




**TITLE IX DECISION-MAKER,
APPEALS, AND ADVISOR
TRAINING**

Allegheny College

NOVEMBER 3, 2023
November 10, 2023




Presentation Rules



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

Aspirational Agenda



November 3 (1:00 – 5:00) (Break at 2:15 PM)

- Themes
- Issues related to Dating Violence, Domestic Violence, Sexual Assault, and Stalking
- Overview of Title IX Process
 - Intake
 - Conducting an Investigation
 - Conducting a Hearing
 - Appeals
 - Informal Resolution
- Scope/Jurisdiction
- Hypotheticals on Consent, Sexual Harassment, etc.
- Title IX definition of Relevant and its practical implications
- Overview of Hypothetical report (Assign homework)

November 10 (1:00 – 5:00) (Break at 2:15 PM)

- Questioning and Cross examination techniques
- Mock hearing (2:30 PM)
- Decisions
- Appeal Process and review.

Posting these Training Materials



- Yes, you may post these slides.
- The University is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website

Training Requirements 1 of 2



	Def. Sexual Harassment	Scope of Ed. Prog./Activity	Conducting grievance process	Serving impartially	Tech training	Drafting investigative report
Coordinator	X	X	X	x		
Investigator	X	X	X	X		X
Decision-Maker	X	X	X	X	*	
Appeals	X	X	X	X	*	
Informal Res. Facilitator	x	X	x	X		
Advisor						


Training Requirements: Clery




Under Clery Act, must receive annual training on:

- Issues related to sexual assault, domestic violence, dating violence, stalking
- How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability

Themes

Themes (1 of 2) 

- Title IX meant to ensure equitable access, regardless of sex
- We have an obligation to protect our community – including both parties
- Transparency in the process encourages participation, reduces stress, and increases trust in the outcome

Themes (2 of 2) 

- Use language of the policy (complainant, respondent, report), not language of criminal law (victim/survivor, perpetrator, allegation)
- Be incredibly mindful not to prejudge the outcome of the case
- Base decisions on evidence, not your “gut”

Sexual Harassment – Title 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 University conditioning the provision of an aid, benefit, or service of the University 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 University's education program or activity; or
 - **Clery crimes** Sexual assault, dating violence, domestic violence, or stalking

Sexual Harassment – Title IX (cont.)



- **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 – Look to state law
 - Statutory rape – Look to state law

A Brief Caveat About the Use of 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

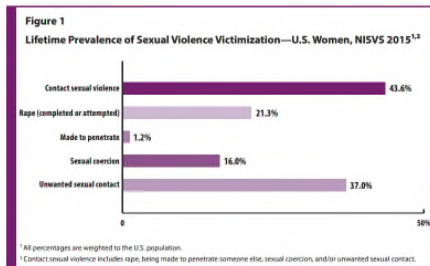
Sexual Assault Data



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

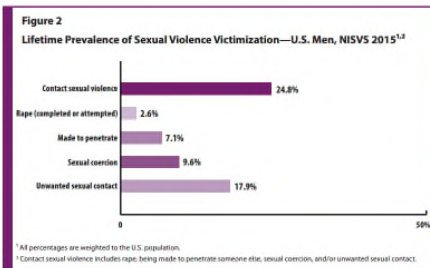
Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, [available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html](https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html) (last visited June 2020).

Sexual Assault Data - 1



Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, [available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html](https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html)

Sexual Assault Data - 2



Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief, [available online at https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html](https://www.cdc.gov/violenceprevention/datasources/nisvs/2015NISVSdatabrief.html)

Sexual Harassment: Dating Violence



“Dating Violence” means:

- (1) an act of violence committed [on the basis of sex] by
- (2) a person who is or has been in a romantic or intimate relationship with the complainant.

NOTE: 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

Data: Intimate Partner Violence



“Nearly 1 in 5 women and about 1 in 7 men report having experienced severe physical violence from an intimate partner in their lifetime.”

“41% of female IPV survivors and 14% of male IPV survivors experience some form of physical injury related to IPV.”

“1 in 6 homicide victims are killed by a current or former intimate partner.”

Source: CDC.gov, “Preventing Intimate Partner Violence” fact sheet, accessed Sept. 20, 2020.

**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 the Violence Against Women Act (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.

Stalking Data - 1



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

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

Stalking Data - 2



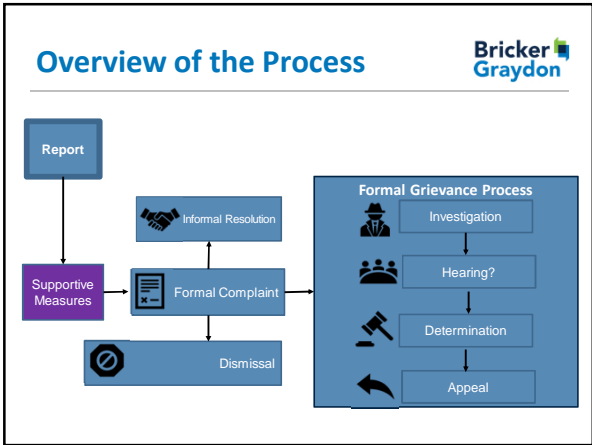
- **11%** of stalking victims have been **stalked for 5 years or more**.
- **46%** of stalking victims experience **at least one unwanted contact per week**.

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

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

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

Overview of Policy/Process



Intake of Report and Support

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



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

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



Designed to:

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

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



- | | |
|--|--|
| • Counseling | • Changes in work or housing 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 | |

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



Role of the TIXC upon receiving a report:

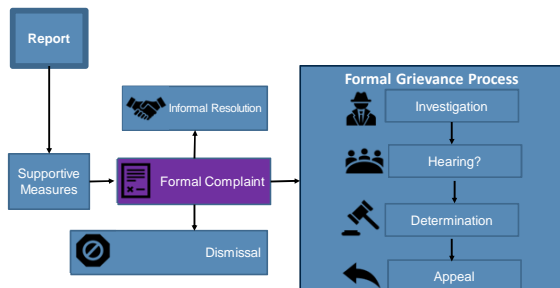
- promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,
- consider the complainant’s wishes with respect to supportive measures,
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint

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*.

Formal Complaints



**Overview of the Process:
Formal Complaint (1 of 2)**



A document filed by a Complainant or signed by the Title IX Coordinator alleging Prohibited Conduct against a respondent and requesting the University investigate the allegations

- In response to a formal complaint, University must follow a grievance process (set by 106.45)
- Title IX Coordinator must offer complainant supportive measures (regardless if files formal complaint – if complainant does not want to file a formal complaint)

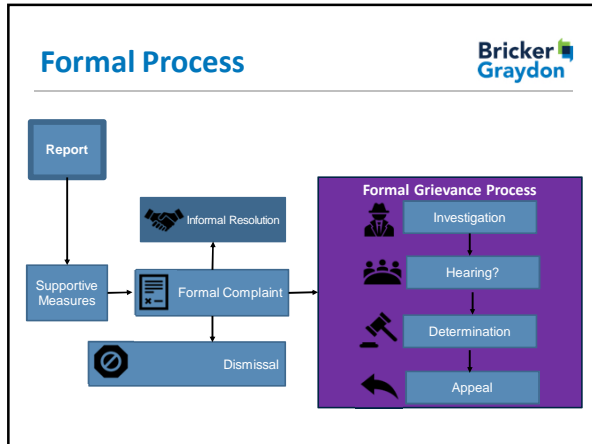
**Overview of the Process:
Formal Complaint (2 of 2)**



Once a Formal Complaint is filed, there are four possibilities:

- Informal Resolution
- Formal Grievance Process (Hearing)
- Mandatory Dismissal from Hearing Process and Resolution through Investigative Process
- Formal Complaint is withdrawn

Conducting an Investigation



Overview of the Process: Formal Grievance Process

Basic requirements:

- Treat complainants and respondents equitably
- Follow grievance process
- Only impose any disciplinary sanctions against a respondent after grievance process followed

Includes the presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process

Overview of the Process: Written Notice

- University's grievance **process** and informal resolution process
- **Allegations** with sufficient time for review with sufficient detail, such as date, location if known
- Parties may have an **advisor of choice**

Overview of the Process:
Investigation (1 of 2)



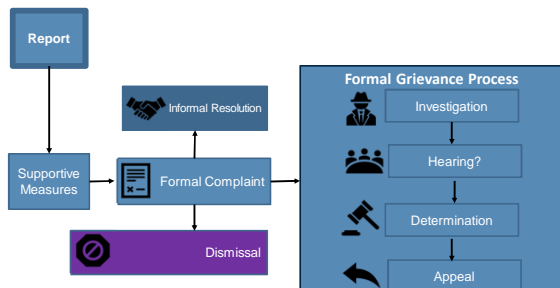
- Only of a formal complaint
- Burden of proof and evidence gathering rests with University
- Cannot access, require, disclose, or consider treatment records of a party without that party's voluntary, written consent
- Provide equal opportunity for parties to present witnesses (fact and expert)

Overview of the Process:
Investigation (2 of 2)



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

Dismissal



Dismissal (1 of 3)



- University MUST investigate allegations in a formal complaint
- BUT University MUST dismiss from the hearing process is
 - if conduct alleged would **not** constitute Sexual Harassment – Title IX, even if proven, OR
 - Conduct did not occur within University’s education program or activity or in the United States

Dismissal (2 of 3)



- University MUST investigate allegations in a formal complaint
- BUT University MUST dismiss from the hearing process is
 - if conduct alleged would not constitute Sexual Harassment – Title IX, even if proven, OR
 - Conduct did not occur within University’s education program or activity or in the United States

Dismissal (3 of 3)



- Cases not eligible for a Title IX hearing go instead to:
 - Investigation
 - Decision (potentially by investigator, without Title IX hearing)
 - Appeal

Conducting a Hearing

Overview of the Title IX Process: Hearings **Bricker Graydon**

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

Advisors **Bricker Graydon**

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



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

Questioning by the Decision-Maker



- “[T]he 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)

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 by 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
- “That is relevant...you may answer.”

More Reminders



- 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



- **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

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


Bricker Graydon

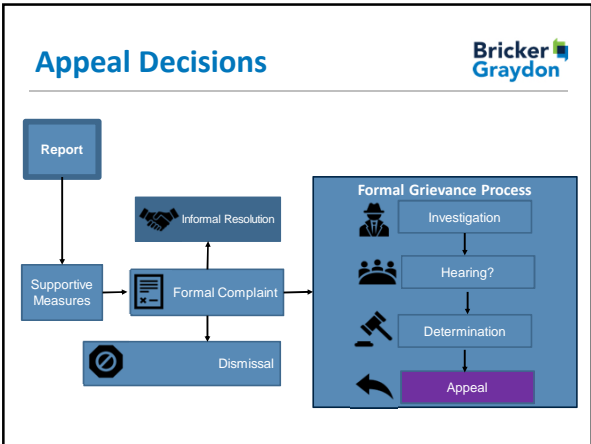
- Findings of fact
- Conclusions applying information to policy language
- Statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity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

Overview of the Process:
Determinations (1 of 2)

Bricker Graydon

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





Overview of the Process:
Appeals (1 of 2)



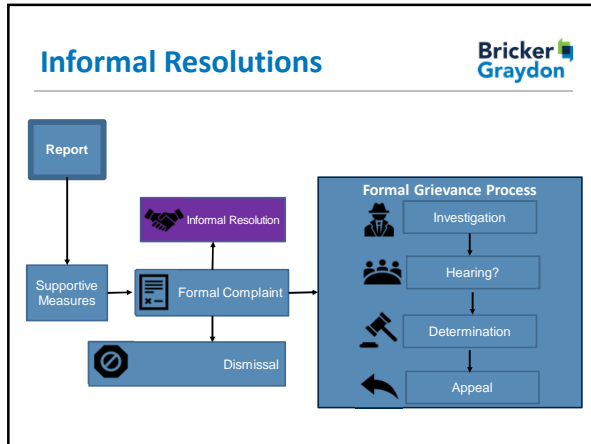
- University must offer to both parties the following bases of appeal:
 - Procedural irregularity *that affected outcome*
 - New evidence *not reasonably available* at the time *regarding responsibility or dismissal* that *could affect outcome*
 - Conflict of interest or bias by the Title IX Coordinator,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

Overview of the Process:
Appeals (2 of 2)



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

Informal Resolution



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

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

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

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

University cannot offer this option in certain cases of employee sexual harassment of a student

Conflicts of Interest



- Be alert to **PERCEIVED** and **ACTUAL** Conflicts of Interest
- Mercyhurst policy:
The parties will have an opportunity to raise any objections regarding a decision-maker's actual or perceived conflicts of interest or bias at the commencement of the live hearing. Policy at p. 17.

Appeals will be decided by Title IX Appeals Officer who will be free of conflict of interest and bias, and will not serve as investigator, Title IX Coordinator, or hearing decision maker in the same matter. Policy at p. 22.

Questions?

HIGHWAY TO THE HEARING ZONE

Highway to a Hearing?



- You **must** provide a hearing under 34 CFR 106.45 **only if** the circumstances require it
- Not all sexual misconduct triggers the hearing requirement
- So, think of your highway to a hearing as having checkpoints to get on and off



Checkpoint one: All of these



- Complainant: Complainant was participating or attempting to participate in your education program or activity when formal complaint was filed
- Definition: Reported conduct in formal complaint could constitute “sexual harassment” under Title IX definition if proved
- Setting: Reported conduct occurred in your education program or activity
- U.S.A.: Reported conduct occurred against a person in the United States

SCOPE OF YOUR EDUCATION PROGRAM AND ACTIVITY

Education Program/Activity

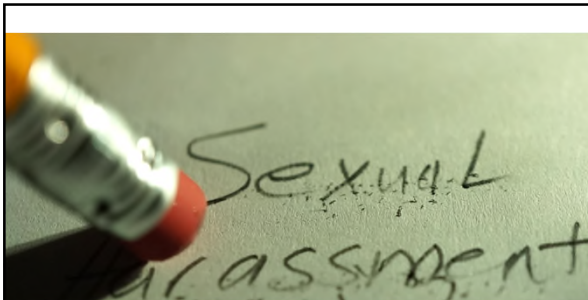


- 106.2(h) – All the operations of a college or university
- 106.44(a) – Includes **locations, events, or circumstances** over which the recipient **exercised substantial control** over **both the respondent and the context in which the sexual harassment occurs**, and also includes **any building owned or controlled by an officially recognized student org**

Within the Scope?



- Co-curricular trip to Cuba – ?
- Fraternity party in recognized house – ?
- Holiday party for students at prof’s house – ?
- Athletes traveling to game, but not with team – ?
- Holiday party at employee’s house, invites co-workers and others – ?
- Off-campus apartment – ?



A quick discussion on “Sexual Harassment”

Sexual Harassment



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

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: Unwelcome Conduct



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

Severe?



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

Pervasive?




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

Objectively Offensive?




Reasonable person is very fact-specific (30167)

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

Hypotheticals – Sexual Harassment 


Let's put these definitions to the test...see your hypo packet

- Chuck and Mary Sue

Consent – Explicit? 

These may be worded slightly differently depending on the party.

- “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? 

These may be worded slightly differently depending on the party.

- 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 Related to Consent



If they say there was consent, these can help get more details.

- 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 Questions (1 of 3)



First, explain why you need information on alcohol/drug use.

- Remember: Amnesty Provision (What does your Policy say?)
- "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 (2 of 3)



You need a good physical description of relevant symptoms

- 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 (3 of 3)



Be alert to the amount of alcohol and how to gauge it

- Was it a cup or a CUP?
- How many "fingers" of alcohol on the solo cup?
- What type of alcohol was consumed? (be alert to ABV%)
- What did they eat? When?

Respondent's Awareness



Did Respondent know or should have known of incapacitation?


- 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



This will be critical

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

Hypotheticals - Consent 


Allegheny Title IX Policy Definition of Consent, Incapacitation and Coercion

Consent is: knowing, and voluntary, and clear permission by word or action to engage in sexual 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 can also be withdrawn once given, as long as the withdrawal is reasonably and clearly communicated. If consent is withdrawn, that sexual activity should cease within a reasonable time.

Proof of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on the College to determine whether its 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.

Hypotheticals - Consent 

Allegheny Title IX Policy Definition of Consent, Incapacitation and Coercion


Incapacitation: A person cannot consent if they are unable to understand what is happening or are disoriented, helpless, asleep, or unconscious, for any reason, including by alcohol or other drugs.

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

Incapacitation occurs when someone cannot make rational, reasonable decisions because they lack the capacity to give knowing/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.


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.

Hypotheticals - Consent 


Allegheny Title IX Policy Definition of Consent, Incapacitation and Coercion

Coercion

Coercion is unreasonable pressure for sexual activity. Coercive conduct differs from seductive conduct based on factors such as the type and/or extent of the pressure used to obtain consent. When someone makes clear that they do not want to engage in certain sexual activity, that they want to stop, or that they do not want to go past a certain point of sexual interaction, continued pressure beyond that point can be coercive.

Hypotheticals - Coercion 


Practice Using Hypotheticals

Strategic Questions 

Be thoughtful about when these are appropriate.

- “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...”

What is Relevant?



Review of Relevance Bricker & Graydon
(1 of 7)

- Regulations do not define “relevant,” but tells us what is not relevant
- Per *Regulations* 34 C.F.R. 106. 45(b)(6)(i):
 - “Only **relevant** cross-examination and other questions may be asked of a party or witness.”
 - “**Before a complainant, respondent, or witness answers** a cross-examination or other question, **the decision-maker must first determine whether the question is relevant** and explain any decision to exclude a question as not relevant.”

Review of Relevance Bricker & Graydon
(2 of 7)

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

- Does this help me in deciding if there was more likely than not a violation/highly probable to be a violation?
- Does it make it more or less likely/does it make it highly probable?
- Why or why not?

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

Review of Relevance Bricker & Graydon
(3 of 7)

- Recipient** must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).” (Preamble, p. 30331)
- A **recipient** may not adopt rules excluding certain types of relevant evidence (Preamble, p. 30294)
- May not adopt Rules of Evidence.

Review of Relevance

(4 of 7) **Bricker
Graydon**

What is NOT relevant:

Questions and evidence about the **complainant's sexual predisposition or prior sexual behavior** are not relevant, **UNLESS**

- 1) Such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- 2) If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

[34 C.F.R. 106.45(b)(6)(i)]

Review of Relevance

(5 of 7) **Bricker
Graydon**

What is NOT relevant:

Information **protected by a legal privilege**

[34 C.F.R. 106.45(b)(1)(x)]

This will vary state-by-state, so check with your legal counsel. Most common in this context are:

- a) Attorney-client privilege
- b) Doctor-patient/counselor-patient
- c) Fifth Amendment/right not to incriminate self (not really applicable in this venue, but sometimes raised and cannot force to answer questions)

Review of Relevance

(6 of 7) **Bricker
Graydon**

What is NOT relevant:

A party's **treatment records** (absent voluntary written waiver by the party)

[34 C.F.R. 106.45(b)(5)(i)]

- PRACTICE TIP – LOOK for that written waiver in the materials provided to you

Review of Relevance



What is NOT relevant:

No improper inference from a party or witness **declining to participate** in cross-examination.

[34 C.F.R. 106.45(b)(6)(i)]

Decorum During Hearings



- Relevant questions must not be abusive
- Enforcement of decorum must be applied evenhandedly
- "...where 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." (Preamble, 30331)
- The decision maker may remove any advisor, party, or witness who does not comply with expectations of decorum. (Preamble 30320)



Practice Making Relevance Determination



Relevance Determination Hypotheticals



(1 of 2)

Okay, decision-maker, is this question relevant?

For practice, we will pose these in cross-examination format. As discussed before, the traditional cross-examination style is aimed at eliciting a short response, or a “yes” or “no,” as opposed to open-ended question which could seek a narrative (longer) response.

For example, instead of, “How old are you?” the question would be, “You’re 21 years old, aren’t you?”

Relevance Determination Hypotheticals



(2 of 2)

For each practice hypothetical, ask yourself:

Is this question relevant or seeking relevant information?

- Why or why not?
- Does the answer to this depend on additional information?
- If it is so, what types of additional information would you need to make a relevance determination?

Relevance Determination Hypotheticals



Disclaimer

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

Practice Hypothetical #1



Question from Respondent's Advisor to Complainant:

Charlie, you filed this bogus complaint because your were angry with Jesse for leaving you and finding a new romantic partner, isn't that right?

Practice Hypothetical #2



Question from Complainant's Advisor to Respondent:

Jesse, you told the investigator that your relationship with Charlie was rocky and that you admit to being visibly angry with Charlie before going back to the car and hitting Charlie, isn't that right?

Practice Hypothetical #3



Question from Respondent's Advisor to Complainant:

You never went to the hospital for the supposed injury to your arm, did you?

Practice Hypothetical #4



Question from Complainant's Advisor to Respondent:

Prior partners have told you that you were physically aggressive, haven't they?

Practice Hypothetical #5



Question from Respondent's Advisor to Complainant:

Charlie, you violated the law that night didn't you by drinking under age at Demi's?

FOLLOW UP: If you're going to lie about drinking alcohol, how can we trust what you're going to say at this hearing?

Practice Hypothetical #6



Question from Respondent's Advisor to Complainant:

Charlie, you staying in a relationship with Jesse after this allegedly violence incident occurred, right?

Practice Hypothetical #7



Question from Complainant's Advisor to Respondent:

Jesse, you're not saying that grab of the arm didn't happen, isn't that right? Because you said that you lost your balance when you leaned over to kiss Charlie.

Practice Hypothetical #8



Question from Respondent's Advisor to Complainant:

Charlie, did you tell your advisor (who is not an attorney) during break that you thought today was not going well for you?

Practice Hypothetical #9



Question from Complainant's Advisor to Respondent:

Charlie, did you tell your attorney during break that you thought today was not going well for you?



Review of Tasker/Murphy Investigation Report

Formal Complaint **Bricker Graydon**

Filed by Charlie on December 2, 2022 – the incident was October 13, 2022.

“On October 13, 2022, my romantic partner, Jesse Jacobs, assaulted me during an argument. We were sitting in Jesse’s car outside of my residence hall. Jesse grabbed my arm, leaving a bruise, and slapped me across the face.”


Opportunities to Practice **Bricker Graydon**

Questioning of Charlie

- o DM questioning of Charlie
- o Relevance determinations for cross-exam of Charlie by Jesse’s advisor


Questioning of Jesse

- o DM questioning of Jesse
- o Relevance determination for cross-exam of Jesse by Charlie’s advisor

Things to Note 

- Reported that Respondent engaged in Title IX Dating Violence on October 13, 2022
- Incapacitation
 - What information does the decision-maker need?
 - What questions are the advisors likely to ask?

How Do You Choose Questions?

What Don't You Know? 

Decision-makers: 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?



Decision-makers: 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 decision-maker's mind.

Disputed Facts?



Decision-makers: Question on disputed facts so that you can weigh credibility, make a determination, and explain your rationale.

Advisors: Highlight areas for the decision-maker 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



- Decision-makers:
 - 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 **Bricker Graydon**

- 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."
 - Decision-maker: "In questioning Complainant, I will try to better understand what effects she felt from her head injury versus intoxication."
 - Etc.



**Practice...
Practice...
Practice...**

Break & Preparation for Practice Session



Decision-Maker Hearing Practice and Debrief

Being Impartial: Objectively Evaluating Evidence and Resolving Credibility Disputes

Objectively Evaluating Relevant Evidence



- As addressed in the preamble and discussed earlier, the decision-maker 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 or Clear & Convincing
- Must use same standard for formal Title IX complaints against both students and employees (including faculty) for all policies and procedures with adjudication for sexual harassment complaints (e.g., union grievances procedures, faculty conduct)
- Must begin with a presumption of no violation by 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)



Considerations:

- Statements by any witnesses to the alleged incident
- 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)



- 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)



- 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)



- 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?

#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)

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- 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)

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- 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

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- 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 about responsibility.**

Writing the Decision

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Required Parts

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


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Our Typical Outline


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

Writing Goals 

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

Unambiguous 

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

Relevancy Check 

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

Sensitive



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

Specific



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

Appeals

Bases for Appeal



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

Process Requirements



MUST:

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

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

Procedural Issue?

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

New Evidence?

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

Conflict of Interest or Bias?

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

Written Appeal Decision



Regulations are clear that you must describe the result and rationale for the result.

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

One More Thing...



Thanks to all our volunteers today!
Thanks to our host, Allegheny College, for pulling us all together.

Questions?

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
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