

Investigator Training

Presenter Name

Presenter Title

Date

University System
of New Hampshire



Welcome

Title IX Training Series



Training Overview

- Thanks!
- Goal:
 - Investigations 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
 - Investigative process and skills
 - The investigation and adjudication process (may differ for employee matters)
 - How to serve impartially without conflicts of interest or bias
 - Relevance and report writing



Acknowledgment

- ▶ 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 investigators. 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

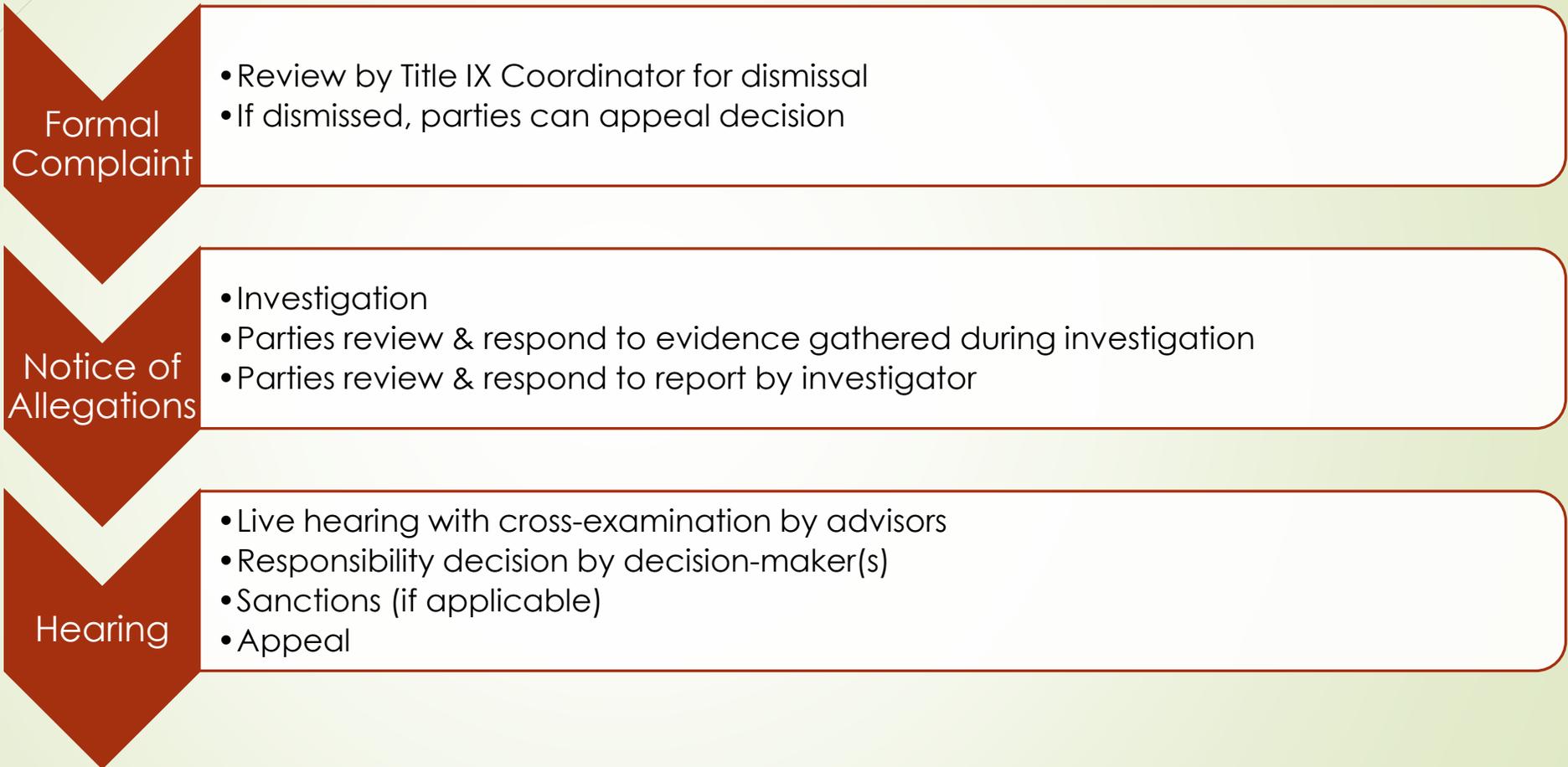
- ▶ “Formal Complaint” by complainant or Title IX Coordinator
 - ▶ Title IX Coordinator reviews and can dismiss if it does not meet the Federal definitions but UNH can still address the matter under institutional policies
 - ▶ Parties can appeal the dismissal decision
- ▶ Investigation by institution
- ▶ Parties review all 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 party 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
- ▶ Advisor must follow rules of decorum (see training handouts)

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 investigation
 - ▶ 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 an investigator's personal interest is inconsistent with or interferes in any way with their ability to impartially gather 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)

- ▶ Investigator'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
- ▶ Investigators can caution all parties and witnesses prior to their interview 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



Investigation

Role of Investigator

- ▶ Promptly search for relevant facts and evidence
 - ▶ Interviews
 - ▶ Documents (especially in digital form)- need for preservation
- ▶ Fair, equitable
 - ▶ Inculpatory evidence – tending to establish responsibility
 - ▶ Exculpatory evidence – tending to exonerate
- ▶ Scope of investigation: established by the Formal Complaint
 - ▶ If new charges/incidents are suggested by the evidence or brought forward by parties or witnesses, contact Title IX Coordinator/Conduct Director
- ▶ Prepare report – review and comment by both parties
- ▶ Consider need for witness at hearing

Role of Investigator (continued)

- Gather evidence “directly related to the allegations” raised in the formal complaint
- This category of evidence is broader than only “relevant” evidence
- Includes both inculpatory and exculpatory information
- Includes evidence upon which the institution does not intend to rely in reaching a determination regarding responsibility
- Summarize relevant evidence in your investigative report



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 under investigation 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
- ▶ Be prepared to separately document information that you determine is not relevant

Summarizing Relevant Evidence

- ▶ Investigators summarize the relevant evidence in the investigative report
 - ▶ 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 include the information in your report but maintain it on file as directly related evidence
 - ▶ 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
 - ▶ Work with Title IX Coordinator to resolve issues of relevancy



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 must have the opportunity to inspect and review evidence you gather that is directly related as well as relevant evidence that you summarize in your investigative report
- ▶ The parties should have the opportunity to argue to you 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
- ▶ Talk to the Title IX Coordinator regarding how to store evidence gathered during your investigation as well as how to provide the parties with an opportunity to review the evidence



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.

Character

- ▶ In “standard” adjudications we generally exclude information about a party’s good or bad character.
- ▶ In sexual misconduct adjudications 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



Prejudicial Information

- In “standard” adjudications unfairly prejudicial information is generally excluded
- In sexual misconduct adjudications, prejudicial information is admitted only if it is **relevant**



Prior Bad Acts

- ▶ 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**



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

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



Interviews

Interviews

- ▶ Draft an investigative plan
- ▶ Provide parties with written notice of investigative interviews with time to prepare
- ▶ Interview parties, and witnesses identified by the parties
 - ▶ You decide the order, but generally complainant first
 - ▶ In person, telephone or videoconference
 - ▶ Record/not record – need consent to record (discuss with Title IX Coordinator or Conduct Director)
 - ▶ Take and keep contemporaneous notes
- ▶ Informal in tone, but outline recommended
 - ▶ Template outlines available, but you may develop your own
 - ▶ Background, narrative, and follow-up questions
- ▶ Prepare summary as soon after interview as possible
 - ▶ Goal: accuracy, not narrative
 - ▶ Headings and bulleted lists are helpful



Suggestions for asking difficult questions

- ▶ Details regarding consent or sexual encounters often are important to the conduct charge
- ▶ Let the witness get all the way through their account before asking questions
- ▶ 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”



Investigative Challenge: Reluctant Witnesses

- ▶ Institution does not compel the parties or any witnesses
 - ▶ Courts can – and do compel parties and witnesses
- ▶ Often a case cannot go to hearing without the complainant
- ▶ Respondent has Fifth Amendment and conduct process right to silence
- ▶ Witnesses might not attend interview or hearing
 - ▶ Variety of motivations



Importance of “Narrative” and “Elements”

- ▶ Essential to equity that investigator understand the “narrative” of both the complainant and respondent
 - ▶ Understanding the narrative helps the investigator to write the report
 - ▶ Explaining the contested and uncontested facts is important to capture in the written report
 - ▶ It also helps with additional witness interviews and document collection
- ▶ Similarly, it is essential that investigator read the violations carefully, and understand the “elements” of every charge
 - ▶ Helps outline interviews and organize questions (“how was consent expressed?”)
 - ▶ Helps focus the report



Investigator's toolkit

- Interviews (first and foremost)
- Social media posts, texts and emails – ask for screenshots
- Swipes (meals, dorms)
- Security camera video
- Law enforcement reports
- Mobile phone images, videos



Confidential Records

- Medical, psychological and similar privileged treatment records
- Institution cannot access or use these records as evidence without written consent of the party
- Title IX Coordinator can provide a consent and release



Investigative Challenge: Closed Groups

- ▶ Teams, clubs, student organizations, Greek organizations
- ▶ Risks:
 - ▶ “Cross-contaminated” accounts
 - ▶ Pre-arranged narratives to help organization avoid misconduct charges
 - ▶ Closely aligned or wildly disparate narratives – sometimes in same interview
 - ▶ Collective amnesia
- ▶ Discuss with Title IX Coordinator/Conduct Director
 - ▶ For student misconduct matter, amnesty offers may apply (rare except for alcohol possession and consumption)



Reports

Process and Report Contents

- ▶ Interviews
- ▶ Opportunity for parties to review evidence
 - ▶ Conduct Director or Title IX Coordinator can help you organize
- ▶ Draft report
 - ▶ Fairly summarizes relevant evidence
 - ▶ Documentation of investigation efforts
 - ▶ Investigator is not making a decision on responsibility or credibility
- ▶ Contents:
 - ▶ Interview summaries, starting with complainant, then respondent, then third party witnesses
 - ▶ Appendix with relevant documents, photos, etc.

Right to Review and Respond

- ▶ Parties will review the evidence and the investigative report
- ▶ Parties have right to respond
- ▶ The parties must have at least 10 business days to submit a written response to the investigative report, which the investigator will consider
- ▶ After the parties' responses are considered, the investigator has discretion with respect to whether and how to amend and supplement the investigative report as long as any such rules and practices apply equally to both parties
- ▶ Work with the Title IX Coordinator to address issues surrounding the parties' responses to the report and evidence



Thank you

- ▶ Investigators 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