight of Evidence (2 of 2)



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

#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 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)
- Clear and convincing: a fact is highly probable to be true (30373 fn. 1409)

#8 Standard of Evidence (2 of 2)

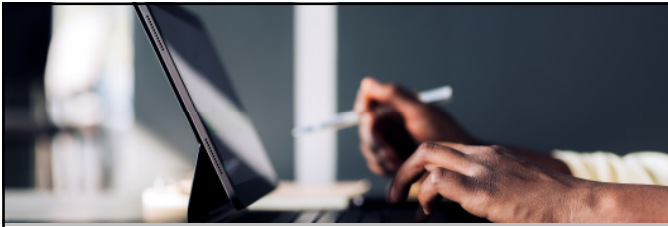


- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

#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.**



Writing the Decision

Show your work, and get credit for your good thinking!

Written Determination in 106.45(b)(7)(ii) (1 of 9)



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii)

(2 of 9)



Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

Written Determination in 106.45(b)(7)(ii)

(3 of 9)



Purpose of key elements of procedural steps “so the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions.” (30389)

Written Determination in 106.45(b)(7)(ii)

(4 of 9)



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

Written Determination in 106.45(b)(7)(ii)
(5 of 9)



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii)
(6 of 9)



- Institution’s procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii)
(7 of 9)



- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii)
(8 of 9)



Reference to code of conduct not prohibited:

“Recipients **retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only. (30389)

Written Determination in 106.45(b)(7)(ii)
(9 of 9)



The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.



Finalizing Our Case

How Do We Decide?

Making OUR Decision



- Questions to consider:
 - Were they dating at the time of the incident?
 - Did Jesse grab Charlie’s arms?
 - If so, was this “violence”?
 - Did Jesse slap Charlie’s face?
 - If so, was this “violence”?

If you are having trouble



- Consider making a list of what you are sure about that relates to the question you are considering.
- Make a list of what facts are disputed.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.

Additional information available at:



Title IX Resource Center at www.bricker.com/titleix

Free upcoming webinars at www.bricker.com/events

Find us on [Twitter](#) at [@BrickerHigherEd](#)



September 11, 2023

John Carroll University
Title IX Training

Bricker Graydon

Disclaimer #1

Bricker Graydon

- 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

Bricker Graydon

- 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.

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).

Today's Agenda



- 8:30 Check in
- 9:00 Themes and the Importance of Neutrality
Sexual Assault, Dating Violence, Domestic Violence, and Stalking
Scope of your Education Program/Activity
Overview of your Policy/Process
- 10:00-10:15 Break**
- 10:15- Intake (overview)
Conducting an Investigation (overview)
Conducting a Hearing (overview)
Overview of Advisor role in hearings
Overview of Hypothetical to review during working lunch
- Noon – Break/Working lunch**
- 12:30 Separate into group by roles
Plan for hearing
- 2:00 Conduct Mock Hearing
- 3:30 Making a Decision and Writing Report



Training Requirements? Clery Act and Title IX

What's required?

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.

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 prejudice 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.

Overarching Themes (2)



- Use language of the policy (reporting party, responding party), 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.



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)

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)

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)

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)

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

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.)

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

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.



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 of the College conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct;
 - **[Unwelcome conduct]** Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education program or activity; or
 - **[Clery crimes]** Sexual assault, dating violence, domestic violence, or stalking

**Sexual Harassment:
Quid Pro Quo**



- Only applies to employee 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 (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

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.

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.

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

Sexual Assault Data

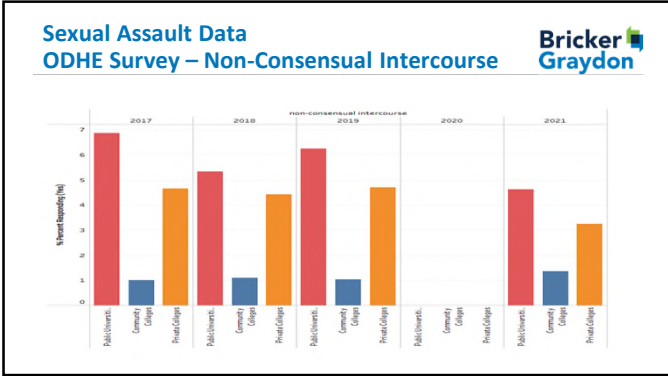


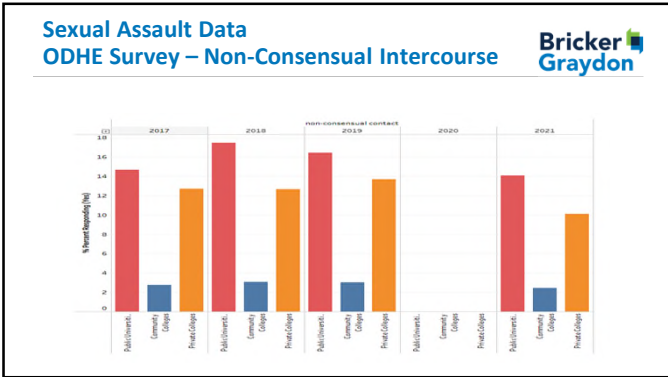
More than 1 in 3 women and 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.

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/factsheet.html](https://www.cdc.gov/violenceprevention/sexualviolence/factsheet.html) (last accessed July 13, 2021)





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/>."

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).

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.

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.

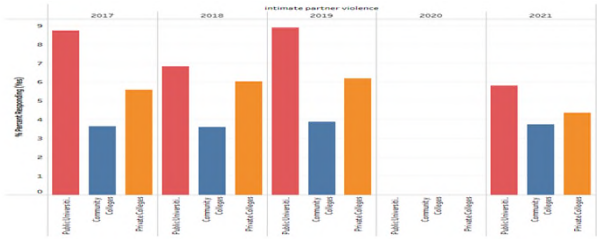
Sexual Harassment: Domestic Violence



“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

ODHE Data



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?

**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)

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.

Stalking: Reasonable Person



“Reasonable person”

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

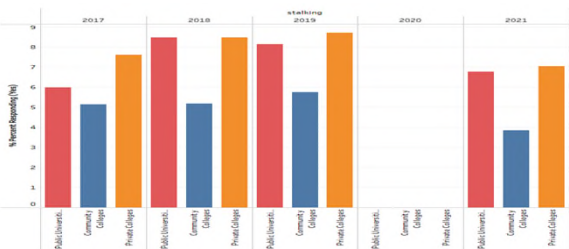
Stalking: Substantial Emotional Distress



“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.

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.]

Stalking: Common Concerns

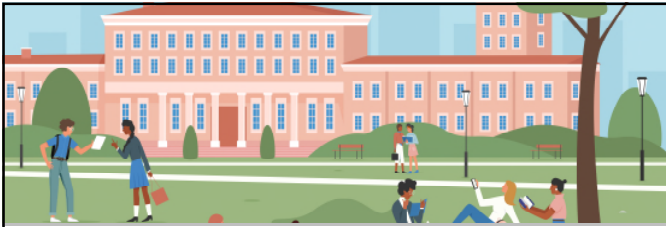


- Clearly defined no-contact orders can be helpful to keep the parties apart and help calm the situation.
- Complainants are often concerned that the respondent may not respect no-contact orders, especially if they have already asked the respondent to stand down. Think of ways to help address this concern 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”
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered



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)

Education Program or Activity



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

- Residence halls
- Classrooms
- Dining halls

Off Campus? (1 of 2)



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

- (1) Incident occurs as part of the College’s “operations”
- (2) If the College exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

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
 - o 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
 - o Must investigate in these locations (30196-97)

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)

Education Program or Activity

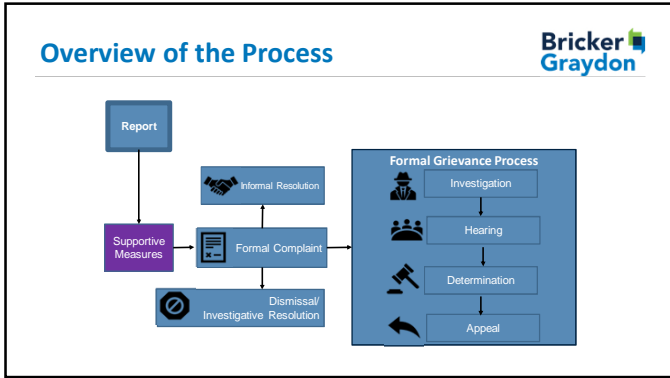


Depends on fact-analysis under "substantial control":

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



Overview of Your Policy/Process



A Report versus a Formal Complaint **Bricker Graydon**

- 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 the College investigate the allegation of sexual harassment

Overview of the Process: Supportive Measures (1 of 5) **Bricker Graydon**

- 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)

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



Designed to:

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

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



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

**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

**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



- The College may dismiss a formal complaint from the Title IX process in certain circumstances detailed on the next few slides
- If a dismissal occurs, the College 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



- Complainant withdraws complaint in writing
- Respondent is no longer enrolled in/employed by College
- "Specific circumstances prevent [the College] 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, the College may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- College cannot require this and also cannot offer **unless a formal complaint is filed**

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



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

College **cannot** offer this option with regard to reports of employee Title IX sexual harassment of a student



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, the College, or both (if applicable based on allegations).
6. Notify of the prohibition against retaliation.

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.

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.

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.

Notice of Allegations to Both Parties

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 Both Parties
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 Both Parties 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 College
- 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)

**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

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



**Overview of the Process:
Investigation (4 of 4)**



- College 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

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
- Explain amnesty policy, if relevant
- 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

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: Hiram Definition



- See Policy, pages 21-22
- “Affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during the sexual encounter.
- Can be withdrawn if “outwardly demonstrated by words or actions”
- Consent for one activity is not consent for another activity

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?

- o Must examine sexual contacts, acts in detail

Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

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?

Incapacitation: Hiram Definition (Page 23) 

“Means the lack of the ability to make rational reasonable judgments as a result of alcohol consumption, other drug use, sleep, etc.”

- “lacks the ability to fully understand the who, what, where, or how...”
- “A state beyond drunkenness or intoxication”
- Did the Respondent know or should have known of the other individual’s incapacitated state?

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?

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 _____?”

Any Drugs?



Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?

Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?

What, how much, and when?

Remember: amnesty

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?

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?

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

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 the College 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

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)

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 questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

**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

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

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

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)

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)

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)

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.

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)

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

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."

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).

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.

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

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).

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.
- You **may** give these statements appropriate weight under the circumstances.

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?

Decorum



“[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)

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

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



Scenario Overview

Charlie and Jesse – Intimate Partner Violence?
Credibility Assessment Scenario

Outline of Evening



- Dinner
- Walk – Argument?
- In the car – Violence?
- Aftermath

Definition of Dating Violence



- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

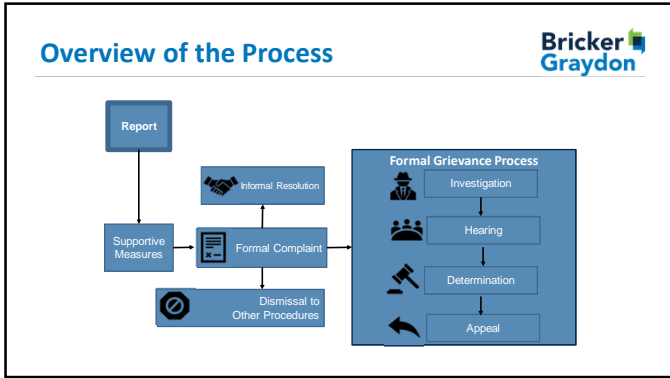
Brainstorm



- What are the elements of dating violence?
- What are the key things that will need to be decided to determine if a policy violation occurred?
- What other things may help with a credibility assessment?



Conducting a Process That Protects and Holds Accountable



Split Roles

Team Charlie
 Team Jesse
 Panel & Volunteers

Need volunteers for three parts:

- Complainant Charlie Chaste
- Respondent Jesse Jacobs
- Witness Whitney Wildcat



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

How Do You Choose Questions?

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 themes do you wish to draw out?
 - 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 with each witness 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?

Pick a Goal



- Consider choosing a goal for yourself to try to reach through questioning:
- Advisor: "By questioning Sarah, I will try to show that Respondent was more aware of Complainant's intoxication level than the report suggests."
- Hearing Officer: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
- Etc.

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!)

Plan Your Strategy



- Pick a goal for the questions you will ask
 - Example: I will try to get Charlie to admit that the bruise could have been from something else.
- Coordinate among team members to ensure goals cover the key points in the case

Mock Hearing






How to Make a Good Decision

Use your Policy and Follow your Process

Reminders (1 of 3)



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- 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

Reminders (2 of 3)



- **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

Reminders (3 of 3)



- Burden of gathering the evidence on the recipient, not the parties (30333)
 - Don't penalize a party for the questions no one asked them.

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the Hearing Officer should evaluate:
- **“consistency, accuracy, memory, and credibility”** (30315)
- **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence
 - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly "50-50," the tie goes to the Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- "Studies demonstrate that inconsistency is correlated with deception" (30321)
- Credibility decisions consider "plausibility and consistency" (30322)

Resolving Disputes (1 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant’s reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes (3 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

#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

#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.

#5 Weight of Evidence (2 of 2)



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

#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 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)
- Clear and convincing: a fact is highly probable to be true (30373 fn. 1409)

#8 Standard of Evidence (2 of 2)

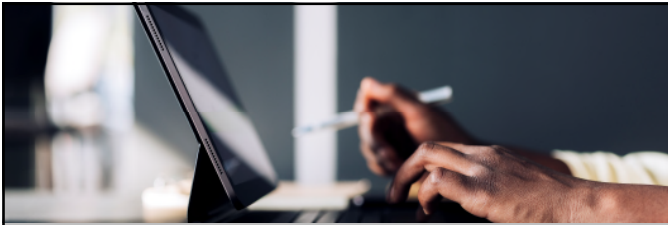


- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

#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.**



Writing the Decision

Show your work, and get credit for your good thinking!

Written Determination in 106.45(b)(7)(ii) (1 of 9)



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii)

(2 of 9)



Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

Written Determination in 106.45(b)(7)(ii)

(3 of 9)



Purpose of key elements of procedural steps “so the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions.” (30389)

Written Determination in 106.45(b)(7)(ii)

(4 of 9)



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

Written Determination in 106.45(b)(7)(ii)
(5 of 9)



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii)
(6 of 9)



- Institution’s procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii)
(7 of 9)



- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii)
(8 of 9)



Reference to code of conduct not prohibited:

“Recipients **retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only. (30389)

Written Determination in 106.45(b)(7)(ii)
(9 of 9)



The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.



Finalizing Our Case

How Do We Decide?

Making OUR Decision



- Questions to consider:
 - Were they dating at the time of the incident?
 - Did Jesse grab Charlie’s arms?
 - If so, was this “violence”?
 - Did Jesse slap Charlie’s face?
 - If so, was this “violence”?

If you are having trouble



- Consider making a list of what you are sure about that relates to the question you are considering.
- Make a list of what facts are disputed.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.

Additional information available at:



Title IX Resource Center at www.bricker.com/titleix

Free upcoming webinars at www.bricker.com/events

Find us on [Twitter](#) at [@BrickerHigherEd](#)



September 11, 2023

John Carroll University
Title IX Training

Bricker Graydon

Disclaimer #1

Bricker Graydon

- 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

Bricker Graydon

- 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.

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).

Today's Agenda



- 8:30 Check in
- 9:00 Themes and the Importance of Neutrality
Sexual Assault, Dating Violence, Domestic Violence, and Stalking
Scope of your Education Program/Activity
Overview of your Policy/Process
- 10:00-10:15 Break**
- 10:15- Intake (overview)
Conducting an Investigation (overview)
Conducting a Hearing (overview)
Overview of Advisor role in hearings
Overview of Hypothetical to review during working lunch
- Noon – Break/Working lunch**
- 12:30 Separate into group by roles
Plan for hearing
- 2:00 Conduct Mock Hearing
- 3:30 Making a Decision and Writing Report



Training Requirements? Clery Act and Title IX

What's required?

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.

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 prejudice 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.

Overarching Themes (2)



- Use language of the policy (reporting party, responding party), 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.



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)

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)

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)

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)

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

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.)

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

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.



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 of the College conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct;
 - **[Unwelcome conduct]** Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education program or activity; or
 - **[Clery crimes]** Sexual assault, dating violence, domestic violence, or stalking

**Sexual Harassment:
Quid Pro Quo**



- Only applies to employee 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 (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

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.

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.

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

Sexual Assault Data

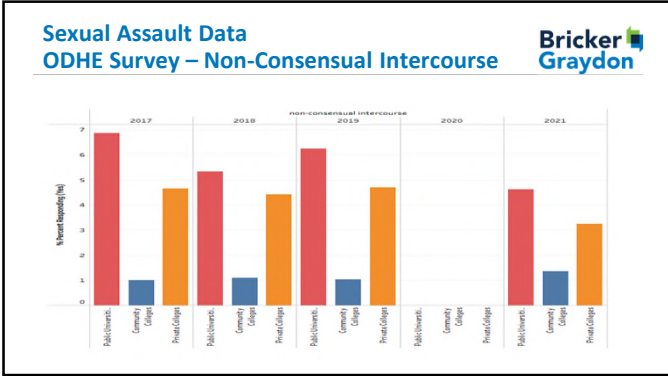


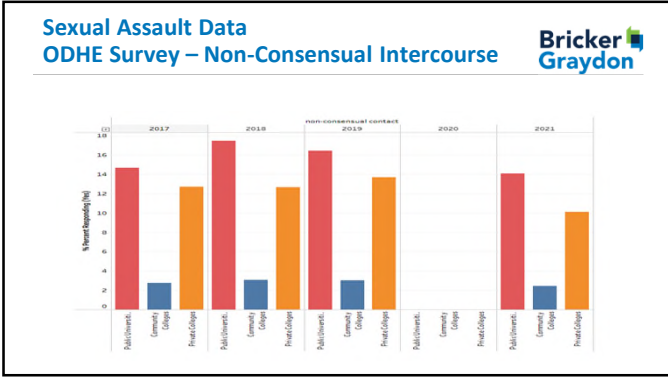
More than 1 in 3 women and 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.

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/factsheet.html](https://www.cdc.gov/violenceprevention/sexualviolence/factsheet.html) (last accessed July 13, 2021)





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/>."

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).

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.

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.

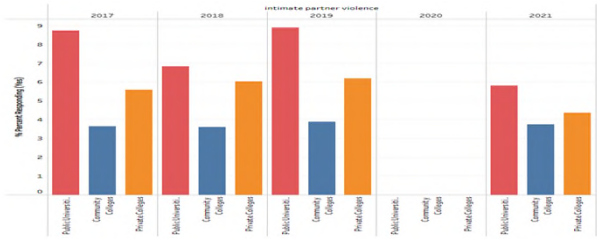
Sexual Harassment: Domestic Violence



“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

ODHE Data



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?

**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)

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.

Stalking: Reasonable Person



“Reasonable person”

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

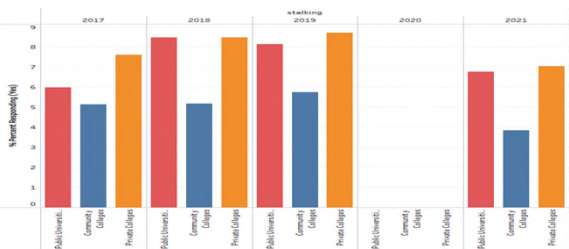
Stalking: Substantial Emotional Distress



“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.

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.]

Stalking: Common Concerns

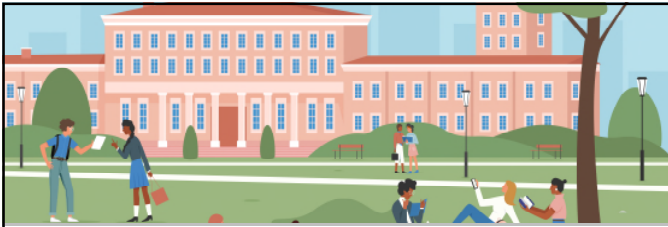


- Clearly defined no-contact orders can be helpful to keep the parties apart and help calm the situation.
- Complainants are often concerned that the respondent may not respect no-contact orders, especially if they have already asked the respondent to stand down. Think of ways to help address this concern 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”
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered



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)

Education Program or Activity



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

- Residence halls
- Classrooms
- Dining halls

Off Campus? (1 of 2)



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

- (1) Incident occurs as part of the College’s “operations”
- (2) If the College exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

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
 - o 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
 - o Must investigate in these locations (30196-97)

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)

Education Program or Activity

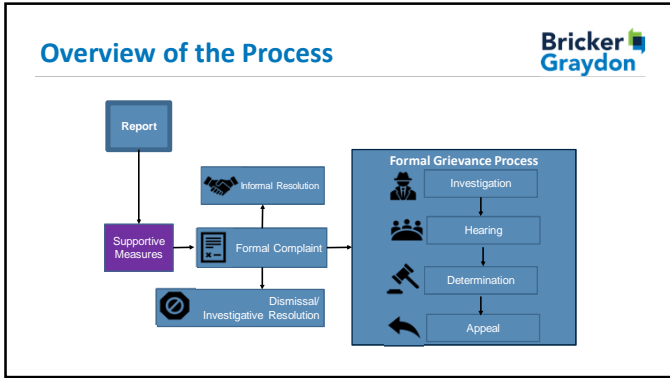


Depends on fact-analysis under "substantial control":

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



Overview of Your Policy/Process



A Report versus a Formal Complaint **Bricker Graydon**

- 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 the College investigate the allegation of sexual harassment

Overview of the Process: Supportive Measures (1 of 5) **Bricker Graydon**

- 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)

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



Designed to:

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

**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

**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



- The College may dismiss a formal complaint from the Title IX process in certain circumstances detailed on the next few slides
- If a dismissal occurs, the College 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



- Complainant withdraws complaint in writing
- Respondent is no longer enrolled in/employed by College
- “Specific circumstances prevent [the College] 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, the College may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- College cannot require this and also cannot offer **unless a formal complaint is filed**

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



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

College **cannot** offer this option with regard to reports of employee Title IX sexual harassment of a student



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, the College, or both (if applicable based on allegations).
6. Notify of the prohibition against retaliation.

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.

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.

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.

Notice of Allegations to Both Parties

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 Both Parties
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 Both Parties 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 College
- 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)

**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

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



**Overview of the Process:
Investigation (4 of 4)**



- College 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

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
- Explain amnesty policy, if relevant
- 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

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: Hiram Definition



- See Policy, pages 21-22
- “Affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during the sexual encounter.
- Can be withdrawn if “outwardly demonstrated by words or actions”
- Consent for one activity is not consent for another activity

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?

- o Must examine sexual contacts, acts in detail

Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

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?

Incapacitation: Hiram Definition (Page 23) 

“Means the lack of the ability to make rational reasonable judgments as a result of alcohol consumption, other drug use, sleep, etc.”

- “lacks the ability to fully understand the who, what, where, or how...”
- “A state beyond drunkenness or intoxication”
- Did the Respondent know or should have known of the other individual’s incapacitated state?

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?

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 _____?”

Any Drugs?



Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?

Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?

What, how much, and when?

Remember: amnesty

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?

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?

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

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 the College 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

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)

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 questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

**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
 - o 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

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

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

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)

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)

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)

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.

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)

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

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.”

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).

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.

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

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).

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.
- You **may** give these statements appropriate weight under the circumstances.

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?

Decorum



“[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)

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

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



Scenario Overview

Charlie and Jesse – Intimate Partner Violence?
Credibility Assessment Scenario

Outline of Evening



- Dinner
- Walk – Argument?
- In the car – Violence?
- Aftermath

Definition of Dating Violence



- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

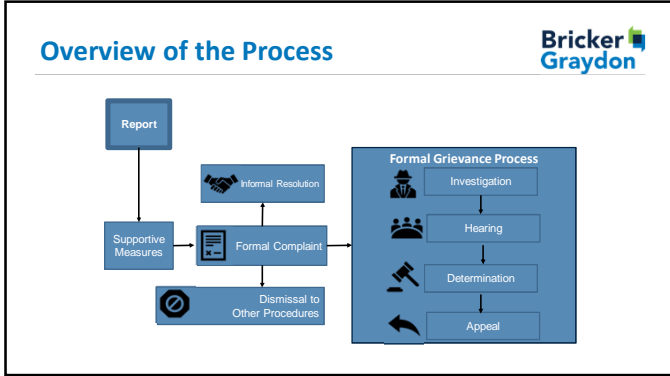
Brainstorm



- What are the elements of dating violence?
- What are the key things that will need to be decided to determine if a policy violation occurred?
- What other things may help with a credibility assessment?



Conducting a Process That Protects and Holds Accountable



Split Roles

Team Charlie
 Team Jesse
 Panel & Volunteers

Need volunteers for three parts:

- Complainant Charlie Chaste
- Respondent Jesse Jacobs
- Witness Whitney Wildcat



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

How Do You Choose Questions?

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 themes do you wish to draw out?
 - 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 with each witness 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?

Pick a Goal



- Consider choosing a goal for yourself to try to reach through questioning:
- Advisor: "By questioning Sarah, I will try to show that Respondent was more aware of Complainant's intoxication level than the report suggests."
- Hearing Officer: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
- Etc.

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!)

Plan Your Strategy



- Pick a goal for the questions you will ask
 - Example: I will try to get Charlie to admit that the bruise could have been from something else.
- Coordinate among team members to ensure goals cover the key points in the case

Mock Hearing





How to Make a Good Decision

Use your Policy and Follow your Process

Reminders (1 of 3)



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- 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

Reminders (2 of 3)



- **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

Reminders (3 of 3)



- Burden of gathering the evidence on the recipient, not the parties (30333)
 - Don't penalize a party for the questions no one asked them.

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the Hearing Officer should evaluate:
- **“consistency, accuracy, memory, and credibility”** (30315)
- **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence
 - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly "50-50," the tie goes to the Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- "Studies demonstrate that inconsistency is correlated with deception" (30321)
- Credibility decisions consider "plausibility and consistency" (30322)

Resolving Disputes (1 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant’s reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes (3 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

#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

#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.

#5 Weight of Evidence (2 of 2)



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

#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 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)
- Clear and convincing: a fact is highly probable 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.**



Writing the Decision

Show your work, and get credit for your good thinking!

Written Determination in 106.45(b)(7)(ii) (1 of 9)



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii)

(2 of 9)



Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

Written Determination in 106.45(b)(7)(ii)

(3 of 9)



Purpose of key elements of procedural steps “so the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions.” (30389)

Written Determination in 106.45(b)(7)(ii)

(4 of 9)



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

Written Determination in 106.45(b)(7)(ii)
(5 of 9)



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii)
(6 of 9)



- Institution’s procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii)
(7 of 9)



- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii)
(8 of 9)



Reference to code of conduct not prohibited:

“Recipients **retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only. (30389)

Written Determination in 106.45(b)(7)(ii)
(9 of 9)



The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.



Finalizing Our Case

How Do We Decide?

Making OUR Decision



- Questions to consider:
 - Were they dating at the time of the incident?
 - Did Jesse grab Charlie’s arms?
 - If so, was this “violence”?
 - Did Jesse slap Charlie’s face?
 - If so, was this “violence”?

If you are having trouble



- Consider making a list of what you are sure about that relates to the question you are considering.
- Make a list of what facts are disputed.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.

Additional information available at:



Title IX Resource Center at www.bricker.com/titleix

Free upcoming webinars at www.bricker.com/events

Find us on [Twitter](#) at [@BrickerHigherEd](#)



September 11, 2023

John Carroll University
Title IX Training

Bricker Graydon

Disclaimer #1

Bricker Graydon

- 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

Bricker Graydon

- 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.

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).

Today's Agenda



- 8:30 Check in
- 9:00 Themes and the Importance of Neutrality
Sexual Assault, Dating Violence, Domestic Violence, and Stalking
Scope of your Education Program/Activity
Overview of your Policy/Process
- 10:00-10:15 Break**
- 10:15- Intake (overview)
Conducting an Investigation (overview)
Conducting a Hearing (overview)
Overview of Advisor role in hearings
Overview of Hypothetical to review during working lunch
- Noon – Break/Working lunch**
- 12:30 Separate into group by roles
Plan for hearing
- 2:00 Conduct Mock Hearing
- 3:30 Making a Decision and Writing Report



Training Requirements? Clery Act and Title IX

What's required?

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.

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 prejudice 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.

Overarching Themes (2)



- Use language of the policy (reporting party, responding party), 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.



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)

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)

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)

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)

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

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.)

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

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.



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 of the College conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct;
 - **[Unwelcome conduct]** Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the College's education program or activity; or
 - **[Clery crimes]** Sexual assault, dating violence, domestic violence, or stalking

**Sexual Harassment:
Quid Pro Quo**



- Only applies to employee 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 (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

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.

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.

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

Sexual Assault Data

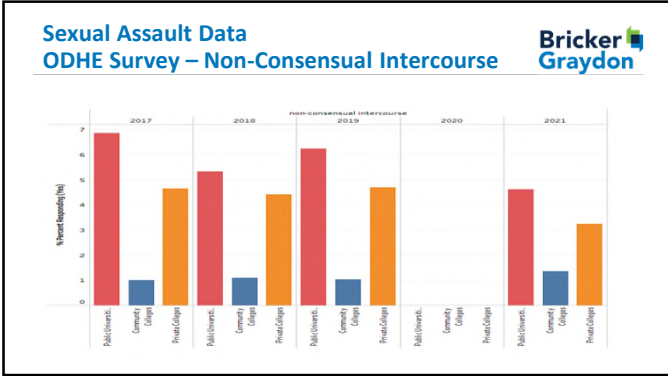


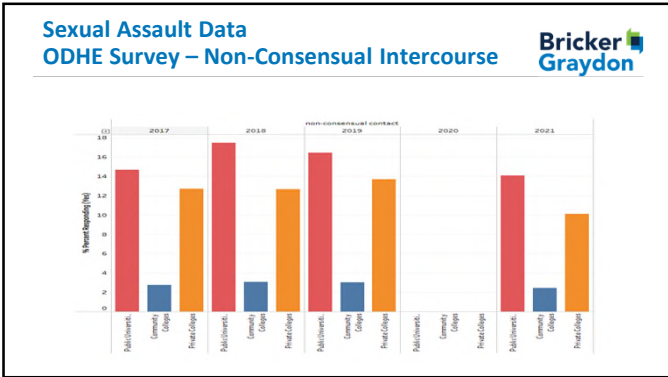
More than 1 in 3 women and 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.

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/factsheet.html](https://www.cdc.gov/violenceprevention/sexualviolence/factsheet.html) (last accessed July 13, 2021)





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/>."

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).

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.

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.

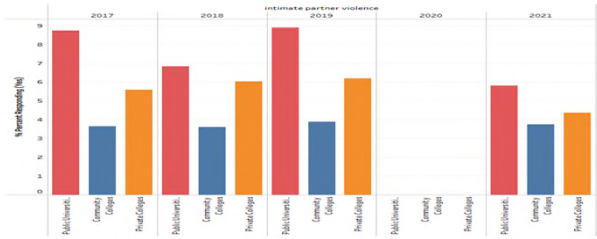
Sexual Harassment: Domestic Violence



“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

ODHE Data



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?

**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)

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.

Stalking: Reasonable Person



“Reasonable person”

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

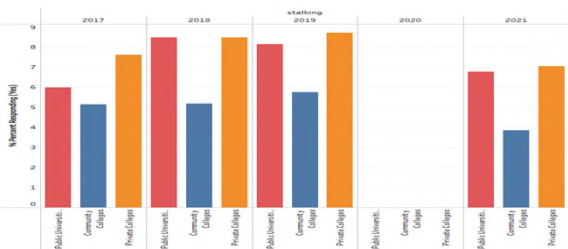
Stalking: Substantial Emotional Distress



“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.

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.]

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”
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered



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)

Education Program or Activity



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

- Residence halls
- Classrooms
- Dining halls

Off Campus? (1 of 2)



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

- (1) Incident occurs as part of the College’s “operations”
- (2) If the College exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

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
 - o 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
 - o Must investigate in these locations (30196-97)

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)

Education Program or Activity

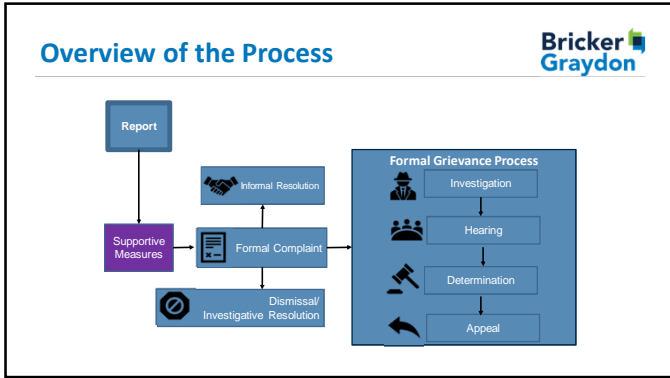


Depends on fact-analysis under "substantial control":

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



Overview of Your Policy/Process



A Report versus a Formal Complaint **Bricker Graydon**

- 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 the College investigate the allegation of sexual harassment

Overview of the Process: Supportive Measures (1 of 5) **Bricker Graydon**

- 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)

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



Designed to:

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

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



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

**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

**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



- The College may dismiss a formal complaint from the Title IX process in certain circumstances detailed on the next few slides
- If a dismissal occurs, the College 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



- Complainant withdraws complaint in writing
- Respondent is no longer enrolled in/employed by College
- "Specific circumstances prevent [the College] 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, the College may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication
- College cannot require this and also cannot offer **unless a formal complaint is filed**

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



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

College **cannot** offer this option with regard to reports of employee Title IX sexual harassment of a student



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, the College, or both (if applicable based on allegations).
6. Notify of the prohibition against retaliation.

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.

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.

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.

Notice of Allegations to Both Parties

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 Both Parties
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 Both Parties 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 College
- 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)

**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

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



**Overview of the Process:
Investigation (4 of 4)**



- College 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

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
- Explain amnesty policy, if relevant
- 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

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: Hiram Definition



- See Policy, pages 21-22
- “Affirmative, unambiguous, and voluntary agreement to engage in a specific sexual activity during the sexual encounter.
- Can be withdrawn if “outwardly demonstrated by words or actions”
- Consent for one activity is not consent for another activity

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?

- o Must examine sexual contacts, acts in detail

Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

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?

Incapacitation: Hiram Definition (Page 23) 

“Means the lack of the ability to make rational reasonable judgments as a result of alcohol consumption, other drug use, sleep, etc.”

- “lacks the ability to fully understand the who, what, where, or how...”
- “A state beyond drunkenness or intoxication”
- Did the Respondent know or should have known of the other individual’s incapacitated state?

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?

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 _____?”

Any Drugs?



Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?

Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?

What, how much, and when?

Remember: amnesty

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?

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?

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

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 the College 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

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)

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 questioning parties and witnesses – not in regulations
 - Consider time restraints on witnesses
 - Questioning of Complainant
 - Questioning of Respondent

**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
 - o 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

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

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

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)

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)

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)

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.

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)

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

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."

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).

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.

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

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).

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.
- You **may** give these statements appropriate weight under the circumstances.

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?

Decorum



“[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)

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

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



Scenario Overview

Charlie and Jesse – Intimate Partner Violence?
Credibility Assessment Scenario

Outline of Evening



- Dinner
- Walk – Argument?
- In the car – Violence?
- Aftermath

Definition of Dating Violence



- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- The existence of such a relationship shall be determined based on the reporting party's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

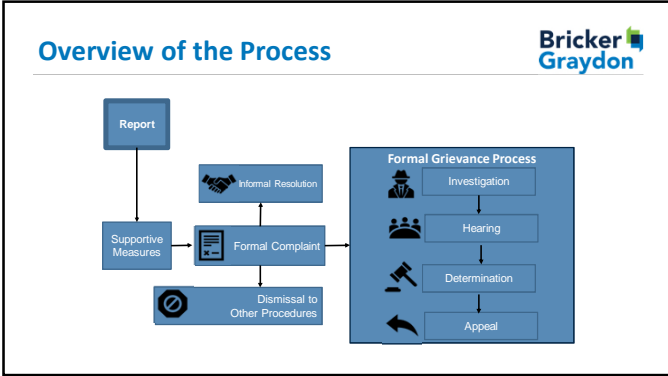
Brainstorm



- What are the elements of dating violence?
- What are the key things that will need to be decided to determine if a policy violation occurred?
- What other things may help with a credibility assessment?



Conducting a Process That Protects and Holds Accountable



Split Roles

Team Charlie
 Team Jesse
 Panel & Volunteers

Need volunteers for three parts:

- Complainant Charlie Chaste
- Respondent Jesse Jacobs
- Witness Whitney Wildcat

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

How Do You Choose Questions?

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 themes do you wish to draw out?
 - 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 with each witness 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?

Pick a Goal



- Consider choosing a goal for yourself to try to reach through questioning:
- Advisor: "By questioning Sarah, I will try to show that Respondent was more aware of Complainant's intoxication level than the report suggests."
- Hearing Officer: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
- Etc.

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!)

Plan Your Strategy



- Pick a goal for the questions you will ask
 - Example: I will try to get Charlie to admit that the bruise could have been from something else.
- Coordinate among team members to ensure goals cover the key points in the case

Mock Hearing





How to Make a Good Decision

Use your Policy and Follow your Process

Reminders (1 of 3)



- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- 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

Reminders (2 of 3)



- **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

Reminders (3 of 3)



- Burden of gathering the evidence on the recipient, not the parties (30333)
 - Don't penalize a party for the questions no one asked them.

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the Hearing Officer should evaluate:
- **“consistency, accuracy, memory, and credibility”** (30315)
- **“implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility”** (030330)
- Standard of proof and using it to guide decision

Standard of Proof



- Standard of Evidence: Preponderance of the Evidence
 - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly "50-50," the tie goes to the Respondent.

Making credibility decisions



The preamble discussion includes the following additional information on credibility:

- "Studies demonstrate that inconsistency is correlated with deception" (30321)
- Credibility decisions consider "plausibility and consistency" (30322)

Resolving Disputes (1 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Statements by any witnesses to the alleged incident (Regs: only when subjected to cross-examination)
- Evidence about the relative credibility of the complainant/respondent
 - The level of detail and consistency of each person's account should be compared in an attempt to determine who is telling the truth
 - Is corroborative evidence lacking where it should logically exist?

Resolving Disputes (2 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence of the complainant’s reaction or behavior after the alleged harassment
 - Were there witnesses who saw that the complainant was upset?
 - Changes in behaviors? Work-related? School? Concerns from friends and family? Avoiding certain places?
 - May not manifest until later

Resolving Disputes (3 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict and consistent with Regulations:

- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
 - But: failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur

Resolving Disputes (4 of 4)



OCR 2001 Guidance recommends considering the following when resolving the conflict:

- Other contemporaneous evidence:
 - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
 - Did the student tell others (friends, parents) about the conduct and their reaction soon after it occurred?
- **Again, only if subjected to cross-examination**

#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

#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.

#5 Weight of Evidence (2 of 2)



- Decision-makers who are trained to perform that role means that the same well-trained decision-maker will determine the weight or credibility to be given to each piece of evidence, and how to assign weight (30331)

#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 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)
- Clear and convincing: a fact is highly probable to be true (30373 fn. 1409)

#8 Standard of Evidence (2 of 2)

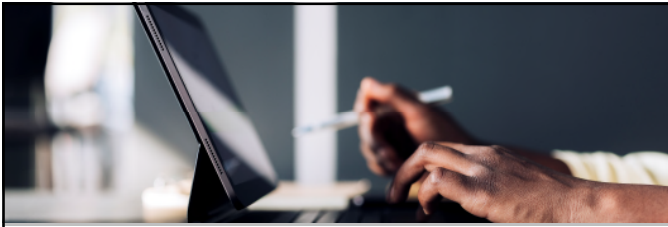


- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

#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.**



Writing the Decision

Show your work, and get credit for your good thinking!

Written Determination in 106.45(b)(7)(ii) (1 of 9)



Written determination must include:

- Identification of the allegations potentially constituting sexual harassment;
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence; and hearings held;

Written Determination in 106.45(b)(7)(ii)

(2 of 9)



Include key elements of any potential policy violation so parties have a complete understanding of the process and information considered by the recipient to reach its decision (30391) – should “match up” with decision (30391)

Written Determination in 106.45(b)(7)(ii)

(3 of 9)



Purpose of key elements of procedural steps “so the parties have a thorough understanding of the investigative process and information considered by the recipient in reaching conclusions.” (30389)

Written Determination in 106.45(b)(7)(ii)

(4 of 9)



- A statement of, and rationale for, the results as to each allegation, including determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient’s education program or activity will be provided by the recipient to the complainant; and

Written Determination in 106.45(b)(7)(ii)
(5 of 9)



- Statement of rationale: requiring recipients to describe, in writing, conclusions (and reasons for those conclusions) will help prevent confusion about how and why a recipient reaches determinations regarding responsibility (30389)
- The requirement of “Transparent descriptions of the steps taken in an investigation and explanations of the reasons why objective evaluation of the evidence supports findings of facts and conclusions of facts” helps prevent injection of bias (30389)

Written Determination in 106.45(b)(7)(ii)
(6 of 9)



- Institution’s procedures and permissible bases for complainant and respondent to appeal
- Provided to both parties in writing contemporaneously (106.45(b)(7)(ii))

Written Determination in 106.45(b)(7)(ii)
(7 of 9)



- Receiving decision simultaneously will ensure both parties have relevant information about the resolution of the allegations

Written Determination in 106.45(b)(7)(ii)
(8 of 9)



Reference to code of conduct not prohibited:

“Recipients **retain discretion to also refer to in the written determination to any provision of the recipient’s own code of conduct** that prohibits conduct meeting the [Title IX definition] of sexual harassment; however” the final regulations apply to recipient’s response to Title IX portion only. (30389)

Written Determination in 106.45(b)(7)(ii)
(9 of 9)



The preamble discussion notes that it does not “expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, all evidence presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness.”

Note: Consider including these anyway for a more thorough determination.



Finalizing Our Case

How Do We Decide?

Making OUR Decision



- Questions to consider:
 - Were they dating at the time of the incident?
 - Did Jesse grab Charlie’s arms?
 - If so, was this “violence”?
 - Did Jesse slap Charlie’s face?
 - If so, was this “violence”?

If you are having trouble



- Consider making a list of what you are sure about that relates to the question you are considering.
- Make a list of what facts are disputed.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.

Additional information available at:



Title IX Resource Center at www.bricker.com/titleix

Free upcoming webinars at www.bricker.com/events

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