

Title IX Training

University of
Tennessee System
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Disclaimer

- This training does not constitute legal advice.
- While I am happy to answer questions seeking clarity or addressing hypotheticals, I cannot give legal advice in this context.
- Please consult with your excellent legal counsel for advice on any particular situation.

Permission to Post

- You have permission to post these slides on your website as required by 34 C.F.R. 106.45(b)(10)(i)(D).

Agenda

- Themes of Title IX
- Sexual Harassment and Title IX – An Overview
- What Happens When Conduct Is Reported?
 - Intake
 - Formal Complaint
 - Informal Resolution
 - Formal Resolution
- Investigations
- Hearings
- Appeals

But First... An Icebreaker

- What is something you remember from your childhood that would be completely foreign to your incoming first-year students?

Themes of Title IX

Themes of Title IX

- Compliance
- Integrity
- Ethic of Care
- Neutrality
- Transparency

Compliance

- Title IX – 20 U.S.C. 1681 et seq.
- Regulations – 34 C.F.R. Part 106 (2020 version)
- Clery Act and Regulations – 20 U.S.C. 1092(f); 34 C.F.R. 668.46
- U.S. Department of Education Non-Regulatory Guidance
- U.S. Supreme Court Case Law
- U.S. Circuit Court of Appeals – 6th Circuit
- U.S. District Courts for Tennessee
- Occasionally, your state courts
- **Start with compliance.**

Integrity

- Yes, you personally require integrity, but that's not what I'm talking about!
- **Follow your policy. Follow your process.**
- You should be able to point to the part of the policy you are following.
- You should continually refer to the policy.
- When you provide updates, tell the parties what part of the policy you are on, and what you are doing next.
- The policy should be your guide.

Ethic of Care

- No policy can provide an answer for every possible situation.
- When your policy is silent, you should be guided by your ethic of care—the underlying values that drive your institution and the way your campus community is treated.
- Your ethic of care also involves supporting the parties, before, during, and after any formal process.
- **“They are all our students.”**

Neutrality

- The policy doesn't put a finger on the scale, and neither should you.
- All Title IX team members (except for advisors) are expected to be neutral throughout the process.
 - No bias for or against complainants or respondents generally
 - No bias for or against a particular complainant or respondent
 - No conflicts of interest that would tilt your findings in one direction or another
- How do you stay neutral?
 - Stay curious. Don't make a determination until the last bit of evidence has passed through your fingertips.
 - Stay supportive.
 - Stay human.
- The biggest risk in terms of liability is to decide how the case "should" come out, instead of relying on the evidence.

Transparency

- “If the parties don’t hear from you, they will assume you are doing nothing or actively working against them.”
- The regulations require evidence to be shared equitably. What does this mean?
- We make sure parties know they have the right to an advisor, and we encourage them to bring one.
- We don’t do things by ambush.
- At the end of the process, even if the parties aren’t satisfied with the ultimate outcome, we want them to feel heard.

Title IX Coverage

Title IX – Statutory Language

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...” 20 U.S.C. 1681(a).

Exceptions include Greek organizations, YMCA/YWCA, scouts, Boy/Girl Conferences, separate living facilities, etc.

When Does Title IX Apply?

“Education Program or Activity”- for purposes of Title IX generally, means everything your institution does. 20 U.S.C. 1687(A)(2)(A).

For purposes of adjudicating Sexual Harassment, it includes:

- Locations, events, or circumstances over which your institution exercised substantial control over both the respondent and the context in which the sexual harassment occurs
- Also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution

34 C.F.R. 106.44(a).

Scope of Program - Hypotheticals

What if the misconduct happened...

- On campus?
- On campus between two unaffiliated individuals attending a sporting event?
- On a team bus traveling to an away game?
- At an off-campus Greek house?
- At an off-campus annex of a fraternity?
- On the public sidewalk at the edge of your campus?
- During a study abroad trip in Sweden?
- Between two employees?
- Between a resident and a doctor at an academic medical center?
- Between a student and a patient at a third-party clinical placement?

Definitions

A Quick Note

Use your policy definitions, not criminal definitions, to help avoid any appearance of predetermination.

- **This**

- Complainant
- Respondent
- Responsible
- Not Responsible

- **Not This**

- Victim/Survivor
- Perpetrator
- Guilty
- Innocent/Not Guilty

What is Sexual Harassment?

- Quid Pro Quo
- Unwelcome Conduct on the Basis of Sex
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

See 34 C.F.R. 106.30.

Quid Pro Quo

- An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.

Unwelcome Conduct on the Basis of Sex

- Unwelcome conduct [on the basis of sex] determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.
- Note: **Impact** on the complainant is an element of this type of sexual harassment.

Sexual Assault

- An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation:
 - Forcible
 - Rape
 - (Sodomy)
 - (Sexual Assault with an Object)
 - Criminal Sexual Contact (Fondling)
 - Nonforcible
 - Incest
 - Statutory rape

Rape

- Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, or by a sex-related object. This definition also includes instances in which the [Complainant] is incapable of giving consent because of temporary or permanent mental or physical incapacity (including due to the influence of drugs or alcohol), or because of age. Physical resistance is not required on the part of the victim to demonstrate lack of consent.

[Criminal] Sexual Contact

- The intentional touching of the clothed or unclothed body parts without consent of the [complainant] for the purpose of sexual degradation, sexual gratification, or sexual humiliation.
- The forced touching by the [complainant] of the [respondent's] clothed or unclothed body parts, without consent of the [complainant] for the purpose of sexual degradation, sexual gratification, or sexual humiliation.

Incest

- Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- In Tennessee, see TN Code 36-3-101.

Statutory Rape

- Nonforcible sexual intercourse with a person who is under the statutory age of consent.

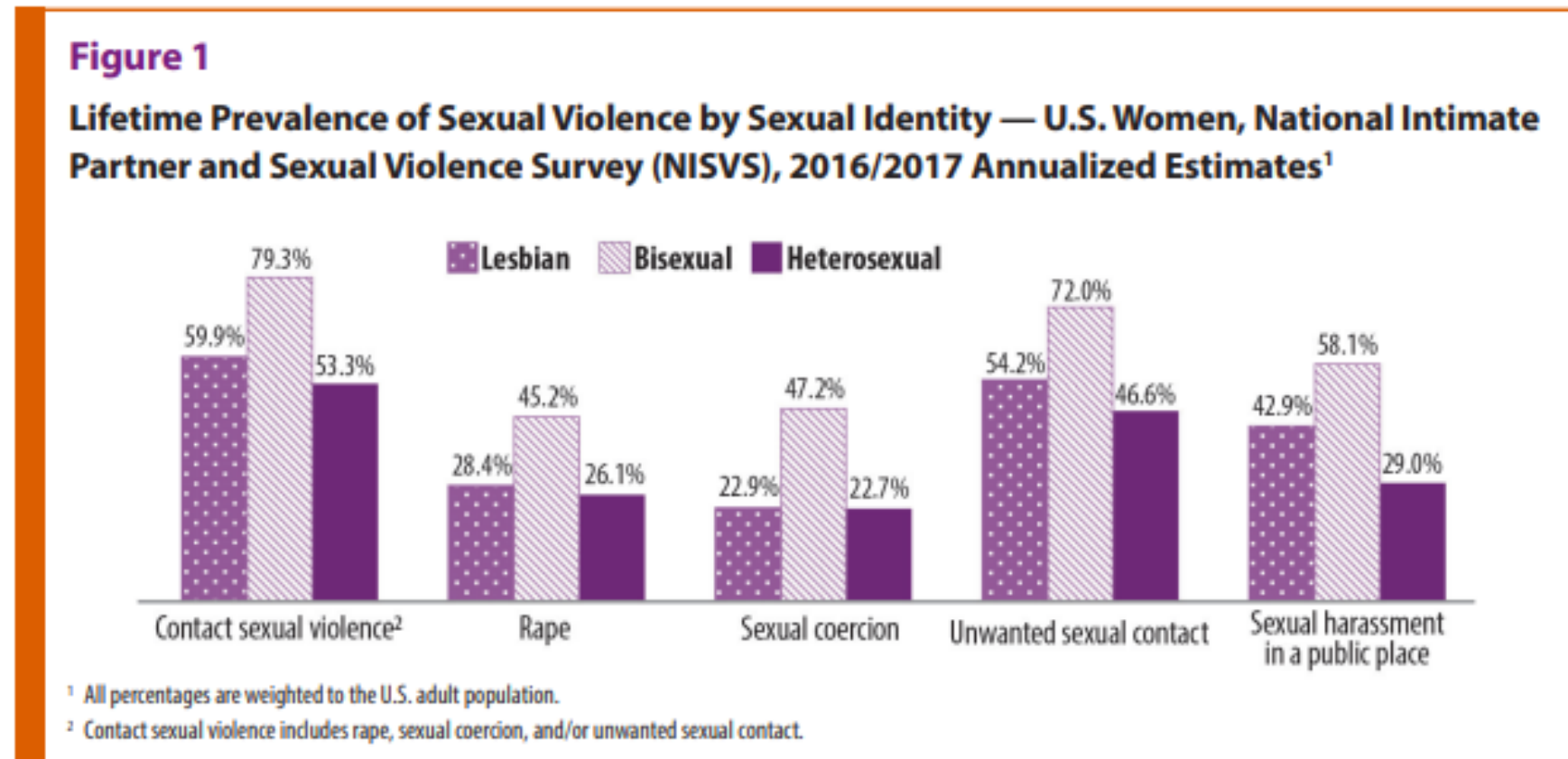
Sexual Assault Hypos

- Assuming no consent, do the following activities count as sexual assault?
 - Kissing
 - French kissing
 - Grinding on a dance floor
 - Slap on the butt on the way out to the football field
 - Slap on the butt on the way onto the dance floor
 - Mouth-to-vagina oral sex

Sexual Assault Data

- More than half of women and nearly 1 in 3 men have experienced sexual violence involving physical contact during their lifetimes.
- One in four women and about one in 26 men have experienced completed or attempted rape.
 - More than four in five female rape survivors reported that they were first raped before age 25, and almost half were raped as a minor.
 - Nearly eight in 10 male rape survivors reported they were made to penetrate someone before age 25 and about four in 10 were first made to penetrate as a minor.
- About one in nine men were made to penetrate someone during his lifetime.
- Data: CDC, “About Sexual Violence” Website (last visited Aug. 2025)

By Sexual Identity (U.S. Women)

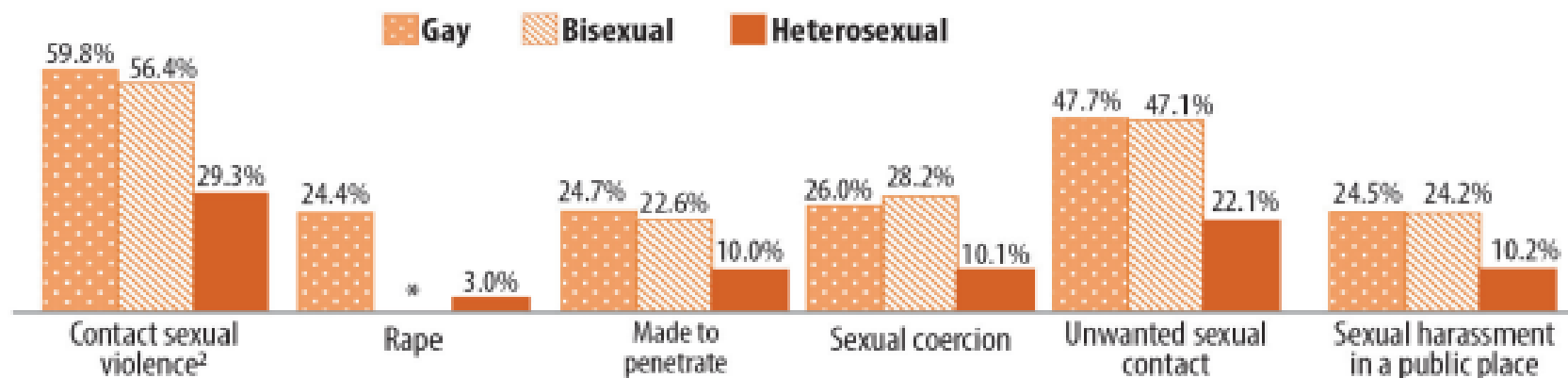


Statistics from: *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Identity*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited Aug. 2025), located at: <https://www.cdc.gov/nisvs/documentation/nisvsReportonSexualIdentity.pdf>

By Sexual Identity (U.S. Men)

Figure 2

Lifetime Prevalence of Sexual Violence by Sexual Identity — U.S. Men, National Intimate Partner and Sexual Violence Survey (NISVS), 2016/2017 Annualized Estimates¹



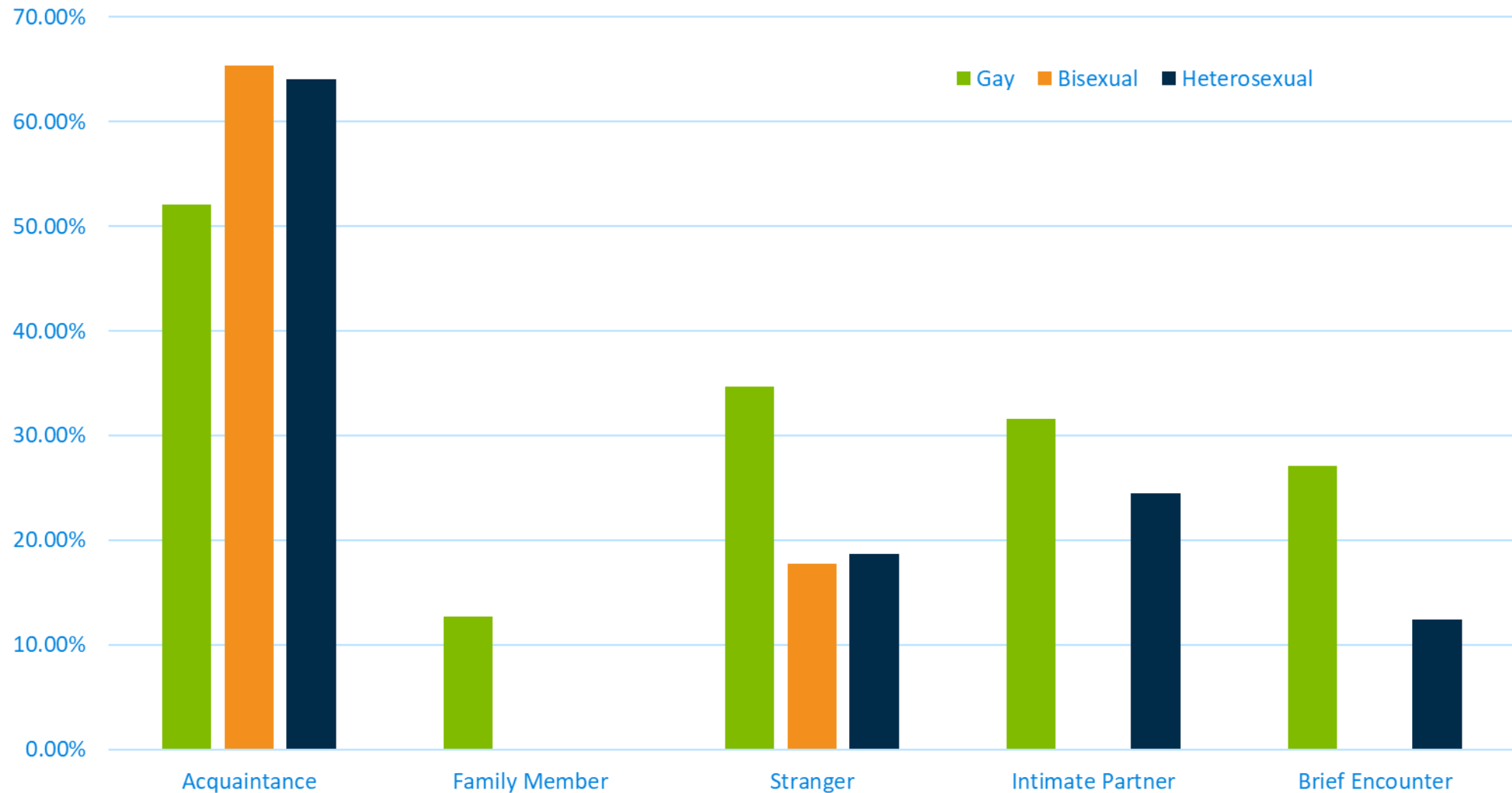
¹ All percentages are weighted to the U.S. adult population.

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

* Estimate is not reported; relative standard error > 30% or cell size ≤ 20.

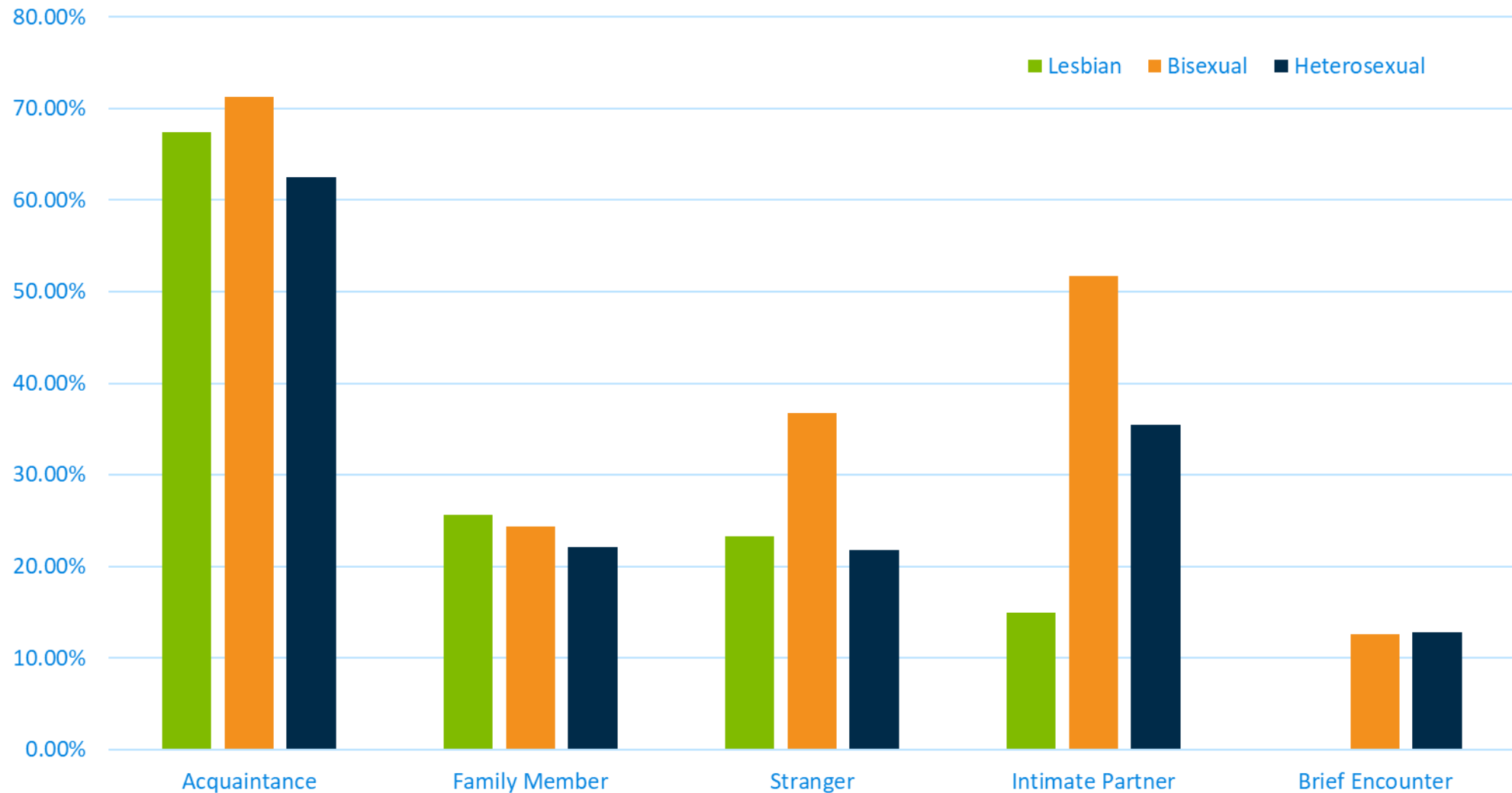
Statistics from: *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Identity*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited Aug. 2025), located at: <https://www.cdc.gov/nisvs/documentation/nisvsReportonSexualIdentity.pdf>

Identity of Perpetrators – Male Victims



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

Identity of Perpetrators – Female Victims



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

Sexual Assault Data: Timing

- More than 50 % of college sexual assaults occur in August, September, October, or November, and students are at an increased risk during the first few months of their first and second semesters in college.
- For the 2014-2015 academic year, a large portion of incidents reported by females occurred in September or October, particularly for first year students.
- Statistic one: “Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*.” RAINN Sourced from: “Campus Sexual Assault Study, 2007; Matthew Kimble, Andrada Neacsiu, et. Al, *Risk of Unwanted Sex for College Women: Evidence for a Red Zone*, Journal of American College Health (2008).”
- Statistic two: Campus Climate Survey Validation Study (CCSVS), 2015

Sexual Assault Data: Alcohol/Drug Use

- “About half of sexual assaults involve survivors drinking alcohol before the assault.”
- “Survivors impaired by alcohol are more likely to disclose to informal, but not formal support sources than are non-impaired victims.”

Lorenz, Katherine, and Sarah E Ullman. “Exploring Correlates of Alcohol-Specific Social Reactions in Alcohol-Involved Sexual Assaults.” *Journal of aggression, maltreatment & trauma* vol. 25,10 (2016): 1058-1078.
doi:10.1080/10926771.2016.1219801.

Sexual Assault: Reporting Statistics

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).

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

- Violence committed by a person:
 - Who is or has been in a social relationship of a romantic or intimate nature with the [complainant]; and
 - Where the existence of such a relationship shall be determined based on a consideration of the following factors:
 - The length of the relationship.
 - The type of relationship.
 - The frequency of interaction between the persons involved in the relationship.
- Question: Is it possible to have dating violence that is not on the basis of sex?

Domestic Violence

- Felony or misdemeanor crimes committed [on the basis of sex] by a current or spouse or intimate partner of the [complainant] under the family or domestic violence laws of the jurisdiction , by a person who:
 - Is a current or former spouse or intimate partner of the [complainant], or person similarly situated to a spouse of the [complainant];
 - Is cohabitating, or has cohabitated, with the [complainant] as a spouse or intimate partner;
 - Shares a child in common with the [complainant]; or
 - Commits acts against a youth or adult [complainant] who is protected from those acts under the family or domestic violence laws of the jurisdiction.

IPV vs. Healthy Relationships

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

Common Concerns in IPV Situations

- Supportive measures are important to ensure the parties can be separate and feel safe, but defining the protective bubble can create risk
- 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
- It is not uncommon for both parties to be complainants and respondents. Watch for this scenario and ensure you provide appropriate intake for both.

Stalking

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for his or her safety or the safety of others; or
 - Suffer substantial emotional distress.

Stalking – Additional Definitions

- Course of conduct means two or more acts, including, but not limited to, acts in which the [respondent] 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.
- Reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.
- Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

(Borrowed from 34 C.F.R. 668.46 Clery Act definitions)

Stalking Data

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

1 in 3 women and 1 in 6 men have been stalked at some point in their lives.

Nearly 58% of female victims and 49% of male victims experienced stalking before the age of 25.

- First statistic: U.S. Department of Justice, Bureau of Justice Statistics, “Stalking Victimization, 2019” published February 2022.
- Second and third statistics: CDC “About Stalking” fact sheet, accessed August 2025

Stalking – Common Concerns

- Those who experience stalking often report fearing not knowing what will happen next.
- 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.

Title IX Jurisdiction

Behavior + “The Box”

- In order to fall under the Title IX grievance process, you must have a behavior that fits into the “Title IX Box”:
 - Must constitute sexual harassment if proved
 - Must have occurred in the recipient’s education program or activity
 - Must have occurred against a person in the United States
 - Formal Complaint must be filed while the complainant is participating in or attempting to participate in the education program or activity of the recipient
- What happens to behavior that doesn’t fit inside the Box?

Offramps

- If behavior doesn't fit into the Box, it is often something that will still be addressed by your institution through another process:
 - Student conduct of conduct
 - Employee disciplinary procedures
 - Faculty manual
 - Collective bargaining procedures
 - No trespass orders
 - Etc. **CHECK YOUR POLICY!**
- Note: If a case deals with behavior that is both inside and outside the box, the case must receive Title IX procedural protections. 34 C.F.R. 106.71.

In the Box? Hypos

- Sexual harassment occurs:
 - In Complainant's residence hall room
 - In Respondent's residence hall room; Complainant is not affiliated with the institution
 - Between employees who are driving to Staples to get office supplies while on the clock
 - Between faculty members attending an off-campus department holiday party
 - Between student health center staff attending a work-related conference in Utah
 - At Respondent's home in California over the summer; Complainant is a recent graduate who did not report until after graduation
 - At Respondent's home in Jamaica the week after Complainant and Respondent enrolled but before they began attending classes

Reporting Sexual Harassment

Reporting Sexual Harassment

- Who: Complainants, respondents, third parties – to the Title IX Coordinator
 - Institutions can choose which employees are required to report and which employees are confidential resources
- When: We encourage reporting as soon as possible, but delays are common
- How: Preferably, in writing, but reports can be submitted by phone or in person
 - Anonymous reports may limit the institution's ability to respond

What Happens When A Report Is Made?

- Outreach from a member of the Title IX team:
 - Link to the policy
 - Offer to speak about options
 - Availability of supportive measures
 - Prohibition on retaliation
- How many times does your campus do outreach?

Intake

Intake Meetings with Complainants

- Information about the resolution process
- Discussion of Title IX jurisdiction
- Potential discussion of definitions
- Information about the interactions between the parties
- Supportive measures
- Protection from retaliation
- “I need to provide you with information, and it would be helpful for you to provide me with information. Would you like me to talk about the process first? Or would you like to share your concerns with me first? Either is fine, and if you can’t decide, I’m happy to help.”

Initial Assessment

- Goal: Get enough information to determine if they are speaking to the right office.
 - Sexual Harassment?
 - Title IX Box vs. Offramp?
- If the person wishes to move forward with a Formal Complaint, what are the appropriate charges?

What is Trauma?

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

Trauma and Its Effects

- Trauma can affect the way an individual responds in the moment while an incident is occurring
- Trauma can affect the way an individual encodes memories while an incident is occurring
- Trauma can affect the way an individual decodes memories when trying to relate what happened

Intake: Being Trauma-Informed

- Encourage them to bring an advisor.
- Limit the number of times a person is required to tell their story. Initial assessment doesn't require all the details.
- Offer autonomy whenever possible.
- Take breaks when needed.
- If the meeting is in person, have water, snacks, and tissues available.
- Take excellent notes and give the person the opportunity to review and suggest revisions after the meeting.
- Document what is discussed and send it in a follow-up email to the person.

Supportive Measures

- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available, and without fee or charge
- Available before or after the filing of a formal complaint or where no formal complaint has been filed
- Designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party
- Includes measures designed to protect the safety of all parties or the educational environment, or deter sexual harassment
- Kept confidential except as necessary to provide the support

Supportive Measures: Examples

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- Other similar measures

Protection from Retaliation

- Protecting parties and witnesses from retaliation is important to ensure the integrity of the process
- Retaliation means intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege under Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX
- Many policies will offramp retaliation allegations; check your policy!

Options to Discuss

- Make a report
 - Title IX
 - Law enforcement (if potentially criminal)
 - Both or neither
- Get supportive measures
- Formal Complaint
 - Informal Resolution
 - Formal Resolution
- Does any other policy apply?
- The choice that you make now can change later.

Intake for Respondents?

- Yes – this typically occurs once Respondents are aware of the situation. (They are not usually notified until a no-contact order or notice of allegations is issued.)
- What is the difference between intake for complainants and respondents? There isn't any difference!
 - Respondents may have experienced trauma as a result of the same incident.
 - Respondents may have prior trauma that affects the way they respond to this incident.
 - Respondents may have claims against the Complainant for sexual harassment.
 - Respondents may have claims that can be reported to law enforcement.
 - Etc.

Formal Complaints

Formal Complaints

- Document is filed by a complainant or signed by a Title IX Coordinator
- Alleges sexual harassment against a respondent
- Requests that the recipient investigate the allegation of harassment
- At the time of the filing of the formal complaint, the complainant must be participating in or attempting to participate in an education program or activity of the recipient
- Can be filed with the Title IX Coordinator in person, by mail, by e-mail, using the contact information in the policy, or by any other method established by the recipient

Filed by Title IX Coordinator?

- Check your policy for guidance on when to move forward even if the complainant does not wish to file a complaint
- Most commonly this is done at the complainant's request to help them avoid retaliation
- Other factors to consider might include:
 - Behavior is particularly severe
 - Behavior was caught on camera
 - Allegations are against an employee
 - Complainant is willing to participate in process
- Note: The Title IX Coordinator is not the complainant!

Formal Complaint Process: Overview

- Formal Complaint
 - Dismissal
 - Investigation and Hearing
 - Informal Resolution

Dismissal

- **Mandatory:**
 - Does not constitute sexual harassment even if proven
 - Did not occur within the education program or activity
 - Did not occur within the United States
- **Discretionary:**
 - Complainant withdraws the complaint in writing
 - Respondent is no longer enrolled or employed by the institution
 - “Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein”
- Dismissal typically means the case is off-ramped to another procedure, but this can be confusing to parties.

Informal Resolution

- Must be voluntary by the parties and cannot be required
- Cannot be offered until a formal complaint is filed
- Can be offered any time after the formal complaint is filed and before a determination is reached
- Is not required to be offered in any case
- Cannot be offered for allegations that an employee sexually harassed a student

Informal Resolution: Notice

- Both parties must receive a notice that includes:
 - The allegations
 - The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations
 - Any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
 - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared

Informal Resolution: Consent

- Both parties must provide voluntary written consent to the informal resolution process

Informal Resolution: Agreement

- Informal resolution, if successful, should result in a signed written agreement that resolves the allegations in the formal complaint.
- What will it take for the parties to be able to move forward from this situation?
- In a stalking case, what happens if Respondent continues with a course of conduct?
- In a quid pro quo or unwelcome conduct case, what happens if Respondent continues the behavior?
- How can the agreement be enforced?

Informal Resolution: Agreement

- Informal resolution, if successful, should result in a signed written agreement that resolves the allegations in the formal complaint.
- What will it take for the parties to be able to move forward from this situation?
- In a stalking case, what happens if Respondent continues with a course of conduct?
- In a quid pro quo or unwelcome conduct case, what happens if Respondent continues the behavior?
- How can the agreement be enforced?

Formal Complaint: Starts with Notice

- Provided to both parties in writing
- Includes:
 - Allegations of behavior potentially constituting sexual harassment
 - Sufficient details known at the time, including identities of the parties, conduct that was reported to constitute sexual harassment, date, and location
 - Respondent is presumed not responsible for the alleged conduct and a determination of responsibility will be made at the conclusion of the grievance process
 - May have an advisor of choice who may be but is not required to be an attorney
 - May inspect and review evidence
 - Provision in the recipient's code of conduct that prohibits making false statements or knowingly submitting false information during the process
- Must be amended if new allegations of sexual harassment surface

Investigations

Investigation: Role of the Coordinator

- Ensure compliance with the policy
- Answer process questions
- Track the case to ensure it is moving forward appropriately
- Continue to provide supportive measures, the need for which may change over time
- Monitor case to determine whether additional allegations should be added to the Notice of Allegations
- Assist external investigators in obtaining information from other parts of the institution where appropriate

Investigation: Role of the Investigator

- Offer the parties an opportunity to sit for an interview, suggest witnesses, provide evidence, and suggest questions for witnesses
- Interview witnesses
- Gather evidence from the parties and witnesses as they may be willing to provide it
- Gather evidence from other sources: surveillance footage, card swipes, class schedules/rosters, grades, medical/counseling records (with written consent from the patient for use in the Title IX case), police records, court proceedings
- Prepare an investigative report that fairly summarizes the relevant evidence gathered
- Stay curious – predetermining a case will result in asking fewer questions than necessary to gather all relevant evidence!

Investigation: Role of the Advisor

- Support your party
- At the discretion of your party:
 - Attend interviews and meetings
 - Help your party think about witnesses and any questions they should be asked
 - Help your party think about what evidence might be relevant
 - Remind your party about the availability of supportive measures if they need them

Initial Outreach

- Introduction
- Advisor of Choice
- Scheduling an interview (complainant only, for now)
- Start thinking about evidence, witnesses, questions you may want asked
- Remember: supportive measures, no retaliation

Preparing for an Interview

- Bring with you:
 - Policy
 - Notice of Allegations
 - Formal Complaint
 - Any evidence provided to you in advance
- What questions must you ask regarding each element of the policy violations that are alleged?
 - Do not forget to ask about impact!
- In person: snacks, water, tissues.
- If you are not recording, plan to take prodigious notes.

Interview Format

- Reminders
- Monologue
- Follow-up questions
- Sensory specific questions
- Reflection and paraphrasing

Reminders

- Who are you, and what is your role?
- Do you make a decision in this case?
- What happens to the information they give you today?
- Who will see what they say today?
- After they talk to you, is there more to the process?
- Retaliation protections

Monologue

- “Do you know what I called you in to speak about today?”
- “Where do you feel comfortable starting?”
- “What happened next?”
- “And then what happened?”
- “Tell me more about that.”

Follow-Up Questions

- Establish a chronology
- Get more details
- Explore evidence and witness regarding particular portions of the incident
- Clarify things that were unclear during the monologue
- Get a good understanding of where things happened, room layout, building layout, etc.
- If you were a camera in the room, could you describe what you saw?

Sensory Specific Questions

- Sensory questions can be helpful when a person is having difficulty recalling a particular portion of an interaction.
- What did you see, hear, taste, smell, or feel?
 - Where were your arms?
 - Where was their body weight?
 - Could you feel anything on your legs?

Reflections and Paraphrasing

- Reflect information back to the person to make sure you understand it.
 - This is particularly helpful for establishing a chronology.
- Paraphrase what they have said and see if they agree. If they don't, it suggests that you have more questions to ask so that your understanding is complete.

Relevance

- Does it help to better understand what happened and the context surrounding it?
- Does it help to better evaluate credibility?
- Is it permissible? (Impermissible evidence is not relevant.)

Impermissible Topics

- Complainant's sexual predisposition or prior sexual behavior, unless such questions and evidence:
 - Are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- Privileged information, where such privilege has not been waived by the holder. (Example: Attorney-client privileged information)
- Medical or counseling records for which the patient has not signed specific consent for the records to be included in the evidence for the case

Using Relevancy To Guide An Investigation

- What do you do if someone hands you irrelevant evidence?
- What do you do if someone wants you to gather evidence and you don't know if it is relevant?
- What do you do if someone asks you to interview a witness and you don't know how they could be relevant?

Questions about Verbal Consent

- Before that started, was there any conversation about it?
- Did they ask you if you wanted to do that? Did you ask if you could do that?
- Did they tell you they were going to do that? Did you tell them you were going to do that?
- Did they say anything in response?
- Was there any conversation while it was occurring?
- Did you say anything to them? Did they say anything to you?
- Did they say [whatever they alleged they said]?
- Did you say [whatever they alleged you said]?

Questions about Non-Verbal Consent

- When they started to do that, how did you respond?
- When you started to do that, how did they respond?
- When they started to do that, did you move your body in any way?
- When you started to do that, did they move their body in any way?
- Did you move your body to help them do that?
- Did they move their body to help you do that?
- How did they know they liked what you were doing?
- How did you show you didn't like what they were doing?
- Did it seem like they were into it? Why or why not?
- Was there any kissing during this? Were they kissing you back?
- Who was controlling the speed of what was happening?

Questions about Positioning

- How were you positioned? How were they?
- While they were on top of you, where was their body weight?
- Where were your arms, legs, hands, head? Where were theirs?
- Were the lights on or off? Could you see their facial expressions?
- Did you change positions at all? How did you get from one position to the next?
- Were you still wearing clothes? What clothes had been taken off? Do you remember how and when they came off?

Questions about Alcohol/Drugs

- Reason for asking + amnesty reminder
- Had you consumed alcohol or drugs? When? How much? Over what period of time?
- Had you eaten? If so, what, when, and how much?
- Were you taking any medication that interacted with alcohol/drugs? What effect does that medication typically have on you, if you know?
- Can you describe the impact the drugs/alcohol had on you at that point in the evening?
- Do you think that alcohol/drugs played a role in what you can remember from that night? Why?

Questions about Intoxication

- Did the person appear to be intoxicated? How did you know?
- Was the person unconscious at any point?
- Did the person vomit?
- Was the person's speech slurred? Could you understand them?
- Were they able to walk and balance? Did they need help walking?
- Did they seem confused about who they were with, what they were doing, or where they were?
- Were you worried about them?
- Was the person able to text and use their smartphone?
- Was the person able to pour their own drinks?
- Was the person able to remove their own clothing?
- What clues did you see that made you believe that the person was not intoxicated?
- Did Respondent see Complainant [describe symptom of intoxication]?

Investigators: Being Trauma Informed

- Remember your ABCs: Advisor, Breaks, Comfort
- Be curious, not judgmental.
- If you sense a question may be misread, explain why you are interested before you pose the question.
 - What were you wearing?
 - Had you been drinking or doing drugs?
- Not asking the difficult questions now may make the process harder down the road.
- If information doesn't make sense, ask more questions.

Mock Interview: Complainant

Evidence Review and Investigative Reports

Evidence Review

- Once the investigator feels that the relevant evidence has been gathered, the parties are offered the chance to review it
- They got 10 days to provide a written response
- Investigator then can conduct more follow-up if necessary
- Investigator prepares a written report that fairly summarizes the relevant evidence
- Parties have ten days to review and provide a written response that will go to the hearing officer

Contents of an Investigative Report

- Check your policy for any requirements
- Typically include
 - Procedural History
 - Notice of Allegations
 - Policy language at issue (in place at the time of the reported conduct)
 - Who was interviewed? Who wasn't interviewed (and why)?
 - What evidence was collected? What wasn't collected (and why)?
 - Was any evidence collected that wasn't relevant and is therefore not summarized? Why?
 - Any procedural disputes? How were they addressed?
 - Summary of relevant evidence collected
 - Appendix including interview summaries/transcripts and evidence collected
- Do not include recommended findings!

Hearings

Hearings: Role of the Title IX Coordinator

- Ensure compliance with the policy
- Answer process questions
- Track the case to ensure it is moving forward appropriately
- Continue to provide supportive measures, the need for which may change over time
- Facilitate the simultaneous provision of decision to both parties

Hearings: Role of the Decision-Maker

- Review the file thoroughly, and stay curious. You won't have all the evidence until the end of the hearing, so don't make up your mind yet!
- Hold pre-hearing conferences (if part of your process – check your policy)
- Conduct hearing
 - Make relevancy determinations
 - Ask questions
- Prepare written decision using the appropriate standard of evidence to determine whether respondent violated the policy as to each charge in the Notice of Allegations
- May or may not assign sanctions – check your policy on how this works at your institution

Hearings: Role of the Advisor

- Support your party
- Attend pre-hearing conference (if part of the process)
- Attend hearing
- Say nothing at the hearing except to ask relevant questions of the other* party and witnesses from the perspective of your party
 - Help the decision-maker better understand things from your party's perspective
- Maintain decorum standards
- If your party wishes, they may want:
 - Assistance determining which witnesses to call
 - Assistance drafting questions
 - Assisting preparing an opening/closing statement (if permitted by policy)

Using Zoom for Hearings: Tips

- When setting up the Zoom link, ensure the waiting room is turned on.
- The parties and advisors will log into the hearing.
- Create breakout rooms: hearing officer, complainant/advisor, respondent/advisor, witness
- Admit each side separately to do a tech check, then assign to the correct breakout room and open the rooms.
- Close the breakout rooms and begin recording to the cloud.
- Make sure closed captioning is available for those who wish to use it.
- Pause recordings on breaks. (Stopping the recording creates multiple files.)
- Evidence can be shared on-screen by the hearing administrator or decision-maker.
- Witnesses should be let in only during their turn to testify, then they log off.
- Messages can be broadcast to the breakout rooms and waiting room if needed.

Pre-Hearing Conferences

- Some policies require them and some don't.
- Pre-hearing conferences can help reduce the anxiety of the parties/advisors and prepare better for the hearing.
- Use this time to explain the procedure, what to expect on the day of the hearing, and discuss witnesses they wish to call.
- Answer procedural questions and address procedural disputes.
- Separate vs. Joint pre-hearing conferences?

Asking Good Questions

- Hearing officers should try to ensure they have enough information on every element of every charge to make a decision.
- Be careful of rabbit holes. How is this relevant? How will this help evaluate credibility?
- Open-ended questions are helpful to give more context and detail.
- Close-ended questions are helpful to clarify ambiguities.
- Remember: if you don't ask it, no one will. This is the last opportunity to get the best evidence out on the table for consideration.

Challenging Questions

- “You told the investigator X, but today you said not X. Can you help me understand this?”
- “You said X, but the witness said Y. Can you help me understand why that might be?”

“Help me understand” is a great way to frame a neutral question that seeks to resolve disputed information.

Relevancy Determinations

- Must be made orally after every advisor-posed question.
- Options:
 - “Relevant”
 - “Can you help me understand why that’s relevant?”
 - “Not relevant.” (Give very brief explanation.)

Mock Hearing: Respondent

Reaching a Decision

What Goes Into Credibility?

- 2001 Revised Sexual Harassment Guidance (withdrawn) – page 9
 - Level of detail and consistency
 - Corroborative evidence is lacking where it should logically exist
 - Evidence that the respondent has been found to have harassed others
 - Evidence that the complainant has been found to have made false allegations against other individuals
 - Reaction after the incident
 - Complainant took steps to report the conduct soon after
 - Complainant writes down the conduct soon after it occurred
 - Complainant tells others about the conduct soon after it occurred

Boiling It Down

- **Plausibility** – Is the story possible, accounting for potential effects of trauma?
- **Consistency** – Is the story consistent over multiple retellings?
- **Corroboration** – Can the story be corroborated by other evidence?
- **Reliability** – Was the person in a good position to witness what they are sharing, and to remember it accurately?

Credibility is a determination that can be made statement by statement.
It is not necessary to call someone a liar to make a credibility determination.

Plausibility

- This is foundational. If it's not plausible, it can't be credible.
- Consider:
 - Body positions, relative height/weight
 - Distribution of body weight
 - Transition from one position to the other
 - Who was in control of the rhythm and movement
- Does it make sense, accounting for potential trauma? If not, is there anything that would make it make sense?

Plausibility – Bias Check

- “It’s not plausible because I wouldn’t have done that in this situation.”
 - You are using your own self as a standard by which you are measuring the evidence. Is this because you are the reasonable person, or is this an effect of bias?
- Be careful of substituting rape myths for plausibility analysis.
 - E.g. “They were in love, so it couldn’t be rape. That wouldn’t be plausible.”

Consistency - Considerations

- To whom is the telling?
 - Friend
 - Parent
 - Police
 - School authority
- What is the purpose of the telling?
 - To receive sympathy and support
 - To make a formal report
- In what mode is the listener?
 - Supportive
 - Investigating

Consistency - Concerns

- Is the telling getting more specific and detailed over time, and if so, why might that be?
- Are details that are inconsistent across retellings important, or are they minor in nature?
- Is the person leaving out information that would be reasonable to include in their retelling?

Consistency and Outcry Witness(es)

- Who is the first person that the party told?
- Under what circumstances?
 - Do those circumstances affect credibility? (Motive)
- More witnesses mean more chances to show consistency – or inconsistency.
 - In other words, these witnesses don't tell us whether the allegations are true. They tell us whether the party is credible in their retelling due to consistency.

Considering Consistency

- Look at the retellings in the order of earliest to latest.
- Is there a reasonable explanation for any differences?
- Does the story evolve over time into something else?
- 2020 Regulations Preamble: “Because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to **trauma**, the effects of **drugs or alcohol**, or **simple fallibility of human memory**.” 85 FR 30026, 30323 (May 19, 2020)

Corroboration

- Is there any objective evidence in this case? If so, what does it tell us?
- Are there any eyewitnesses to corroborate an assertion by a party?

Reliability

- How much time has passed?
 - Is there any reason this particular occasion might have “stuck out” to someone?
- Was the person intoxicated or high?
- Was the person in a position to observe the conduct?
- Has the person’s story been influenced by another party/witness, or by social situations?
- Does the person have a motive to lie?
- Does the person have special training such that their information might be given more weight on a particular point?

Reliability – Bias Check

- Are we assigning a reliability value based on the identity of the party?
 - Complainant vs. respondent
 - Status as a police officer or school administrator
- Are we assigning a reliability value based on a person's:
 - Alcohol/drug problems
 - Mental health issues
 - Cognitive/intellectual disabilities
 - Age
 - And if so – is that supportable under the circumstances?

Check for Other Bias

- Switch the race, sex, or other protected characteristic of the parties. Would your decision come out the same? If so, is that appropriate?
 - This is particularly important when allegations go against the “stereotypical norms” for a situation. We know that complainants and respondents can be of any sex.
- Are you making any assumptions that are not based on the evidence, and if so, are those fair under the circumstances?

Weighing the Evidence

- What is the most important? What are the rocks upon which you can build a solid foundation?
- What is less important? What can be reasonably explained?

Each fact is found using the standard of evidence your institution has chosen (e.g. preponderance of the evidence).

Each element of a policy violation is analyzed using that same standard.

Credibility – Two Ways to Tackle

- Elemental – What evidence do we have in support of or against each element?
- Credibility – What evidence do we know is not credible?

Things Not To Consider

- Impermissible evidence (e.g., medical records without consent)
- Irrelevant evidence
- But what about:
 - Demeanor?
 - Pattern evidence?
 - Character evidence?

Let It Go

- You don't have to resolve every factual dispute.
- Consider whether it is important for credibility purposes or necessary to your findings. If not, do we need to go there?
- If you aren't considering something, particularly if the parties thought it was important, explain why.

Reminders

- **Show your work. Get credit for your good work.**
- You cannot base a determination of responsibility solely on whether someone declined to participate in the process.
- Do not consider the impact of your determination on the parties when determining whether a policy was violated.
- Do not use sex stereotypes to resolve a case. Base your decision only on the evidence before you.
- “Gut feelings” are a sign you need to ask more questions, not something you put on the scale.

Written Decision (1 of 2)

- Allegations potentially constituting sexual harassment
- 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 recipient's code of conduct to the facts

Written Decision (2 of 2)

- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant
- Recipient's procedures and permissible bases for the parties to appeal

Note: This is provided to both parties simultaneously.

Sanctions

- Check policy for factors, but here are some to consider:
 - Prior disciplinary history of respondent
 - How the institution has sanctioned similar incidents in the past
 - Nature and violence of the conduct at issue
 - Impact of the conduct on the complainant
 - Impact of the conduct on the community
 - Whether respondent accepted responsibility for their actions
 - Any other mitigating or aggravating circumstances
- Some policies include impact/mitigation statements from the parties to be read only if sanctions are to be determined. Check your policy!

Appeals

Bases for Appeal

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
- Check your policy to see if your institution offers any additional bases for appeal beyond the regulatory requirements.

Who Hears Appeals?

- Check your policy.
- The appeals officer must be neutral and have no conflict of interest.
 - Can't be the Coordinator, Investigator, or Decision-Maker.
- They must be trained!

Appeal Decisions

- These are not typically as long as the original decision.
- Must address arguments if they are appropriate bases for appeal.
- Typically include:
 - Very short procedural history of the case and the appeal.
 - Outline of the bases for appeal raised in the appeal.
 - Evaluation of each basis for appeal, in whatever order makes sense.
 - Next steps: Remand for new hearing or more investigation? Affirm decision? Overturn decision? (Policies often dictate the options available here.)

Upcoming Free Webinars

- All of these are free and held at 12:00 CT
- Sign up at www.brickergraydon.com/events
 - August 28th – Trauma-Informed Intakes
 - September 25th – Working with Advisors in the Title IX Process
 - October 30th – Weighing the Evidence in Sexual Violence Cases
 - November 20th – Title IX Litigation Update
 - February 26th – Informal Resolution
 - March 26th – Transferrable Skills for Title IX and Title VI Investigators
 - April 23rd – Legal History of Title IX
 - May 28th – Title IX Litigation Update

Thank You

