

Title IX Experiential Training

Lynn University
July 26, 2023



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Disclaimer



- We will cover legal requirements and use Lynn University's policy for definitions, but these slides also include best practices.
- Even as we speak, the requirements are in the process of being changed. Watch for final regulations as soon as October 2023. New case law and guidance is being issued all the time.
- We cannot give legal advice today, but are happy to address hypotheticals.
- The allegations for the scenario we will discuss are serious, but intentionally written with a light touch to allow for creativity in the way our actors and actresses portray the characters, and in the way we respond and handle difficult questioning. Use this as an opportunity to explore and ask questions in an intentionally caricatured scenario.

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Reminders



- If you need to step away for any reason, feel free to do so.
- If you have questions or concerns, feel free to chat with us. There will be plenty of opportunities to do so.
- We will be engaging in lots of discussion. If you want to push the group, use a “For the sake of argument...” question format. This makes sure we are considering many perspectives – even ones that may seem counterintuitive.

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Agenda



- Introductions
- Title IX Themes
- Sexual Assault, IPV, and Stalking
- Trauma Informed Approaches
- A Walk Through of our Report
- Roles and Goals
- Small Group Prep
- Questioning our Parties
- Credibility Determinations
- Deciding the Case
- Writing the Decision

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Can We Post These Training Materials?

YES – Post away!

The “recipient” (college or university) is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website.



**Bricker
Graydon**

Introductions

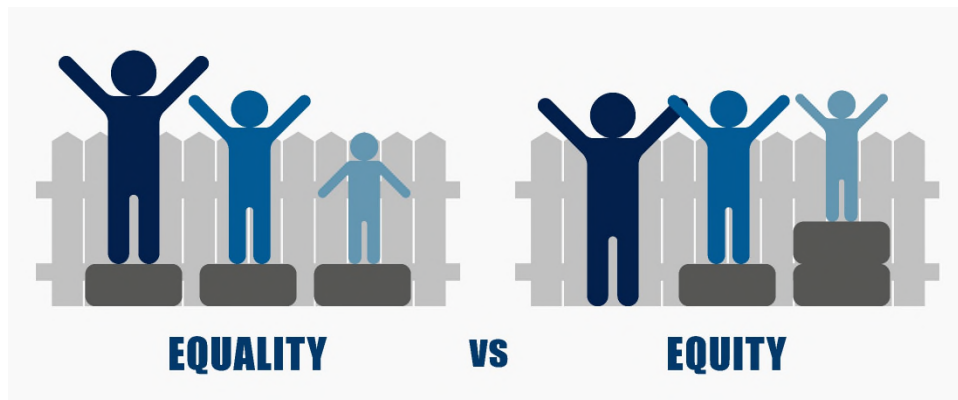
- Name
- Role(s) on the Title IX team
- Primary job, if you're not full-time in Title IX
- First music you purchased and in what format

**Bricker
Graydon**

TITLE IX TODAY: Themes

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Title IX is an Equity Statute



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Ethic of Care



What are Your Institution's Values?

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

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Overview of Themes



Themes - Access



What we do for one, we do for the other

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

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Themes – Duty to Protect



All members of your campus community

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

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Themes - Transparency



Help Others Trust the Process

- **TRANSPARENCY** is key to trusting the process.
 - Know your grievance process
 - Help them understand next steps.
- If participants don't know what is happening, they will assume nothing is happening

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Themes – Evidence Based Decisions



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

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Themes – Always Room for Improvement



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

Themes – Avoid Conflicts of Interest, Bias



- Always be working to avoid actual or perceived:
 - Conflict of interest
 - Bias
- **Institutional Duties and Interests vs. Personal interests**
- Your work can impact the lives of others: take periodic self-inventories to be mindful of your activities, involvements, social media, and biases you may have and work to ensure you remain neutral.

Confidentiality Foundations



- Information learned in a Title IX case is protected as private and can only be shared on a “need to know” basis.
- Sharing information with someone who does not need to know may be retaliation.
- Who needs to know – and what do they need?
 - Roxy wants to move to new residence hall as a supportive measure.
 - Matthew wants a midterm rescheduled so he can sit for his interview when his advisor is available.
 - Roxy is distraught and needs a counseling appointment.
- What are some other common scenarios?

FERPA Foundations



- FERPA protects education records from disclosure without consent, except in certain cases such as:
 - To another school official with a legitimate educational interest (e.g. need to know)
 - Health and safety emergency
 - To facilitate transfer to another institution*
 - To the parent of a tax dependent student*
 - Disclosure is required pursuant to a subpoena (may have to notify the student)

Sexual Assault, Intimate Partner Violence, and Stalking

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Data and Statistics - Disclaimer



- More Disclaimers
 - These should not influence your decision in any particular Title IX case
 - We didn't do the research ourselves and can't vouch for it
 - Some of the studies use the terms Offender, Victim, and Rape. Please use policy definitions (complainant, respondent) when you handle Title IX cases.
 - Okay but really, statistics SHOULD NOT influence your decision in any particular Title IX case

Sexual Assault Data 1 of 3

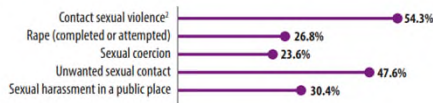


- Nearly 1 in 2 women and about 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.
- 1 in 4 women and about 1 in 26 men will experience completed or attempted rape during their lifetimes.

Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)
 Located at: <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf>

Sexual Assault Data 2 of 3

Figure 1
Lifetime Reports of Sexual Violence — U.S. Women, National Intimate Partner and Sexual Violence Survey, 2016/2017 Annualized Estimates¹



¹ All percentages are weighted to the U.S. adult population.
² Contact sexual violence includes rape, sexual coercion, and/or unwanted sexual contact.

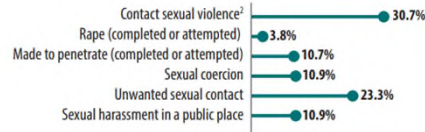
- **Types of Sexual Contact Reported by U.S. Women:**
- 54.3% reported sexual violence;
- 26.8% experienced completed or attempted rape;
- 23.6% experienced sexual coercion;
- 47.6% reported experiencing some form of unwanted sexual contact other than those specifically identified elsewhere.

• Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)
 • Located at: [Link to survey: CDC website](https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf)

Sexual Assault Data 3 of 3

Figure 2

Lifetime Reports of Sexual Violence — U.S. Men, National Intimate Partner and Sexual Violence Survey, 2016/2017 Annualized Estimates¹



¹ All percentages are weighted to the U.S. adult population.

² Contact sexual violence includes rape, being made to penetrate, sexual coercion, and/or unwanted sexual contact.

- Types of Sexual contact reported by U.S. Men:
- 30.7% reported some form of sexual violence
- 3.8% experiencing completed or attempted rape,
- 10.7% made to penetrate, 10.9% experiencing sexual coercion,
- 23.3% experiencing some other form of unwanted sexual contact.

• Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)

• Located at: <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf>

Sexual Assault Data: Prevalence Data in Higher Ed

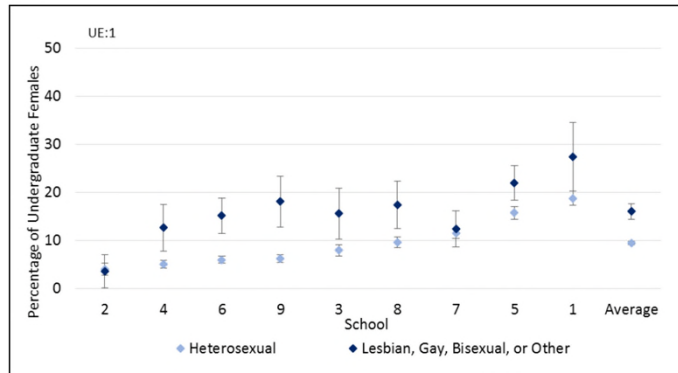


- More than **50 percent** of college sexual assaults occur in **August, September, October, or November**, and students are at an increased risk during the first few months of their first and second semesters in college.
- For the 2014-2015 academic year, a large portion of incidents reported by females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

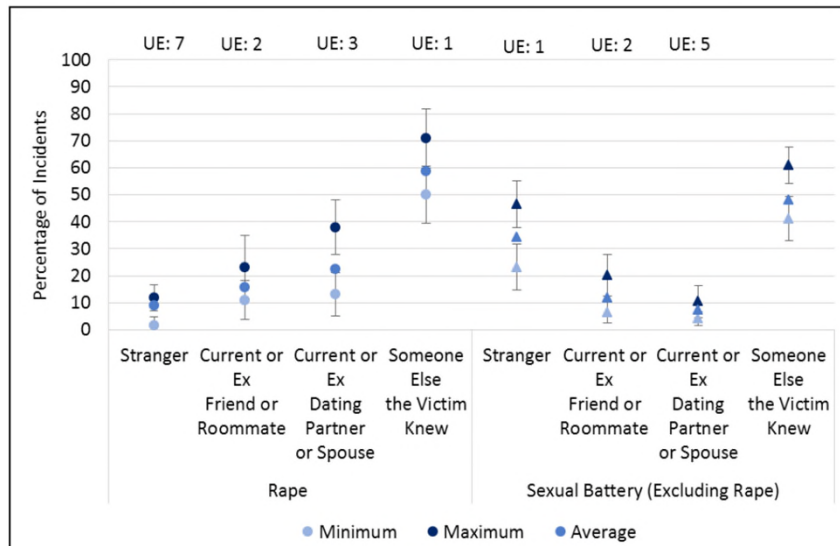


Prevalence of Sexual Assault reported by Non-heterosexual female students



Source: Campus Climate Survey Validation Final Technical Report (2016)

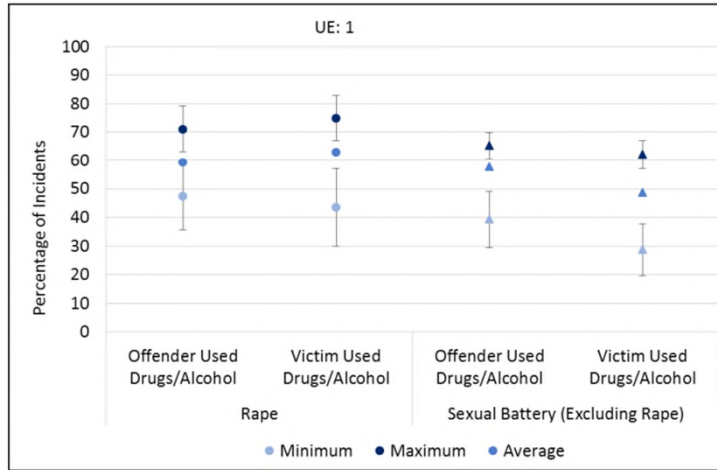
Sexual Assault Data: Identity of Perpetrator



Source: Campus Climate Survey Validation Final Technical Report (2016)

Sexual Assault Data: Alcohol/Drug Use

Figure 28. Minimum, maximum, and overall average estimates of the percentage of rape and sexual battery incidents experienced by undergraduate females that were believed to involve offender and victim alcohol/drug use, 2014–2015 academic year



Source: Campus Climate Survey Validation Final Technical Report (2016)

Sexual Assault Data: Alcohol/Drug Use



- “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.
- 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.
- 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).
- 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.

Dating Violence



- “Dating Violence” means **an act of violence** committed **on the basis of sex** by a person 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.

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Domestic Violence



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

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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 local domestic violence shelter to ensure consistent messaging with regard to the policy, as opposed to healthy relationship dynamics?

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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.

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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, if there was violence alleged to have been completed by the complainant?

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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.
- To qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)

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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.

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Stalking: Reasonable Person



- “Reasonable person”
 - Under VAWA regulations, for purposes of the stalking definition: means a reasonable person under similar circumstances and with similar identities to the victim.

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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.

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Stalking Data 1 of 2



- **31.2%** of women and **16.1%** of men in the U.S. reported stalking victimization at some point in their lifetime.
- **43.4%** of female victims and **32.4%** of male victims of stalking are stalked by a **current or former intimate partner**.
- Over **85%** of stalking victims are stalked **by someone they know**.
- First and second statistics: Smith, S.G., Basile, K.C., & Kresnow, M. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Stalking — Updated Release*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.
- Third statistic: National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (CDC)

Stalking Data 2 of 2



- **11%** of stalking victims have been **stalked for 5 years or more.**
- **46%** of stalking victims experience **at least one unwanted contact per week.**
- [Matthew J. Breiding et al., "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011"]
- Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 63, No. 8 (2014): 7]
- [Katrina Baum et al., (2009). "Stalking Victimization in the United States," (Washington, DC:BJJS, 2009).]

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

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Trauma Informed Approaches

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Role Reminders



- If your friend tells you something terrible happened to them, it's not your job to interrogate them or figure out what happened.
 - In this situation, be supportive and listen.
- If you are in your role as a Title IX team member and someone tells you something terrible happened to them, it might actually be your job to ask detailed questions and make a determination regarding a policy violation.
 - The institution still provides support to people during the process.
 - That being said, you may still be required to ask tough questions and make tough decisions.

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Goal: Don't Make This Any Harder



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

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First: Make No Assumptions



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

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Second: They Are Not You



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

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Third: Neurobiology of Trauma Is A Thing



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

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So... What Does This Mean, Practically?



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

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Emotions During Interviews



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

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First Interview vs. Second Interview



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

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Trauma and Decision Making



- Focus on corroboration, consistency, and plausibility.
 - Is there anything else in the file that backs up this assertion?
 - Has the person been consistent over time (recognizing that it is hard to say exactly the same words when telling the story multiple times)?
 - Is the person's story plausible?
- Avoid making decisions based on demeanor, as there are too many reasons—including cultural norms—that may affect how some people behave and how you perceive it.
- These are good practices regardless of whether anyone may be traumatized.

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A Walk-Through Of Our Report

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Overview of Procedure



- The report should “fairly summarize relevant evidence” collected during the investigation.
 - What you summarize is likely narrower than what you include in the file for review.
- Parties get 10 days to review evidence (and draft?) and provide written feedback.
- Investigators then prepare final report.

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Sections of the Report



- Procedural History
- Allegations (from Notice of Investigation)
- Investigation Overview
 - Witnesses – Who you spoke with, who declined to participate, who never responded, who was requested but wasn’t relevant (and why)
 - Evidence – What you gathered, what you tried to gather but couldn’t, what you were asked to gather but didn’t (and why)
- Relevant Policy Language (Definitions)

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Summary of Information



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

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Attachments to Report



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

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Party Responses



- Do you need to conduct follow up interviews or request additional evidence?
- (Do you need to then circle back and do another round of evidence review/response?)
- Integrate relevant portions of the responses into your summaries.
- Attach the responses.
- And speaking of party responses, let's talk more about incorporating feedback!

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Opportunities for Feedback (1 of 2)



- Discretionary opportunities
 - After interviews
 - Not required, but may address issues earlier in the process and can help build trust
 - Be consistent
 - Within individual cases (“What we do for one, we do for the other”)
 - Across your caseload

Opportunities for Feedback (2 of 2)



- Mandatory opportunities for feedback per Title IX regs
 - Time for parties/advisors to **review evidence**
 - **10 days** to submit a written response, “which the investigator will consider prior to completion of the investigative report”
 - Time for parties/advisors to **review the investigative report** and respond in writing
 - At least **10 days** prior to hearing
- (34 C.F.R. §106.45(b)(5)(vi) and (vii))

Eliciting, Receiving, & Considering Feedback



Practical Tips for Feedback to Interview Summaries and Preliminary Investigative Reports

- | | |
|---|---|
| <ul style="list-style-type: none"> • <u>Eliciting:</u> • Allow for track changes? • Send as PDFs? • Watermarks? | <ul style="list-style-type: none"> <u>Receiving:</u> • Track changes (preserve the full document as a pdf) • Edits via text message • A separate document or email with edits |
|---|---|

Capturing Feedback

(1 of 3)



- Just change the interview summary/PIR?
 - Be careful
 - Depends on the feedback
 - Minor clarifications v.
 - Additional or revised information v.
 - A different account entirely
 - Document your edits and reasons therefor within the summary or report

Capturing Feedback

(2 of 3)



- Track changes
 - See prior slide for caveats
 - Save red-line version as a pdf?
 - Incorporate by reference
- Text message
 - Take a Screenshot and save to the file
 - Incorporate by reference

Capturing Feedback

(3 of 3)



- A separate document or email
 - Save document or email as a pdf
 - Incorporate into your version via footnotes?
 - Make sure to incorporate by reference – so add a note to the summary or report – don't just attach it without referencing
 - Don't let this separate document get lost in your file! It may be critically important at the hearing or in drafting an outcome letter.

Roles and Goals

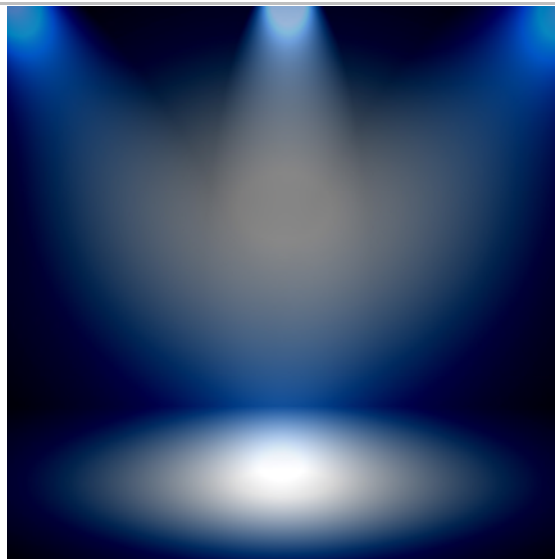
The Parts You'll Play



- Need volunteers for Roxy and Matthew
- Then we must split into three teams:
 - Team Neutral
 - Team Roxy
 - Team Matthew
- We will break for small group preparation in a moment. But first, let's talk about the roles we'll play.

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Three Roles: Three Spotlights



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Role: Hearing Panel Member



- Reviews the evidence file, final investigation report, and responses of the parties
- Considers what is missing, what is unclear, and what elements are disputed
- Asks relevant questions at hearing, adjusting as other questions are asked
- Is neutral in both the manner they act and the questions they asked

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Hearing Panel Member: Your Goal



- Have enough information on every element of every charge so that you can render a decision by a preponderance of the evidence
- Have enough information to make decisions regarding the credibility of the parties and witnesses
- Make relevancy determinations after every question asked by the advisors
- Maintain decorum at all times, by all participants

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Role: Advisor



- Reviews the evidence file, final investigation report, and responses of the parties
- Assists their party with preparation of relevant questions for hearing
 - Goals is to assist the Decision-Makers with understanding the case from their party's perspective
- Asks relevant questions at hearing, adjusting as other questions are asked
- Is not neutral, as the role is inherently biased towards their party, but still maintains decorum standards at all times

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Advisors: Your Goal



- The role of the advisor is to help the Panel understand your party's perspective by:
 - Highlighting important evidence to help your party prove that the elements are met/not met
 - Highlighting discrepancies in the evidence that disprove the other party's story
 - Highlighting credibility issues of the other party and witnesses where they are testifying against your party

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What Don't You Know?



- Hearing Officers: If you need to know it to make a determination, you have the obligation to ask the question.
- Advisors: If you don't know the answer to the question before you ask it, it may harm your party. Weigh the benefits of asking carefully before proceeding.

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What DO You Know?



- Hearing Officers: It can be helpful to ask questions when you think you already know the answer, to ensure that you are able to sequence events correctly and that you understand nuances in the testimony.
- Advisors: If the testimony is going to help tell your party's story, it can be helpful to bring it to the forefront of the Hearing Officer's mind.

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Disputed Facts?



- Hearing Officers: Question on disputed facts so that you can weigh credibility, make a determination, and explain your rationale.
- Advisors: Highlight areas for the Hearing Officer where the other party's story doesn't make sense by asking questions to discredit the witness, or to provide corroborating evidence for your party's story.

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Make Your Plans



- Hearing Officers:
 - What facts do you wish to nail down?
 - What disputed points do you need information on?
 - Who will cover which topics?
 - Which questions will be asked?
- Advisors:
 - Use this discussion to help frame your questions. What key points do you think need to be addressed to highlight your party's story?
 - What information is most critical of your party's story, and what can help highlight the weaknesses in that information as compared to the strengths in your information?

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For Today: Pick a Goal



- Consider choosing a goal for yourself to try to reach through questioning:
 - Advisor: “By questioning Roxy, I will try to show that she was feeling guilty for not going out, to corroborate Matthew’s story.”
 - Hearing Officer: “In questioning Matthew, I will try to better understand what the relationship was like between April 8th and their breakup.”
 - Etc.

Coordinate with team members to make sure you are covering all needed areas.

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Remember: Credibility Factors



- Credibility is determined based on a “totality of the circumstances.” Factors to consider:
 - Witness statements
 - Detail and consistency of accounts
 - Corroborating evidence or the lack thereof, if it should logically exist
 - Information about how the reporting person acted following the incident, both immediately and over time
 - Information about whether the complainant told others about the incident soon after it occurred
 - Other contemporaneous evidence of accounts
 - Credible reports of similar incidents by the respondent (careful here!)
 - Whether the reporting person has been shown to make false reports (again, careful here!)

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Mock Hearing

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Credibility Determinations and Deciding the Case

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Credibility, 2001 Guidance Style



- The guidance was rescinded but the list of factors to consider is still relevant:
 - Level of detail and consistency of accounts
 - See if corroborative evidence is lacking where it should logically exist
 - Pattern of behavior by the respondent
 - Evidence of the complainant's reaction or behavior after the encounter*
 - Evidence of whether the complainant took action to protest the conduct soon after the alleged incident*
 - Other contemporaneous evidence – writing a journal, telling a friend

*The Department noted that counterintuitive responses and delayed reaction may be normal.

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Preamble Considerations



Weighing the Evidence in Title IX Cases (and beyond?)

The Preamble identifies the following considerations:

- That parties may benefit from the opportunity to challenge the opposing party's "consistency, accuracy, memory, and credibility so that the decision-maker can better assess" the narrative to be believed. (Preamble, 30315).
- That parties may direct the decision-maker's attention to "implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility" in a party's statements. (Preamble, 30330).

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Quality Versus Quantity



Weighing the Evidence

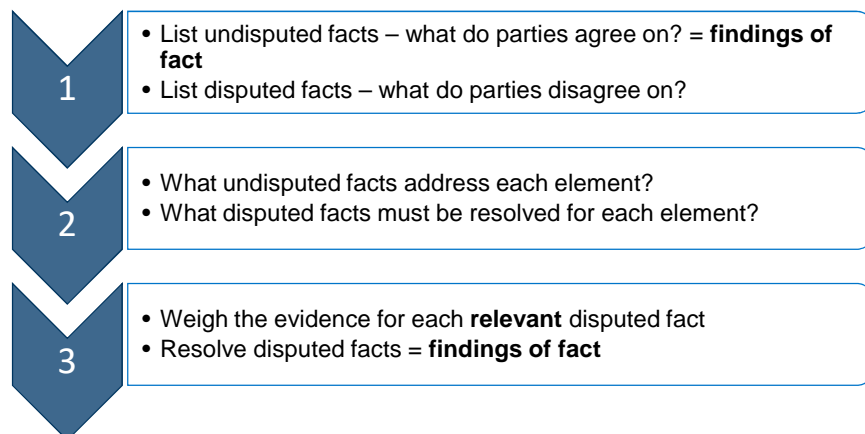
- It is the weight of the evidence, or its strength in tending to prove the issue at stake, that is important
- The quality of the evidence is not determined by its quantity
 - Don't compare 1 witness to 3 witnesses and make assumptions
 - Quantity *can* be a factor, but it should not be automatic

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Resolving Factual Disputes



• Fact Finding Process:



Resolving Factual Disputes



Fact Finding Process Step 1:

- Undisputed vs. Disputed Facts
 - List undisputed facts
 - What do parties agree on? = **findings of fact**
 - List disputed facts
 - What do parties disagree on?
-

Resolving Factual Disputes



Fact Finding Process Step 2:

- How do the facts fit the elements?
 - What **undisputed** facts address each element?
 - These will be findings of fact that **MUST** be included
 - What **disputed** facts must be resolved for each element?
 - Resolve in next step
 - These will be findings of fact that **MUST** be included

Resolving Factual Disputes



Fact Finding Process Step 3:

Resolve remaining factual disputes:

- Weigh the evidence for each **relevant** disputed fact
 - Remember the funnel – your list of relevant disputed facts should be pared down by this point

What Goes ON the scale?



Weighing the Evidence in Title IX Cases

- What goes on the scale?
 - Relevant Information
 - Per the most current ED guidance, statements do not have to be tested by cross-examination in order to be considered
 - Remember that a lack of information may affect its weight

What DOESN'T Go On the Scale?



Weighing the Evidence in Title IX Cases

- What doesn't go on the scale?
 - Rape Shield
 - 34 C.F.R. § 106.45(b)(6)(i)
 - Legally Privileged Information
 - 34 C.F.R. § 106.45(b)(1)(x)
 - Treatment Records
 - 34 C.F.R. § 106.45(b)(5)(i)

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#1 Keep An Open Mind



- Keep an open mind until all statements have been tested at the live hearing
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all of the evidence AND consider only the evidence that can remain (statements in the record might have to be removed from consideration if not tested in live-hearing)

#2 Sound, Reasoned Decision



- You must render a sound, reasoned decision on every charge
- You must determine the facts in this case based on the information presented
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence

#3 Consider All/Only Evidence



- You must make a decision based solely on the relevant evidence obtained in this matter and only statements in the record that have been tested in cross-examination
- You may consider nothing but this evidence

#4 Be Reasonable and Impartial



- You must be impartial when considering evidence and weighing the credibility of parties and witnesses
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party
- Identify any actual or perceived conflict of interest and consider whether recusal is appropriate

#5 Weight of Evidence (1 of 2)



- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the weight of the evidence, or its strength in tending to prove the issue at stake that is important.
- You must evaluate the evidence as a whole based on your own judgment.

#6 Evaluate Witness Credibility (1 of 3)



- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.

#6 Evaluate Witness Credibility (2 of 3)



- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

#6 Evaluate Witness Credibility (3 of 3)



- Credibility is determined fact by fact, not witness by witness
 - The most earnest and honest witness may share information that turns out not to be true

#7 Draw Reasonable Inferences



- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning.

#8 Standard of Evidence (1 of 2)



- Use the your standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.
- Preponderance of the evidence: a fact is more likely than not to be true (30373 fn. 1409)

#8 Standard of Evidence (2 of 2)



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

#9 Don't Consider Impact



- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.
- **Do not consider the impact of your decision.**

Even Weight Distribution



Weighing the Evidence

If nothing tips the scale:

- No finding of violation
- Remember your standard of evidence
 - Preponderance of the Evidence

After the Hearing

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Required Parts



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

Our Typical Outline



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

Appeals

Bases for Appeal at Lynn



1. There was an alleged procedural irregularity that affected the outcome;
2. There is new evidence that was not reasonably available at the time of the determination or dismissal was made, that could have affected the outcome (a summary of this new evidence and potential impact must be included)
3. The Title IX Coordinator, Investigator, or Hearing Officer(s) had a conflict of interest or bias that affected the outcome; or
4. The sanction(s) imposed is/are excessive or inconsistent with the nature of the offense.

Process Requirements



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

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

Procedural Issue?

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

New Evidence?

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

Conflict of Interest or Bias?

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

You Are Deciding the Appeal



- Melissa will deliver the appeal based the decision reached by the workshop participants
- How does your group decide on each?
- Refer to the previous slides for reminders on the standard.

Written Appeal Decision




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

Last Thoughts



- Thanks to all our volunteers today!
- Catch our free “What You Missed This Summer” webinar on August 17th at noon – www.bricker.com/events

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