

Title IX Training

Columbus State Community College

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Today's Session

- Annual Clery Training
- Intake and Support
- Investigative Interviews
- Writing an Investigation Report
- Hearing Procedures
- Writing a Decision
- Appeals Officer Perspective

Annual Clergy Training

Data and Statistics - Disclaimer

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

Sexual Assault

- “An offense classified as a forcible or nonforcible sex offense under the Uniform Crime Reporting System of the Federal Bureau of Investigation”
 - Rape
 - [Non-Consensual Sexual Contact]
 - Incest
 - Statutory Rape

Sexual Assault: Rape - NIBRS

-
- 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 victim 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.

Sexual Assault – Non-Consensual Sexual Contact – Your Policy

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

Sexual Assault – Incest: NIBRS

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

Note: Under Ohio law, marriage is prohibited between anyone closer in kin than second cousins. Also note that the criminal definition of incest under Ohio law is narrower than this definition.

Sexual Assault – Statutory Rape: NIBRS

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

In Ohio:

- Under 13 – can't consent
- 13 to under 16 – can consent to people who are under 18
- 16 and up – can consent

Sexual Assault Data 1 of 3

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

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

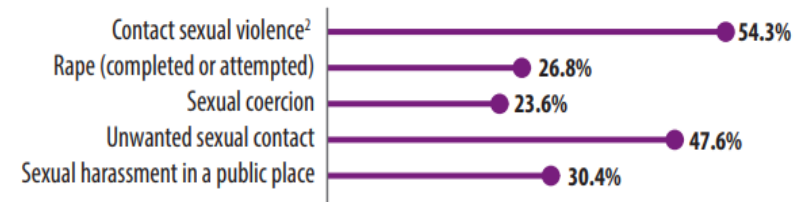
Located at: <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf>

Sexual Assault Data 2 of 3

- Types of Sexual Contact Reported by U.S. Women:
- 54.3% reported sexual violence;
- 26.8% experienced completed or attempted rape;
- 23.6% experienced sexual coercion;
- 47.6% reported experiencing some form of unwanted sexual contact other than those specifically identified elsewhere.
- Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)
- Located at: [Link to survey; CDC website](#)

Figure 1

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



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

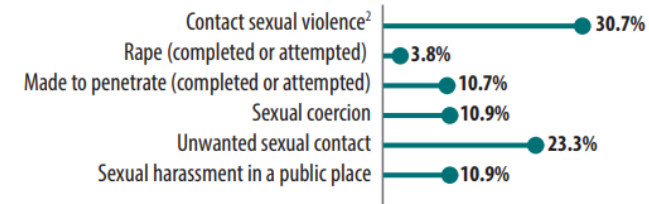
² Contact sexual violence includes rape, sexual coercion, and/or unwanted sexual contact.

Sexual Assault Data 3 of 3

- Types of Sexual contact reported by U.S. Men:
 - 30.7% reported some form of sexual violence
 - 3.8% experiencing completed or attempted rape,
 - 10.7% made to penetrate, 10.9% experiencing sexual coercion,
 - 23.3% experiencing some other form of unwanted sexual contact.
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- Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)
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Figure 2

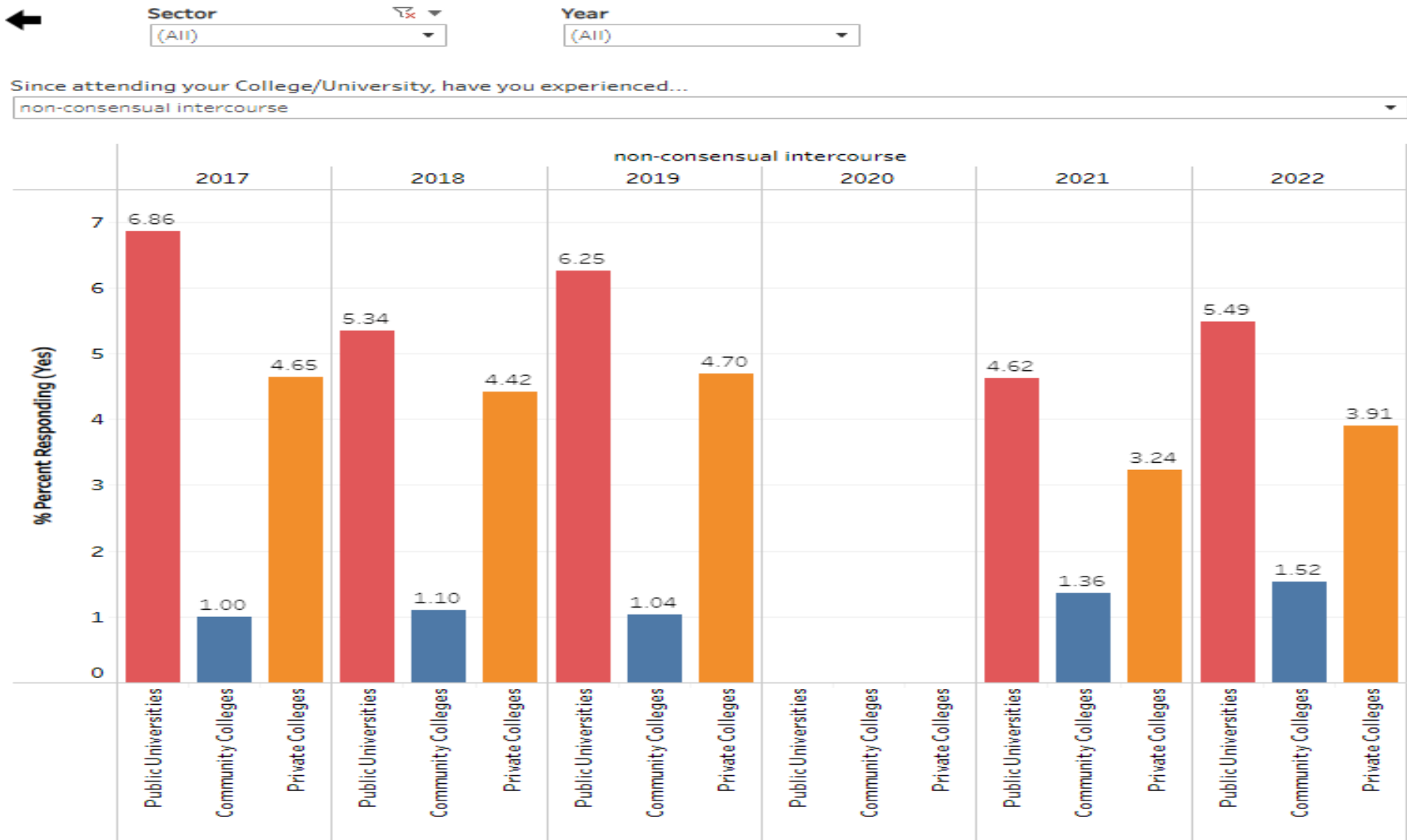
Lifetime Reports of Sexual Violence — U.S. Men, National Intimate Partner and Sexual Violence Survey, 2016/2017 Annualized Estimates¹



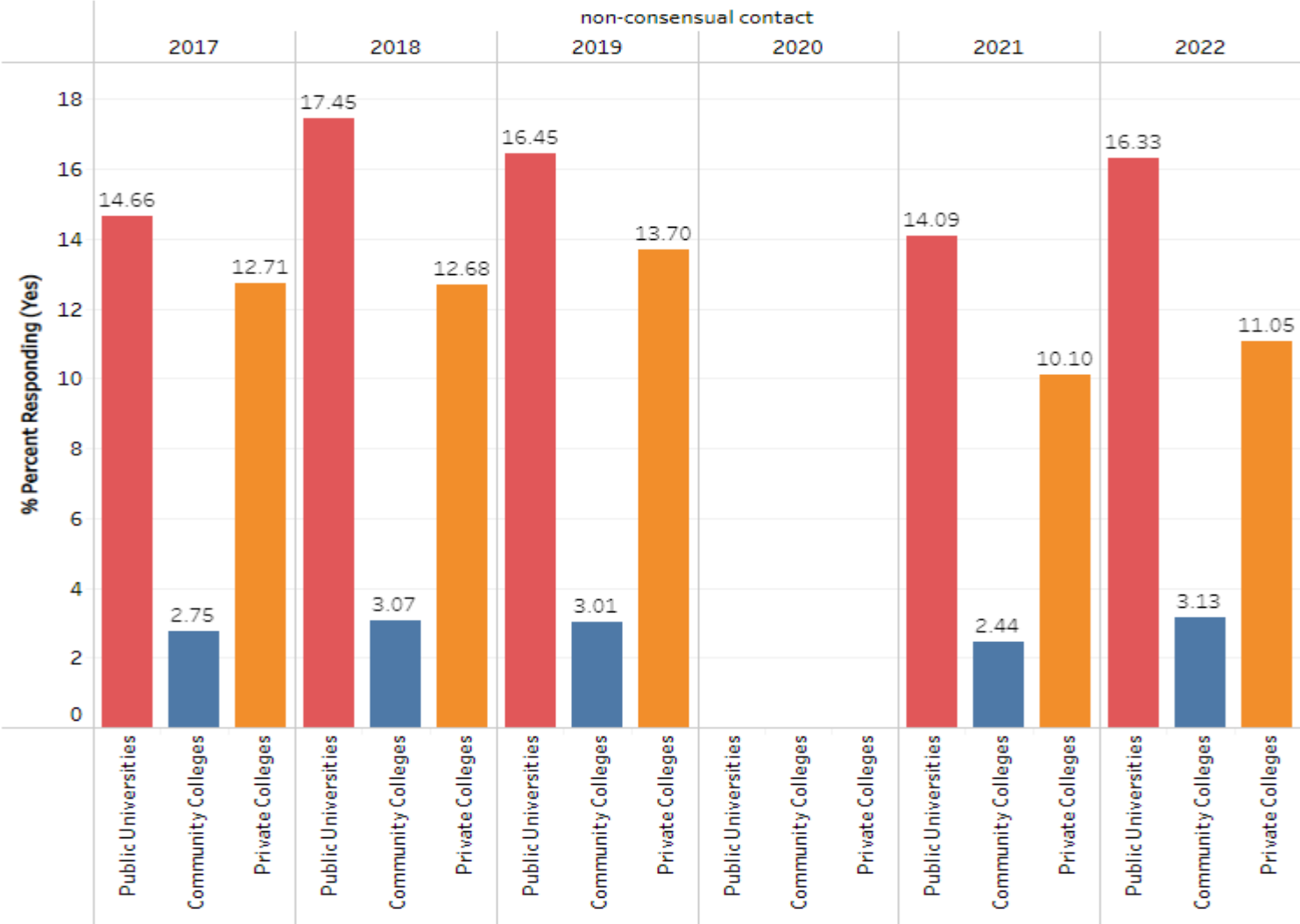
¹ All percentages are weighted to the U.S. adult population.

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

ODHE – Non-Consensual Intercourse



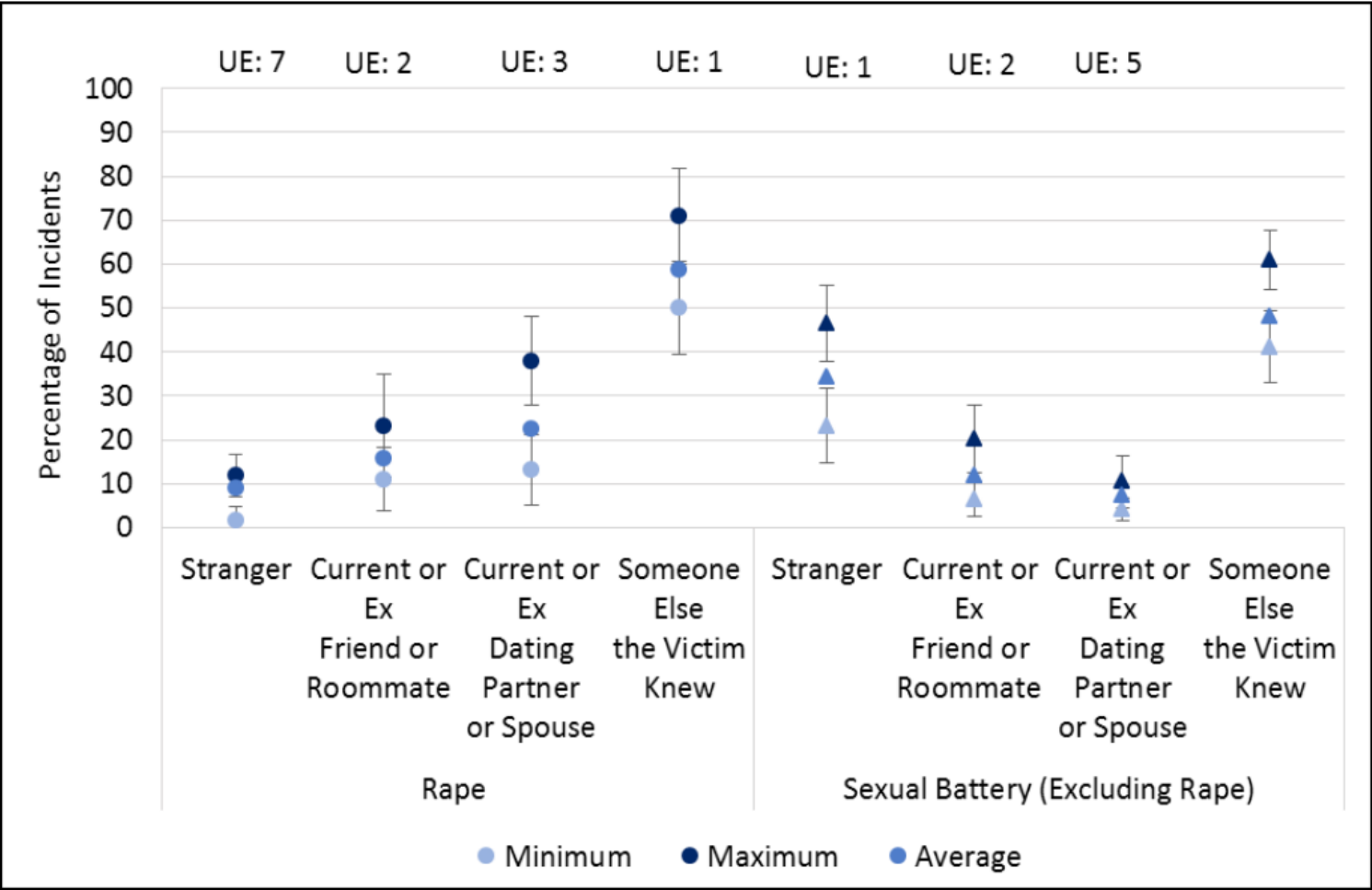
ODHE – Non-Consensual Sexual Contact



Sexual Assault Data: Prevalence Data in Higher Ed

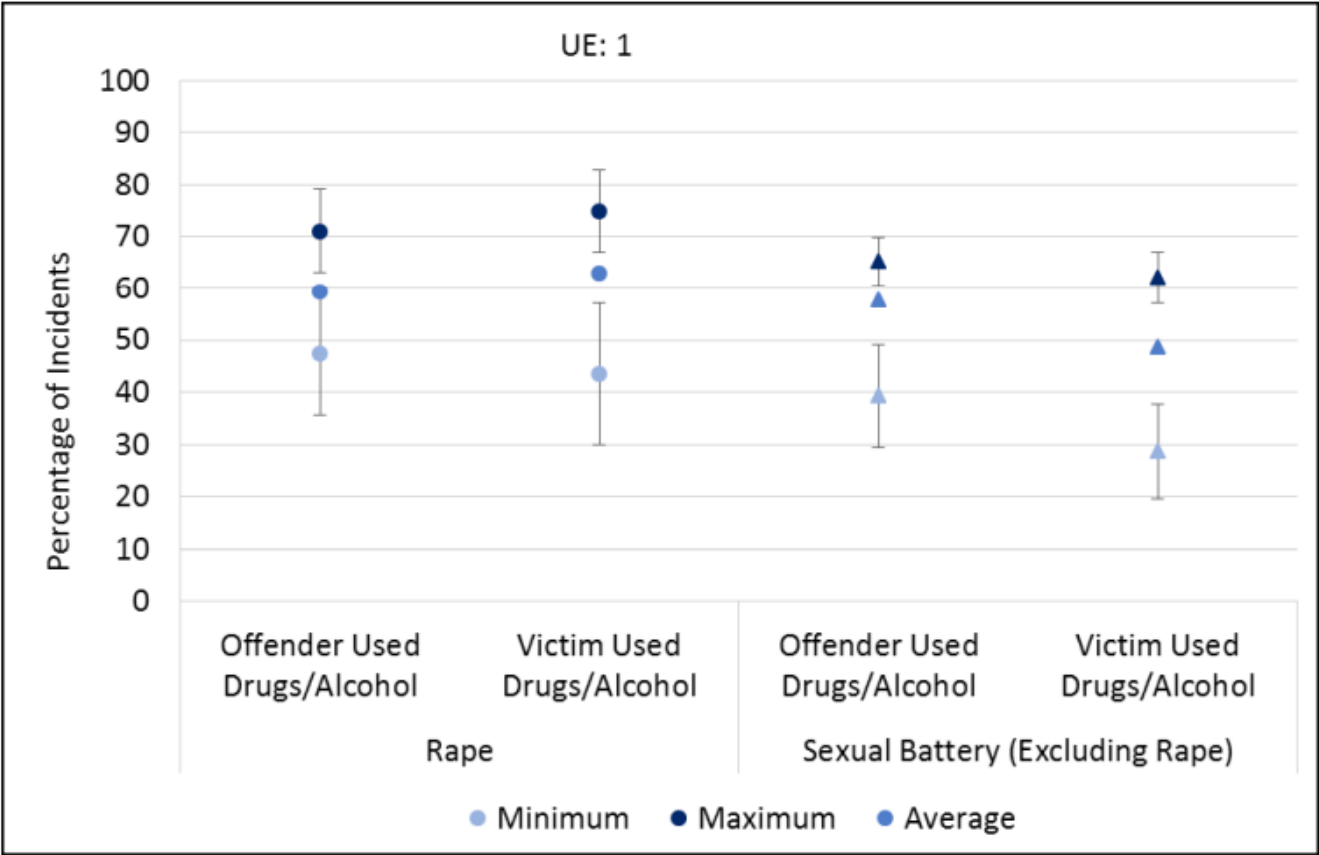
- More than 50 percent of college sexual assaults occur in August, September, October, or November, and students are at an increased risk during the first few months of their first and second semesters in college.
- For the 2014-2015 academic year, a large portion of incidents reported by females occurred in September or October, particularly for first year students.
- Statistic one: “Rape, Abuse & Incest National Network (RAINN), Campus Sexual Violence: Statistics.” RAINN Sourced from: “Campus Sexual Assault Study, 2007; Matthew Kimble, Andrada 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: Identity of Perpetrator



Sexual Assault Data: Alcohol/Drug Use

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



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

Sexual Assault Data: Alcohol/Drug Use

- “Survivors impaired by alcohol are more likely to disclose to informal, but not formal support sources than are non-impaired victims.”
- Lorenz, Katherine, and Sarah E Ullman. “Exploring Correlates of Alcohol-Specific Social Reactions in Alcohol-Involved Sexual Assaults.” *Journal of aggression, maltreatment & trauma* vol. 25,10 (2016): 1058-1078. doi:10.1080/10926771.2016.1219801.

Data and Statistics: Reporting Data

- About **65 percent** of surveyed rape victims reported the incident to a friend, a family member, or roommate but only **ten percent** reported to police or campus officials.
- U.S. Dep't of Justice, Office of Justice Programs, Office for Victims of Crime, *2017 National Crime Victims' Rights Week Resource Guide: Crime and Victimization Fact Sheets* (2017).

Data and Statistics: Impact Data

(1 of 2)

- Approximately **70 percent** of rape or sexual assault victims experience moderate to severe distress, a larger percentage than for any other violent crime.
- U.S. Dep't of Justice, Bureau of Justice Statistics, *Special Report: Socio-emotional impact of violent crime (2014)*.

Data and Statistics: Impact Data

(2 of 2)

- **81% percent** of women and **35% percent** of men report significant short- or long-term impacts of sexual assault, such as post-traumatic stress disorder (PTSD).
- Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, The National Intimate Partner and Sexual Violence Survey (NISVS); 2010 Summary Report (Nov. 2011).

Sexual Assault: Common Concerns

- Be cautious of questions that appear to blame the party for what happened, or they will shut down and stop engaging.
- Better options:
 - Explain why you need information on alcohol/drug use, what the party was wearing, etc. before you ask the questions.
 - Explain the concept of consent to the parties so that they can understand why you need detailed information on the sexual encounter.
 - Check your tone constantly so as to encourage continued sharing of information.

Dating Violence – CSCC Policy

- “Dating Violence” means **violence** committed [on the basis of sex] by a person who **is or has been in a romantic or intimate relationship with the complainant**. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

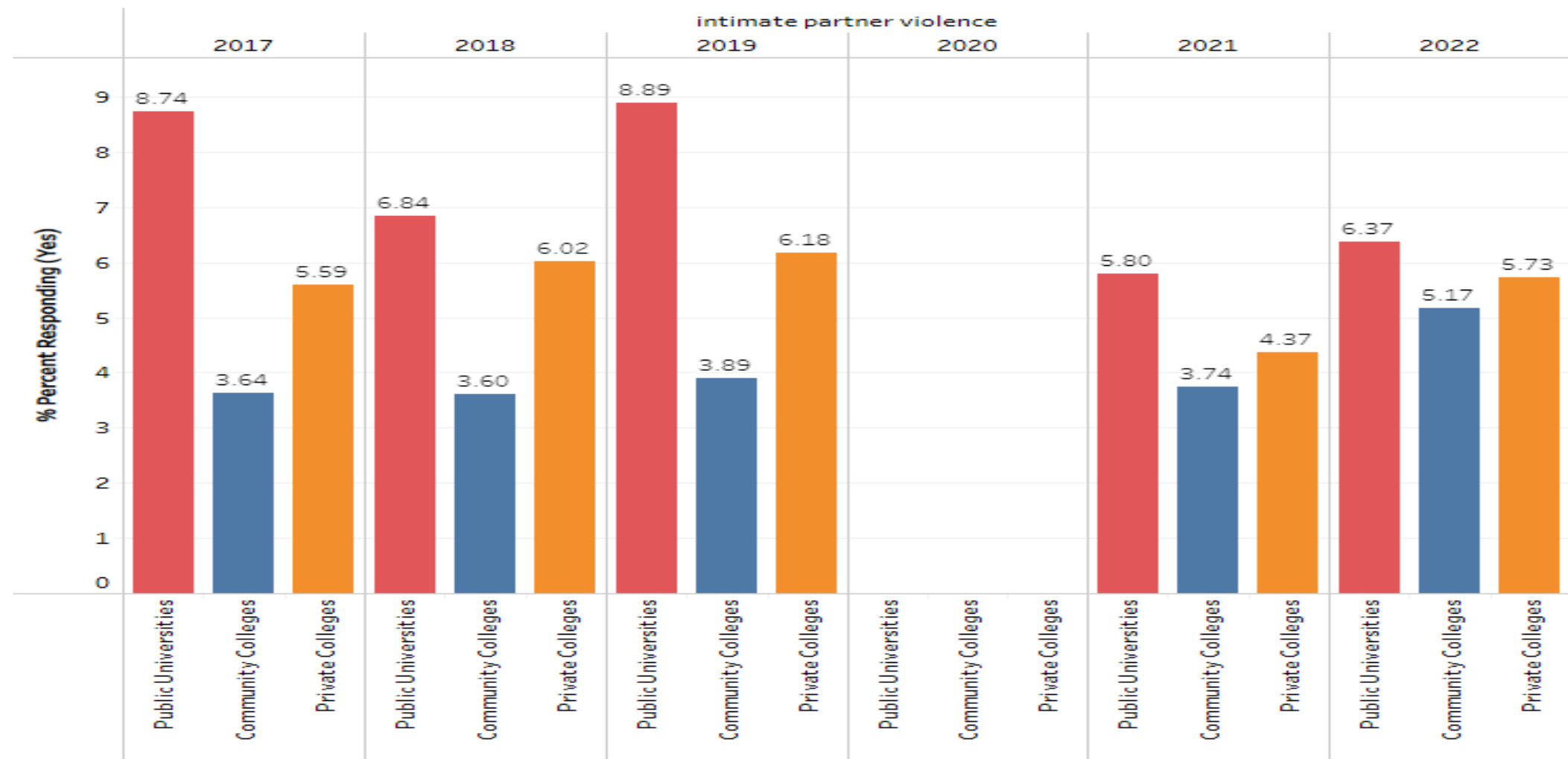
Domestic Violence – CSCC Policy

- “Domestic violence” is conduct that may constitute felony or misdemeanor crimes on the basis of sex under the family or domestic violence laws of Ohio that is committed by a person who is:
 - A **current or former spouse** of the complainant;
 - Similarly situated to a spouse
 - Cohabiting or who has cohabitated as a spouse or intimate partner
 - Shares a child in common with the complainant.
- This includes the use or attempted use of physical or sexual abuse, or a pattern of any other coercive behavior committed, enabled or solicited to gain or maintain power and control over a complainant, including verbal, psychological, economic or technological abuse. This also includes acts committed against a youth or adult who is protected from those acts under the family or domestic violence laws of Ohio, where such conduct is on the basis of sex.

IPV vs. Healthy Relationships

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

ODHE Data - IPV



Common Concerns in IPV Situations

- Supportive measures are important to ensure the parties can be separate and feel safe
- Retaliation is often a critical concern – parties may still have a relationship
- Consider whether parties need contingency plans as part of their supportive measures if safety concerns arise
- Balancing third-party reports of violence and safety concerns with complainant's refusal to participate in the process
- No contact order violations as continued evidence of underlying policy violation allegation
- It is not uncommon for both parties to be complainants and respondents. Watch for this scenario and ensure you provide appropriate intake for both.

IPV: Questions

- What is the relationship between the parties? Do they agree?
- What is the act of violence described?
- Under what circumstances did the act of violence occur?
- If the situation involved mutual combat:
 - Was one person the initiator and the other acting in self defense?
 - Should an investigation be opened against the complainant as well, if there was violence alleged to have been completed by the complainant?

Stalking – CSCC Policy

- “Stalking” is engaging in a course of conduct, on the basis of sex, directed at a specific person that would cause a reasonable person to:
 - Fear for the person’s safety or the safety of others; or
 - Suffer substantial emotional distress.

Stalking: Course of Conduct

- Under VAWA regulations: means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

Stalking: Reasonable Person

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

Stalking: Substantial Emotional Distress

- Under VAWA regulations means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Stalking Data 1 of 2

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

Stalking Data 2 of 2

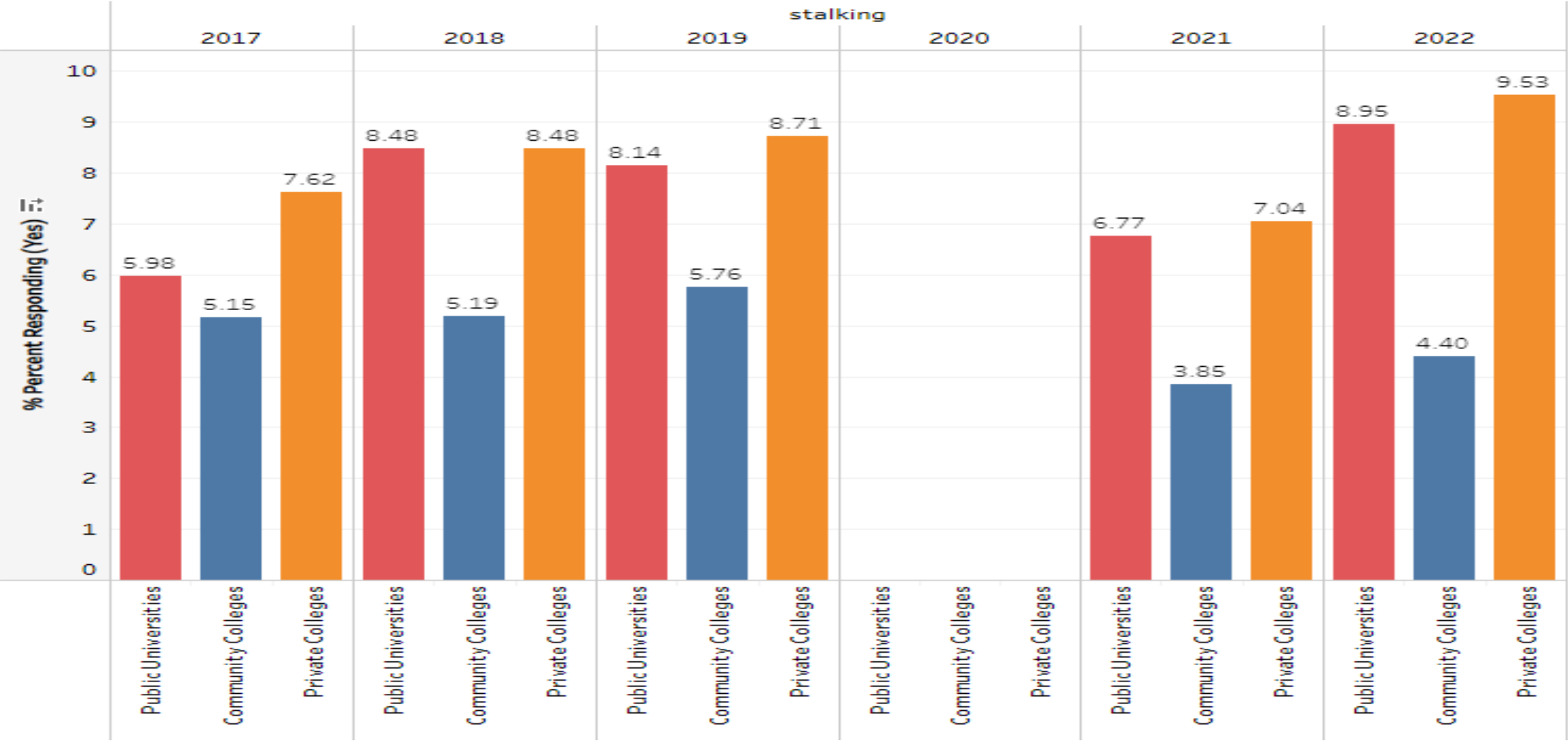
- **11%** of stalking victims have been stalked for 5 years or more.
- **46%** of **stalking** victims experience at least one unwanted contact per week.

[Matthew J. Breiding et al., "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011")

Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 63, No. 8 (2014): 7])

[Katrina Baum et al., (2009). "Stalking Victimization in the United States," (Washington, DC:BJA, 2009).]

ODHE Data - Stalking



Stalking: Common Concerns

- Clearly defined no-contact orders can be helpful to keep the parties apart and help calm the situation.
- Complainants are often concerned that the respondent may not respect no-contact orders, especially if they have already asked the respondent to stand down. Think of ways to help address this concern through supportive measures.
- Stalking after a no contact order may constitute additional instances of the underlying alleged policy violation, which may mean you need to run it through your Title IX process.

Stalking: Considerations

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

Title IX Jurisdiction

Definition of Sexual Harassment (Type A)

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

Hostile Environment

- 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 College's education program or activity.

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?

“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).

Offramps

- If behavior doesn't fit into the Box, it is often something that will still be addressed by your institution through another process:
 - If it's Sexual Exploitation or Type B Sexual Harassment, the case goes through a Non-Title IX Resolution Process
 - Student conduct of conduct
 - Employee disciplinary procedures
 - Faculty manual
 - Collective bargaining procedures
 - No trespass orders
- 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:
 - 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 Toledo 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

Intake and Support

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
- CSCC Policy offramps retaliation cases to Student Conduct or HR (but note that sometimes, the retaliation may constitute more stalking or sexual harassment and therefore may need to be rolled into the Title IX process)

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.

Investigative Interviews

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 (1 of 2)

- 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.

Writing an Investigative Report

Writing Interview Summaries (1 of 2)

- No magic formula
- Try to draft them near the time of the interview
- Summarize the discussion with as much detail as possible
 - Include policy and procedure discussions
 - Include questions asked and answered
 - Use quotations when possible

Writing Interview Summaries (2 of 2)

- Must be readable
- Must be accurate
- Incorporate feedback promptly
 - Otherwise you might forget what was said or what the feedback is referencing
- Put the work in
 - If your summaries are accurate and readable, they may become the bulk of your report (depending on your institution's report format)
 - Putting the work in now may save you time later

Writing Investigation Reports

From the Title IX Regulations...

- The 2020 Regulations provide that the investigator must create a report that:
 - Fairly summarizes relevant evidence
 - 34 C.F.R. §106.45(b)(5)(vii)
- What does this mean?

Preparing to Write the Report

Timing and Form

- Don't start writing the Final Report before the investigation has concluded, if you can help it
 - However, your interview summaries may be the bulk of your report and you will write those as the investigation proceeds
 - Starting the report too soon might give the impression that you have pre-judged the facts or have confirmation bias
- Find out whether your institution has a template for reports
 - Use it and your policy as a checklist

Investigation Reports

- **Basics**

- Summarize **facts**
- No findings of fact; No determinations
- Provide to parties and advisors at least 10 days before the hearing
- Did you create a draft and share it with the parties when you shared the evidence?
 - If so, make sure to distinguish between the DRAFT report and the FINAL report because the FINAL report must address your consideration of the feedback provided

Things to Keep in Mind

- Two or more “stories”
-
- Each case includes at least TWO stories, maybe more
 - (1) The underlying case
 - (2) The investigation of the underlying case

Story One of (at least) Two

The Underlying Facts

- Each case includes at least TWO stories in one:
 - (1) The facts of the underlying case
 - On August 25, 2020, Complainant and Respondent attended a party together at Thompson Point Residence Hall
 - Complainant reports A, B, and C
 - Respondent reports X, Y, and Z

Story Two of (at least) Two

The Investigation of the Underlying Case

- Each case includes at least TWO stories in one:
 - (2) The investigation of the underlying case
 - On August 30, 2020, Complainant filed a formal complaint
 - On September 5, 2020, Complainant spoke with Investigator
 - On December 10, 2020, Complainant shared the Investigation Report with Witnesses 1, 2, and 3

Different Ways to Tell These Stories

Structural Considerations

- Template
- Typical practice for your institution
- Common structural tools
 - Chronology
 - Topic or allegation
 - Perhaps by chronology within each topic or allegations
 - Chronology of how the information came into the investigation
 - By Witness Summary

Where to Begin? (1 of 2)

Structuring Your Report – Introduction

- Should preview both stories
 - How did the underlying “story” get to the Title IX Office?
 - What about the underlying story was reported?
- Identify relevant individuals with just factual information
 - Complainant
 - Respondent
 - Investigator
 - Witnesses

Where to Begin? (2 of 2)

Structuring Your Report – Introduction

- The Allegations
 - Refer back to the Notice when drafting your descriptions of the allegations
 - Do they match your description?
 - If not – why?
 - Did both parties receive Notice of the issues you’ve investigated?
 - Did something come up during the investigations that requires further notice or charges?
 - Remember to use the names and definitions of violations as they existed when the conduct is reported to have occurred
 - Same policy for definitions and procedure? Or a split?

Identify and include all alleged policy violations

- Always include definitions of prohibited conduct alleged from applicable policy
- Always include related definitions as appropriate (e.g. consent, incapacitation) or any code of conduct included if done together
- Include verbatim, in entirety
 - This will take up space but it's worth it
 - Acts as a check on the process to ensure accuracy
 - Gives the parties and advisors a reference point within the report itself

Process and Procedure

Structuring Your Writing – Step-by-Step

- Procedural Steps beginning with Formal Complaint:
 - Can work well between the introduction and discussion of facts
 - Pieces of this description may need to be repeated later
 - Include the following for your Decision-Maker(s):
 - Formal Complaint
 - Notifications to the parties
 - Interviews with parties and witnesses
 - Site visits
 - Methods used to gather other evidence

Explaining the Facts

Structuring Your Report – What Happened According to Whom?

- Infinite ways to structure a report
 - We are providing suggestions *ONLY*
- Structure may need to change depending on the type of case and information presented
 - Think about this early in the writing process
- Remember – you are telling at least TWO stories to anyone reading your report
 - Both must be readable

Explaining Your Structure

Example Explanation

- “The information in this report is a summary of facts provided by the participating parties and witnesses. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate.”

Other Basics to Include

Issues of Relevance and Procedure

- Address any relevance determinations you made during the investigation
 - Witnesses NOT interviewed (and why)
 - Records NOT requested (and why)
- Any procedural anomalies that need explained?
 - Explaining them in the report gives the parties an opportunity to address them prior to the hearing

A statement regarding relevant evidence

- “All relevant information gathered during the course of the investigation has been included in this report.”
- Identify if you thought something was not relevant and why – consider including in attachment(s) for the decision-maker, even if you’ve concluded it is not relevant
- Provide a table or list of all relevant evidence gathered and attach that evidence

- If you can, synthesize the information from multiple parties and witnesses
 - May work best in an overview/introduction section or a conclusion section
- Where the stories diverge:
 - “Information from [Complainant]”
 - “Information from [Respondent]”

Look for opportunities to logically combine related facts

- Undisputed facts at the beginning
 - May give a framework without creating repetition
- Disputed facts
 - Facts may be related by:
 - Timing
 - Source
 - Topic

Synthesis Example #1

Logically combine related facts to tell a story

Pre-Gaming at Apartment 12

Complainant and Witnesses A, B, and C, reported that they each took 3 shots of vodka when they arrived at Apartment 12. Appendix, pp. 6-9. Witnesses agree that approximately two hours after Complainant and Witnesses A, B, and C arrived and took vodka shots, Respondent arrived at Apartment 12 with Witness D. Appendix, pp. 4-9. During his Title IX interview, Respondent reported that he did not take any shots of vodka and had a clear memory of the night. Respondent also reported that he did not observe Complainant take any shots of vodka that night, did not see Complainant stumbling when she walked around the apartment, and did not hear Complainant slur her speech at any time. Appendix, p. 7.

Synthesis Example #1 – Takeaways

Can you apply these takeaways in your cases?

- Several things worth noting in this example:
- The information is presented under a topic heading
 - "Pre-Gaming at Apartment 12"
- Information comes from different sources and is blended together
 - Parties and witnesses
 - References to appendix suggest that the information came from several different interview summaries

Synthesis Example #2

Logically combine related facts to tell a story

Report that Respondent choked Complainant

As previously mentioned, Complainant reported four separate acts that might rise to the level of a policy violation. First, Complainant reported that Respondent choked her during their argument on September 1, 2020. Formal Complaint, p. 1. When Complainant described this incident to the Title IX investigator, she said that Respondent used his hand to encircle her throat and then squeeze, preventing her from breathing or talking. (Sept. 10th Interview of Complainant). Complainant submitted photographs of her neck during the Title IX investigation, which are included in the Appendix to this Report on pages 10 and 11. Two witnesses, Witness A and Witness B, reported to the Title IX investigator that they observed bruising on the Complainant's neck when they saw the Complainant the morning of September 2, 2020. (Sept. 12th Interview of Witness A; Sept. 20th Interview of Witness B).

Respondent denied that he choked Complainant. In his statement to the Title IX Investigator...

Synthesis Example #2 - Takeaways

Can you apply these takeaways in your cases?

- Several things worth noting in this example:
 - The information is presented under a topic heading
 - “Report that Respondent Choked Complainant”
- Information comes from different sources and is blended together
 - Parties and witnesses
 - References to multiple interview summaries and photographs
 - When things cannot be logically combined, begin a new paragraph (“Respondent denied...”)

Analysis of Disputed & Undisputed Facts

Be careful to avoid drawing any conclusions

- **Complainant and Respondent's Accounts of Events**

- A. Areas of Agreement
-
- B. Areas of Disagreement

Consider Feedback

And document that Consideration

- Remember...
 - **“Prior to completion of the investigation report,** the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, **which the investigator will consider prior to completion of the investigative report.”**
- Make sure the investigation report reflects your consideration
 - Don’t just go through the motions

Common Writing Mistakes

Consistent and Precise Language

- Inconsistent Terminology
 - Referring to individuals or locations differently in different places in the report
 - May leave the reader with the impression that you are talking about different places or people
 - Tom, Tom Smith, Mr. Smith, Thomas
 - Tom's room, Room 4A, Hubbard Hall
- Word choice
 - Be as precise as possible
 - This can add time to the writing process, but can pay off in terms of clarity
 - Avoid charged language

Common Writing Mistakes

Empathy and Tone

- Empathy
 - Stay away from charged words of advocacy
 - Clearly/obviously
 - Innocent/guilty
 - Victim/perpetrator
 - Watch your use of adjectives and adverbs – unless they are in a quote
 - “really drunk”
 - “forcefully pushed”
- Tone
 - Be non-judgmental
 - Recognize the impact of your words

Common Writing Mistakes

Cite Your Source

- Failing to include sources of information
 - If explaining this in every sentence (“Bob stated this happened”) weighs down your writing, use footnotes to add clarity.
 - Citing the source of your information helps the reader and underscores your neutrality
- Confusing Quotation Marks
 - Is the quoted language from the interviewee?
 - Is the quoted language actually a quote from someone else?
 - Footnote 10: The quoted language was attributed to Respondent by Complainant during Complainant’s October 10, 2020 Title IX interview.

Common Writing Mistakes Structure

- Topic sentences and transitions
 - Provide a roadmap in your introduction and under new headings
 - Sentences should flow from one-to-another
 - Remember – telling two or more stories to someone unfamiliar with the case
- Pronouns
 - Be careful of pronoun usage so that the reader always knows who is saying or doing what
 - When using pronouns, make sure you are using the right pronouns for the individual

Common Writing Mistakes

Miscellaneous

- Typos
 - They happen to everyone, but
 - Typos in every sentence undermine the integrity of a summary/report
- Run-on sentences/Sentence fragments
 - Make sure each sentence has a subject and a verb
 - If combining multiple independent clauses, consider whether to separate sentences

Hearing Procedures

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
- 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
- Assign sanctions using the factors in your policy

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)

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?

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.

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.)

Writing 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.
- Think: laws of physics.
- 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? Is this even fair?
- 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, gender, sexual orientation, etc.
- Are you making any assumptions that are not based on the evidence, and if so, are those fair under the circumstances?
 - Compare “They are carrying a wet umbrella so it’s probably raining” with “They look sad today so it’s probably raining”

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.

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 (2 of 2)

- **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

Appeals Officer Perspective

Bases for Appeal – CSCC Policy

- 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

Appeal Decisions

- These are not typically as long as the original decision.
- Must address arguments if they are appropriate bases for appeal.
- If arguments do not meet the requirements to be an appropriate basis for appeal, the decision should explain that.
- 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? (What makes sense to ensure that we have a fair, equitable process?)

Upcoming Free Webinars

- All of these are free
- Sign up at www.brickergraydon.com/events
 - Dec. 12th at **12:00** – Clery Hot Topics
 - Dec. 15th at 1:00 – Title IX Litigation Update
 - February 26th at 1:00 – Informal Resolution
 - March 26th at 1:00 – Transferrable Skills for Title IX and Title VI Investigators
 - April 23rd at 1:00 – Legal History of Title IX
 - May 28th at 1:00 – Title IX Litigation Update

Thank You

