

TITLE IX

Training for the Title IX Coordinator, Deputy Coordinators,
Investigator(s), & Decision-Maker(s)

CHARLESTON

SCHOOL OF LAW

Fall 2020

Disclaimer

This information is provided for informational purposes only. This presentation shall not constitute legal advice, nor does it create an attorney-client relationship. The laws referenced in this presentation may change or could be affected by case law developments.

Topics we will discuss during this training:

- ✓ Title IX overview
- ✓ CSOL's Title IX Policy
- ✓ Sexual harassment and other prohibited conduct
- ✓ Reports of alleged violations
- ✓ Supportive measures
- ✓ Informal resolution process
- ✓ Formal complaints
- ✓ Investigations
- ✓ Live hearings
- ✓ Technology used for live hearings
- ✓ Sanctions
- ✓ Remedial measures
- ✓ Appeals
- ✓ Avoiding bias, conflicts of interest, and the importance of serving impartially
- ✓ Q & A

What is Title IX?

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any educational program or activity receiving federal financial assistance.”

- Title IX of the Education Amendments of 1972 (“Title IX”), 20 U.S.C. § 1681 *et seq...*

Statistics (from New Regulation)

*Statistics should **not** influence your decision in any Title IX case!*

- ▶ **58%** of female academic faculty and staff have experienced sexual harassment.
- ▶ **1 in 10** female graduate students at major research universities report being harassed by a faculty member.
- ▶ Men are more likely to be **sexually assaulted** than falsely accused of assault.
- ▶ The lifetime **cost** of being a rape victim is estimated to be from \$87,000 to \$240,776.
- ▶ More than **one-fifth** of intimate partner rape survivors lose an average of eight days of paid work per assault, and that does not include the subsequent job loss, psychological trauma, and cost of treatment and cost to society at large.

Brief History of Title IX & Sexual Misconduct

- ▶ 1997
 - ▶ OCR issues *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties*
- ▶ 1999
 - ▶ *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. Of Educ.*, 526 U.S. 629 (1999)
- ▶ 2001
 - ▶ OCR guidance requires schools to conduct an investigation into allegations of campus sexual assault

Brief History of Title IX & Sexual Misconduct (Cont.)

- ▶ 2011 Dear Colleague Letter
 - ▶ Broadly defines sexual harassment to include rape, sexual assault, sexual battery, and sexual coercion
 - ▶ Required the preponderance of the evidence standard
- ▶ 2014
 - ▶ 52 Page Dear Colleague Letter (“Q&A”)
- ▶ September 2017
 - ▶ DOE revokes 2011 & 2014 guidance and puts in place a 7-page interim guidance Q &A.
 - ▶ More due process and equity in interim measures
 - ▶ Option for clear and convincing standard
 - ▶ No longer a set 60-day deadline

Brief History of Title IX & Sexual Misconduct (Cont.)

- ▶ November 2018
 - ▶ Proposed Title IX Rule
- ▶ May 2020
 - ▶ Regulation released
- ▶ August 14, 2020
 - ▶ **New regulation is effective!**
 - ▶ Deadline to publish:
 - ▶ Notice of Non-Discrimination
 - ▶ Grievance Procedures
 - ▶ Training Materials

Who?

- ▶ School employees, students, and non-employee third parties
- ▶ Both males and females can be victims of sexual misconduct
- ▶ The harasser and the victim can be of the **same sex**
- ▶ Sexual harassment and misconduct can occur between strangers or acquaintances, including people involved in an intimate or sexual relationship

Basic Definitions

- ▶ **Complainant:** An individual who is alleged to be the victim of conduct that could constitute a violation of the policy.
- ▶ **Parties:** Term used to collectively refer to Complainants and Respondents.
- ▶ **Respondent:** An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- ▶ **Student:** A person who is enrolled in courses at the School of Law.
- ▶ **Witness:** A person who is believed to have knowledge of the alleged misconduct.

Where?

Title IX applies to harassment and sexual misconduct that takes place within an “*educational program or activity*”:

An “education program or activity includes locations, events, or circumstances over which the recipient exercised **substantial control** over both the **respondent** and the **context** in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.” § 106.44(a)

- ▶ For example, sexual misconduct that occurs in buildings owned or controlled by the School of Law
- ▶ Only applies to educational programs or activities in the US

Jurisdiction

- ▶ The School of Law must take action if it is on **actual notice** of an allegation of prohibited conduct:
 - ▶ If it occurred within its **educational programs and activities** in the **USA** and
 - ▶ If the School had **substantial control** over both the **respondent** and **context** in which the conduct occurs.
- ▶ The School of Law must initiate its grievance process if a formal complaint is filed.

Actual Knowledge

- ▶ **Actual Knowledge**: Notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient
 - ▶ **Notice to the Title IX Team!**
- ▶ Note: A formal complaint is not required to trigger the School's response.

The Title IX Team

Dean, Larry Cunningham

Title IX Coordinator & Director of Human Resources, Shera Silvis

Deputy Title IX Coordinator & Associate Dean of Students,
Nick Sanders

Deputy Title IX Coordinator & Associate Dean for Academic Affairs,
Margaret Lawton

Title IX Decision-Maker & Associate Dean for Information Services,
Katie Brown

Title IX Decision-Maker & Professor of Law, Miller Shealy

Title IX Decision-Maker & Director of Business Operations, RJ
Quillinan

Title IX Investigator & Associate Director of Career Services, Emily
Guerrero

Title IX Investigator & HR Administrator, Laura Morse

Title IX Investigator & Director of Financial Aid, Bobby Greer

Campus Security

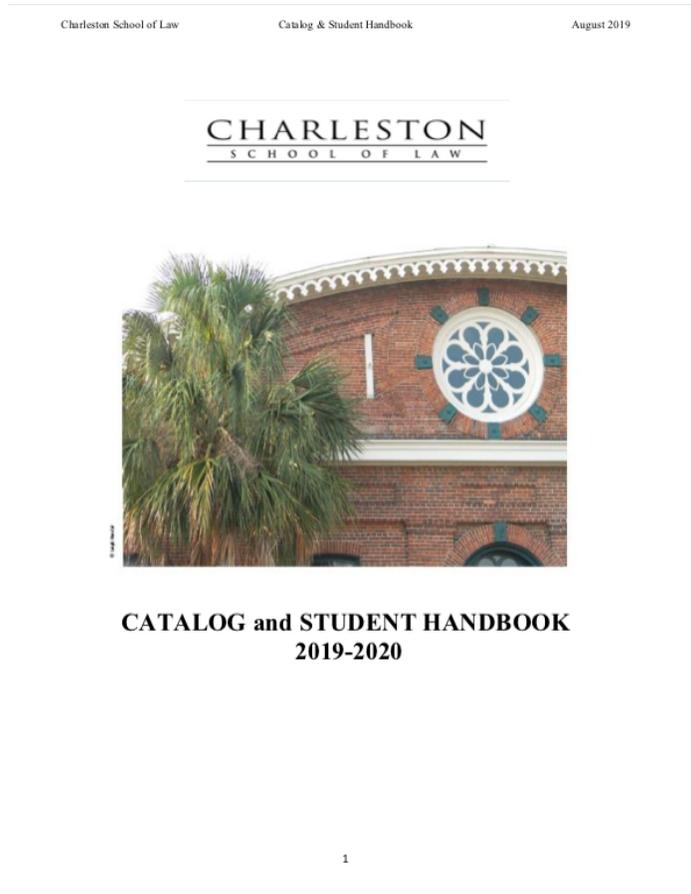
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Prohibited Conduct

Title IX at CSOL

Policy Prohibits:

1. Sexual Harassment and Gender-Based Harassment
2. Sexual Assault
 - Rape
 - Fondling
 - Statutory rape
 - Incest
3. Stalking
4. Intimate Partner Violence
 1. Dating Violence
 2. Domestic Violence



Gender-Based Harassment:

- ▶ “Gender-Based Harassment based on sex, sexual orientation, gender identity, or gender expression, which may include acts of aggression, intimidation, or hostility, whether verbal, physical, graphic, or otherwise.”
 - ▶ Need not involve conduct of a sexual nature.

Sexual Harassment:

- ▶ Conduct on the basis of sex that satisfies one or more of the following:
 1. *Quid pro quo*: An employee conditioning the provision of an aid, benefit, or service on an individual's participation in unwelcome sexual misconduct.
 2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to an educational program or activity (i.e. hostile environment).
 3. Sexual assault, dating violence, domestic violence, and/or stalking.

Sexual Harassment: Examples

If severe, pervasive and objectively offensive:

- ▶ Unwelcome physical contact, including unwelcome touching, sexual/physical assault, impeding, restraining, or blocking movements, or unwanted sexual advances.
- ▶ **Verbal conduct**, including:
 - ▶ Making or using derogatory comments, slurs, or humor
 - ▶ Verbal abuse of a sexual nature
 - ▶ Graphic verbal commentaries about an individual's body
 - ▶ Sexually degrading words used to describe an individual
 - ▶ Suggestive or obscene letters, notes, or invitations
 - ▶ Objectively offensive comments of a sexual nature including sexually explicit statements, questions, jokes, or anecdotes

Sexual Assault

- ▶ Sexual Assault is defined as any **sexual act** directed against another person, **without consent of the victim**, including instances where the victim is incapable of giving consent.
- ▶ Sexual Assault includes:
 - ▶ Rape
 - ▶ Fondling
 - ▶ Incest
 - ▶ Statutory Rape

Rape

- ▶ **Rape** means the 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, without the consent of the victim.

Fondling

- ▶ **Fondling** means the touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

Incest

- ▶ **Incest** mean sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

Statutory Rape

- ▶ **Statutory Rape** means sexual intercourse with a person who is under the statutory age of consent.

Consent

- ▶ **Definition:** *Words or actions* that **communicate approval** of sexual activity taking place between the parties.
 - ▶ “The consent must be based on mutually understandable communication that clearly indicates a willingness to engage in sexual activity.”
- ▶ **Consent to one activity does not automatically imply consent to other forms of sexual activity.**
- ▶ ***Silence* in and of itself cannot be interpreted as consent.**
- ▶ **Consent cannot be interpreted from lack of resistance alone.**
- ▶ **A current or previous dating/romantic *relationship* does not imply consent.**
 - ▶ Relying solely on non-verbal communication can lead to a false conclusion as to whether consent is present.

Consent (Cont.)

- ▶ Consent may be WITHDRAWN at ANY TIME!
 - ▶ Consent must be evaluated in an ongoing manner.
 - ▶ Parties must communicate clearly throughout all stages of sexual activity.
 - ▶ Once consent is withdrawn, the sexual activity must cease *immediately* and all parties must obtain mutually expressed or clearly stated consent before continuing further sexual activity.

Consent (Cont.)

- ▶ Consent may be ***invalidated*** by:
 - ▶ Force
 - ▶ Intimidation
 - ▶ Coercion
 - ▶ Incapacitation

Consent is invalid if it is FORCED

- ▶ **Force** = the use or threat of physical violence to overcome an individual's freedom of will to choose whether or not to participate in sexual activity or provide consent.

Consent is invalid if there is INTIMIDATION

- ▶ **Intimidation** = the use of implied threats to overcome an individual's freedom of will to choose whether or not to participate in sexual activity or provide consent.

Consent is invalid if it is COERCED

- ▶ **Coercion** = the improper use of pressure to compel another individual to initiate or continue sexual activity against the individual's will.
 - ▶ Includes manipulation, threats, and blackmail
 - ▶ *Examples:*
 - ▶ Threatening to “out” someone based on sexual orientation, gender identity, or gender expression
 - ▶ Threatening to harm oneself if the other party does not engage in sexual activity
 - ▶ Continued activity or pressure after someone indicates that they do not want to engage in a particular sexual activity

Coercion (Cont.)

- ▶ The following factors will be used to determine if coercion was present:
 1. The **frequency** of the application of the pressure
 2. The **intensity** of the pressure
 3. The degree of **isolation** of the person being pressured
 4. The **duration** of the pressure

Consent is invalid if the party is INCAPACITATED

- ▶ **Incapacitation** = a state where an individual cannot make an informed and rational decision to engage in sexual activity because of a lack of conscious understanding of the fact, nature, or extent of the act.
 - ▶ Unable to understand the who, what, when, where, why, or how of the interaction
- ▶ May result from use of alcohol, drugs, or medication

Consent is invalid if the party is INCAPACITATED

- ▶ Consumption of alcohol or other drugs alone is insufficient to establish incapacitation.
- ▶ Individual assessment as to impact on individual's:
 1. Decision making ability
 2. Awareness of consequences
 3. Ability to make informed judgments
 4. Capacity to appreciate the nature and scope of the act
- ▶ **Test**: Did the Respondent know or reasonably should have known that the Complainant was unable to consent to sexual activity?

Consent is invalid if the party is INCAPACITATED (Cont.)

- ▶ The respondent reasonably should have known that the Complainant was unable to consent if the Complainant was:
 - ▶ Was asleep or unconscious
 - ▶ Incapacitated due to the influence of drugs, alcohol, or medication, so that the Complainant could not understand the fact, nature, or extent of the sexual activity
 - ▶ Unable to communicate due to a mental or physical condition

Consent is invalid if the party is INCAPACITATED (Cont.)

- ▶ Whether the respondent should have known will be evaluated using an **objective reasonable person standard**.
- ▶ Policy States: *“The fact that respondent was **unaware** of the complainant’s incapacity is **irrelevant** to this analysis, particularly where respondent’s failure to appreciate the complainant’s incapacitation resulted from the respondent’s failure to take reasonable steps to determine the complainant’s incapacitation or where the respondent’s own use of alcohol or drugs caused the respondent to misjudge the complainant’s incapacity.”*

Stalking

- ▶ _____ means engaging in a course of conduct directed at a specific person that would cause a reasonable person to
 - A) fear for their own safety or the safety of others; or
 - B) suffer substantial emotional distress

Case Study 1

Andrew, a 3 L, and Chelsea, a 2L, hooked up a few times early in the semester. Months later, as Andrew is walking to his car on the sidewalk in front of the Library, Chelsea drives by him on Mary Street very slowly.

Could this be considered stalking?

Stalking (Cont.)

- ▶ **Course of conduct** - two or more acts, including, but not limited to, acts in which a person directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about another person, or interferes with another person's property.
- ▶ **Reasonable person** - a reasonable person under similar circumstances and with similar identities to the Complainant.
- ▶ **Substantial emotional distress** - significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Case Study 2

Andrew, a 3 L, and Chelsea, a 2L, hooked up a few times early in the semester. Andrew was not interested in pursuing the relationship further, and Chelsea texted him constantly asking what had happened. When he blocked her phone number, Chelsea started messaging him on Facebook. One day, as Andrew is walking to his car on the sidewalk, Chelsea drives by him on King Street very slowly.

The next day, Chelsea appears to be waiting in her parked car. When Andrew walks by, she starts her engine. She drives slowly next to him, and when he crosses John Street, she makes a quick left causing Andrew to take a step back to avoid being hit.

Could this constitute stalking?

Actions that may constitute Stalking if the elements are satisfied:

- ▶ Repeated, unwanted, and or intrusive communications from the offender via telephone, text, email, or in-person
- ▶ Gathering of information about a person from family, friends, co-workers, and/or classmates
- ▶ Following or lying in wait for a person at home, school, work, or other locations frequented by the person
- ▶ Posting information or spreading rumors about a person on the internet, in a public place, or by word of mouth
- ▶ Damaging or threatening to damage a person's property
- ▶ Repeatedly sending flowers or unwanted gifts to a person

Intimate Partner Violence

- ▶ _____ includes any act of violence or threatened act of violence against a person who is, or has been involved in a sexual, dating, spousal, domestic, or other intimate relationship with the Respondent.
- ▶ Dating violence, domestic violence, or relationship violence
- ▶ Physical, sexual, psychological or emotional violence and economic abuse
- ▶ One act or ongoing pattern

Dating Violence

- ▶ _____ violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- ▶ Whether such a relationship exists or existed will be determined based on a consideration of the following factors:
 - ▶ Length of the relationship
 - ▶ Type of relationship
 - ▶ Frequency of interaction between the parties

Domestic Violence

- ▶ _____ violence or threats of violence committed by a current or former spouse of the victim, by a person with whom the victim shares a child in common, by a person cohabitating with or who has cohabitated with the victim as a spouse, or by any other person against a victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

Retaliation

- ▶ **Retaliation is PROHIBITED!**
 - ▶ *“The School of Law prohibits retaliation against any individual who, in good faith, complains of a violation of the School of Law’s Title IX Policy or assists by providing information about an allegation of discrimination, including a complaint of sexual misconduct. The School of Law considers an act of retaliation against a complainant or witness a separate violation of this policy and will be adjudicated as such.”*
- ▶ Cannot retaliate against parties or witnesses for not participating.

Case Study:

Monica is in her second year at CSOL. She is three months pregnant. Her mock trial team is traveling by plane to compete in Arizona. The mock trial coach is concerned about Monica traveling while pregnant and told her she was not to attend this competition. Monica talked to her doctor and they both feel comfortable with her traveling on the plane. She shares this with the coach, but the coach still refuses to let Monica participate.

Pregnancy Discrimination

Title IX prohibits discrimination because of an individual's parental status, pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery from any of these conditions.

Grievance Procedures

Overview

Presumption

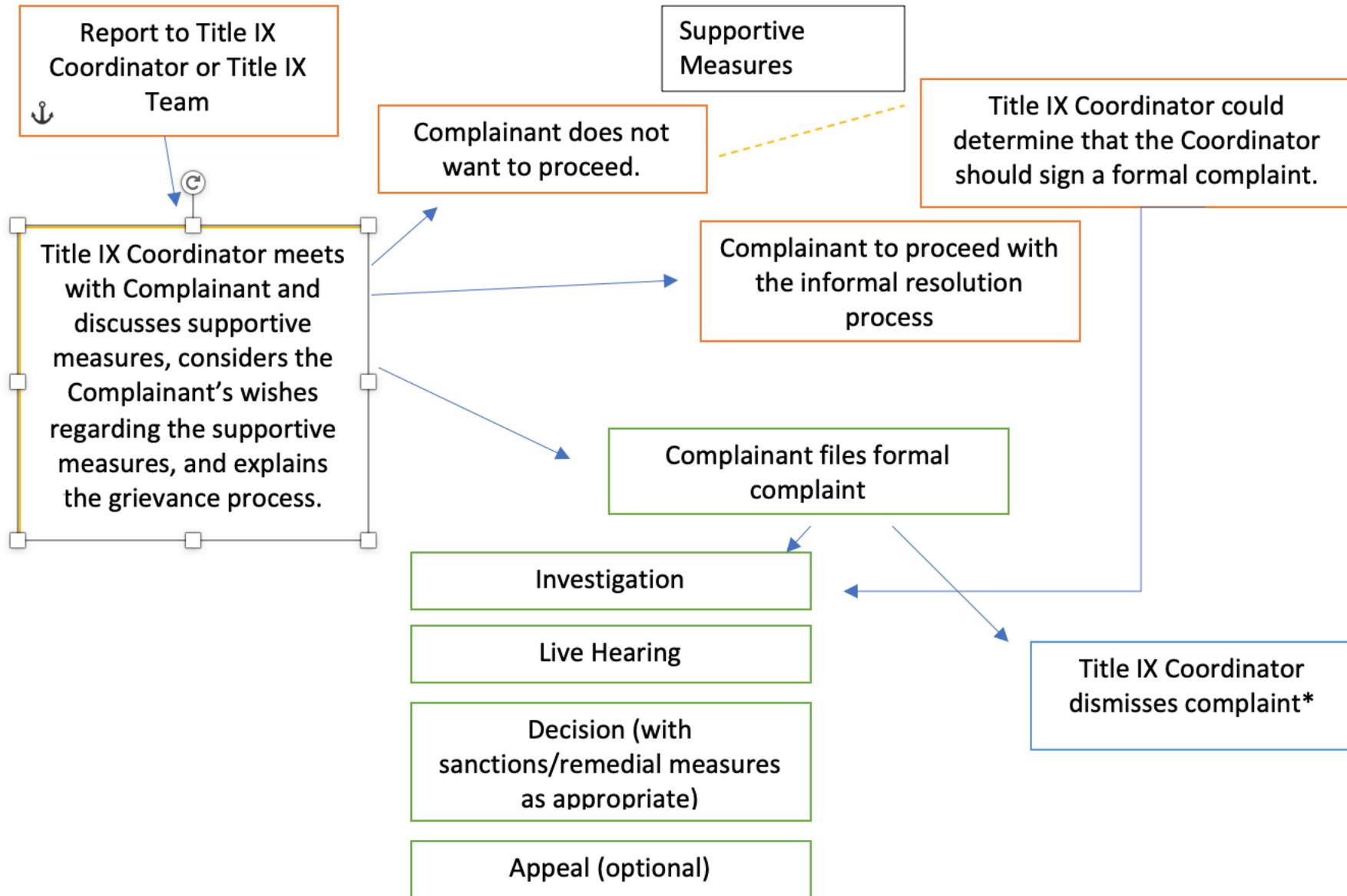
- ▶ The Respondent is presumed not to be responsible for the alleged conduct unless and until a determination regarding responsibility is made at the conclusion of the grievance process.

Timeline

- ▶ Investigation = 60 Days
- ▶ Investigation + Hearing = 90 Days
- ▶ Timelines may be extended in extenuating circumstances.
 - ▶ Title IX Coordinator must notify parties in writing:
 - ▶ Reason for delay
 - ▶ Anticipated timeframe for completion of the investigation and/or resolution

Training Requirement

- ▶ The regulation requires that the following individuals receive training:
 - ▶ Title IX Coordinator
 - ▶ Investigators
 - ▶ Decision-Makers
 - ▶ Appeals Officer
 - ▶ Informal Resolution Officers
- ▶ These individuals must be trained:
 - ▶ To understand the grievance process
 - ▶ About conflicts of interest and bias
 - ▶ How to serve impartially and without prejudging the facts



Reporting

Report

- ▶ A report triggers the School's responsibility to respond.
- ▶ Who can report?
 - ▶ Complainant
 - ▶ Third party
 - ▶ Does not have to be a member of the School of Law
- ▶ Reports can be made to the Title IX Coordinator and Title IX Team!
 - ▶ **If you receive a report, notify the Title IX Coordinator immediately!**

Response to Report - § 106.44(a)

- ▶ “The Department will not permit a recipient to ignore sexual harassment if the recipient has actual knowledge of such sexual harassment in its education program or activity against a person in the U.S., and such a recipient is required to respond to sexual harassment as described in § 106.44(a).” (30114)
- ▶ “A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond **promptly** in a manner that is **not deliberately indifferent.**”
 - ▶ “A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.”

Response to Report

- ▶ Title IX Coordinator is to promptly contact the Complainant to:
 - ▶ Discuss supportive measures;
 - ▶ Consider the Complainant's wishes with respect to supportive measures; and
 - ▶ Explain the process for filing a formal complaint.

Supportive Measures

- ▶ Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or Respondent.
- ▶ Purpose: To **restore or preserve equal access** to the School's educational program or activity *without* unreasonably burdening the other party.
- ▶ Includes measures designed to protect the safety of all parties &/or the School's educational environment &/or deter sexual harassment.
- ▶ Treat both parties equitably!
 - ▶ Offer supportive measures to BOTH parties!

Examples of Supportive Measures

- ▶ Counseling
- ▶ Extensions of time
- ▶ Course-related adjustments
- ▶ Modifications of work or class schedules
- ▶ Campus escort services
- ▶ Restrictions on contact between the parties
- ▶ Leaves of absence
- ▶ Increased security and monitoring

Supportive Measures (Continued)

- ▶ Supportive measures must be provided whether or not Complainant files a formal complaint!
- ▶ Supportive measures must be maintained as confidential to the extent that maintaining such confidentiality would not impair the ability of the School to provide the supportive measures.
- ▶ Title IX Coordinator is responsible for coordinating the effective implementation of these supportive measures.
- ▶ *Document! Document! Document!*

Emergency Removal

- ▶ **Emergency Removal:** CSOL can remove Respondent from its educational program or activity if the following process is followed:
 - ▶ Title IX Coordinator undertakes an individualized safety and risk analysis, and
 - ▶ If the Title IX Coordinator determines that the Respondent poses an immediate threat to the physical health or safety of any student or other individual, then the Title IX Coordinator can issue **written notice** to the Respondent requiring removal so long as the Respondent is advised of their **opportunity to appeal**.
 - ▶ Appeal to the Dean or Designee within two (2) business days following the removal.
 - ▶ The Dean or Designee shall issue a decision within three (3) business days.

Administrative Leave

- ▶ The School of Law reserves the right to place a non-student employee respondent on administrative leave during the investigation and resolution of a formal complaint.

Informal Resolution

- ▶ When appropriate, certain student-on-student or employee-on-employee complaints may be resolved by the Title IX Coordinator or Deputy Coordinators without a formal resolution.
 - ▶ NOT appropriate when an employee sexually harasses a student.
- ▶ Either party may be able to elect to go through the formal process **at any point** prior to the resolution.
- ▶ Certain requirements must be met.

Informal Resolution - Requirements

The Title IX Coordinator must provide the parties a written notice disclosing:

1. The allegations
2. 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, provided, however, that at 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 . . .” § 106.45(b)(9)
3. Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared

The Title IX Coordinator must obtain the parties' voluntary written consent to the informal resolution process.

Informal Resolution - Process

- ▶ The Title IX Coordinator* will facilitate the resolution and give final sanction(s) as deemed suitable and provide written notice simultaneously to the parties.
- ▶ Possible remedial measures and/or sanctions may include, but are not limited to:
 - ▶ Permanent no-contact orders
 - ▶ Written apology and/or explanation of the circumstances surrounding the grievance
 - ▶ Community service
- ▶ *If the Title IX Coordinator has a conflict of interest, then they will appoint one of the Deputy Coordinators to serve as the informal resolution officer.

Formal Complaint Process

Formal Complaint

- ▶ **Formal Complaint** = a document filed by a Complainant or signed by the Title IX Coordinator alleging sexual harassment against a Respondent and requesting that the School investigate the allegation of sexual harassment.
 - ▶ At the time of filing a formal complaint, a Complainant must be **participating** in or **attempting** to participate in the educational program or activity.
 - ▶ *Document filed by a complainant* = a document or electronic submission that contains the Complainant's physical or digital signature, or otherwise indicates that the Complainant is the person filing the formal complaint.
 - ▶ The Title IX Coordinator may sign a formal complaint to initiate an investigation. In this situation, the Title IX Coordinator is not a Complainant or other party.

Formal Complaint - Response

- ▶ A Formal Complaint **triggers** the School's duty to investigate and provide due process!
 - ▶ *See Section IX of the Policy: "Investigation, Resolution Process, and Right to Appeal"!*

Formal Complaint - Notices

- ▶ Title IX Coordinator must provide written notice to the parties that must include:
 - (1) Notice of the grievance **process**, including the informal resolution process
 - (2) Notice of the **allegations** of sexual misconduct potentially constituting a policy violation including *sufficient details* known at the time and with sufficient time to prepare a response before any initial interviews.
 - ▶ **Identities** of the parties (if known)
 - ▶ The **conduct** allegedly constituting policy violation
 - ▶ The **date** and **location** of the alleged incident

Formal Complaint - Notices

- ▶ Title IX Coordinator must provide written notice to the parties that must include:
 - (3) A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.
 - (4) Inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence.
 - (5) Inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Formal Complaint - Notices (Cont.)

- ▶ Update notice as needed:
 - ▶ “If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice . . . the recipient must provide notice of the additional allegations to the parties whose identities are known.” § 106.45(b)(2)

Dismissal of Complaint

- ▶ The Title IX Coordinator reserves the right to dismiss the formal complaint if the Title IX Policy does not have jurisdiction.
 - ▶ If the alleged conduct would not constitute sexual harassment even if proven, OR
 - ▶ The conduct did not occur within the School's educational program or activity or in the United States.
- ▶ Document reasons for dismissal!

Dismissal of Complaint (Cont.)

- ▶ During the investigation or hearing, the Title IX Coordinator can dismiss the formal complaint if:
 - ▶ A Complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - ▶ The Respondent is no longer enrolled or employed by the School; or
 - ▶ Specific circumstances prevent the School from gathering evidence sufficient to reach a determination as to the formal complaint or allegations.

Report signed by Title IX Coordinator

- ▶ The Title IX Coordinator reserves the right to sign reports against a student or employee in order to trigger the formal complaint grievance and disciplinary procedures.
- ▶ “When a Title IX Coordinator believes that with or without the complainant’s desire to participate in a grievance process, a non-deliberately indifferent response to the allegations requires an investigation, the Title IX Coordinator should have the discretion to initiate a grievance process.” (30131).
- ▶ “The recipient is required to document its reasons why its response to sexual harassment was not deliberately indifferent, under §106.45(b)(10), thereby emphasizing the need for a decision to initiate a grievance process over the wishes of a complainant to be intentionally, carefully made taking into account the circumstances of each situation.” (30131).

Formal Complaint Process Reminders:

- ▶ There is **no time limit** on filing a Formal Complaint.
- ▶ The **Respondent is presumed to not be responsible** for the alleged conduct unless and until a determination regarding responsibility is made at the conclusion of the grievance process.
- ▶ Treat Complainants and Respondents equitably.
- ▶ Evaluate evidence objectively.
- ▶ Do not pre-judge.
- ▶ Follow the Policy!

Investigation

Separate Investigation

- ▶ Complainants have the option to file a Formal Complaint with the School of Law and criminal charges with the police department.
- ▶ The School of Law's investigation will be separate from law enforcement.

Investigation Process

1. Title IX Coordinator will assess the complaint to ensure jurisdiction.
2. If jurisdiction exists, the Title IX Coordinator will assign the case for investigation within three (3) business days and provide written notice to the parties.
3. The Investigator(s) will conduct an investigation into the facts
 - Interview Complainant, Respondent, witnesses, etc.
 - Collect relevant evidence
4. The Investigator(s) will conduct an objective evaluation of all relevant evidence.

Investigation Process (Cont.)

5. Investigator(s) will draft and submit an investigatory report to the Title IX Coordinator.
6. The Title IX Coordinator will contact the parties and provide both parties with separate access to the relevant evidence and notify them of the time, date, and location of the live hearing.
7. The parties have an opportunity to correct any item allegedly submitted by the party that they believe is factually inaccurate. Parties can also provide additional evidence.
 - *10* days to submit evidence to the Title IX Coordinator.

Investigation Process (Cont.)

8. Investigator(s) will determine whether any additional evidence is relevant and provide both parties the opportunity to review all additional evidence in the investigatory report prior to the Live Hearing.

Role of Investigators

1. *Gather* relevant evidence

- ▶ Cannot restrict the ability of either party to discuss the allegations under investigation or to gather or present relevant evidence. (§ 106.45(b)(5)(iii))
 - ▶ Interviews with parties and witnesses
 - ▶ Any other evidence (video etc.)

2. *Organize* relevant evidence into an Investigatory Report

Remember, the burden is **NOT** on the parties to gather the evidence.

Investigative Interviews - Before the Interview

- ▶ Create a witness list
 - ▶ Include what questions/information you want to ask about
- ▶ Coordinate schedules with the co-investigator (as applicable)
- ▶ Provide all individuals you interview with written notice (email is fine) and “sufficient” time to prepare.
- ▶ Notice should include:
 - ▶ Date
 - ▶ Time
 - ▶ Location
 - ▶ Participants
 - ▶ Purpose of interview or meeting

(§ 106.45(b)(5)(v))

Investigative Interviews - During the interview

- ▶ Introduce yourself
- ▶ Be polite
- ▶ Explain the Title IX grievance process
- ▶ Remind the individual being interviewed that the School prohibits retaliation
- ▶ Take good notes
- ▶ Use the “funnel” method
 - ▶ Broad/open-ended questions first, then more specific questions
 - ▶ Get details!
 - ▶ “What happened next?”
- ▶ Don’t be afraid of “awkward” silences

Investigative Interviews - During the interview (Cont.)

- ▶ Review your notes before ending the interview
- ▶ Ask follow-up questions
- ▶ Make sure to get a copy of all evidence possible before you end the interview
- ▶ Give the individual your contact information and invite them to follow up with you if they have questions or additional information

- ▶ In general:
 - ▶ Be hospitable
 - ▶ Do not accuse or pre-judge
 - ▶ Remain neutral
 - ▶ Do not make a determination on responsibility

Relevant Evidence

- ▶ During Investigation:
 - ▶ The Investigators must **gather** all *relevant* evidence.
- ▶ During the Live Hearing:
 - ▶ Each party's **advisor can ask** the other party and all witnesses all *relevant* questions and follow-up questions.
 - ▶ The Decision-Maker must **determine whether the questions are relevant**.

Relevant Evidence (Cont.)

- ▶ What is relevant evidence?
 - ▶ Evidence that is probative of any material fact concerning the allegations. (30343)

NOT Relevant Evidence

- ▶ Protected by Privilege
- ▶ Relates to a party's medical records (including mental health)
 - ▶ Exception: voluntary written consent
- ▶ Party or witness statements that have not been subjected to cross-examination at a live hearing
- ▶ Protected by rape-shield protections

Rape Shield Protections

- ▶ Evidence regarding a **Complainant's** sexual history is not relevant and must not be considered *UNLESS*:
 - (1) It is offered to prove that someone other than the respondent committed the conduct, OR
 - (2) it is offered to prove consent.
- ▶ “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.**” (30353)

Investigatory Report

- ▶ Purpose: **Summarizes** relevant evidence!

Suggested Outline:

- (1) Names of the parties
- (2) Allegations
 - ▶ provide specific definition from policy of alleged misconduct
- (3) Names of Investigators
- (4) Witnesses Interviewed
 - ▶ Document why you chose not to interview certain witnesses (as applicable)
- (5) Timeline of process
 - ▶ When did School receive actual notice?
 - ▶ When were the parties notified?
 - ▶ Dates of investigation

Investigatory Report

(6) Supportive measures provided (if any)

(7) Summary of evidence

- ▶ Chronological may be easiest
- ▶ Disputed v. undisputed facts
- ▶ If you found that requested evidence was not relevant, explain why

(8) A table of relevant evidence attached as appendices to the report

▶ Example:

- ▶ Attachment A: Interview notes from interview with Complainant
- ▶ Attachment B: Screenshots of text messages from Complainant to Respondent on August 12, 2020

Live Hearing

Live Hearing

- ▶ The Decision-Maker has absolute discretion to determine the format for the hearing and to determine which witnesses are relevant.
- ▶ The Decision-Maker may decline to hear from a witness if the Decision-Maker concludes that the information is not necessary for their final determination.
- ▶ The School of Law shall keep an official record of the hearing in audio format.
- ▶ At the request of either party, the School will conduct the live hearing with the parties located in separate rooms and with technology enabling the Decision-Maker and parties to simultaneously see and hear the party or the witness answering questions.

Live Hearing - Decision-Maker

- ▶ Must be neutral
 - ▶ School reserves the right to hire a third party to perform this role!
- ▶ Do not draw inferences about a party's failure to appear or answer questions in live cross-examination hearing.
- ▶ Do not make assumptions.
- ▶ Do not rely on sex stereotypes.
- ▶ “[A] recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; although such a rule is part of the **Federal Rules of Evidence**, the **Federal Rules of Evidence** constitute a complex, comprehensive set of evidentiary rules and exceptions designed to be applied by judges and lawyers, while Title IX grievance processes are not court trials and are expected to be overseen by layperson officials of a school, college, or university rather than by a judge or lawyer.” (30294)

Live Hearing - Witnesses

- ▶ If either party wishes to call witnesses at the live hearing, the following must be submitted to the Decision-Maker and Title IX Coordinator via email no later than twelve** business days before the hearing:
 - (1) The names of any witnesses;
 - (2) A written statement and/or description of what each witness observed, if not already provided during the investigation;
 - (3) A summary of why the witness's presence is relevant to making a decision about responsibility at the hearing; and
 - (4) The reason the witness was not interviewed by the Investigator(s), if applicable.

Live Hearing - Witnesses Not Interviewed

- ▶ The Decision-Maker will determine if the proffered witness(es) has relevant information and if there is sufficient justification for permitting a witness who was not interviewed by the Investigator(s).
 - The Decision-Maker shall determine whether such witness shall be allowed to testify at the live hearing, and shall notify the party who proffered the witness(es) of its determination no later than ten business days of the live hearing.

Training on Using Technology for Live Hearings

For additional questions, contact Jamie Hiers at (843) 377-2159.

Decorum

- ▶ School can adopt rules that govern the conduct and decorum of participants at the live hearing.
 - ▶ Must treat parties equally!
- ▶ “[W]here the substance of a question is relevant, but the manner in which an advisor attempts to ask the question is harassing, intimidating, or abusive (for example, the advisor yells, screams, or physically ‘leans in’ to the witness’s personal space), the recipient may appropriately, evenhandedly enforce rules of decorum that require relevant questions to be asked in a respectful, non-abusive manner.” (30331)
- ▶ Breaks may be helpful!

Live Hearing - Advisor of Choice

- ▶ Both parties are entitled to their own personal advisor of their choice at any stage of the process.
- ▶ If a party does not have an advisor, the School of Law shall provide one.
- ▶ “Potted Plant”
 - ▶ Role of the advisor:
 - ▶ Consult and advisee their advisee
 - ▶ Deliver cross-examination
 - ▶ *Cannot* speak for the advisee
 - ▶ *Cannot* directly question Decision-Maker or Investigator(s)

Live Hearing - Cross Examination

- ▶ Advisor to ask relevant questions of other party.
- ▶ The Decision-Maker is to decide whether the question is relevant and explain if the question is not relevant.
 - ▶ “[C]ross examination must focus only on questions that are relevant to the allegations in dispute.” (30319)
 - ▶ A party cannot answer a question until the Decision-Maker determines that it is relevant.
 - ▶ The Decision-Maker’s explanations regarding the relevancy do not have to be complex.
 - ▶ “... it is sufficient... to explain that a question is irrelevant because it calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations.” (30343)
- ▶ Questions challenging credibility are allowed subject to two exceptions.

Live Hearing - Cross Examination - Rape Shield Protections

- ▶ Questions regarding a Complainant's sexual predisposition or prior sexual behavior are NOT relevant *unless*:
 - ▶ The questions and evidence are offered to prove that someone other than the Respondent committed the alleged misconduct; 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.

Reliance on Prior Statements

- ▶ If a party who was interviewed during the investigation chooses not to participate in the hearing, the Decision-Maker cannot rely on any statement made by that party in reaching their determination.
- ▶ “[I]f a party does not appear or submit to cross-examination the party's statement cannot be relied on. . . .” (30346)
- ▶ Cannot compel participation.
 - ▶ Cannot retaliate against someone for not participating!
- ▶ “Reliance on party and witness statements that have not been tested for credibility via cross-examination undermines party and public confidence in the fairness and accuracy of the determinations reached by postsecondary institutions. This provision need not result in failure to consider relevant evidence because parties and witnesses retain the opportunity to have their own statements considered, by submitting to cross-examination.” (30347).

Reliance on Prior Statements - FAQ

- ▶ OCR Blog (May 22, 2020): “One question that a postsecondary institution may have is whether *not* relying on a party’s statement—because that party has not submitted to cross-examination—means not relying on a description of the words allegedly used by a respondent if those words constitute part of the alleged sexual harassment at issue.”
 - ▶ OCR says “No” <https://www2.ed.gov/about/offices/list/ocr/blog/20200522.html>
 - ▶ Statement = Intent to make a factual assertion, not the underlying allegations!
 - ▶ “For example, where a complainant alleges that the respondent said to the complainant: “If you go on a date with me, I’ll give you a higher grade in my class,” and at the postsecondary institution’s live hearing, the respondent does not submit to cross-examination, then § 106.45(b)(6)(i) does *not* preclude the decision-maker from relying on *the complainant’s testimony* that the respondent said those words to the complainant.”
 - ▶ “The words described by the complainant, allegedly attributed to the respondent, are themselves the misconduct that constitutes sexual harassment under § 106.30 (i.e., a recipient’s employee conditioning an educational benefit on participation in unwelcome sexual conduct, often referred to as *quid pro quo* harassment) and are not the respondent’s “statement” (i.e., the respondent’s intent to make a factual assertion).”

Reliance on Prior Statements - FAQ (Cont.)

- ▶ What about absentee witnesses?
 - ▶ “The Department understands that complainants (and respondents) often will not have control over whether witnesses appear and are cross-examined, because neither the recipient nor the parties have subpoena power to compel appearance of witnesses. Some absences of witnesses can be avoided by a recipient thoughtfully working with witnesses regarding scheduling of a hearing, and taking advantage of the discretion to permit witnesses to testify remotely. Where a witness cannot or will not appear and be cross-examined, that person's statements will not be relied on by the decision-maker, but the Department believes that any determination reached under this provision will be more reliable than a determination reached based on statements that have not been tested for credibility.” (30348).

Reliance on Prior Statements - FAQ (Cont.)

- ▶ What about police reports, SANE reports, medical reports, etc.?
 - ▶ “Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination.”
 - ▶ “While documentary evidence such as police reports or hospital records may have been gathered during investigation and, if directly related to the allegations inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report, the hearing is the parties' first opportunity to argue to the decision-maker about the credibility and implications of such evidence.”
 - ▶ “Probing the credibility and reliability of *statements* asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements.”

(30349).

Reliance on Prior Statements - FAQ (Cont.)

- ▶ Can a party's advisor appear without the party?
 - ▶ “[W]here one party does not appear and that party's advisor of choice does not appear, a recipient-provided advisor **must still cross-examine the other, appearing party “on behalf of” the non-appearing party**, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance). Because the statements of the appearing party were tested via cross-examination, a fair, reliable outcome can result in such a situation.” (30347).

Weight of Evidence

- ▶ “[W]here a cross-examination question or piece of evidence is relevant, but concerns a party’s character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level weight or credibility, so long as the decision-maker’s evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.” (30337)

Decision-Maker Reminders:

- ▶ Remember your standard of evidence:
 - ▶ The preponderance of the evidence
 - ▶ Is the fact more likely than not to be true?
- ▶ Do not consider the impact of your decision on either party when making a determination as to responsibility.
 - ▶ You are the neutral Decision-Maker.

Final Decision

- ▶ Written decision
- ▶ Needs to be detailed!
- ▶ Must be provided to the parties simultaneously by email.

Final Decision - Suggested Outline

I. Parties

II. Allegations

III. Procedural Steps

- i. Date of formal complaint
- ii. Date of notices
- iii. Date of Informal hearing (if applicable)
- iv. Investigators assigned
- v. Date of live hearing
- vi. Hearing participants

Final Decision - Suggested Outline (Cont.)

IV. Standard of Evidence

- Preponderance of the evidence

V. Findings of Fact

VI. Conclusions

VII. Sanctions

VIII. Notice of Right to Appeal

Findings of Fact

- ▶ List undisputed facts.
- ▶ List disputed facts.
- ▶ What are the elements of the alleged charge?
- ▶ What undisputed facts must be resolved to address each element?
- ▶ Weigh the evidence for each disputed fact.
- ▶ Evaluate both inculpatory and exculpatory evidence:
 - ▶ *Inculpatory evidence*: tends to prove a violation of a policy
 - ▶ *Exculpatory evidence*: tends to exonerate the respondent

Conclusion

- ▶ A statement of and rationale for the result as to each allegation, including a determination regarding responsibility.
- ▶ Explain your reasons for your conclusions.
- ▶ Make sure to include the key elements of the policy and definitions!
- ▶ Include sanctions and/or remedial measures as applicable.

Examples of Remedial Measures

- ▶ 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 locations
- ▶ Leaves of absence
- ▶ Increased security and monitoring of certain areas of the School's campus, and other similar measures.

The Title IX Coordinator is responsible for effective implementation of any remedies.

Possible Sanctions for Students

- ▶ Expulsion
- ▶ Suspension
- ▶ A letter of reprimand to be made a permanent part of the student's file
- ▶ Public service
- ▶ Remedial education
- ▶ Denial of degree

Possible Sanctions for Employees

- ▶ Termination
- ▶ Demotion
- ▶ Suspension
- ▶ A letter of reprimand to be made a permanent part of the employee's file

Sanctions

- ▶ Sanctions are effective immediately.
- ▶ If the Respondent appeals the Decision-Maker's determination, the sanction(s) will continue in effect during the appeal.
- ▶ The sanction(s) may be lifted only if, as a result of the final outcome of the appeal, the Respondent is found not responsible for one or more of the policy violations as stated in the Dean's written determination.

Appeal Process

Appeal

- ▶ Both parties have the right to appeal the Final Decision to the Dean on the following four bases:
 1. Procedural irregularity that materially affected the outcome of the matter
 2. New evidence not available at the time of the hearing
 3. The Title IX Coordinator, Investigator(s), and/or Decision-Maker had a conflict of interest or bias that materially affected the outcome of the case, and/or
 4. Excessive sanction.

Appeal (Cont.)

- ▶ Appellate review is a review of the record only (except as to a claim of new evidence).
 - ▶ No additional meetings unless exceptional circumstances in which case the Dean must offer both the Complainant and Respondent an opportunity to discuss the case.
- ▶ All appeals must be **emailed** to the Dean within **five (5) business days** of notification of the Final Decision.
- ▶ Once the Dean receives an appeal, he will notify the other party and provide the other party with an opportunity to review the submitted appeal and submit a written response.
 - ▶ Response must be submitted within 7 days.
 - ▶ Dean can extend this deadline under exceptional circumstances.

Appeal (Cont.)

- ▶ Upon review of the record, the Dean (or Designee) may respond as follows:
 1. Affirm the Decision-Maker's decision in all respects
 2. Modify the Decision-Maker's decision
 3. Vacate and dismiss the Decision-Maker's decision
 4. Vacate and remand to the Decision-Maker for further proceedings
- ▶ The Dean or his Designee shall issue a written decision to both parties within thirty (30) days.
- ▶ The decision of the Dean or his Designee is final.

Bias, Conflicts of Interests, and The Importance of Impartiality

Bias

- ▶ Definition: Prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair. (*Oxford Languages*).
- ▶ Be aware of your own biases!
 - ▶ Check in with yourself!
 - ▶ Unconscious bias?
- ▶ Avoid sex stereotypes.

Bias (Cont.)

- ▶ Use a reasonable person test to determine if bias exists.
 - ▶ Example of an unreasonable determination of bias:
 - ▶ “[A]ssuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents” (30252)
 - ▶ The Preamble calls this a “common sense approach.”

Hypothetical

- ▶ You are assigned as an Investigator for a formal complaint filed by a former co-worker who now works in a different department. You do not like your former co-worker. The Respondent is a professor that you've only talked to in passing.
 - ▶ What would you do?

Conflict of Interest

- ▶ Considerations:
 - ▶ Financial interest?
 - ▶ Familial relationships?
 - ▶ Past advocacy for Complainant or Respondent's group?
 - ▶ *But*: “[F]or example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents” is unreasonable (30252)
- ▶ Decision-Makers and Investigators should not talk about the case with each other except during the Live Hearing.

Impartiality

- ▶ Key: Neutrality
- ▶ Do not pre-judge facts
- ▶ Keep an open mind
 - ▶ Do not compare this case to the last one you were involved with

If you do not believe you can be impartial, please let the Title IX Coordinator know!

Final Points

Website

- ▶ Need to post these training materials on the School's website by August 14, 2020.

Record Keeping

- ▶ Seven years!

Q & A

► Questions?