

University System
of New Hampshire

Training for Decision-Makers

Title IX and Related Sexual Misconduct Matters

University System of New Hampshire

University System
of New Hampshire



Welcome

Title IX Training Series



Training Overview

➤ Thanks!

➤ Goal:

- Hearings regarding matters of Sexual Violence, Sexual Harassment and Related Offenses, including matters falling within the scope of 2020 Federal Title IX Regulations
- Definition of sexual harassment
- Scope of the university's educational program or activity
- The adjudication process (may differ for employee matters)
- How to serve impartially without conflicts of interest or bias
- Relevancy determinations at live hearings
- Written determination regarding responsibility

Acknowledgement

- ▶ Examples in this training use references to explicit sexual behavior or body parts
- ▶ These references are a common occurrence in this work.
- ▶ Such references must not easily offend decision-makers. Please discuss concerns with Title IX Coordinator or Conduct Director



Title IX Overview

Title IX Definitions

▶ Title IX

▶ Sexual Harassment is defined by Title IX as:

- ▶ An employee or graduate student in an employment role conditioning the provision of an aid, benefit, or service of the university on an individual's participation in unwelcome sexual conduct (commonly known as *quid pro quo* sexual harassment); OR
- ▶ Unwelcome conduct on the basis of sex determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the university's education program or activity; OR
- ▶ Sexual assault as defined in the Clery Act, or dating violence, domestic violence, or stalking as defined in VAWA.

▶ "Institutional Policy" – USNH institutions continue to hold community members responsible for their behavior toward fellow community members through the student code of conduct and/or discriminatory harassment policy:

- ▶ Severe "or" pervasive sexual harassment
- ▶ Sexual assault, unwanted sexual contact, relationship abuse (domestic violence), stalking

▶ Same investigative and adjudication process is used for **both** "Title IX" and institutional policy for cases alleging violation by a student. Process may differ for cases alleging violation by an employee



Scope of the University's Education Program or Activity

- ▶ It is a fact specific inquiry. The key question is whether the institution exercised “substantial control over the respondent and the context in which the incident occurred”
- ▶ There is no bright-line geographic test, and off-campus sexual misconduct is not categorically excluded from Title IX protection
- ▶ For example, Title IX applies to sexual harassment that occurred in an off-campus building owned or controlled by a student organization that the university has officially recognized, such as Greek housing
- ▶ However, USNH Policy makes clear the university will pursue misconduct that meets a broader definition of sexual harassment or occurs outside of its program or activity

Title IX Process Requirements

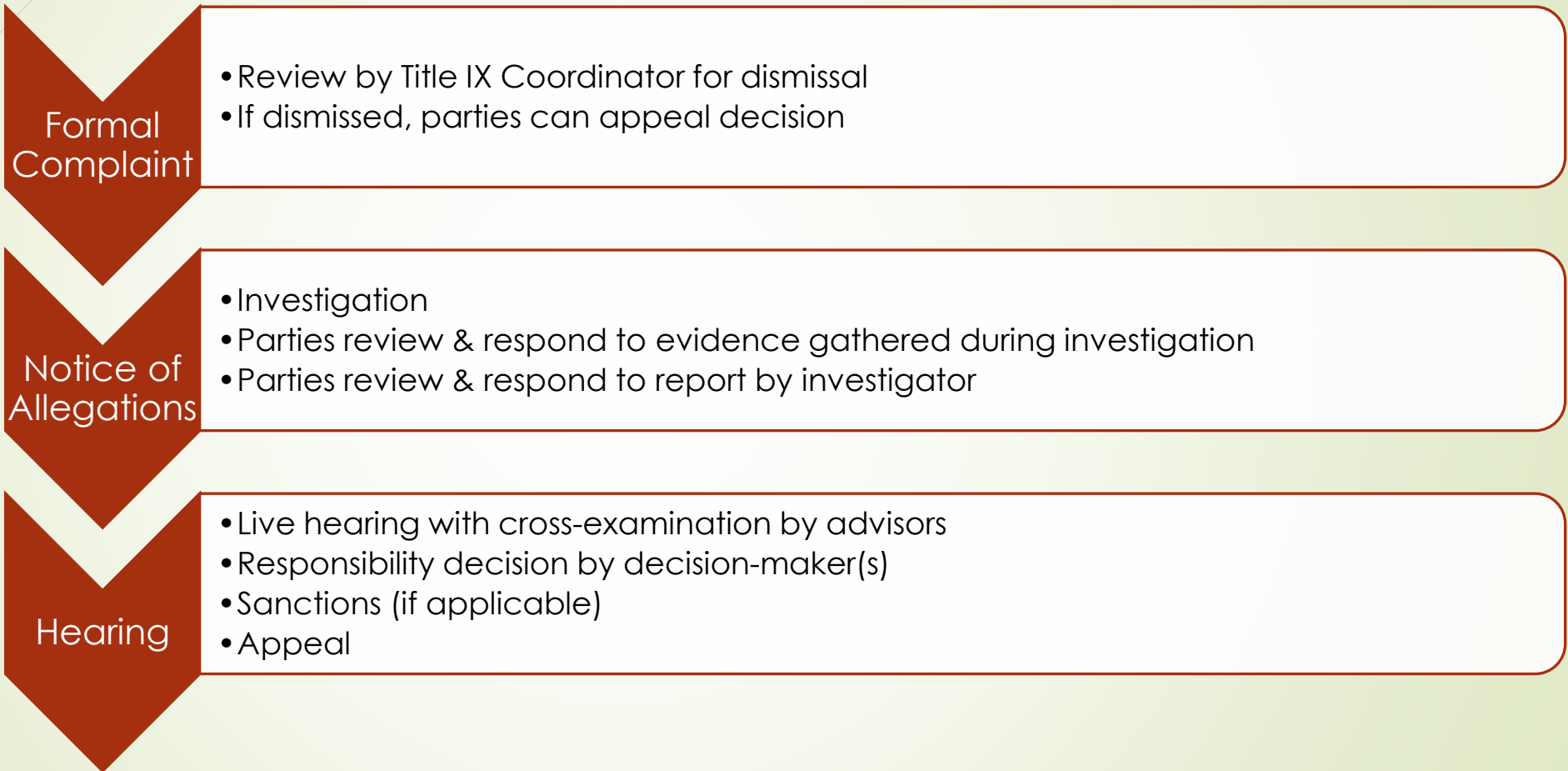
- ▶ “Formal Complaint” by complainant or Title IX Coordinator
 - ▶ Title IX Coordinator reviews and must dismiss if it does not meet the Federal definitions but UNH can still address the matter under institutional policies
 - ▶ Parties can appeal the dismissal decision
- ▶ Investigation by institution
- ▶ Parties review evidence and investigation report
- ▶ Institution presents case
- ▶ Live hearing with cross-examination is required
- ▶ Responsibility determination and sanctions (if applicable)
- ▶ Appeal
- ▶ Supportive measures are offered to the parties throughout the adjudication process

- ▶ *Note: sexual identity, gender or gender identity are legally neutral in Title IX: any person may commit or be impacted by sexual violence*

Advisor of Choice

- ▶ Both parties may have an advisor of their choice who can be an attorney
- ▶ Institution must appoint an advisor if a student/employee does not have one
- ▶ The advisor may accompany a party to interviews and hearings
- ▶ The advisor may also inspect evidence and review the investigative report
- ▶ The advisor can cross-examine parties and witnesses, but only the advisor is permitted to do so
 - ▶ Relevant questions
 - ▶ Follow-up questions
 - ▶ Including challenges to credibility
- ▶ The Advisor must follow the rules of decorum

Phases of the Process





How to Serve Impartially and Avoid Conflicts of Interest

Equity

- ▶ Principal Goal of Title IX & Institutional Policy
 - ▶ Complainant has a right to fair process, free from bias
 - ▶ Respondent has a right to fair process, free from bias
 - ▶ Generally, supports and procedural adjustments for one party are offered to the other party
- ▶ Respondent is presumed not responsible throughout adjudication process
 - ▶ Avoid prejudgments about the merits of the claim or strength of witnesses
- ▶ Investigative and adjudication process designed to protect the fairness and integrity of the decision on responsibility

Conflicts of Interest & Bias

- ▶ Impartial
 - ▶ Treat all parties equally
 - ▶ No conflicts – direct relationship to party, role in advocacy groups, publications favoring complainants or respondents
 - ▶ Confer with Title IX Coordinator or Conduct Director if you have any concerns about serving impartially and without bias
- ▶ Be especially vigilant to avoid bias or generalizations including, but not limited to, any of the following:
 - ▶ Gender or gender identity
 - ▶ Race, ethnicity
 - ▶ Age
 - ▶ Sexual behavior, sexual identity
 - ▶ Avoid the “if it were me” fallacy: focus on the facts of the case before you

Conflicts of Interest Continued

- ▶ Duty to be fair to both parties and avoid bias against either party
- ▶ A conflict may occur when a decision-maker's personal interest is inconsistent with or interferes in any way with their ability to impartially weigh information and evidence
- ▶ Examples
 - ▶ Student is advisee, current member of your class
 - ▶ Employee is your co-worker/supervisee/supervisor
 - ▶ Familial relationship, close family friend
 - ▶ Direct financial interest, like a shared business, or someone who has input on your merit pay
- ▶ What are likely not conflicts of interest:
 - ▶ Former student or co-worker with no other connection to you
 - ▶ Student in your department who may take a course with you in the future

Conflicts of Interest (continued)

- ▶ Decision-maker's perception that the interest does not create a conflict or bias is not legally sufficient
 - ▶ Perceived conflicts
 - ▶ Potential conflicts
- ▶ But not every relationship creates a conflict of interest
 - ▶ Case by case analysis
 - ▶ Time matters
 - ▶ Closeness of the interest matters
- ▶ If you think you might have a conflict of interest, contact the Title IX Coordinator/Conduct Director

A Word on Confidentiality

- ▶ Student conduct is part of educational record
- ▶ Employee personnel matters are generally confidential
- ▶ Breach of confidentiality can be a form of retaliation
- ▶ Witnesses, investigators, staff and decision-maker(s) are required to maintain the privacy and confidentiality of the proceedings
- ▶ However, parties have the right to discuss the incidents or the allegations
 - ▶ They may be cautioned to avoid litigating the case through gossip, innuendo, social media (retaliation)
 - ▶ They may be cautioned about retaliation, libel, and slander



A Word on Retaliation

- ▶ Act of punishment, revenge or recrimination
- ▶ Every party and every witness in a Title IX or related investigation has a legal right to be free from retaliation
- ▶ Title IX expressly prohibits retaliation against any individual exercising rights under Title IX, specifically protecting any individual's right to participate or refuse to participate in a Title IX grievance process
- ▶ The institution can caution all parties and witnesses about the prohibition on retaliation
- ▶ UNH does not tolerate retaliation of any kind, whether or not the complaint is ultimately judged to be sexual violence or sexual harassment



Relevance




Relevance

- ▶ Dictionary: closely connected or appropriate to what is being done or considered
- ▶ Legal: evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence
- ▶ The evidence is pertinent to proving whether facts material to the allegations are more or less likely to be true
- ▶ Merriam-Webster Dictionary defines “relevant” as “affording evidence tending to prove or disprove the matter at issue or under discussion.”




Basic Relevance

- ▶ Dangers of irrelevant information
 - ▶ Waste time, prejudice and faulty findings
 - ▶ Irrelevant evidence may rob a party of their right to fair decision
- ▶ Focus on the incident(s) itself
 - ▶ Information connected with the incident probably is relevant
 - ▶ Information that is not directly connected to the incident is more likely not to be relevant
 - ▶ Exceptions: course of conduct, demographic information (introductions), threat
- ▶ If you have questions, consult with Title IX Coordinator/Conduct Director



Relevant Evidence v. Directly Related Evidence

- The investigator is charged with gathering evidence “directly related to the allegations” raised in the Formal Complaint
- Directly related evidence is more broad than “relevant” evidence
- The investigator may gather evidence that is directly related to the matter at issue, but ultimately decide that it is not relevant to include in the investigative report



Relevant Evidence v. Directly Related Evidence (continued)

- ▶ However, parties and their advisors will have the opportunity to inspect and review evidence gathered by the investigator that is directly related as well as relevant evidence summarized in the investigative report
- ▶ The parties will have the opportunity to argue to the investigator and to the decision-makers that evidence directly related to the allegations is in fact relevant, and parties will not have a robust opportunity to do this if evidence related to the allegations is withheld from the parties by the investigator



Advanced Relevance for Decision-Makers

- ▶ Decision-makers determine whether questions and evidence are relevant
 - ▶ Made by applying logic and common sense, but not against a backdrop of legal expertise
 - ▶ Probative – demonstrates a fact at issue, but does **not** necessarily resolve the issue
 - ▶ Material fact – necessary to decide an issue in the case
 - ▶ If not relevant, do not allow the question or use the information in your decision
 - ▶ Evidence being used for the purpose of suggesting that a person acted on the occasion in question consistently with their poor character in unrelated circumstances raises questions of relevancy or the weight given to such evidence

Decisions on Relevance

- ▶ For matters adjudicated pursuant to the Student Code of Conduct, a panel of three persons is designated by the Director of Community Standards as the decision-makers
 - ▶ One panel member may lead the discussion and state the hearing panel's ruling on relevance, but all panel members must be involved in the decision
- ▶ For matter adjudicated pursuant to the Discrimination & Discriminatory Harassment policy, one decision-maker will be designated by the Title IX Coordinator
- ▶ If the decision-maker(s) decide something is not relevant, no lengthy explanation is required
 - ▶ Simply say, “this is not probative of any material fact”
- ▶ Both parties are permitted, through their advisor, to discuss the decision on relevance with the decision-maker(s) during the hearing
 - ▶ However, after receiving the explanation, both parties advisors' are prohibited from further challenging the decision during the hearing



Rape Shield Principles

- ▶ Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- ▶ Exceptions:
 - ▶ 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
 - ▶ Specific incidents of the complainant's prior sexual behavior with respect to the respondent are offered to prove consent

Examples

- ▶ In case where consent is an issue, respondent offers testimony, subject to cross-examination, of complainant's former partner, that complainant and former partner had consensual sexual intercourse
 - ▶ Not admissible (excluded under the Rape Shield protections – deemed irrelevant)
- ▶ In case where it is alleged that respondent used force during sexual interaction, complainant offers testimony of respondent's former partner, subject to cross-examination, that on two occasions respondent choked the partner during sexual intercourse, which caused the break-up
 - ▶ Rape Shield protections do not apply to respondent's prior sexual behavior
 - ▶ Determine if the evidence is relevant
 - ▶ If relevant, then determine what weight it is afforded

Character

- ▶ For example, in “standard” conduct hearings we generally exclude information about a student’s good or bad character
- ▶ In sexual misconduct hearings character evidence is admissible only if it is **relevant**
 - ▶ The party offering character evidence can be asked to explain how the character evidence that is being offered is relevant
 - ▶ The closer the connection to the incident at issue, the more likely it is admissible
- ▶ “Badgering” or abusive, intimidating and/or disrespectful questioning of witnesses is never permitted, including to get them to admit to bad character
- ▶ Cumulative information about good/bad character may be excluded

Examples

- ▶ Respondent offers evidence through a witness, that they participated extensively in Scouting, which tends to prove that they would not assault another, because of the Scout oath
 - ▶ Excluded, not relevant to the incident at hand, assault is not part of the Scout oath
- ▶ Respondent offers evidence through a witness that they are kind, to support the contested fact of whether they gave the complainant a ride home and helped nurse the complainant's hangover the morning after the reported incident
 - ▶ Admitted, relevant to a disputed fact about the incident
- ▶ Complainant offers evidence that respondent was found responsible for plagiarism, to support the claim that respondent is lying about the incident.
 - ▶ Admitted, if the witness has personal knowledge about the plagiarism (for instance, respondent admitted it to them) and can be cross-examined



Prejudicial Information

- For example, in “standard” adjudications unfairly prejudicial information is generally excluded
- In sexual misconduct adjudications, prejudicial information is admitted only if it is **relevant**
- “Badgering” or abusive, intimidating and/or disrespectful questioning of witnesses is never permitted
- Cumulative information regarding prejudicial information may be excluded

Examples

- ▶ Complainant offers evidence, through a witness, that respondent owns a gun. Respondent objects, stating that the decision-maker may be unfairly biased against gun owners and possession of a gun on campus violates other conduct rules.
 - ▶ Not relevant to the incident unless facts of case make it relevant
 - ▶ Relevant to the incident if complainant has testified that respondent threatened them with force, and they consented to sexual acts because they believed that the threat of force was backed by implicit threat to use a gun
- ▶ Respondent offers evidence through a witness that complainant is a transgendered person, and that the evidence is related to the incident because respondent claims that they would not engage in sexual activity with a transgendered person. Complainant objects on grounds of unfair prejudice.
 - ▶ Grounds of unfair prejudice do not automatically exclude this evidence
 - ▶ Determine if the evidence is relevant
 - ▶ If relevant, determine what weight it is afforded

Prior Bad Acts

- For example, in “standard” adjudications, evidence of a person’s previous misconduct is not generally admitted
- In sexual misconduct cases, evidence of prior bad acts is admitted only if it is **relevant**
- “Badgering” or abusive, intimidating and/or disrespectful questioning of witnesses is never permitted, including to get them to admit to prior bad acts
- Cumulative information about prior bad acts may be excluded

Examples

- ▶ Complainant offers evidence, through a witness, that respondent touched another person without permission, through clothing, over a sexual organ
 - ▶ Evidence being used for the purpose of suggesting that a person acted on the occasion in question consistently with their poor character in unrelated circumstances raises questions of relevancy or the weight given to such evidence
 - ▶ Determine if the evidence is relevant
 - ▶ If relevant, determine what weight it is afforded
- ▶ Respondent offers evidence, through a witness, that complainant falsely accused their same-sex roommate of theft
 - ▶ Admitted, relevant to whether complainant is truthful

Weight

- ▶ Courts of law are suspicious of character evidence, prejudicial evidence and prior bad acts evidence for very good reasons:
 - ▶ Distract from focusing on the case at hand
 - ▶ Create a disrespectful atmosphere
 - ▶ Unfairly disadvantage one party or the other
 - ▶ Increases risk of error
- ▶ We recommend that decision-makers use caution with these 3 kinds of evidence :
 - ▶ You may choose to give such evidence less “weight” than direct evidence about the incident (weight is what will convince you one way or the other)
 - ▶ Be scrupulously careful to be fair to both parties both in admitting and weighing this kind of evidence



Consent

University's Definition of Consent

- ▶ Agreement to sexual interaction is essential
- ▶ “Expressed consent”
 - ▶ Verbal, or
 - ▶ By conduct
- ▶ Consent can be revoked at any time
- ▶ Consent may not be:
 - ▶ Coerced by threat, violence or manipulation
 - ▶ Given by a person who is incapacitated
- ▶ Institutional policies (Student Code of Conduct) define consent, incapacity and related terms



Consent

- Agreement to sexual interaction is essential
- “Expressed consent”
 - Verbal
 - By conduct
- Consent can be revoked at any time
- Consent may not be:
 - Coerced by threat, violence or manipulation
 - Given by a person who is incapacitated
- Institutional policies (Student Code of Conduct) define consent, incapacity and related terms

Common Issues with Consent

- ▶ Consent by conduct
 - ▶ Physical passivity is not consent, but expressed consent does not require verbal consent at any stage of a sexual interaction
 - ▶ Would a reasonable sexual partner understand that consent was given?
- ▶ Revocation of consent – how clearly must a person communicate that their mind/intention has changed?
 - ▶ It must be communicated, but it does not have to be communicated verbally
 - ▶ Would a reasonable sexual partner understand that consent was revoked?
- ▶ Incapacity
 - ▶ Intoxication is not incapacity
 - ▶ Physical manifestations of incapacity in presence of partner: slurred speech, loss of motor control, falling asleep during sexual interaction, incoherent speech, vomiting
 - ▶ Would a reasonable partner understand that the other was incapacitated?




Trauma Informed



Impact of Trauma

- ▶ There is a body of scientific research that suggests that physical and emotional trauma can interfere with the formation of memory
 - ▶ Trauma during an event may help explain gaps in a person's memory of the event
 - ▶ This research has influenced training of investigators and decision-maker(s)
- ▶ There also is a scientific and policy critique of the “trauma informed” approach
 - ▶ There are other causes of gaps in memory
 - ▶ Risk of gender bias
 - ▶ Risk of assuming that gaps in memory are themselves evidence of trauma
 - ▶ In the context of campus sexual assault, violent sexual assault is rare, but disputes about whether consent was expressed are very common



What we can learn from “trauma informed” principles

- People do not necessarily form stronger memories during a stressful event, in fact
- People often do not remember events in precise, detailed chronological order
- Start by asking witnesses what they do remember about an event, don't interrupt as they relate their memories, and allow them to report what they do remember
- Gaps in memory are not proof that someone is lying – or that they are telling the truth



Our recommendations regarding trauma informed techniques

- ▶ Use the “trauma informed” questioning techniques with all witnesses, regardless of their gender or role in the case (see training handouts)
- ▶ Treat all witnesses with respect, regardless of their gender or their role in the case
- ▶ Gather the information that is available, compare it to the other information and evaluate the case based on all of the evidence
- ▶ Be as fair as possible to everyone in the process
- ▶ Don’t substitute any assumption about what gaps in memory mean for a careful, thoughtful, fair assessment of the facts



Live Hearing

Live Hearings Can Be Held Virtually

▶ Tips for Online Hearings

- > **For employees working virtually, please be sure to review and follow UNH IT security standards:** <https://www.unh.edu/hr/it-security-standards-teleworking>
- > **Log On Early:** Sign into the hearing a little early to make sure you can connect without issues!
- > **Internet Stability:** We can't control the internet...if yours goes out, simply reconnect to the hearing as quickly as you can. We will pause the hearing if anyone leaves unannounced.
- > **Share Your Screen:** If you want to reference a photo or document, or even draw a diagram, just ask to share your screen.
- > **Breakout Rooms:** We will use breakout rooms often in online hearings. We jump around from room to room coordinating things...so hang tight...we haven't forgotten about you.
- > **Viewing Documents:** We've heard that it's been useful to have a second screen or device to look at hearing documents on. This way you aren't trying to do everything on one screen.
- > Let the Title IX Coordinator or Conduct Director know if you are unfamiliar with Zoom or need equipment for the hearing.

Order of Live Hearing

- Opening Instructions
 - Rules of Decorum
 - Order of Events for the Day
- Submitting report into evidence
- Opening statements
- Questions by decision-maker(s)
- Cross-Examination by the advisors
- Closing statements and instructions/guidance



Rules of Decorum

- In essence: rules for good meetings
 - Fairness
 - Politeness
 - Mutual respect
- Apply to everyone: parties, advisors, decision-makers


Topics Included (partial list)

Required

- ▶ Preparation
- ▶ Promptness
- ▶ Cell phones silenced
- ▶ Listening
- ▶ Speaking in turn
- ▶ Focus on relevant topics
- ▶ Courtesy, respect
- ▶ Maintain confidentiality

Prohibited

- ▶ Outbursts
- ▶ Profanity
- ▶ Threatening
- ▶ Disorderly behavior
- ▶ Disruptive conversations/
interruptions
- ▶ Disobeying rules of decorum



Decision-Makers Will Have the Opportunity to Ask Questions of the Parties and Witnesses at the Live Hearing

- ▶ Details regarding consent or sexual encounters often are important to the determination regarding responsibility.
- ▶ Allow witness time to speak before asking question
- ▶ Listen carefully, try not to get distracted by questions you plan to ask
- ▶ Who, what, where, when, & how
- ▶ Rarely why?
- ▶ “Help me to understand . . .”
- ▶ “I’m sorry to have to pry into intimate details, but it is important for us to know . . .”
- ▶ “It seems that you are having difficulty recalling some details, but please tell me, if you can what happened”
- ▶ Be careful not to “telegraph” your feelings regarding the evidence being offered at the hearing

“Reluctant” Parties and Witnesses

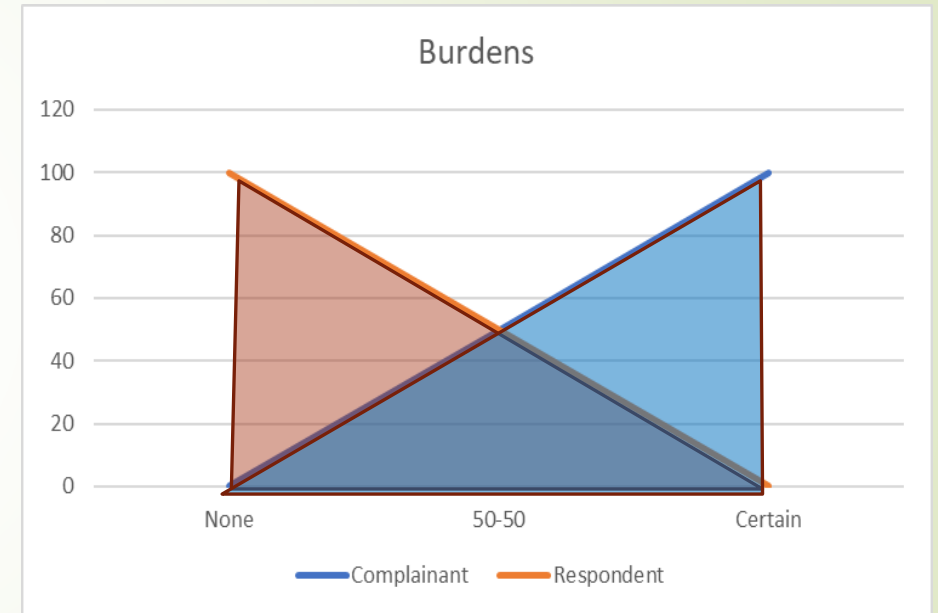
- ▶ Institution cannot compel the parties or any witnesses
 - ▶ Courts can – and do compel parties and witnesses
- ▶ Usually the complainant and respondent will be present
- ▶ Respondent has Fifth Amendment and conduct process right to silence
- ▶ Witnesses may not attend the live hearing
 - ▶ Do not hold that against anyone



Burden of Proof

Burden of proof

- ▶ Respondent presumed not to be responsible for the violation until it is proven
- ▶ Institution has to prove the matter “by a preponderance” of the evidence
 - ▶ More likely than not
 - ▶ “50% and a feather”
- ▶ Not required to prove to certainty



Burden of Proof

- ▶ To make a finding of responsibility, decide which evidence was more convincing
 - ▶ If University presented more persuasive evidence on the elements of the charge(s), then the respondent should be found responsible
 - ▶ If not, or if the evidence is equally balanced, the respondent should be found NOT responsible
 - ▶ Consider each “element” of each violation
- ▶ Simply means “more likely than not” – you may have doubts, but believe that it is more likely than not that the incident occurred
- ▶ Greater weight of the evidence
 - ▶ Quality and persuasiveness
 - ▶ Not number of witnesses or documents

[Adapted from Federal Civil Jury Instructions]

Written Determination Regarding Responsibility

- The decision-maker(s) must issue a written determination regarding responsibility by applying the preponderance of the evidence standard of proof
- The written decision must contain all of the following:
 - Identification of the allegations potentially constituting sexual harassment
 - A description of the procedural steps taken from the receipt of the Formal Complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the policy to the facts
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the institution imposes on the respondent (if applicable), and whether remedies designed to restore or preserve equal access to the education program or activity will be provided to the complainant
 - The institution's procedures and permissible bases for the complainant and respondent to appeal

Appeal

- ▶ An appeal can be based on one or more of the following purposes:
 - ▶ Procedural Error: To determine whether the original hearing was conducted in conformity with the procedures contained in this policy.
 - ▶ Newly Available Evidence: To consider whether there is new evidence, sufficient to alter a decision, provided, however, that the evidence was not reasonably known to the person appealing at the time of the original hearing
 - ▶ Legal error: To determine whether there was bias, conflict of interest or other legal error in the investigative or adjudicative process that a court would likely recognize as requiring a new hearing
- ▶ Additional grounds for appeals may exist for matters handled under the Student Code of Conduct



Thank you!

- ▶ Decision-makers play a central role in the University System's response to reports of incidents of sexual violence and related misconduct
- ▶ We appreciate your participation in this process