

Introduction To Title IX & Clery Act Basics

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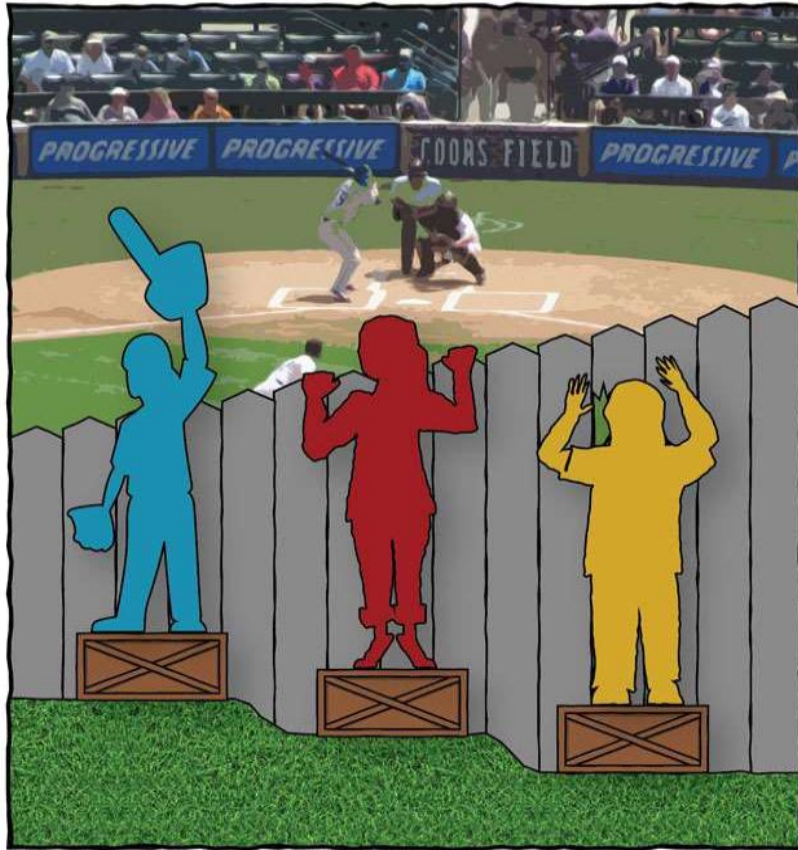
Required Training for Title IX/Clery Team

- Definition of Sexual Harassment/Misconduct
- Scope of Educational Program or Activity
- Investigation and Complaint Process
- Impartial Consideration
- Identification of relevant questions and evidence
- Writing reports

Who Should Receive Training

- Title IX coordinators
- Investigators
- Decision-makers
- Appellate decision-makers
- Informal resolution facilitators

Title IX is an Equity Statute



EQUALITY



EQUITY

Title IX: A Federal Statute

A provision of the federal Education Amendments Act of 1972:

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

Sexual Violence:

Data and statistics

Sexual Assault Data

- 43.6% of women and 24.8% of men experienced some form of contact sexual violence in their lifetime, with 4.7% and 3.5% experiencing such violence in the 12 months preceding the survey.

Statistics from the National Intimate Partner and Sexual Violence Survey (NISVS), Centers for Disease Control and Prevention, 2015 Data Brief (last visited June 2020).

Continued

Sexual Assault Data: Alcohol/Drug Use

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

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

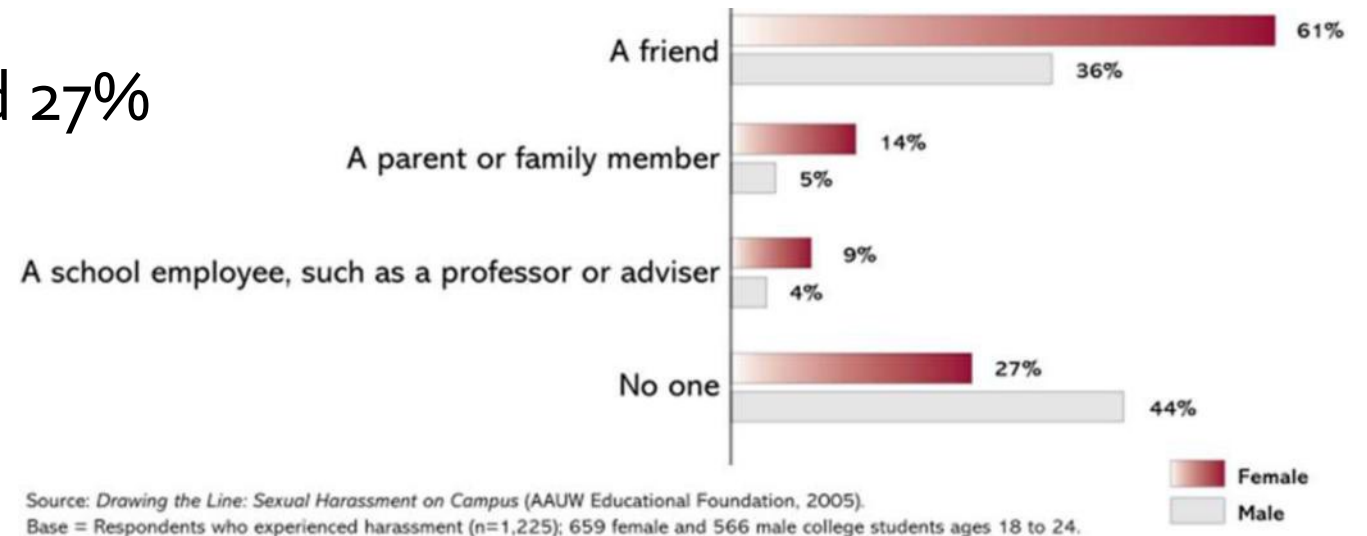
Data & Statistics: Reporting Data

- About 65% of surveyed rape victims reported the incident to a friend, a family member, or roommate but only 10% reported to police or campus officials.

Preamble, p. 30082 (Official) notes that “Commenters cited: 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).

Many Students do Not Report to Anyone That They Have Been Harassed

- 61% of females and 36% of males report the harassment to a friend. 14% of females and 5% of males report to a parent or family member. 9% of females and 4% of males report it to a school employee such as a professor or adviser. And 27% of females and 44% of males report it to no one.
- Why are males less likely to report?



Data & Statistics: Impact Data

- 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).

Preamble, p. 30080 (Official) notes that “Commenters cited: 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 Harassment Data

- Percentage of females versus males on experiencing different forms of sexual harassment:
 - Sexual harassment: Female gender 62%; Male gender 61%
 - Sexual comments: Female gender 57%; male gender 48%
 - Grabbed: Female 28%; Male 22%
 - Called homophobic name: Female 13%; male 37%
 - Cornered sexually: Female 13%; male 10%
 - Forced to kiss: Female 7%; male 8%
 - Sexual postings: Female 6%; male 12%

Preamble, p. 30076 (Official) notes that "Commenters cited: American Association of University Women Educational Foundation, Drawing the Line: Sexual Harassment on Campus (2005)."

Sexual Harassment Data

- LGBT students are more likely to be sexually harassed and have negative emotional and behavioral responses to harassment.
- 73% of the LGBT students report harassment (versus 62% of heterosexual students).

Continued

Preamble, p. 30076 (Official) notes that "Commenters cited: American Association of University Women Educational Foundation, Drawing the Line: Sexual Harassment on Campus (2005)."

Stalking Data

- 4.5 million women and 2.1 million men are stalked in one year in America.
- Over 85% of stalking victims are stalked by someone they know.
- 61% of female victims and 44% of male victims are stalked by a current or former intimate partner.
 - First statistic: National Intimate Partner and Sexual Violence Survey: 2015 Data Brief (CDC)
 - Second and third statistics: National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (CDC)

Continued

Stalking Data

- 11% of stalking victims have been stalked for five 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", (referenced in Preamble, p. 30079 fn 366 (Official))

Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 63, No. 8 (2014): 7] (referenced in Preamble, p. 30079 fn 366 (Official))

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

Statutory Definitions

- **Complainant** is “an individual who is alleged to be the victim of conduct that could constitute sexual harassment.” §106.30
 - Not just students (employees, guests, visitors)
- **Respondent** is “an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.” §106.30
 - Not just students (employees, guests, visitors)

Continued

Statutory Definitions

- **Recipient** “means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives such assistance, including any subunit, successor, assignee, or transferee thereof.” §106.2

Continued

Statutory Definitions

- **Post-secondary institution** is “an institution of graduate higher education as defined in §106.2(l), and institution of undergraduate higher education as defined in §106.2(m), an institution of professional education as defined in §106.2(n), or an institution of vocational education as defined in §106.2(o).” §106.30(b)

Applicable Law

- Law – 20 U.S.C. 1681 et seq.
- Regulations – 34 C.F.R. Part 106
 - Athletics, employment, admissions, housing, etc.
- Clery – 20 U.S.C. 1092(f); 34 C.F.R. 668.46; Clery Handbook* (Appendix)

Continued

Applicable Law

- To the extent they do not conflict with the regulations:
 - 2001 Guidance (Rescinded)
 - 2015 – DCL on obligations of TIX Coordinators
 - 2015 – DCL on VAWA Final Regulations
 - 2017 – DCL and Q&A – reaffirming 2001 Guidance
- Rolled into or addressed in regulations

Continued

New Title IX Regulations

“Non-negotiable principles” include the right of every survivor to be taken seriously and the right of every person accused to know that guilt is not predetermined. (30059 and throughout)

- Training requirements
- Different definitions
- Different processes

Overview of the Process

- Report
- Supportive measures
- Formal complaint
- One of three options here:
 - Informal resolution
 - Dismissal
 - Formal grievance process
- Formal grievance process includes investigation, hearing, determination and appeal

Overview of the Process: Actual Knowledge

- Under past interpretations/regs, institution could be found to have “constructive knowledge” and be required to act.
- 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 (discretion of the postsecondary institution)
 - Notice to employees is no longer enough to trigger actual knowledge (ability or obligation to report not enough)
 - Purpose to allow complainants to speak with employees without automatically triggering process

Overview of the Process: Formal Complaint

- A document filed by a complainant or signed by the Title IX coordinator alleging sexual harassment against a respondent and requesting the recipient investigate the allegation of sexual harassment
 - In response to a formal complaint, a recipient must follow a grievance process.
 - Title IX coordinator must offer complainant supportive measures (regardless if files formal complaint – if complainant does not want to file a formal complaint).

Overview of the Process: Formal Grievance Process

- Any provisions, rules, or practices, other than those in the regulations, must apply equally to both parties.
- Basic requirements:
 - Treat complainants and respondents equitably
 - Follow grievance process
 - Only impose any disciplinary sanctions against a respondent after grievance process followed

Continued

Overview of the Process: Formal Grievance Process

- Requires an objective evaluation of all relevant evidence (inculpatory and exculpatory)
- Provide credibility determinations not based upon person's status as complainant, respondent or witness
- Require individual designated by recipient as Title IX coordinator, investigator, decision-maker, informal resolution officer and/or appeals officer be free from conflict of interest or bias

Continued

Overview of the Process: Formal Grievance Process

- Include presumption that respondent is not responsible for the alleged conduct until a determination regarding responsibility is made through the grievance process
- Include prompt time frames
- Describes range of possible disciplinary outcomes
- States standard of evidence (preponderance of the evidence or clear and convincing)

Continued

Overview of the Process: Formal Grievance Process

- Include procedures and bases for complainant and respondent to appeal
- Describe range of supportive measures available to complainants and respondents
- Not require legally privileged evidence absent a voluntary written waiver by the holder of the privilege

Overview of Process: Written Notice to Complainant & Respondent

- Describes grievance process and informal resolution process
- Describes allegations with sufficient time for review with sufficient detail, such as date, location, if known
- States that respondent presumed not responsible for alleged conduct and determination made at conclusion of grievance process
- Advises that parties may have an advisor of choice

Continued

Written Notice

- Describes any provision in recipient's code of conduct that prohibits knowingly making false statements or providing false information during the grievance process
- Provides additional notification to parties if new allegations arise as apart of the investigation

Dismissal as an Outcome?

- Recipient MUST investigate allegations in a formal complaint
- BUT recipient MUST dismiss:
 - If conduct alleged would not constitute sexual harassment, even if proven, OR
 - Conduct did not occur within recipient's education program or activity or in the United States

The Investigation

- Only of a formal complaint
- Burden of proof and evidence gathering rests with college
- Cannot access, require, disclose or consider treatment records of a party without that party's voluntary, written consent
- Must provide equal opportunity for parties to present witnesses (fact and expert)

Continued

The Investigation

- Provides equal opportunity for parties to present inculpatory and exculpatory evidence
- Cannot restrict ability of either party to discuss or gather and present relevant evidence
- Provides parties same opportunities to have others present during the grievance process, including advisor of choice

Continued

The Investigation

- Provides written notice of date, time, location, participants and purpose of all hearings, investigative interviews or other meetings with sufficient time to prepare
- Provides both parties equal opportunity to inspect and review any evidence obtained in the investigation – recipient must send to party and party’s advisor with at least 10 days to submit a written response before completion of investigation report

Continued

The Investigation

- College must make all such evidence subject to inspection and review at any hearing.
- An investigation report must be prepared at least 10 days before a hearing that fairly summarizes the relevant evidence and send to each party and party's advisor.

Hearings

- College must provide a LIVE hearing, which allows for cross examination of witnesses.
- Parties must have an advisor and the college must provide an advisor for a party, if the party does not have one.
- Advisors ask only relevant cross-examination questions—no party-on-party questioning.
- May be virtual, but must be recorded or transcribed

Determinations

- Decision-maker (not Title IX coordinator or investigator) must issue a written determination regarding responsibility.
- Must include:
 - Allegations
 - Procedural steps taken from receipt of formal complaint

Determinations

- Must include findings of fact
- Must include conclusions
- Must include a statement of and rationale for each result of each allegation, including determination of responsibility and any disciplinary imposition and whether remedies designed to restore or preserve access to educational program or activity will provide to complainant

Continued

Determinations

- Must inform the parties of procedures and bases for appeal by both parties
- Must serve written determination to parties “simultaneously”

Appeals

- College must offer to both parties the following bases of appeal:
 - Procedural irregularity that affected outcome
 - New evidence not reasonably available at the time regarding responsibility or dismissal that could affect outcome
 - Conflict of interest or bias by the Title IX coordinator, investigator and/or decision-maker that affected the outcome

Continued

Appeals

- The decision-maker for the appeal cannot be the same decision-maker from the hearing, or the Title IX coordinator or investigator.
- Must provide both parties a reasonable, equal opportunity to submit a written statement in support of or challenging the determination.
- Must issue a written decision describing the result of the appeal and rationale and provide the decision simultaneously to the parties.

Informal Resolution

- At any time prior to the determination regarding responsibility, the college may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.
- College cannot *require* this and also cannot offer unless a formal complaint is filed.

Continued

Informal Resolution

- College can offer informal resolution, if:
 - Provides written notice to the parties
 - Obtains the parties' voluntary, written consent to the informal process
 - Cannot offer as an option for employee sexual harassment of a *student*

Retaliation

Neither the college nor any other person may retaliate against an individual for purpose of interfering with any right or privilege secured by Title IX or because made a report or complaint, or participated or refused to participate in the process

Confidentiality During the Process

- College must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who made a report, any complainant, any alleged perpetrator, any respondent, and any witness, unless required by law, permitted by FERPA, or for the purposes of carrying out grievance process.

Jurisdiction

- College has no obligation to address off-campus conduct that does not involve a program or activity of school, BUT
- “Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities.”

Jurisdiction

- A recipient with actual knowledge of sexual harassment in an educational 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 only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

Jurisdiction

- **“Educational 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.”

Education Program or Activity

- Locations, events, or circumstances with substantial control – the easy ones:
 - Residence halls
 - Classrooms
 - Dining halls

Off Campus?

- Any of the three conditions must apply to extend Title IX jurisdiction off campus:
 - Incident occurs as part of the college's "operations" (meaning as a "recipient" as defined in the Title IX statute or the regulations).
 - If the college exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus

Continued

Off Campus?

- Incident occurred in an off-campus building owned or controlled by a student organization officially recognized by the college.
- Regulations specifically address off campus sorority and fraternity housing and, as long as owned by or under control of organization that is recognized by the college, it falls within Title IX jurisdiction
- Must investigate in these locations

Not an Education Program or Activity

- Locations, events or circumstances without substantial control:
 - Anything outside of the United States (some recent case law questioning this requirement)
 - Privately-owned off campus apartments and residences that do not otherwise fall under the control of the college (example: privately-owned apartment complex not run by a student organization)

Education Program or Activity

- What about the grey areas???
 - Conventions in the United States
 - Holiday party for an academic department
 - Professor has students over to house
- Depends on fact analysis under “substantial control”

Mandatory Dismissal?

- **WHEN?**
- **Dismissal of a formal complaint:** The recipient must investigate the allegations in a formal complaint.
- (BUT) If the conduct alleged in the formal complaint would not constitute sexual harassment even if proved, did not occur in the recipient's **education program or activity**, or did not occur against a person in the United States . . .

Continued

Mandatory Dismissal?

- Then the college must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under Title IX; such a dismissal does not preclude action under another provision of the college's code of conduct.

Study Abroad Programs

- Draws a bright line-not outside of the United States: plain text of Title IX “no person in the United States,” means no extraterritorial application. Must dismiss.
- Programs of college based in other countries? No jurisdiction and must dismiss.
- Foreign nationals in the United States covered.

Online Study

- “Operations” of the recipient may include computer and online programs and platforms “owned and operated by, or used in the operation of, the recipient.”
- Still has to occur in educational program or activity
- And in United States...

Hypotheticals Related to Jurisdiction

Did it happen in an educational program or activity?

Jurisdictional Hypotheticals Questions

- To answer these questions, think through the elements for jurisdiction:
 - In an educational program or activity?
 - In the United States?
 - On campus?
 - If off campus:
 - Exercise substantial control over respondent and context?
 - Off campus building owned or operated by student group recognized by institution?

Hypothetical 1

- Samantha, a student, informs the Title IX coordinator or designee that she was sexually assaulted at a party over the weekend, by another student she knows, John. Samantha states that the party and assault occurred at College Manor apartments. Samantha believes this is part of campus. College Manor apartments is a complex directly behind the college and sits in between two college-owned senior apartment complexes, but College Manor is owned by a private landlord.

Hypothetical 2

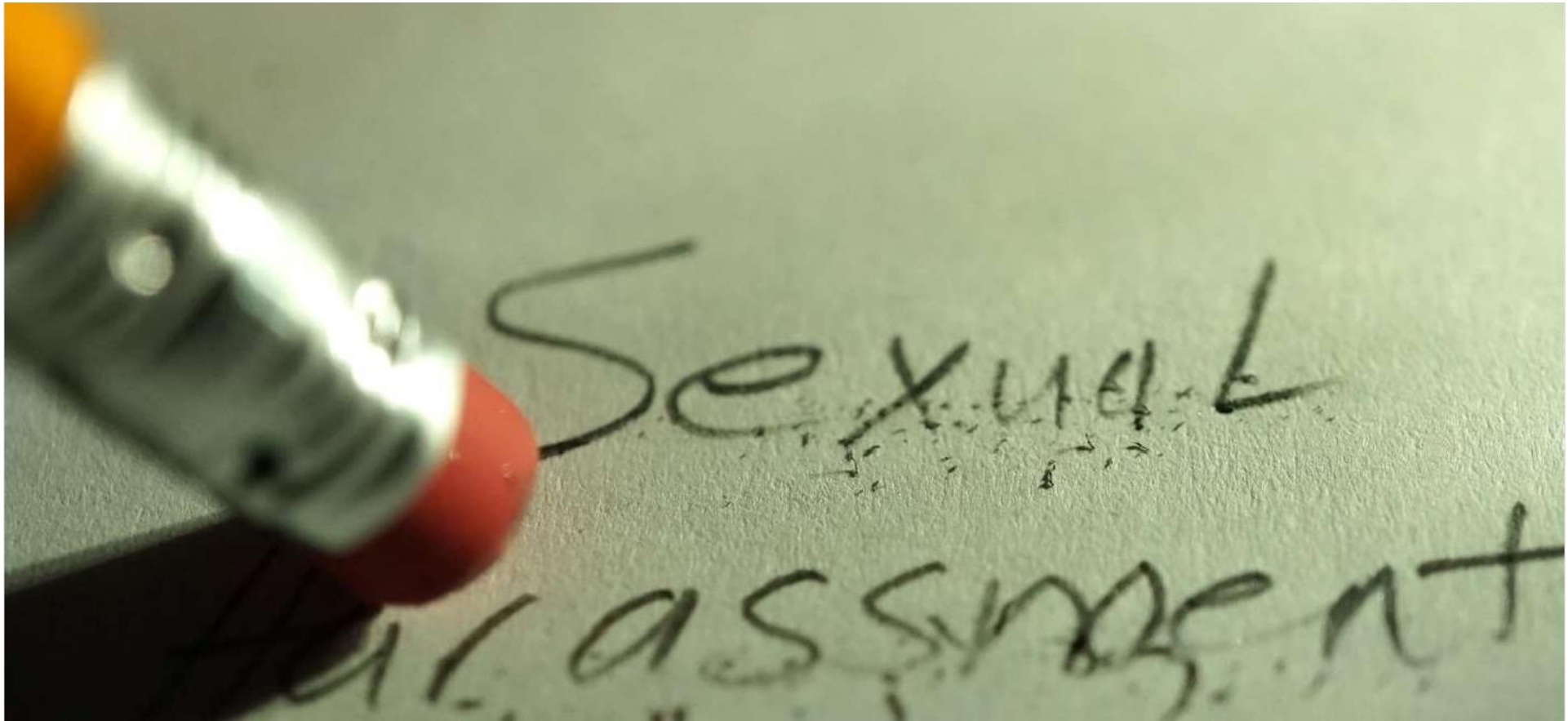
- Jonas, a student, informs the Title IX coordinator or designee that a stranger sexually assaulted him at a fraternity party over the weekend. The fraternity house is affiliated with the college, but the university does not own the house and the house is located off-campus.

Hypothetical 3

- The college has partnered with the city for an improvement district along the main street that runs through campus. The improvement district demolishes and rebuilds buildings on the street, oversees the cleanliness of the sidewalks, and has a task force that patrols the area on bicycles to deter crime. Alex, a student, informs the Title IX coordinator or designee that a stranger sexually assaulted her on the main street in front of campus over the weekend.

Hypothetical 4

- Eric, a student, calls the Title IX coordinator or designee frantically from Italy, where he is enrolled in the university's "Italy program," in which professors and students from the college hold courses at a sister university in Italy. Eric states that one of the college's professors told Eric that he could only get an A in the course if he slept with the professor.



Sexual Harassment

Sexual Harassment

- Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
 - [**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 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
 - [**Clery crimes**] Sexual assault, dating violence, domestic violence or stalking

Sexual Harassment: Quid Pro Quo

- Only applies to employee respondents (can be any complainant).
- DOE interprets this broadly to encompass implied quid pro quo.
- No intent or severe or pervasive requirements, but it must be unwelcome.
- “[A]buse of authority is the form of even a single instance...is inherently offensive and serious enough to jeopardize educational access.”

Sexual Harassment: Pervasive

- Must be severe, persistent and objectively offensive
- Denies the student equal access to educational programs
- Does not require intent
- Reasonable person standard – means a reasonable person in the shoes of the complainant

Severe

- Takes into account the circumstances facing a particular complainant
- Examples: age, disability status, sex, and other characteristics
- Preamble discussion in regulations states that this removes the burden on a complainant to prove severity.

Objectively Offensive

- “Reasonable person” is fact-specific:
 - Because it is so fact-specific, different people could reach different outcomes on similar conduct, but it would not be unreasonable to have these different outcomes.
 - Nothing in the regulations prevents institutions from providing implicit bias training.

Applies to Employees

- Title VII vs. Title IX
 - “Severe or pervasive” definition in Title VII (a work environment that a reasonable person would consider intimidating, hostile, or abusive).
 - Shouldn’t apply to Title IX because elementary, secondary, and postsecondary schools are unlike the adult workplace.
 - Instead - “severe, pervasive, and objectively offensive”

Applies to Employees

- Department of Education has noted:
 - “The Department does not wish to apply the same definition of actionable sexual harassment under Title VII to Title IX because such an application would equate workplaces with educational environments, whereas both the Supreme Court and Congress have noted the unique differences of educational environments from workplaces and the importance of respecting the unique nature and purpose of educational environments.”

Applies to Employees

- Colleges are subject to both Title VII and Title IX must comply with both.
- “Deliberate indifference” standard “most appropriate” for both Title VII and Title IX.
- Because Title IX recipients are “in the business of education”
- “Marketplace of ideas” makes postsecondary institutions special.

Applies to Employees

- Conflicts between Title VII and Title IX noted by commenters:
 - Formal complaint requirement
 - Notice requirement
 - Deliberate indifference standard (noted above)
 - Definition of sexual harassment
 - Live hearing (as opposed to notice and opportunity to respond)

Definitions: Sexual Assault, Dating, Violence, Domestic Violence & Stalking

- Statutory definitions for sexual assault, dating violence, domestic violence and stalking:
 - Sexual assault is defined as forcible and non-forcible sex offenses as defined in the FBI's Uniform Crime Reporting (UCR) database, which you can find in the National Incident-Based Reporting System (NIBRS) manual
 - Dating violence, domestic violence, and stalking definitions are from Clery statute (not regulations) as amended by VAWA

Sexual Assault

- Sexual assault includes:
 - Rape
 - Sodomy
 - Sexual assault with an object
 - Fondling
 - Incest
 - Statutory Rape

Sexual Assault: Rape

- Rape means the **carnal knowledge** of a person, 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 or physical incapacity. **Carnal knowledge** is defined as the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis).

Sexual Assault: Sodomy

- Sodomy means **oral or anal sexual intercourse** with another person, 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 or physical incapacity.

Sexual Assault: With an Object

- Sexual Assault with an Object means use an object or instrument to unlawfully **penetrate**, however slightly, the **genital or anal opening** of the body of another person, 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 or physical incapacity. An object or instrument is anything used by the offender **other than the offender's genitalia**, (i.e., a finger, bottle, handgun, stick).

Sexual Assault: 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 or physical incapacity.

Sexual Assault: Incest

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

Sexual Assault: Statutory Rape

- Statutory rape means sexual intercourse with a person who is under the statutory age of consent.
- In Michigan:
 - Under 16 → can't consent
 - Over 16, under 18 → can't consent to those in positions of authority

Sexual Harassment: Dating Violence

- Dating violence means an act of violence committed 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.

Sexual Harassment: Domestic Violence

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

Sexual Harassment: Stalking

- Stalking is engaging in a course of conduct directed at a specific person that would cause a reasonable person with similar characteristics under similar circumstances to:
 - Fear for the person's safety or the safety of others
 - Suffer substantial emotional distress
- As mentioned before, to qualify under Title IX, it must be sex-based stalking.

Stalking: On the Basis of Sex

- Distinguishes between stalking and stalking on the basis of sex (*only the latter of which falls under Title IX*):
 - Recognition that stalking does not always relate to sex and therefore do not always fall under Title IX (i.e., celebrity stalking)
 - “Stalking that does not constitute sexual harassment because it is not ‘on the basis of sex’ may be prohibited and addressed under a recipient’s non-Title IX codes of conduct”

Stalking: Course of Conduct

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

Stalking: Reasonable Person

- Reasonable person, under VAWA regulations, means a reasonable person under similar circumstances and with similar identities to the victim.

Stalking: Substantial Emotional Distress

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

What can College Include in Codes of Conduct

- Discretion to address what falls outside of Title IX in student or employee or faculty codes of conduct
- Nothing in the final regulations precludes a recipient from applying the Title IX grievance process to address sexual assaults that the recipient is not required to address under Title IX.

Codes of Conduct Considerations

- Also be aware of **retaliation**:
 - “Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX, constitutes retaliation.”

Sexual Harassment Hypotheticals

Is this sexual harassment under Title IX?

Hypotheticals Reference

- Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
 - [**Quid pro quo**] An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct
 - [**Hostile environment**] Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity
 - [**Clery crimes**] Sexual assault, dating violence, domestic violence, or stalking

Hypothetical One

- Complainant tells the Title IX coordinator that respondent, a fellow student in complainant's art history class, referred to women in a painting as "fat women" in his answer about the painting.
- Complainant stated that this was devastating to her because she considers herself overweight and interpreted this as an attack on her and other overweight women in the class.

Hypothetical Two

- Complainant tells the Title IX coordinator that her boyfriend hit her in the face and wants to file a complaint against him. Complainant states that he hit her six months ago, but they just broke up and she felt she should report it.

Hypothetical Three

- An anonymous letter to the Title IX coordinator states that a video is circulating among students of respondent, a student, having sex with complainant, another student, who appears to be unresponsive.

Hypothetical Four

- Complainant, a student, alleges that his boyfriend, another student, secretly took a video of them engaged in sexual intercourse. Complainant stated that he just found out about the video when a friend informed him about it.

Hypothetical Five

- Complainant, an employee, tells the Title IX coordinator that respondent, an unknown person on campus, who may be a student, has been following complainant around campus. Whoever it is has key card access to buildings. Complainant states that she often catches respondent staring at her. Complainant states she is scared because she is often alone at night on campus.

Policies: Mandatory Regulation Language Versus Discretionary Policy Language

Discretionary: Consent, Coercion, Incapacitation, Exploitation

- Discretion is left to the institution on consent, coercion, and incapacitation, which allows institutional discretion on the extent of these violations, especially under “sexual assault.”
- Exploitation/revenge porn: may be pervasive unwelcome conduct depending on widespread dissemination

Consent: Left to the Institution to Define

- Department of Education left “consent” and terms that often negate consent to the discretion of the colleges/universities to “reflect the unique values of a recipient’s educational community.”
 - No required definition in law, regulations or guidance.
 - Policy language is going to be critical to your analysis.

Who Can NEVER Give Consent?

- Those who are unable to consent by law (i.e., minors, incarcerated persons)
- Severely cognitively disabled persons
- Those who are incapacitated

Consent: NCMC Policy Definition

- Voluntary, positive agreement between the participants to engage in specific sexual activity.
- Must be clear and unambiguous
- Must relate to every “stage” of the sexual encounter
- Asleep or incapacitated cannot consent
- Active, not passive consent (silence not consent)
- Given freely and without duress
- Specific to the form of sexual activity

Consent

- May be withdrawn with clear communication.
- Consent for one activity is not consent for everything.
- Silence or failure to resist does not constitute consent.
- Previous consent does not constitute consent for future activities.

Evidence of Consent?

- What words or actions did complainant use to convey consent/non-consent?
 - Must examine sexual contacts, acts in detail
- Was complainant capable of consenting?
(Asleep? Passed out? Not understanding what was happening?)

Evidence of Consent

- Who took off what clothes?
- Who provided the condom?
- Who initiated physical contact?
- Who touched who where?
- “They gave consent” = What did you say to them, and what did they say to you?

Do Not Forget to Consider Coercion

- Not specifically defined in your policy
- Often defined as unreasonable pressure for sexual activity.
- Compare: “I will break up with you” versus “I will kill myself”

Incapacitation

- State of being unconscious, asleep or under the influence of drugs and/or alcohol to such an extent that the person cannot appreciate the nature or consequences of their actions
- Intoxicated people can consent. Incapacitated people cannot consent.
- Incapacitation Amnesty (in NCMC Policy): Nothing in the regulations precludes the postsecondary institution from providing amnesty to students for personal alcohol and/or drug use when participating in a Title IX investigation.

Productive Questioning on Gauging Intoxication vs. Incapacitation

- Avoid:
 - How trashed were you?
 - On a scale of 1-10, how drunk were you?
 - Why did you get that drunk?
- Preferable approach:
 - Explain why you need the information
 - Don't place blame

Any Drugs?

- Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?
- Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?
- What, how much and when?
- College has amnesty in policy for personal drug and alcohol use, but not more serious offenses such as illicit drug distribution or sale.

Other Policy Issues

- Anonymous reports: NCMC policy allows for the acceptance of anonymous complaints.
- No obligation to file a formal complaint.
- The information in an anonymous complaint may give rise to a duty to investigate. However, the college may be limited in its ability to investigate without an identified complainant.

Continued

Other Policy Issues

- Materially false statements.
- A violation of NCMC's Code of Conduct.
- Determination of responsibility is not the same as making a false statement.
- An individual may be "charged" with making a materially false statement in bad faith during the process and such a charge is not considered retaliation.

Continued

Other Policy Issues

- Complainant make choose not to proceed in the process.
- Title IX coordinator makes the final determination as to how to proceed. The Title IX coordinator may sign a formal complaint following a “risk assessment” which includes analysis of health/safety risks, patterns of misconduct, threats, predatory conduct, abuse of minors, use of weapons or violence.
- If college honors request to not proceed, it still must offer informal resolution options and supportive measures.

Supportive Measures

- Non-disciplinary individualized services offered as appropriate and reasonably available and without fee to the parties to restore or preserve access to NCMC's educational programs or activities, including measures to protect the safety of all parties or the educational environment and/or to deter harassment or retaliation.



Myths & Stereotypes: Not Consistent with Impartiality



Most rapes are committed
by perpetrators that know
their victims

Rape can happen in a committed relationship







Rape can happen
between individuals of any
gender identity

Victims of intimate partner violence
may return to their perpetrator
for reasons that may not seem
rational to others

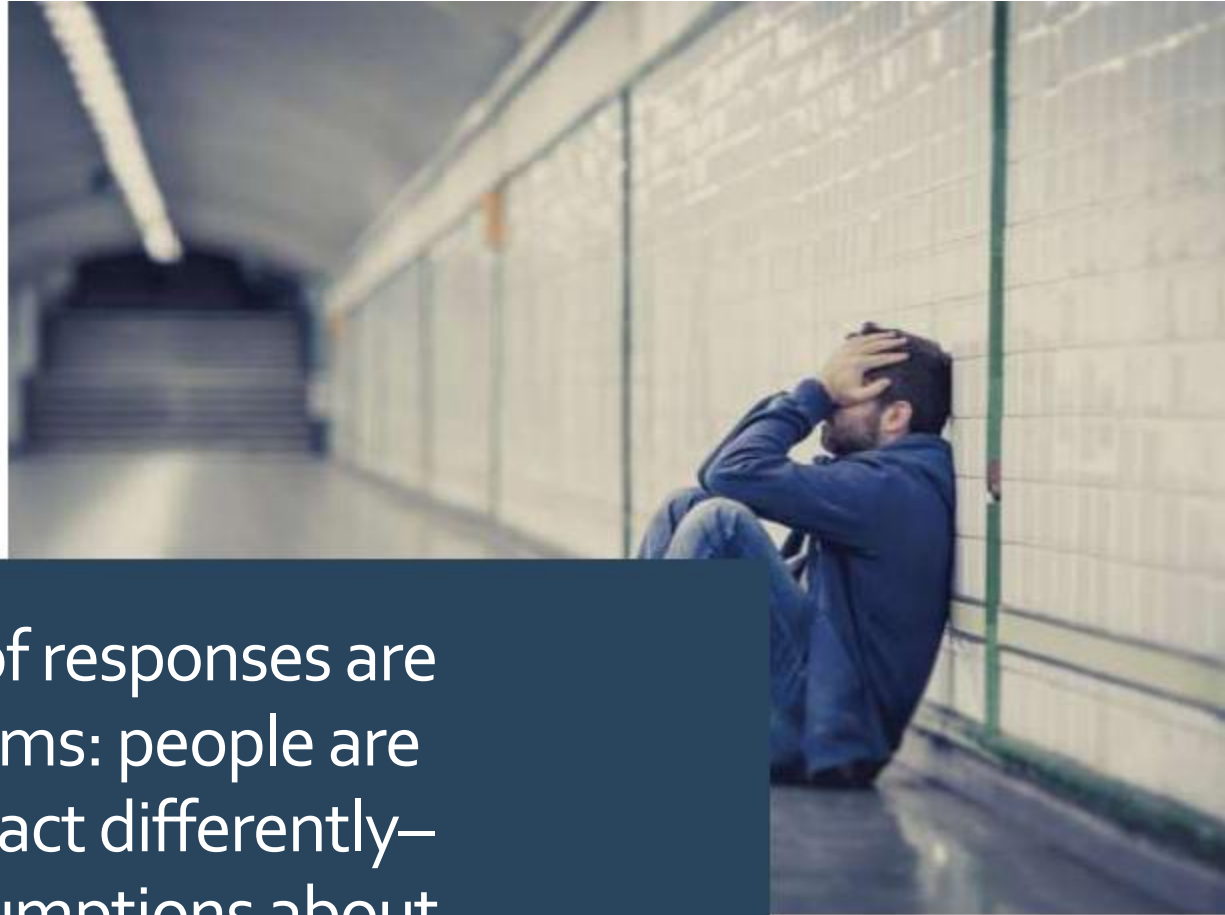




Drug-facilitated sexual assault
is common, and the most
common drug used is alcohol



Being drunk doesn't excuse a perpetrator's own behavior



A wide variety of responses are normal for victims: people are different and react differently—don't make assumptions about how they "should act"



How people mentally process what happened to them affects the way the brain encodes and decodes memories of what occurred

Why it is
Important to
NOT make
assumptions?



Why Don't People Tell Right Away

- The Preamble to the Title IX Regulations tell us:
 - Fear of retaliation
 - Fear of not being believed



Trauma

- Assume all parties and witnesses may be dealing with trauma – from this or other incidents.
- Meet them where they are.
- Help them tell their story as part of the process.
- Signs of trauma ≠ policy violation
- No signs of trauma ≠ no policy violation

Trauma Informed Analysis

- Understanding the impact of trauma is essential for anyone conducting investigations.
- New trauma can trigger old traumatic experiences in complaining students.
- Trauma is an emotional response to an event that a person finds physically or emotionally threatening or harmful.
- Triggered by incidents that are repeated events, significant single events and or even through a close association with someone who experiences a traumatic event (secondary trauma).

Trauma Informed Analysis

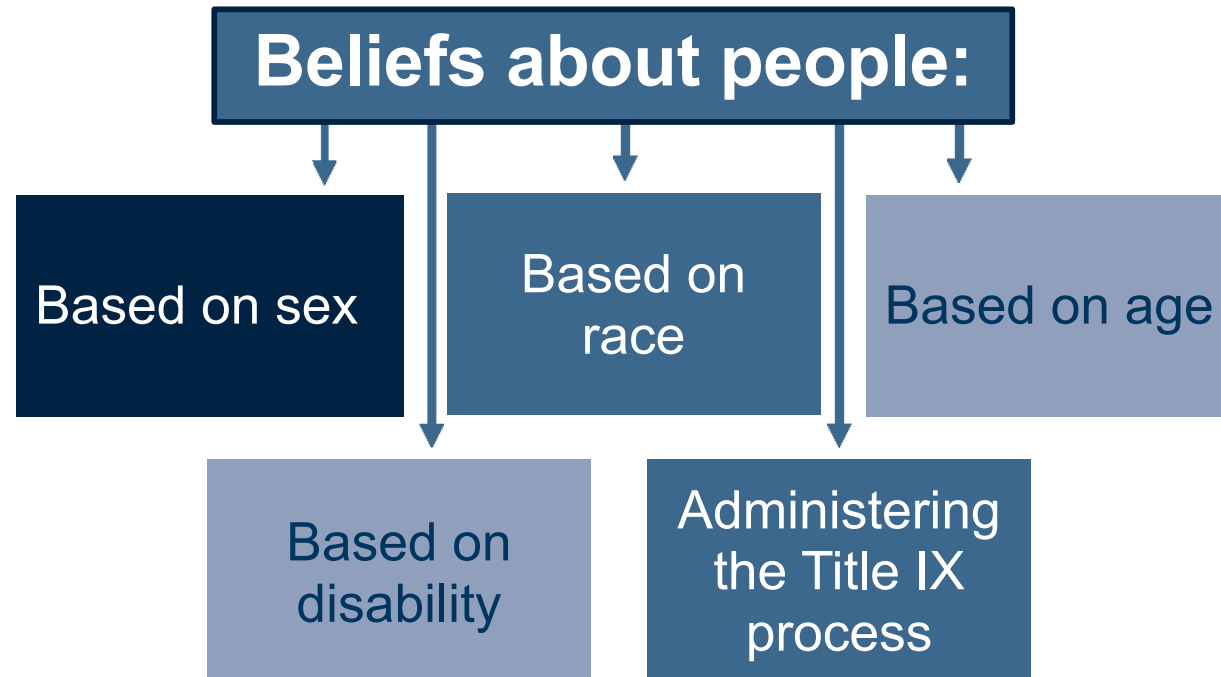
- What to know about the effect of trauma on your investigation/hearing:
 - Trauma can impact a witness' ability to recall information.
 - Memories may be fragmented, non-linear and subject to intrusive flashbacks which can contain inaccuracies.
 - The person may be at a loss to explain the absence of certain information.

Trauma-Informed Tactics

- Listen, listen, listen
- Get an advocate/support person early on for any student, witness, etc. suffering from trauma
- Do not ask judgmental questions such as “Why didn’t you fight back?”
- Do not expect a linear memory. Ask questions such as “What else happened?” as opposed to “What happened next?”

Also consider how you, as an investigator/hearing/appeals officer, processes information.

Stereotypes Affect Response



Avoiding Sex Stereotypes

- Do not rely on sex stereotypes and avoid pre-judgment of facts, remaining unbiased and impartial
- Examples of sex stereotypes:
 - Women have regret sex and lie about sexual assaults
 - Men are sexually aggressive or likely to perpetrate sexual assault

Analyzing Sex Stereotypes

- Age of consent
- Dating versus arranged marriages
- Attitudes towards homosexuality
- Attitudes towards intimate partner violence
- Cooperating with investigations
- Sharing personal information
- Reactions toward authority figures
- Reactions toward male versus female

Culture Affects Response

- I won't report it if it doesn't feel wrong.
- I'll admit it because I don't understand it's prohibited.
- I won't report it if I would be a snitch.
- It's impolite to look you in the eye, so I'll look down the whole time.
- I deserved it. It's normal.
- Reporting this would result in serious consequences at home.

Process Your Response

- Is your assessment based on your culture, or theirs, or both? (It shouldn't be.)
- Is your assessment based on stereotypes you hold based on sex? Race? Culture? Yours or theirs? (It shouldn't be.)
- Is your assessment based on their role (Complainant or respondent)? (It shouldn't be.)

Process Your Response

- Is your assessment based on a person you like or someone you identify with? (It shouldn't be.)
- Is your assessment based on a person "acting guiltily" by not making eye contact or fidgeting? (It shouldn't be.)
- Would you have done things differently?
- If so, SO WHAT?

Counterintuitive Response

- If they didn't act the way you might have, that doesn't mean it isn't true.
- Stop and consider carefully before you decide someone is lying because they responded in a way different from how you would have responded.
- Counterintuitive response has to be measured to another's perspective. Be careful to use a valid measurement.

Questions?

