

Title IX Training for Higher Education

Simmons University
April 1, 2025

**Bricker
Graydon**

Posting These Training Materials?

- Yes!
- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution electronically to post



Agenda – From Start to Finish

- Intake
- Formal Complaints
- Initial Assessment
 - Dismissal
 - Notice of Allegations
- Investigation
- Hearing
- Appeals

This training will also cover annual Clery training requirements under 34 CFR 668.46(k)(2)(ii).

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Themes

- Transparency
- Equity
- Care
- Support
- Neutrality
- Objectivity

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Three Components of Intake



Supportive Measures, Process, Gathering Necessary Information



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Trauma Defined

The [Substance Abuse and Mental Health Services Administration \(SAMHSA\)](#) defines trauma as “a result from an event, series of events or set of circumstances that is experienced by an individual as physically or emotionally harmful or life-threatening and that has lasting adverse effects on the individual’s functioning and mental, physical, social, emotional or spiritual well-being.”

The [CDC](#) defines trauma as "a physical, cognitive, and emotional response caused by a traumatic event, series of events, or set of circumstances that is experienced as harmful or life-threatening."

See also, DSM-5 Diagnostic Criteria for PTSD



Trauma-Informed Basics for Intake Meetings



- Assume all parties and witnesses may be dealing with trauma – from this or other incidents
- Meet them where they are
- Help them tell their story as part of the process by asking good questions and documenting the answers
- Signs of trauma ≠ policy violation
- No signs of trauma ≠ no policy violation
- If they didn't act the way you might have, that doesn't mean it isn't true.

Title IX Intake Framework

Institutional response to a report:

- Actual knowledge (defined 34 CFR 106.30)
- "Must respond promptly in a manner that is not deliberately indifferent."
- Response to actual knowledge must be equitable
- 34 CFR 106.44(a):
 - The Title IX Coordinator must promptly contact the complainant to discuss:
 - the availability of supportive measures...
 - 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,
 - And explain to the complainant the process for filing a formal complaint.

Takeaways from the 2020 regulations: Supportive Measures and Process for Filing a Formal Complaint

Practical Extensions of this Framework

Information about the resolution process

- Necessary for informed decision-making

Discussion of Title IX Jurisdiction

- Necessary to discuss the applicable process and potential for Exit Ramps

Potential discussion of definitions

- Necessary to discuss the applicable process and potential for Exit Ramps

Information about the interactions between the parties

- May be necessary to consider supportive measures



Jurisdiction?

- For Title IX:
 - Complainant must be participating or attempting to participate in the program at the time of the Formal Complaint
 - Conduct must constitute Title IX Sexual Harassment as alleged
 - Conduct must occur within the University's education program/activity
 - Conduct must occur against a person in the United States

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Big Picture Concepts



Give autonomy whenever possible



Remember the context

You are not the decision-maker

This is not an investigative interview

Give the benefit of the doubt to both parties



Remember what you know about trauma

Memories might be encoded in non-linear ways

There may be gaps

Self-blame

Why Don't People Tell Right Away

- The Preamble to the Title IX Regulations suggests:
 - Shame
 - Fear of retaliation
 - Fear of not being believed (Preamble p. 30081)



Why Don't People Always Remember

- A party should not be “unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory” (Preamble, p. 30323)





Use a list of talking points or a checklist, but...



Be mindful of the human in front of you



Be flexible and willing to change direction



Have your policy close by



Talk about your process



Talk about your definitions (if necessary)

Supportive Measures

What does your policy say?

Create a list and use it during every intake

- Both Complainants and Respondents
- Put it out there – the person may not realize what they need or what's available to them

Don't overpromise (ex: housing)

Must not unreasonably burden the other party

Confirm the discussion and next steps in a follow-up email after each intake meeting

If a requested supportive measure is not available, explain the rationale and document the decision



Supportive Measures (2020 Title IX Regs)



34 CFR 106.30(a)

Non-disciplinary, non-punitive

Individualized services

Offered as appropriate, as reasonably available, without fee or charge

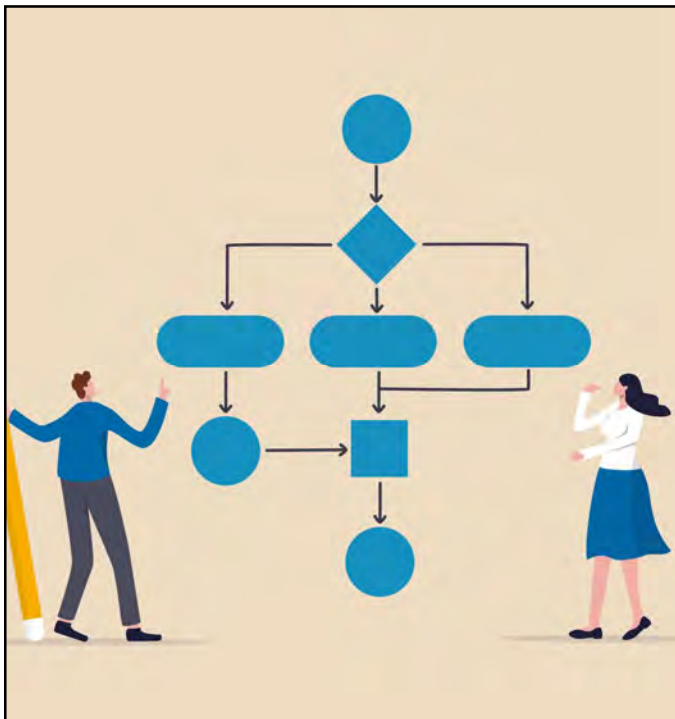
Available before or after the filing of a Formal Complaint

Available if no Formal Complaint is filed

"Designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party"

- May include measures designed to protect safety of the parties and the educational environment, or deter sexual harassment

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Process Discussion

What does this look like for you?

- Review of Policy language
- Step 1, Step 2, Step 3...
- Flowchart

How do you describe the investigation?

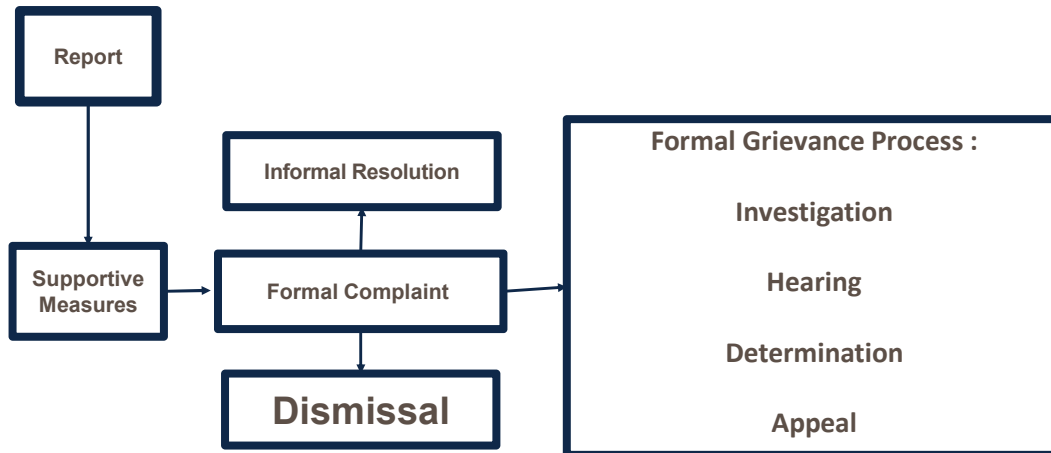
How do you describe the hearing process?

- Cross-examination

How do you describe informal resolution?

- Mutual, informed, written consent
- Respondent-employees

Process Flow Chart



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Gathering Necessary Information

Remember the goal – to determine where this report fits and what might be done about it

Think of the basic "W" questions – who, what, where, when, why

Same level of detail needed for an investigative interview?

- What if you are the TIXC *and* the investigator?
- If not, is it better to get fewer details?
 - Remember – meet the person where they are





Gathering Necessary Information (cont.)

In most cases, you will need to ask for information

- "And then he did it."
- "They were toxic."

What are the required elements in your policy?

- Understand the definition
- Break it down

Things that *Aren't* Trauma-Informed



Multiple meetings to gain additional information

- It is sometimes necessary – particularly if you are meeting the person where they are
- But... getting everything you need in one meeting is best

Shock

Judgment

Skepticism

- "Why are you just now reporting this?"

Initial Meetings with Respondents



“What we do for one, we for the other”

Will look a bit different,

But should mirror your Complainant intake as much as possible

Supportive measures

- Document

Process Discussion

Gathering Information (?)

- Less necessary than with the initial report
- Meet people where they are

Confirm the discussion and next steps in a follow-up email after each intake meeting



Formal Complaints

- Signed by the Complainant (or Coordinator)
- Alleging Sexual Harassment against a Respondent
- Requesting investigation
 - (This is required even if the Complainant wishes to request Informal Resolution)

Dismissal of Formal Complaint

- Mandatory Dismissal: Doesn't meet the requirements of a Formal Complaint
- Discretionary Dismissal:
 - Complainant requests to withdraw
 - Respondent is no longer enrolled or employed
 - "Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein"

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Dismissal – Not Necessarily “The End”

- Often, dismissal results in the case being referred to another process at the University
- Supportive measures may still be available
- Remember: retaliation prohibition.

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Notice of Allegations

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

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Notice of Allegations – Required Statements

- Respondent is presumed not responsible
- Determination regarding responsibility is made at the conclusion of the grievance process
- Parties may have an advisor of choice who may be an attorney and who may inspect and review evidence
- Knowingly false statements may result in discipline

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Special Situations

- Title IX Coordinator-signed Formal Complaint
- Concurrent criminal investigation
- External advisors
- Consolidation of complaints

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The Investigator's Role

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No Single-Investigator Model for Title IX

- The roles of investigator and decision-maker **MUST** be separate.
- The investigator does not make decisions.



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The Investigation and Report

- The investigator has the burden of asking the parties for and collecting all relevant evidence.
- Parties have the right to present fact and expert witnesses.
- Issues of relevancy will often not be made until the decision-maker is involved.

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The Investigator's Roles



The **GATHERER** of all relevant evidence.



The **ORGANIZER** of all relevant evidence.

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Issues of Relevance

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What is Relevant? 1 of 3

The regulations don't really tell us directly.
But, it may include evidence that is:

“ probative of any material fact concerning the allegations ”

- Preamble, 30343

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What is Relevant? 2 of 3

The preamble also tells us:

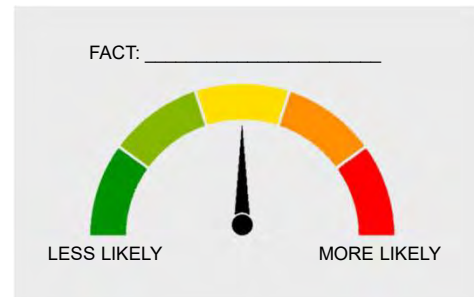
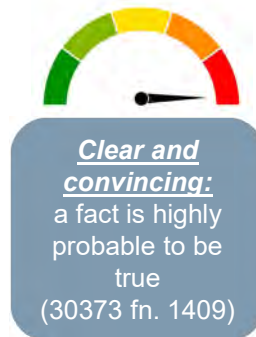
“ evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant) ”

- Preamble, 30294

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What is Relevant? 3 of 3

Does this question, topic, evidence help **move the dial** under the standard of evidence?



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Issues of Relevancy (NOT Rules of Evidence) 1 of 2

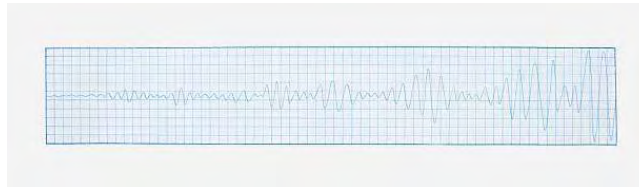
- The Rules of Evidence do **NOT** apply and **CANNOT** apply



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Issues of Relevancy (NOT Rules of Evidence) 2 of 2

“[A] recipient may **not** adopt rules **excluding** certain types of **relevant evidence** (e.g., **lie detector test results**, or rape kits) where the type of evidence is not either deemed “not relevant” (as is, for instance, evidence concerning a complainant’s prior sexual history) or otherwise barred for use under 106.45 (as is, for instance, information protected by a legally recognized privilege).”



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This means: 1 of 2

- ✘ Cannot exclude redundant evidence
- ✘ Cannot exclude character evidence
- ✘ Cannot exclude hearsay
- ✘ Cannot exclude evidence where the probative value is substantially outweighed by the danger of unfair prejudice (30294)



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Issues of Relevancy: What isn't relevant by definition?



Party's medical, psychological, and similar records (unless voluntary written consent)



Information protected by a legally recognized privilege

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Relevancy: Medical treatment and Investigation



Section 106.45(b)(5)(i): when *investigating* a formal complaint, recipient:

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

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Relevancy: Legally Privileged Information



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

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

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Relevancy: Legally Privileged Info – What does this include?



- Preamble identifies medical and treatment records.
- Jurisdiction-dependent
 - Attorney-client communications
 - Implicating oneself in a crime
 - Confessions to a clergy member or other religious figures
 - Spousal testimony in criminal matters
 - Some confidentiality/trade secrets

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Issues of Relevancy: What isn't relevant? – Rape Shield Provision



- Evidence about **complainant's** prior sexual history (must exclude) unless such questions/ evidence:
 - are offered to prove that someone other than the respondent committed the conduct, or
 - if the questions/evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

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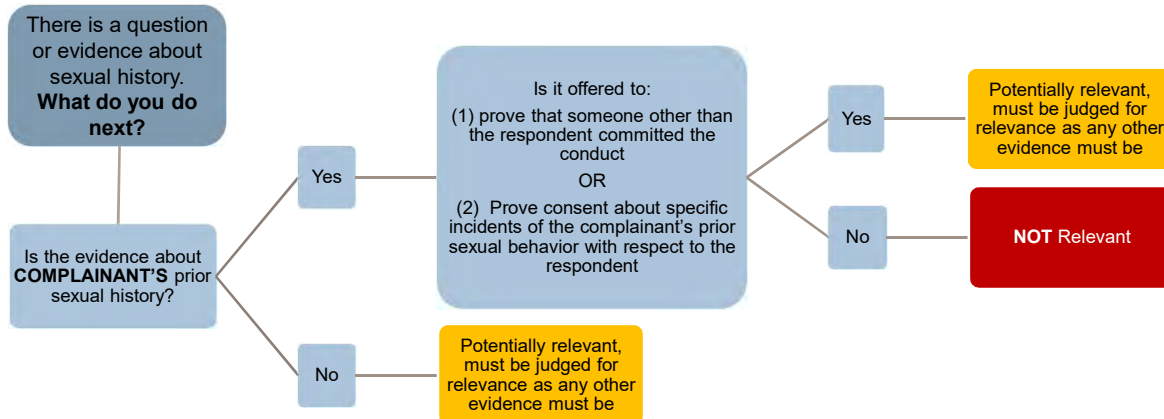
Issues of Relevancy: What isn't relevant? – Rape Shield Provision



- Rape shield protections do not apply to Respondents
- “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser **must be judged for relevance as any other evidence must be.**”
- **Guidance from Sept. 2021 Q&A: no party's sexual history is usually relevant**

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Rape Shield Provision Flowchart



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Retaliation

- When parties elect not to participate, a recipient cannot retaliate against them (30322)
- It is the right of any party or witness not to participate in the investigation

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Relevancy and the Investigator

The gatherer of all relevant evidence

“**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, 30331

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Relevancy and the Investigation and Report 1 of 2



Summarize



Evaluate

“ The requirement for **recipients** to **summarize** and evaluate **relevant evidence**, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to section 106.45, appropriately direct **recipients** to **focus investigations** and adjudications **on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true** (i.e., on that is relevant.) ”

- Preamble, 30294

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Relevancy and the Investigation and Report 2 of 2



The **GATHERER** of all relevant evidence.



The **ORGANIZER** of all relevant evidence.

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Introduction to Investigative Techniques

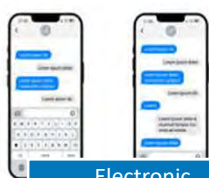
51

Initial Review

- Review notes and information collected by the Title IX Coordinator
- Review Notices to Complainant and Respondent
- Review Policy/Code of Conduct
- Define Scope of Investigation
 - What elements do you think will be disputed?
 - Agreed upon?

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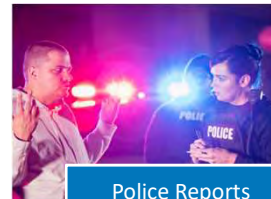
Begin Evidence List



Electronic Communications



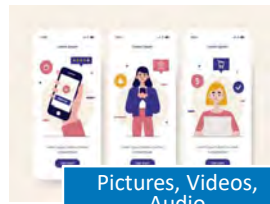
Security Information



Police Reports



Personnel Files,
Student Records



Pictures, Videos,
Audio

↓
If there is a criminal investigation, work with law enforcement to collect and preserve evidence

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Begin Witness List

- If there is a criminal investigation, work with law enforcement to ensure permission to question witnesses
- Who should be included?
- Who should NOT be included?
- In what order should the witnesses be interviewed?
- Be flexible

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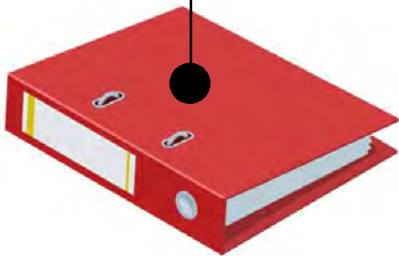
Craft Questions for Each Witness

- Refer to the policy
- Consider what information they are likely to have related to each element
- Consider what information they are likely to have that may assist the decision-maker in determining credibility
- Be flexible



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Organizing for the Interview



- What should you have with you?
- Intake Report
 - Written notice with allegations
 - Investigation log
 - Investigation notes cover sheet
 - Pre-prepared questions
 - Evidence you may need to reference or show witness
 - Policy or Handbook

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Note-taking Tips

- Use predictable symbols in the margin to easily skim during the interview if you are handwriting notes:
 - ? ← Follow-up questions
 - * ← Potential evidence
 - W ← Potential witness
- Try to record exact quotes when possible

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Simultaneous Criminal Matter

- Is it okay to proceed with the investigation?
- **If not, could be interfering with a police investigation**
- Communicate with your Title IX Coordinator
- May require calling the local police department and/or detective



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Remember: The gatherer of relevant evidence

- To ensure burden of proof and burden of gathering evidence is not on the parties (106.45(b)(5)(i))
- To provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory or exculpatory evidence (106.45(b)(5)(ii))
- Not restrict the ability of either party to discuss the allegations under investigation or to gather or present relevant evidence (106.45(b)(5)(iii))

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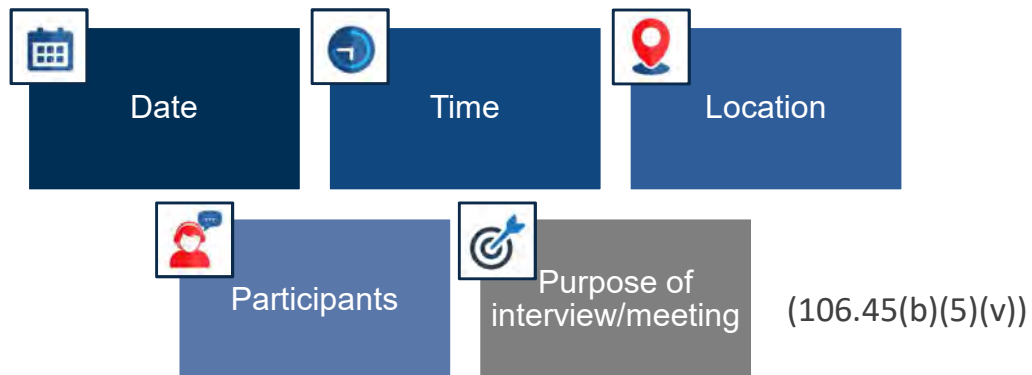
Setting Up the Interview 1 of 2

- Identify yourself, your role, and a general outline of what you're investigating
- Consider requesting the TIX Coordinator check in with those who fail to respond or refuse to participate
- Don't give up on the interview till you've tried at least 3 times, in at least 2 different methods (if available)

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Setting Up the Interview 2 of 2

You must provide any party whose participation you seek, with written notice (email) with "sufficient" time to prepare:



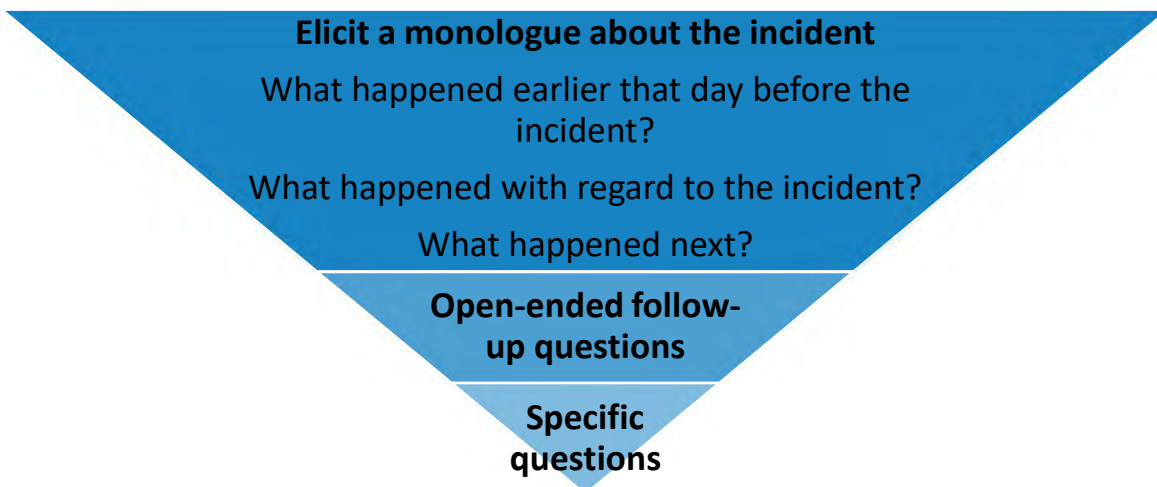
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Set the Stage

- Make introductions
- Be hospitable
- Give overview of why they are being interviewed
- Explain retaliation policy
- Invite questions

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Begin Broadly



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Ask Follow-Up Questions

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

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Freeze Frames



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

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When Consent is at Issue

- **Common concern of Title IX Coordinator: investigators not asking the questions to get details needed for incapacitation analysis**
- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent
- See Level 1 slides for a list of questions to get you started

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Credibility

- Gather facts to assist **decision-maker**
- Your job: Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by parties/witnesses
 - But remember: probably less stressful to give a full account during the investigation than the hearing

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What goes into Credibility?



2001 Revised Sexual Harassment Guidance (withdrawn) – page 9

- Level of detail and consistency
- Corroborative evidence is lacking where it should logically exist
- Evidence that the respondent has been found to have harassed others
- Evidence that the complainant has been found to have made false allegations against other individuals
- Reaction after the incident
- Complainant took steps to report the conduct soon after
- Complainant writes down the conduct soon after it occurred
- Complainant tells others about the conduct soon after it occurred

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Boiling it Down



Plausibility – Is the story possible, accounting for potential effects of trauma?

Consistency – Is the story consistent over multiple retellings?

Corroboration – Can the story be corroborated by other evidence?

Reliability – Was the person in a good position to witness what they are sharing, and to remember it accurately?

Credibility is a determination that can be made statement by statement.

It is not necessary to call someone a liar to make a credibility determination.

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Questions about Credibility - Bias

- Friendships – then and now
- Romantic relationships – then and now
- When was the last time you talked to X?
- Did anyone tell you what to tell me today?

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Questions about Credibility – Perception and Recall

- What is the witness's perception of the facts?
 - Has **time** impacted recall or ability to remember clearly?
 - How many times has the **witnesses talked to the other party** about this case?
 - Was there **anything** that impacts the person's physical or mental ability to perceive or recall facts accurately?
- Does the witness form a conclusion without knowing certain information?

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Questions about Credibility – Inconsistency in Statements

- If a fact was very important, why did it not come up until now?
- What possible reasons might the witness have for changing their testimony?
- Did a witness receive coaching from the party or others between making one statement and another?
- Has the witness's perspective or motive changed between statements?
- Does changing this fact help the other party's case?

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Questions about Credibility – Example

- **Example: Intoxication level information from witness.**
 - You did not see the consumption, or keep track of how long the party was consuming alcohol?
 - You did not measure the alcohol poured by ____ or the party?
 - Your statements are based on information provided by others? the other party?
 - Party's statements were made after they had been drinking alcohol (consuming other drugs, etc.)?

Remember: Is the person speaking from personal knowledge?

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Closing the Interview

- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you

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After the Witness Leaves (1 of 2)

- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email



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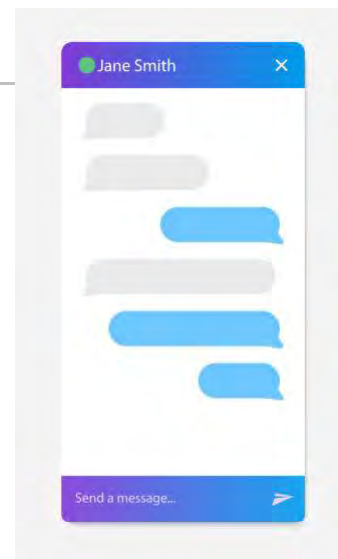
After the Witness Leaves (2 of 2)

- Consider whether there are additional allegations that you need to bring to the Title IX Coordinator
 - Remember: notice of allegations must be sent out before you can ask questions of a respondent.
- Ensure you are not leaving the burden of proof on any party or witness alone (106.45(b)(5)(i))

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Physical Evidence

- Follow up on anything identified during interviews
- Is law enforcement involved? Could they be?
- Ensure physical evidence is in a secure location and documented in the investigation log. Chain of custody is important!



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What about advisors or support persons in interviews?

Must provide parties the same opportunity to be accompanied by the advisor of their choice

- Nothing in the preamble prohibits support persons in the interview process (this is different at the hearing)
- Allowed to limit participation of advisor in process
- Whatever rules your institution selects, apply them equally to both parties

(106.45(b)(5)(iv))

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Inspection and Review of Evidence

Provide evidence to both parties and advisors

- Include everything related to allegations, even if you don't expect decision-maker to rely on it
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report

(106.45(b)(5)(vi))

Preliminary Investigation Report

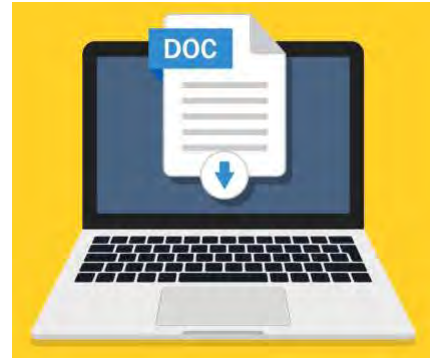


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Create Investigative Report

- Summarize **information gathered**
- No determination
- Provide to parties and advisors
- Allow 10 days to review prior to hearing
- We will discuss report writing later today

Final Investigation Report



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Writing the Report

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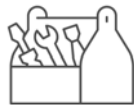
Remember: The organizer of all relevant evidence.
1 of 2



The **GATHERER** of all relevant evidence.



The **ORGANIZER** of all relevant evidence.



Here are some tools for how to best organize all the relevant evidence.

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Remember: The organizer of all relevant evidence.
2 of 2

The Regulations provide that the investigator must create a report that:

- Fairly summarizes relevant evidence

(106.45(b)(5)(vii))

What does this mean?

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Start with the basic information

Identify factual information:



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Consider general organization

Natural and neutral organization suggestions:

- Chronological order
- By topic or allegation
 - Perhaps by chronology within each topic or allegation
- By chronology of how the information came in to the investigation
- By witness summary

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Explain how organized

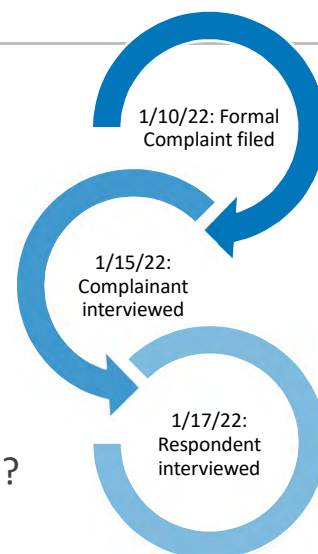
Explain your structure. Example:

“The information in this report is a summary of the facts as agreed upon by the parties and the witnesses. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate.”

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Other basic information to include

- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses Interviewed
- Witnesses Not Interviewed (and why)
- The procedure followed, step-by-step
- Any procedural anomalies that need explained?



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Identification of witness sign-off

If this is your practice:

“Each person interviewed was provided with a written copy of a summary of their interview, and was given an opportunity to provide feedback and approve the accuracy of the summary.”

- Did everyone do so?

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A statement regarding relevant evidence

“All relevant information gathered during the course of the investigation has been included in this report.”

- Identify if you thought something was not relevant and why – consider still including in attachment for decision-maker
- Provide a table or list of all relevant evidence gathered and attach that evidence



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Identify and include all alleged policy violations

- Definition of prohibited conduct alleged from applicable policy
- Related definitions as appropriate (e.g. consent, incapacitation) or any code of conduct included if done together
- Include verbatim, in entirety



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What to do with evidence



Give an overview of
evidence collected

AND



Attach as appendices any
statements and important
evidence

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Be helpful to reviewers – keep it transparent!

Citations to the record – always

- Be helpful for your fact-finders!

Hearing packet or exhibits – helpful to number the pages sequentially for easy citation

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Include screenshots/pictures in the report?

*Text text text text
text text text text
text text text text*



YES (and also in appendix)

Pros: can be illustrative and forefront; reviewer doesn't have to flip to the appendix

Cons: can make the report bulky

*Text text text text text text text text text
text text text text text text text text text
text text text text text text text text text*

NO (just include in appendix)




Pros: can keep the report neat and concise

Cons: may lose impact if the viewer doesn't jump back and forth between the appendix and text, which can also be annoying for reviewers

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What not to include in report (but note requested and why not included) 1 of 3

The specific type of evidence deemed not relevant in the Regulations:

-  Information protected by a legally recognized privilege
-  Party's medical, psychological, and similar records unless voluntary written consent
-  Rape Shield protection for Complainant

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What not to include in report (but note requested and why not included) 2 of 3

If evidence is requested by a party and/or you determine it is not relevant, always explain that it was requested and why you determined it was not relevant.

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What not to include in report (but note requested and why not included) 3 of 3

If you determined evidence was not relevant because of matters outside of the specific reasons identified in the regulations—i.e. because you did not think it was probative of material fact—explain and consider attaching in an Appendix

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Helpful synthesis

If you can, synthesize the information from multiple parties and witnesses

Where the stories diverge:

- “Information from [Complainant]”
- “Information from [Respondent]”



97

Summary of Information 1 of 2

Don't forget to summarize impact on complainant if the charges require consideration as an element

- *“The investigator notes that this incident and the process may have had an impact on [Respondent]. However, to determine whether sexual harassment occurred, the hearing panel will be required to review the impact of the reported behavior on [Complainant]. This is the reason that the information here focuses solely on [Complainant].”*

98

Summary of Information 2 of 2

Undisputed Facts

- Series of numbered sentences

Disputed Facts

- Series of numbered sentences

Make sure you have facts for each element of each charge.

Do not make credibility determinations.

99

Hearings

- Verbal relevancy determination after each advisor-asked question
- Each party must have an advisor, even if the party does not participate
- Decorum standards must be adhered to
- Breaks taken in break-out rooms
- Hearing must be recorded or transcribed

100



Being Impartial and Avoiding Bias, Conflict of Interest, and Prejudgment of Facts

101

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts 1 of 2

Section 106.45 **requires** that investigators (and Title IX Coordinators, decision-makers, informal resolution officers and appeals officers)

- be free from **conflict of interest, bias,** and
- be trained **to serve impartially** and **without prejudging facts.**

(30053)

102

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts 2 of 2

- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.

(30249-30257; 30496)



103

Impartiality

- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible [and it's contrary to your neutral role] (30323)

104

Bias: Concerns raised in comments in preamble

- Neutrality of paid staff in Title IX positions
- Institutional history and “cover ups”
- Tweets and public comments
- Identifying as a feminist



105

Perceived v. Actual Bias

- Both can lead to the same perception (30252)
- On appeal of decisions, the Department requires the bias “that could affect the outcome of the matter”

106

How the Department tried to prevent bias

No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn’t relevant that an investigator might (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

107

Bias: Objective Rules and Discretion 1 of 2

“[R]ecipients *should* have **objective rules** for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the **Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...**” (30250)

108

Bias: Objective Rules and Discretion 2 of 2

- **Discretionary**: Recipients have the discretion to have a process to raise bias during the investigation.
- **Mandatory**: Basis for appeal of decision-maker’s determination per 34 C.F.R. 106.45(b)(8)(i)(C).

109

Conflict of Interest: Concerns raised in comments in preamble

- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

110

Preamble Discussion on Bias and Conflict of Interest 1 of 3

- Final regulations “leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient's own employees are expected to perform functions free from conflicts of interest and bias.” (30251)

111

Preamble Discussion on Bias and Conflict of Interest 2 of 3

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

(30252-30253)

112

Preamble Discussion on Bias and Conflict of Interest 3 of 3

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

113

Example of Unreasonable Conclusion that Bias Exists

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

114

Training, Bias, and Past Professional Experience

This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience

(30252)



115

Department: Review of Outcomes Alone Does Not Show Bias

- Cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.”
- Explained: the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.” (30252)

116

Examples of Bias

- An investigator used to supervise one of the parties;
- Information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)



117

Avoiding Prejudgment of Facts at Issue

A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

118



Clery Annual Training

119

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.

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.

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 classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation”

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.

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

Sexual Assault Types

- Forcible:
 - Rape
 - Sodomy
 - Sexual Assault with an Object
 - Fondling
- Non-forcible
 - Statutory rape
 - Incest

Sexual Assault: Rape

The carnal knowledge of a person, without the consent of the victim, including instances where the victim is unable to give consent because of their age or because of Their temporary or permanent mental or physical incapacity.

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

Sexual Assault: Sodomy

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

Sexual Assault with an Object

To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is unable to give consent because of their age or because of their temporary or permanent mental or physical incapacity.

An “object” or “instrument” is anything used by the offender other than the offender’s genitalia, e.g., a finger, bottle, handgun, stick.

Sexual Assault: Fondling

The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is unable to give consent because of their age or because of their temporary or permanent mental or physical incapacity.

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: Incest and Statutory Rape

Incest: **Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law, which includes one's own mother, father, grandmother, grandfather, daughter son, granddaughter, grandson, sister, brother, niece, nephew, aunt, or uncle.**

Statutory rape: **Nonforcible sexual intercourse with a person who is under the statutory age of consent. (Massachusetts = 16)**

Sexual Assault Data Women and Men

More than **half of women** and nearly **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** were made to penetrate someone (completed or attempted) during his lifetime.

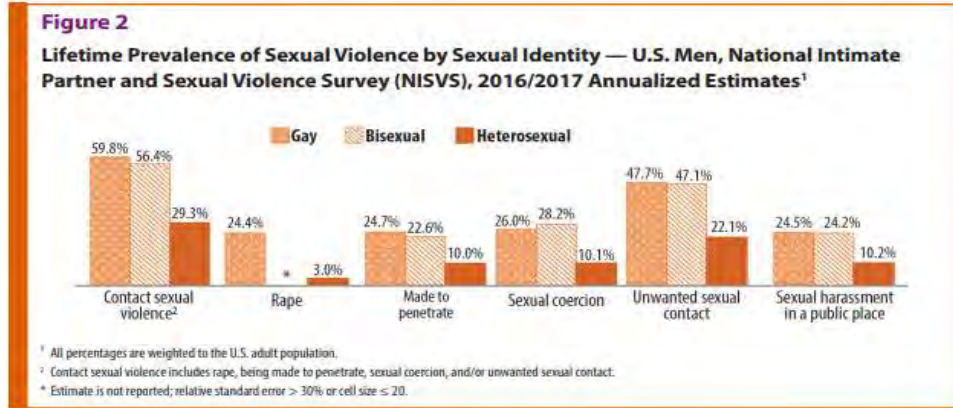
Statistics from CDC.gov/violenceprevention/sexualviolence/fastfact.html (last accessed September 19, 2024)

Sexual Assault Data – Lifetime Prevalence by Sexual Identity – U.S. Women

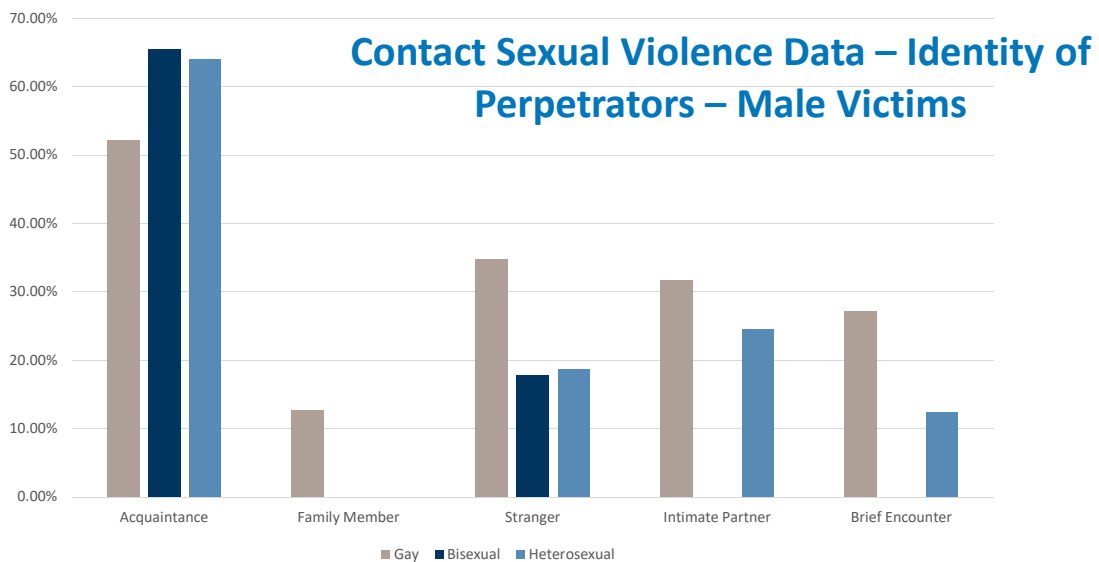


Statistics from: *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Identity*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited Oct. 2024), located at: <https://www.cdc.gov/nisvs/documentation/nisvsReportonSexualIdentity.pdf>

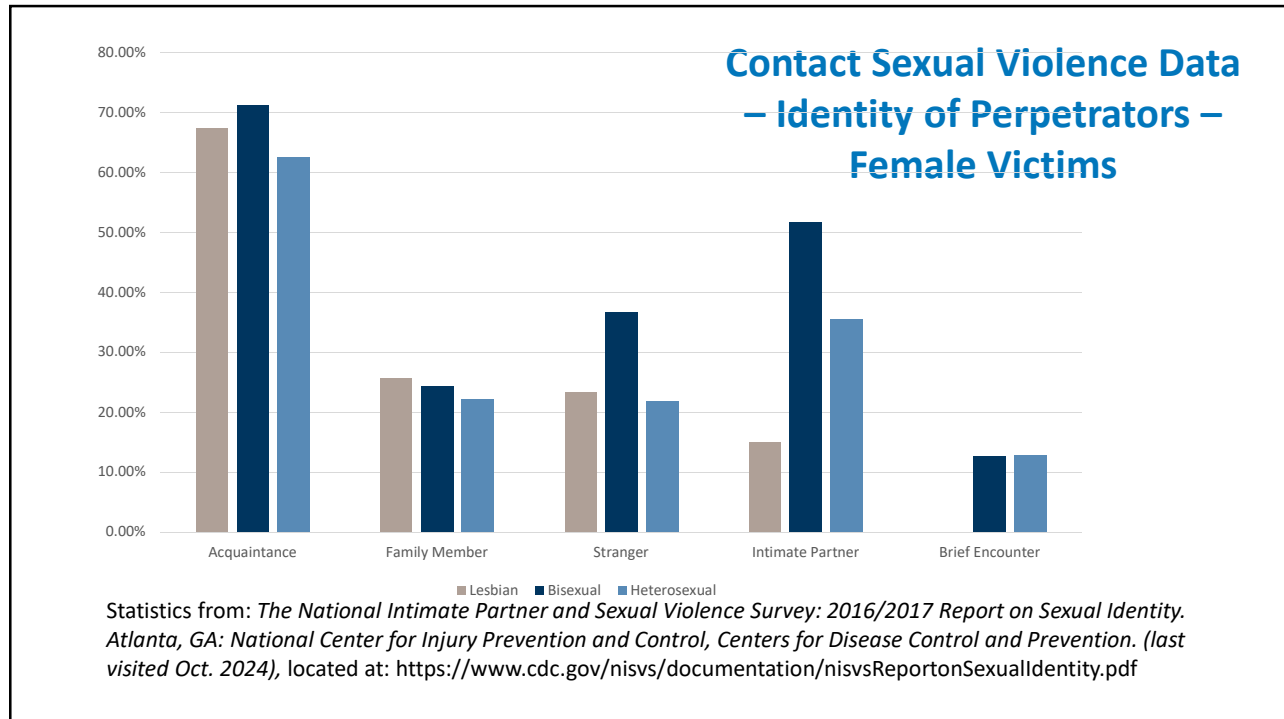
Sexual Assault Data – Lifetime Prevalence by Sexual Identity – U.S. Men



Statistics from: *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Identity*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited Oct. 2024), located at: <https://www.cdc.gov/nisvs/documentation/nisvsReportonSexualIdentity.pdf>



Statistics from: *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Identity*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited Oct. 2024), located at: <https://www.cdc.gov/nisvs/documentation/nisvsReportonSexualIdentity.pdf>



Sexual Assault Data: Timing Prevalence Data for Postsecondary Institutions

- More than **50 %** of college sexual assaults occur in **August, September, October, or November**, and students are at an increased risk during the first few months of their first and second semesters in college.
- For the 2014-2015 academic year, a large portion of incidents reported by females occurred in **September or October, particularly for first year students**.

Statistic one: "Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*." RAINN Sourced from: "Campus Sexual Assault Study, 2007; Matthew Kimble, Andrada Neacsiu, et. Al, *Risk of Unwanted Sex for College Women: Evidence for a Red Zone*, Journal of American College Health (2008)."

Statistic two: Campus Climate Survey Validation Study (CCSVS), 2015

Sexual Assault Data: Alcohol/Drug Use

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

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

Lorenz, Katherine, and Sarah E Ullman. “Exploring Correlates of Alcohol-Specific Social Reactions in Alcohol-Involved Sexual Assaults.” *Journal of aggression, maltreatment & trauma* vol. 25.10 (2016): 1058-1078. doi:10.1080/10926771.2016.1219801.

Data and Statistics: Reporting Data

About **65 percent** of surveyed rape victims reported the incident to a friend, a family member, or roommate but only **ten percent** reported to police or campus officials.

Preamble, p. 30082 (Official) notes that “Commenters cited: U.S. Dep’t of Justice, Office of Justice Programs, Office for Victims of Crime, *2017 National Crime Victims’ Rights Week Resource Guide: Crime and Victimization Fact Sheets* (2017).”

Data and Statistics: Impact Data (1 of 2)

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

Preamble, p. 30080 (Official) notes that "Commenters cited: U.S. Dep't of Justice, Bureau of Justice Statistics, *Special Report: Socio-emotional impact of violent crime (2014)*.

Data and Statistics: Impact Data (2 of 2)

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

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

Sexual Assault: Common Concerns

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

Sexual Harassment: Dating Violence

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

Sexual Harassment: Domestic Violence

“Domestic violence” is felony or misdemeanor crime committed [on the basis of sex] by:

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

IPV vs. Healthy Relationships

- Counseling individuals on healthy and unhealthy relationships will teach them about warning signs and how to handle problematic behavior.
- The line between healthy and unhealthy is not typically where your policy draws the line for disciplinary purposes.
 - How do you partner with your counseling center and 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.

IPV: Questions

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

Sexual Harassment: Stalking

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

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

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

Stalking: Course of Conduct

“Course of Conduct”

- Under VAWA regulations: means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

Stalking: Reasonable Person

“Reasonable person”

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

Stalking: Substantial Emotional Distress

“Substantial emotional distress”

Under VAWA regulations: means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Stalking Data

3.4 million individuals aged 16 or older (1.3%) were stalked during 2019. This represents a slight drop from 2016 (1.5%). Females were stalked more than twice as often as males.

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

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

- First statistic: U.S. Department of Justice, Bureau of Justice Statistics, "Stalking Victimization, 2019" published February 2022.
- Second and third statistics: CDC "Preventing Stalking" fact sheet, accessed October 29, 2022.

Impact of Stalking on Victims (1 of 2)

46% of stalking victims fear not knowing what will happen next.

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

29% of stalking victims fear the stalking will never stop.

[Baum et al.]

67% of stalking victims in 2019 were fearful of being killed or physically harmed.

U.S. Department of Justice, Bureau of Justice Statistics, "Stalking Victimization, 2019" published February 2022.

Impact of Stalking on Victims (2 of 2)

1 in 8 employed stalking victims **lose time from work** as a result of their victimization and **more than half** lose **5 days of work or more**.

1 in 7 stalking victims move as a result of their victimization.

[Baum et al.]

The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims.

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

Stalking: Common Concerns

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

Stalking: Considerations

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