







Ice Breaker

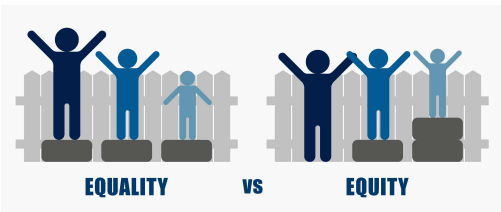
- Name
- What your job is at UD
- What your role is on the Title IX Team (if different from your "day job")
- What fictional character do you think best embodies your personal definition of JUSTICE?



Themes for Today

Compliance + Values = Your Process

Title IX is an Equity Statute



Ethic of Care

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

Overview of Themes



Access

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

Protection

- **“They are all our students.”**
- Supportive measures
- Any action by a recipient that results in changes or removal of access to education for respondents will require a process to respond
 - Appeal of interim emergency measure
 - Hearing with live cross-examination

Transparency

- **TRANSPARENCY** is key to trusting the process.
 - Know your grievance process
 - Help them understand next steps.
- If participants don’t know what is happening, they will assume nothing is happening or that you are actively working against them.

Evidence-Based Decisions

We base decisions on **EVIDENCE**.

- **“Don’t weigh your gut.”**
- We can make reasonable inferences and credibility determinations, but be mindful of implicit bias, stereotypes, and using our own behavior as a yardstick.
- Beware of confirmation bias based on what you *think* may have happened.

Constant Improvement

Always be working to **IMPROVE**:

- Yourself as a neutral
- Your campus as a healthy and fair place to be
- Your policy to provide a better process informed by case law, regulations, guidance, and experience
- Your resources for all involved

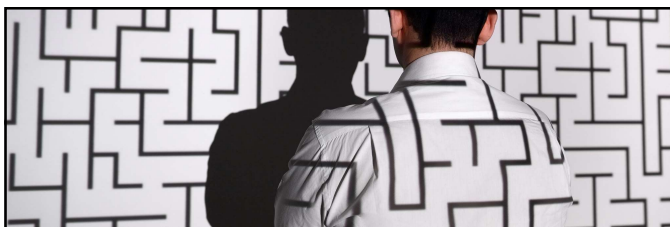
Conflicts of Interest/Bias

• Always be working to avoid actual or perceived:

- Conflict of interest
- Bias

Institutional Duties and Interests vs. Personal interests

Your work can impact the lives of others: take periodic self-inventories to be mindful of your activities, involvements, social media, and biases you may have and work to ensure you remain neutral.



Clery Training: IPV, Sexual Assault, and Stalking

Sticky Issues & Difficult Questions

Clery Act in Context

- April 5, 1986 – Jeanne Clery is raped and murdered at Lehigh University
- 1990 - Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act – tied to Higher Education Act funding
- 2013 – Violence Against Women Act amends the Clery Act with regard to sexual assault, dating violence, domestic violence, and stalking procedures
- July 1, 2015 – Current Clery regulations go into effect
- 2016 Handbook – Issued to give detailed guidance on compliance
- August 13, 2020 – New Title IX Regulations go into effect
- October 9, 2020 – 2016 Handbook is rescinded; new Appendix put in place; updated January 19, 2021

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 – but if the case is addressed through another policy, the Clery Act still applies.

A Note About Terminology

- The Clery Act is closely intertwined with criminal law. It uses terms like “victim” and “perpetrator” – but both of these words suggest potential predetermination.
- We will use the words “complainant” and “respondent” except when using language from the Act.

Training Requirements

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.

Title IX Overlay

- New regulations issued on May 6, 2020, effective on August 13, 2020.
- OCR Blog posts and guidance issued throughout fall of 2020.
- New administration has issued guidance on *Bostock*, which has been enjoined in 20 states (including Ohio)
- ED discontinued enforcement of regulatory provision that prohibited consideration of “statements” by individuals not subjected to cross-exam
- Proposed Title IX rules are pending (final rules *supposedly* due in March 2024).

Data Disclaimer

- We will be discussing statistics regarding sexual assault, dating violence, domestic violence, and stalking
- Statistics help us understand the way these crimes may affect the individuals involved, as well as our community.
- Statistics should **never** influence your decisions with regard to handling a specific case.

Sexual Assault

Sexual assault is defined as "an offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI's UCR program and included in Appendix A of this subpart"

Appendix A includes definitions from the FBI's Summary Reporting System (SRS), which was phased out effective December 31, 2020. The FBI now uses NIBRS. NIBRS doesn't match Appendix A.

The Policy must include in its definition the conduct not permitted by NIBRS, but can be worded differently.

Sexual Assault: UD's Definition

Sexual Assault is engaging or attempting to engage in one of the following activities with another individual without consent or where the individual cannot consent because of age or temporary or permanent mental or physical incapacity:

- 1. Sexual intercourse (anal, oral, or vaginal), including penetration with a body part (e.g., penis, finger, hand, or tongue) or an object, however slight;
- 2. Intentional touching of the intimate body parts of another for the purpose of sexual gratification. Intimate body parts include the breasts, buttocks, groin, and genitals.

Sexual Assault: UD's Definition (cont.)

- 3. Sexual intercourse (anal, oral, or vaginal) between individuals who are not permitted to marry. In Ohio, this means that individuals closer in kin than second cousins may not have sexual intercourse.*
- 4. Sexual intercourse (anal, oral, or vaginal) with a person who is under the statutory age of consent. In Ohio, state law prohibits sex with any individual under the age of 13; additionally, individuals over the age of 18 may not have sex with individuals under the age of 16.

Sexual Assault: Hypos

- Do the following count as sexual assault, if there is no consent?
 - Kissing
 - French kissing
 - Grinding on a dance floor
 - Slap on the butt on the way out to the football field
 - Slap on the butt on the way onto the dance floor
 - Mouth-to-vagina oral sex

Sexual Assault: Attempt

Note that attempted sexual assault is considered to be sexual assault under the UCR.

What constitutes "attempt"?

Ohio law defines attempt as engaging in conduct that, if successful, would constitute or result in the offense. ORC 2923.02(A).

Sexual Assault: Attempt Hypos

Which of the following do we believe constitute attempted rape?

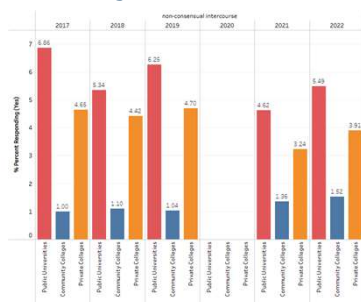
- Respondent stranger pulls Complainant into the bushes, begins to undress Complainant, and then is disrupted by passersby and runs away
- Respondent attempts to penetrate Complainant with genitalia but does not aim correctly and misses, then is disrupted
- Respondent attempts to fondle Complainant for sexual gratification but actually fondles Complainant's roommate, for whom Respondent has no sexual attraction

Sexual Assault Data Women and Men

More than **1 in 2 women** and almost **1 in 3 men** have experienced sexual violence involving physical contact during their lifetimes.
1 in 4 women and about **1 in 26 men** will experience completed or attempted rape during their lifetimes.
 Nearly **1 in 9 men** was made to penetrate someone (completed or attempted) during his lifetime.

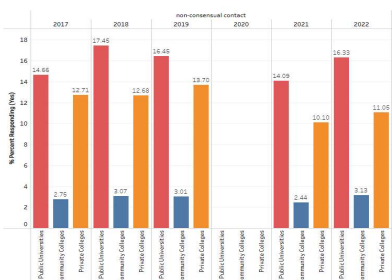
Statistics from [CDC.gov/prevention/sexualviolence/factsheet.html](https://www.cdc.gov/prevention/sexualviolence/factsheet.html) (last accessed January 8, 2024)

Sexual Assault Data ODHE Survey – Non-Consensual Sexual

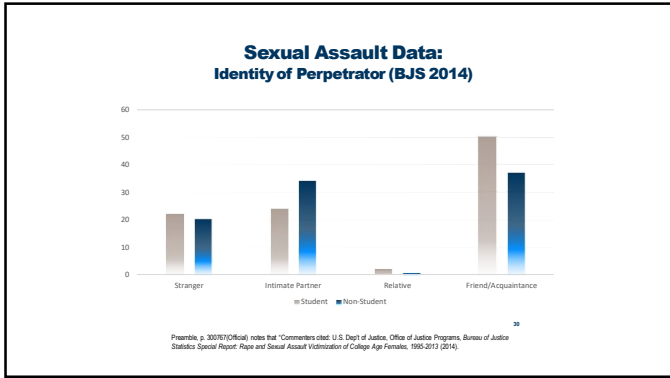


Statistics from ODHE Changing Campus Culture Benchmark Data (last accessed January 19, 2024)

Sexual Assault Data ODHE Survey – Non-Consensual Contact



Statistics from ODHE Changing Campus Culture Benchmark Data (last accessed October 9, 2023)



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/>." 31

Sexual Assault Data: Alcohol/Drug Use

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

"Survivors impaired by alcohol are more likely to disclose to informal, but not formal support sources than are non-impaired victims."

Lorenz, Katherine, and Sarah E. Ullman. "Exploring Correlates of Alcohol-Specific Social Reactions in Alcohol-Involved Sexual Assaults." *Journal of aggression, maltreatment & trauma* vol. 25,10 (2019): 1058-1078. doi:10.1080/10926771.2016.1219801. 32

**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. Dept of Justice, Office of Justice Programs, Office for Victims of Crime, 2017 National Crime Victims' Rights Week Resource Guide: Crime and Victimization Fact Sheets (2017).

**Data and Statistics:
Impact Data (1 of 2)**

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

Preamble, p. 30080 (Official) notes that "Commenters cited: U.S. Dept of Justice, Bureau of Justice Statistics, Special Report: Socio-emotional impact of violent crime (2014).

**Data and Statistics:
Impact Data (2 of 2)**

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

Preamble, p. 30080 (Official) notes that "Commenters cited: Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, The National Intimate Partner and Sexual Violence Survey (NISVS), 2010 Summary Report (Nov. 2011).

Sexual Assault: Common Concerns

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

Sexual Harassment: Dating Violence

“Dating Violence” means violence committed by a person: (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors:

- The length of the relationship
- The type of relationship
- The frequency of interaction between the persons involved in the relationship.

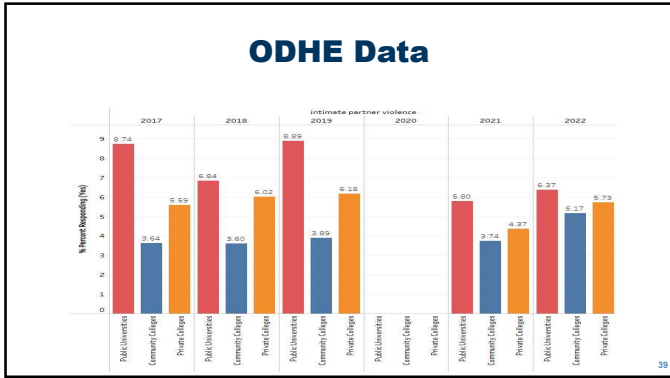
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Sexual Harassment: Domestic Violence

“Domestic violence” is any felony or misdemeanor crimes of violence committed by:

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

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Domestic Violence Incidents: City of Dayton PD

	DVI Charge	Other Charge	No Charge
2019	1,826	22	57
2020	1,483	295	53
2021	1,279	8	192
2022	1,625	9	75

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

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.

Supportive Measures in IPV

- Think of a no-contact order as a protective bubble. The bubble gets bigger by:
 - Mutual residence-hall restrictions
 - Dividing resources on campus
 - Building presence restrictions
 - Emergency removal
- How big of a bubble is necessary based on your facts?
- Let the parties guide you. Remember: Defining the bubble may increase the risk.

IPV: Questions

- What is the relationship between the parties? Do they agree?
- What is the violence described?
- Under what circumstances did the 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 as the respondent?

**Sexual Harassment:
Stalking**

“Stalking” is engaging in a course of conduct [on the basis of sex] directed at a specific person that would cause a reasonable person to:

- Fear for their safety or the safety of others; or
- Suffer substantial emotional distress.

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Stalking: Course of Conduct

“Course of Conduct”

- **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.

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Stalking: Reasonable Person

“Reasonable person”

A reasonable person under similar circumstances and with similar identities to the victim.

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Stalking: Substantial Emotional Distress

“Substantial emotional distress”

Significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

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Stalking: Data (1 of 2)

- **31.2%** of women and **16.1%** of men in the U.S. reported stalking victimization at some point in their lifetime.
- **43.4%** of female victims and **32.4%** of male victims of stalking are stalked by a **current or former intimate partner**.
- Over **85%** of stalking victims are stalked by **someone they know**.

First and second statistics: Smith, S.G., Basile, K.C., & Kresnow, M. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Stalking — Updated Release*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.

Third statistic: National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (CDC)

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Stalking: Data (2 of 2)

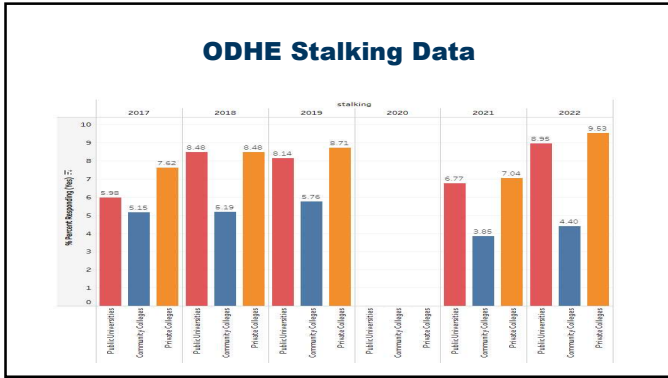
- **11%** of stalking victims have been **stalked for 5 years or more**.
- **46%** of stalking victims experience **at least one unwanted contact per week**.

[Matthew J. Breiding et al., "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011"]

Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 63, No. 8 (2014): 7])

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

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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.

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Stalking: Considerations

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

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Sexual Harassment (Title IX)

Conduct on the basis of sex that satisfies one or more of the following:

- Quid Pro Quo Sexual Harassment: An employee of the University conditioning the provision of aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct
- Hostile Environment Sexual Harassment: 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 University's education program or activity
- Sexual assault, dating violence, domestic violence, or stalking.

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Quid Pro Quo

Complainant: Anyone
Respondent: Employee

Consider:

- What impact did the behavior have on their ability to participate at UD?
- What power differentials exist between the parties, if any?

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Unwelcome Conduct

Severe: Consider physical vs. verbal conduct
Pervasive: Must be more than once
Objectively offensive: To a reasonable person
Impact: How has this changed the way they go about their business?

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Impact

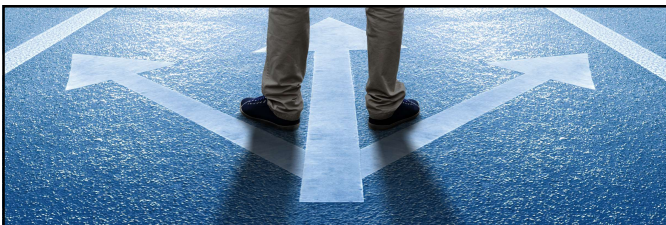
- Do you go to class? Has it affected your grades or participation?
- Do you feel comfortable on campus?
- Are you still going to the gym, clubs, dining hall as usual?
- Has this changed the way you move about campus?
- How are you handling this emotionally?
- Has this caused disruptions to your sleep? To other parts of your schedule or habits?

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Impact: Tips

- Not everyone can automatically articulate impact. It may be easier to answer questions about behavioral changes in response to the situation than it is to discuss emotional impact.
- Ask every Complainant about impact. In some cases, it is an element of the charge. In all cases, it can help identify if more supportive measures are needed, and may give additional details about the underlying allegations.
- Witnesses may have observed impact.

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Jurisdiction and Scope Under the 2020 Regulations

Obligation to Respond

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

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“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)

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**“Education Program or Activity”
Easy Examples**

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

- Residence halls
- Classrooms
- Dining halls

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Online Study

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

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What about...

Depends on fact-analysis under “substantial control”:

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

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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)

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Jurisdiction under Title IX

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

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Off-Campus Jurisdiction? (1 of 2)

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

- (1) Incident occurs as part of the recipient’s “operations” (meaning as a “recipient” as defined in the Title IX statute or the Regs 106.2(h));
- (2) If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

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Off-Campus Jurisdiction? (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)

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Study Abroad Programs

- Title IX draws a bright line: plain text of Title IX states “no person in the United States” is protected, which means you must dismiss anything that occurred against a person outside the USA. (30205-06)
- Programs of college based in other countries? No jurisdiction and must dismiss.
- Foreign nationals in the United States are covered.

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Jurisdiction and Mandatory Dismissal (1 of 3)

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

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

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

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Jurisdiction and Mandatory Dismissal (2 of 3)

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

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Jurisdiction and Mandatory Dismissal (2 of 3)

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

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Off-Ramps!

Rule of Thumb: We address bad behavior that affects our community, regardless of whether it falls under Title IX.

Title IX: Sexual Harassment Resolution Process (investigation + hearing)

Not Title IX, but related: Equity Compliance Resolution Process (investigation + investigator resolution)

Neither: Check your other policies and procedures.

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Jurisdictional Hypotheticals

After review of each hypothetical, you will be prompted to raise your hand to answer:

- Yes, there is jurisdiction
- No, there is not jurisdiction
- I'm not sure (we only give you this option because we are nice)

Yes, we permit campaigning. The goal is to get a consensus.

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Hypothetical 1

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

Hypothetical 2

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

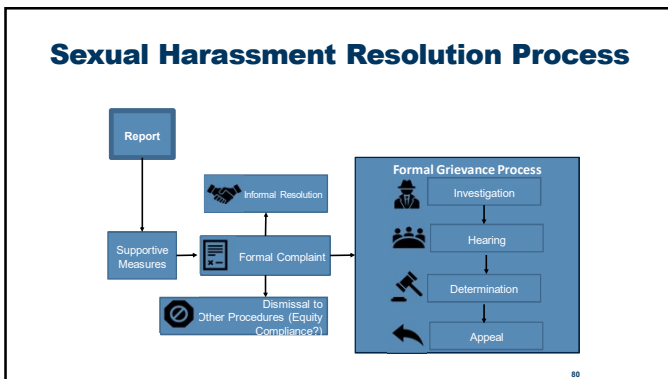
Hypothetical 3

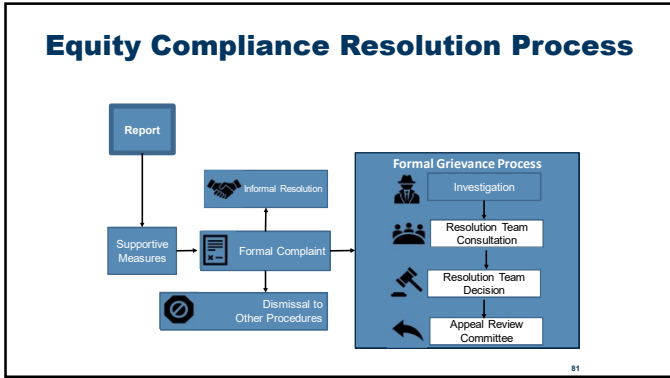
The university has partnered with the city for an improvement district along the main street that runs through campus. The improvement district removes and rebuilds buildings on the street, oversees the cleanliness of the sidewalks, and has a task force that patrols the area on bicycles to deter crime.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

Hypothetical 4

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







Hostile Environment Discriminatory Harassment

- Membership in a protected class (sex/gender) where harassment is sufficiently severe, pervasive, **or** persistent and objectively offensive so as to unreasonably interfere with, deny or limit a person's (a) ability to participate in or benefit from the University's educational programs, services, residential programs, or campus activities; or (b) a University's employee's employment.
- Must be unwelcome
- Reasonable person must perceive the conduct as objectively offensive
- This goes through the Equity Compliance Process

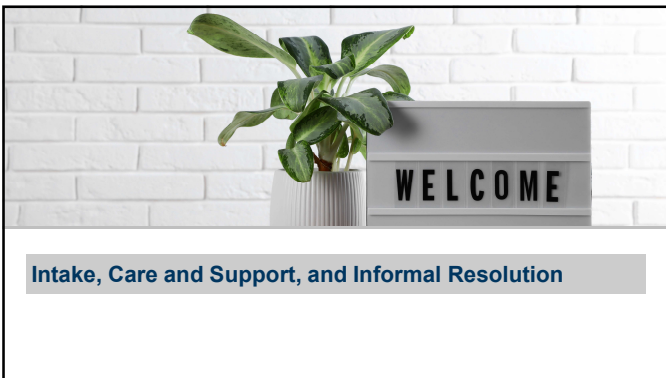
Sexual Exploitation

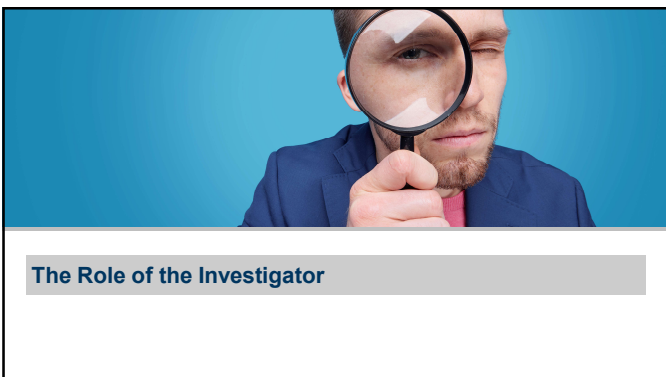
- Occurs when a person takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, when such behavior does not constitute Sexual Harassment under this Policy.

Other Civil Rights Offenses

- Threatening or Causing Physical Harm
- Discrimination
- Intimidation
- Hazing
- Bullying
- Retaliation

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Investigators Lay the Foundation

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

Investigators Do NOT Make Decisions

- You do not make findings of fact
- You do not make decisions as to whether the policy was violated
- You do not make credibility determinations
- You do not offer your opinion to the decision-maker about whether Respondent "did it" or whether Complainant is not telling the truth (because your opinion is not evidence)
- You do not consult with the decision-maker as to what their finding should be

So... You're Free? (Uh, not exactly.)

- Free to engage with the parties in a way that lets them know you are there to help them record their side of the story.
- Free to compile the information and walk away without having to make the final decision.
- Free to form your own opinions in your head without sharing them – after you have finished your investigation (to avoid confirmation bias).

Email to Complainant (1 of 4)

Dear [Complainant],
My name is Melissa Carleton and the Title IX Coordinator has assigned me to **investigate your case**. I would like to meet with you to discuss **what you remember** about your encounter. Do you have time to meet with me on **March 10th at 12:30 in the conference room**? You may bring an **advisor of choice** with you, so if that date and time is not convenient for both of you, please let me know a few times that would work better.

Email to Complainant (2 of 4)

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

Email to Complainant (3 of 4)

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

Email to Complainant (4 of 4)

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

What About Respondent?

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



Email to Respondent (1 of 4)

Dear [Respondent],

My name is Melissa Carleton and the Title IX Coordinator has assigned me to **investigate your case**. My first step will be to meet with the other person to get more information about the formal complaint. I am in the process of setting that meeting up.

Once I have conducted that interview, I will reach back out to you to set up a time to interview you. You will be permitted to bring an advisor of choice to that interview.

Email to Respondent (2 of 4)

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

Email to Respondent (3 of 4)

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

Email to Respondent (4 of 4)

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

The Investigator Spiel

- Explain your role
- Explain how information will be shared in the process
- Explain the prohibition against retaliation
- Explain amnesty provision

Explain Your Role (1 of 2)

"As the investigator, my job is to gather evidence, interview witnesses, and prepare summaries of those interviews."

"Today, I'll be taking notes so that I can prepare a good summary of our conversation, but I want to make sure it's accurate, so I'll send you a copy for your review. You'll get the opportunity to suggest changes to make sure that it's complete and truthful, and that I've properly captured your side of the story."

Explain Info Sharing

"When the summary is finalized, it will go into the case file. Both parties are going to get a chance to look at the case file, so they will see what you tell me today. The summary will also be shared with the hearing officer, so if you get called as a witness to the hearing, it will be what people use to ask you questions. The more complete it is, hopefully the fewer questions they will need to ask you!"

Explain Your Role (2 of 2)

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

Retaliation Prohibition

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

Retaliation – More Oomph

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

Amnesty

Check your policy for your language.

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

To Record Or Not?

- Ohio is a "one party" state, which means as long as one party to the conversation is aware of the recording, you can record.
- Your Policy requires you to notify everyone present if you are recording.

Role of Advisors

- Advisors can be any human being.
- During investigation: Silent observers
 - If they come to a meeting/interview without an advisor, ask if they would like to reschedule so they can bring someone.
- During hearing: Ask questions on behalf of their party
 - If parties do not have an advisor of choice, University must provide one.

Handling Difficult Advisors

- Must have FERPA release if students are involved and the advisor is not an employee
- Title IX Coordinator can help set expectations for advisors up front
- Communicate with the party and copy the advisor: "Your advisor asked _____, so I wanted to share my response directly with you."
- If the advisor submits the party's written statement, make sure the party adopts that statement as their own. Advisors don't typically get to submit evidence unless they are witnesses.



Interviewing Skills

Start with your Scope

- This should be documented in the Notice of Investigation and Allegations
- The NOIA should also include information about which policies are at issue
 - Double-check – is the correct policy cited?
 - Use the definitions in place at the time of the conduct, and make sure the parties have access to those definitions.
- Break down the provisions to elements.

Elementary, My Dear Watson

- For example:
 - ✓ Unwelcome conduct
 - ✓ On the basis of sex
 - ✓ That a reasonable person would determine to be:
 - ✓ So severe, pervasive, and objectively offensive that
 - ✓ It effectively denies a person equal access to the recipient's education program or activity.

Outline Your Thoughts

- Prepare a bullet point list of things you want to explain at the outset
- Have your policy language at the ready
- Bring any evidence that you may want them to review and comment on
- Prepare an outline of questions
 - Don't forget to ask the complainant about impact if it's an element of your policy language!

Setting the Stage

- Private location – be cautious of windows, traffic in the area, distractions
- Comfortable seating that provides equal positioning for interviewee, interviewer, and advisor (if any)

Things I Always Cover

- What is my role?
- Who will read your information?
- No retaliation
- How to access supportive measures (always for parties – as needed for witnesses)
- “Do you know what I’ve called you to talk about today?”

Start with Relationships

- What year are you? Where are you from originally? What is your major? Where do you live on campus?
- What is your title/position here? How long have you worked here?
- Who did you meet first, C or R? How? When?
- Relationships with other key people in the case (to help assess potential bias)

Get a Timeline

- “What do you remember regarding this situation?”
 - Give them a starting point or let them choose
 - “And then what happened? And what happened next?”
 - Let them deliver a monologue
- Think in terms of a timeline for your report
 - What section headings will help you tell the story chronologically?
 - Are you clear as to which parts of their monologue fit under which section?

Ask Follow-Up Questions

- Go back to each incident on your timeline and flesh out the details.
- If the witness was alleged to have done or said something in particular, check to see if that's accurate
- Cover every element that the individual could have information about
 - Remember: is impact an element in my case?

Consent – UD Definition (1 of 4)

- Consent is granted when a person freely, actively and knowingly agrees by word or action at the time to participate in a particular sexual act with a particular person.
- Consent exists when mutually understandable words and/or actions demonstrate a willingness to participate in mutually agreed-upon activity at every stage of that sexual activity.
- Reasonable reciprocation can be implied.
- Consent can be withdrawn once given, as long as the withdrawal is clearly communicated through words or actions.
- If consent is withdrawn, that sexual activity should cease within a reasonable time.

Consent – UD Definition (2 of 4)

Since individuals may experience the same interaction in different ways, it is the responsibility of each party to determine that the other has consented before engaging in the activity.

If consent is not clearly provided prior to engaging in the activity, consent may be ratified by word or action at some point during the interaction or thereafter, but clear communication from the outset is strongly encouraged.

Consent – UD Definition (3 of 4)

Consent to some sexual contact (such as kissing or fondling) cannot be presumed to be consent for other sexual activity (such as intercourse). A current or previous intimate relationship is not sufficient to constitute consent.

Consent – UD Definition (4 of 4)

Proof of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on the University to determine whether this Policy has been violated.

The existence of consent is based on the totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

Consent – Explicit?

- "They gave consent" → "What did you say to them, and what did they say to you?"
- Did you have any conversation about sexual activity?
- Did the other person say anything to you that suggested they were consenting?
- Did the other person do anything that suggested they were consenting?
- Who initiated the sexual activity?

Consent – Implicit?

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

Questions for Respondent

- What did the other person say to you to show consent?
- What actions did the other person do to show consent?
- Were they making any noises during the encounter?
- Did they help position their body during the encounter?
- Did they move your hands during the encounter?

Incapacitation – UD's Definition (1 of 3)

A person cannot consent if they are unable to understand what is happening or they are disoriented, helpless, asleep, or unconscious, for any reason, including by alcohol or other drugs. As stated above, a Respondent violates this Policy if they engage in sexual activity with someone who is incapable of giving consent.

It is a defense to a sexual assault policy violation that the Respondent neither knew nor should have known the Complainant to be physically or mentally incapacitated. "Should have known" is an objective, reasonable person standard which assumes that a reasonable person is both sober and exercising sound judgment.

Incapacitation – UD’s Definition (2 of 3)

Incapacitation occurs when someone cannot make rational, reasonable decisions because they lack the capacity to give knowing and informed consent (e.g., to understand the “who, what, when, where, why, or how” of their sexual interaction).

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

Incapacitation – UD’s Definition (3 of 3)

This policy also covers a person whose incapacity results from a temporary or permanent physical or mental health condition, involuntary physical restraint, and/or the consumption of incapacitating drugs.

Incapacitation

- Remember: amnesty.
- “I want to understand the role that drugs or alcohol may have played in this situation.”
- “I want to understand whether you were capable of giving consent, or whether you were incapacitated due to drugs or alcohol.”
- “I want to understand whether the other person was sober enough to understand and consent.”
- “I am trying to get a sense of how intoxicated the person may have been when you saw them.”

Incapacitation Questions (1 of 2)

- How much alcohol? Any drugs?
- Any medications that may have affected your ability to stay awake, or that might have interacted with alcohol?
- "They were drunk" → What did "drunk" look like?
 - Slurring? Clumsy? Uncoordinated?
 - Able to walk on their own? Need assistance to navigate or complete tasks?
 - Vomiting?
 - Able to carry on a conversation?
 - Oriented to who/what/where/when/why?

Incapacitation Questions (2 of 2)

- Was it a cup or a CUP?
- How many "fingers" of alcohol on the solo cup?
- What type of alcohol was consumed?
- What did they eat? When?

Respondent's Awareness

- Was Respondent there?
- Did Respondent see when Complainant was [fill in symptom]?
- Did Respondent bring Complainant any alcohol/drugs?
- Did Respondent say anything about Complainant's level of intoxication?
- Was any planning done to take care of Complainant? Was Respondent part of that conversation or plan?

Incapacitation: Timeline

- Drinks
- Drugs
- Food
- Complainant's own recall
- Behavioral observations from other
- Electronic information – texts, videos, audio files
- Security footage
- Cards swipes

Sensory Questions

- What do you remember hearing, smelling, tasting, feeling?
- Where was the other person's hand, leg, body weight, etc.?

Paraphrase Questions

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

Strategic Questions

- "Would it surprise you to learn..."
- "Witness X said.... Do you agree?"
- "Here you said X, but today, you said Not X. Can you help me reconcile those things?"
- "Witness X said this and Witness Y said that. Can you help me understand why they might have different information?"
- "Let's look at this [evidence] together so I can get a better understanding..."

Final Questions

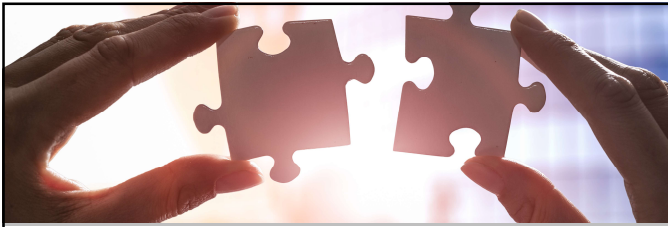
- Is there anything you thought I would ask you about that we haven't discussed?
- Is there anything else you'd like to tell me?
- Is there anything else you think I should know?

Drafting Interview Summaries

- Virtually every sentence should start with, "Witness stated..." or "Witness recalled..."
- Use direct quotes whenever possible and appropriate.
- Don't use adjectives or adverbs unless they are direct quotes from the witness.
- Avoid pronouns, as they can make a sentence ambiguous.

Thoughts about Summaries

- Include procedural review at the outset (your “spiel”)?
- Complete sentences vs. bullet points?
- Anonymize witness names?
- Use “Complainant” or “Respondent,” or use the names as they are used by the witness?



Trauma Informed Approaches to Questioning

Role Reminders

If your friend tells you something terrible happened to them, it's not your job to interrogate them or figure out what happened.

- In this situation, be supportive and listen.

If you are in your role as a Title IX team member and someone tells you something terrible happened to them, it might actually be your job to ask detailed questions and make a determination regarding a policy violation.

- The institution still provides support to people during the process.
- That being said, you may still be required to ask tough questions and make tough decisions.

Goal: Don't Make This Any Harder

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

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First: Make No Assumptions

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

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Second: They Are Not You

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

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Trauma and the Brain

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

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Practical Application

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

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Managing Emotions

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

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First Interview vs. Second Interview

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

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Trauma and Decision Making

Focus on corroboration, consistency, and plausibility.

- Is there anything else in the file that backs up this assertion?
- Has the person been consistent over time (recognizing that it is hard to say exactly the same words when telling the story multiple times)?
- Is the person's story plausible?

Avoid making decisions based on demeanor, as there are too many reasons—including cultural norms—that may affect how some people behave and how you perceive it.

These are good practices regardless of whether anyone may be traumatized.

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Moving an Investigation to Completion

Party Participation

- Parties may each separately decide whether to participate in the process and if so, to what extent.
 - Interview?
 - Written statement?
 - Written questions/answers?
 - Submission of evidence/witness lists?

Reluctant Party

- How do you encourage a reluctant party to participate?
- Address concerns about:
 - Retaliation
 - Intimidation
 - Subtle attempts to influence party
 - Emotional impact of the process
- There is a line between providing support to allow for participation and coercing participation. Remember: retaliation definition is broad. Don't coerce.

Participation by Reluctant Party

- If a party opts out of participation during the investigation, what does this mean for the investigative report review?
- Can the party still provide information in response to the case file and/or draft report? YES. Don't coerce the party to participate either.

Witness Participation

- Invite them to participate. We can't force them to.
- Let them know that they are not in any trouble.
- Consider what level of information you should provide them as to the topic of discussion.
- Rule of thumb: Ask nicely twice before giving up if they are non-responsive.

Gathering Evidence from Parties/Witnesses

- Ask for it from parties and witnesses
 - Text messages
 - Photos/screenshots
 - Call logs
 - Rideshare information
 - Receipts
 - Audio/video
 - Emails
 - Physical evidence?
- Get time, date, and location information for texts, photos, etc.
- Where messages are really critical, gather messages from both parties to a conversation and ensure they match.

Gathering Evidence from Other Sources

- Gather it if it is in possession of the University
 - Security footage should be gathered immediately if available
 - Incident report(s)
 - Card swipes
 - Relevant emails?
- Request it from other sources (e.g. police, hospital)
 - Need specific written consent to gather and include medical records

Preliminary Investigation Report

- Investigators:
 - Conduct interviews of all available, relevant witnesses who are willing to participate
 - Gather relevant evidence
 - Provide regular status updates to the parties
 - Prepare a comprehensive investigation report fairly summarizing the investigation, all witness interviews, and addressing all relevant evidence (attached)
 - Provide draft report and evidence file to parties and advisors for review and response within 10 business days

Elements of a Report

- Introduction – Who are the parties, and what policy applies?
- Summary of the Formal Complainant (from Notice of Investigation)
- Relevant Policy Language (Definitions)
- Procedural History
 - Witnesses – Who you spoke with, who declined to participate, who never responded, who was requested but wasn't relevant (and why)
 - Evidence – What you gathered, what you tried to gather but couldn't, what you were asked to gather but didn't (and why)

Summary of Information

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

What to Include

- Summary of statements by parties and witnesses
- Summary of all relevant inculpatory, exculpatory, and expert evidence
- All other information deemed relevant by the investigator

Tips for Drafting

- If the case is complicated, consider including a timeline.
- Consider listing disputed and undisputed facts to help focus the parties on what is most important.
- Have you gathered and included information regarding every element of every charge?

Attachments to Report

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

What is Relevant?

- Relevant evidence is evidence that tends to prove or disprove a fact significant to the case.
- Your investigative report must summarize all relevant evidence.
- What if you are given something that you don't believe is relevant?

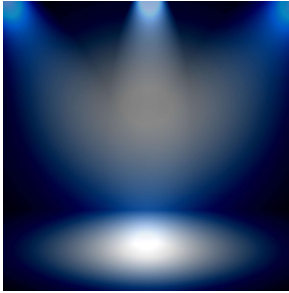
Finalizing Report

- Investigators:
 - Conduct any follow-up deemed necessary
 - Incorporate responses and additional evidence into report
 - Finalize report
- Parties/advisors have 10 business days to provide a written response to the report



On to the Hearing!

Three Roles/Three Spotlights



Role: Decision-Maker

- 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
- Note: UD permits one or three Decision-Makers to be assigned

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Goal: Decision-Maker

- 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

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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-Maker 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

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Goal: Advisors

The role of the advisor is to help the Decision-Maker 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

Hearing

- Pre-hearing conferences are held with each party/advisor to review procedures, determine witnesses, and address any evidentiary issues
- Decision-Maker holds the hearing
- In making the decision, the Decision-Maker can generally use:
 - Hearing testimony
 - Investigative report/attachments
 - Other new, relevant evidence if permitted at the hearing

Can't Consider

- Evidence that is not relevant
- Evidence relating to prior sexual history/predisposition of the complainant
- Evidence relating to privileged information where privilege has not been waived
- Medical records, the inclusion of which consent has not been provided from patient
- Inferences from party/witness refusing to submit to cross-examination or declining to participate

Relevancy

- Decision-Maker/Chair will make verbal relevancy determinations at the hearing after every question: "Relevant"
- Cross-examination will be live and direct
- Decision-Makers are permitted (and expected) to ask questions

Decorum

- Parties and advisors are expected to abide by decorum standards
- Generally, questions must be relevant, respectful, and non-abusive
 - Hard questions can be asked without being disrespectful

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?



Making the Decision

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 is relevant

#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)

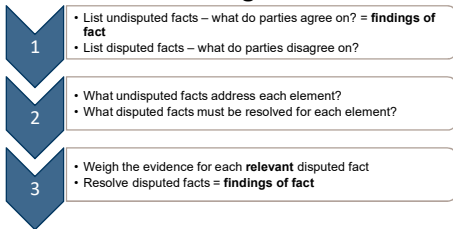
- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether or not the burden has been met.
- Any time you make a decision, use your standard of evidence

#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.**

Resolving Factual Disputes

Fact Finding Process:



Written Decision Must Include

- Allegations
- Procedural History
- Findings of Fact
- Conclusions under the Policy
- Statement of and Rationale for the Result of Each Allegation
- Sanctions (if applicable)
- If remedies are available to the Complainant
- Appeal procedures and bases for appeal

Sanctions

- Holding parties accountable also includes sanctioning appropriately where the policy has been violated
- Be consistent in sanctioning similar conduct under similar circumstances
- Under UD's Sexual Harassment Process, sanctions are determined by the person(s) making the decision
 - Equity Process: Sanctions are issued depending on the status of the Respondent (student, staff, faculty, etc.)

UD Sanctioning Factors – Sexual Harassment Process

- The nature, severity of, and circumstances surrounding the violation(s)
- The Respondent's disciplinary history
- Previous allegations or allegations involving similar conduct
- The need for sanctions/responsive actions to bring an end to the misconduct and/or retaliation
- The need for sanctions/responsive actions to prevent the future recurrence of misconduct and/or retaliation
- The need to remedy the effects of the Sexual Harassment and/or retaliation on the Complainant and the community
- The impact on the parties
- Any other information deemed relevant by the Decision-Maker(s)

UD Sanctioning Factors – Equity Process

- The nature, severity of, and circumstances surrounding the violation
- An individual's disciplinary history
- Previous allegations or allegations involving similar conduct
- Any other information deemed relevant by the decision makers
- The need for sanctions/responsive actions to bring an end to the misconduct
- The need for sanctions/responsive actions to prevent the misconduct
- The need to remedy the effects of the misconduct on the reporting party and the community

Appeals: Sexual Harassment Process

- Basis for appeals at UD:
 - Procedural irregularity that affected the outcome of the matter
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
 - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against the complainant or respondent generally, or the individual complainant or respondent that affected the outcome of the matter.

Appeals: Equity Compliance Process

- Basis for appeals at UD:
 - emergence of new evidence that was previously unavailable, or
 - based on the grounds that Resolution Process was not adequately followed
