Title IX Training

University of Dayton

November 3, 2026

Rebecca A. Joseph

Bricker Graydon Wyatt

Disclaimer

- This training does not constitute legal advice.
- I am happy to address questions about the materials, as well as hypotheticals today.
- If you need legal advice for a pending situation, let's find a time to talk with your counsel in a more private setting.

Permission to Post

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

Agenda

- Annual Clery Training for Title IX/ECRP Team Members
- ECRP and SHRP
- Roles in the Process
- Hearings and Cross-Examination
- Reaching a Decision

Annual Clery Training

Data and Statistics - Disclaimer

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

Sexual Assault – University of Dayton Definition

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- Sexual Assault is engaging or attempting to engage in one of the following activities with another individual without consent or where the individual cannot consent because of age or temporary or permanent mental or physical incapacity:
  i. Sexual intercourse (anal, oral, or vaginal), including penetration with a body part (*e.g.*, penis, finger, hand, or tongue) or an object, however slight;
  ii. 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.
  iii. 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.
  iv. Sexual intercourse (anal, oral, or vaginal) between individuals who are not permitted to marry. In Ohio, this means that individuals closer in kin than second cousins may not have sexual intercourse.
  v. Sexual intercourse (anal, oral, or vaginal) with a person who is under the statutory age of consent. In Ohio, state law prohibits sex with any individual under the age of 13; additionally, individuals over the age of 18 may not have sex with individuals under the age of 16.

CDC Sexual Violence Data 2023-2024 (1)

- Reports of experiencing some form of contact sexual violence in their lifetime:
  - 45.1% of women (nearly 1 in 2 women)
  - 16.9% of men (more than 1 in 6 men)
- Reports of experiencing some form of contact sexual violence (rape, sexual coercion, unwanted sexual contact) in the 12 months prior to the survey:
  - 5.5% of women (1 in 18 women)
    - 1.1% reported experiencing completed or attempted rape
    - 2.8% reported experiencing sexual coercion
    - 3.3% reported experiencing unwanted sexual contact
  - 2.1% of men (1 in 48 men)
    - No available data on percentage of men reported experiencing completed or attempted rape*
    - 2.8% reported experiencing sexual coercion
    - 3.3% reported experiencing unwanted sexual contact

CDC Sexual Violence Data 2023-2024 (2)

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12-month Prevalence			
	Verbal sexual harassment in the workplace	Verbal sexual harassment in a public place	Technology-facilitated sexual violence
Women	1 in 28	1 in 12	1 in 10
Men	1 in 50	1 in 36	1 in 14

CDC Sexual Violence Data 2023-2024 (2)

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Technology-facilitated sexual violence 12-month prevalence		
	Received Unwanted Sexual Message or Image	Distributed Victim's Sexual Image Without Consent
Women	9.8%	6.3%
Men	1.9%	1.7%

CDC Sexual Violence Data 2023-2024 (3)

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Contact Sexual Violence, Lifetime Prevalence								
	Any Contact Sexual Violence		Rape (Completed or Attempted)		Sexual Coercion		Unwanted Sexual Contact	
	National Average	Ohio	National Average	Ohio	National Average	Ohio	National Average	Ohio
Women	45.1%	49.9%	21.0%	14.5%	20.3%	19.6%	39.0%	43.3%
Men	16.9%	No statistically reliable estimate	Not reported				13.8%	No statistically reliable estimate

AAU 2019 Campus Climate Survey (posted by RAINN) (1)

- 1 in 8 students experiences sexual violence during college
- 13% of undergraduates experienced rape or sexual assault after enrolling in college
  - 16% of undergraduate women reported nonconsensual sexual contact in their first year
- Experienced nonconsensual sexual contact by physical force or inability to consent since enrolling at school
  - 26% of women (approximately 1 in 4)
  - 7% of men (approximately 1 in 14)
- Prevalence of rape and sexual assault among undergraduates who reached at least their fourth year of college
  - 32% of undergraduate women (1 in 3)
  - 8% of undergraduate men (1 in 12)

AAU 2019 Campus Climate Survey (posted by RAINN) (2)

- Rates of nonconsensual sexual contact by physical force or inability to consent among graduate or professional students
  - 1 in 10 women
  - 1 in 33 men
- 2 in 5 college students experience sexual harassment
  - Nearly 42% reported experiencing at least one sexually harassing behavior since enrolling in school
  - 1 in 5 students reported experiencing sexually harassing behavior that interfered with academic or professional performance, limited their ability to participate in an academic program, or created an intimidating, hostile, or offensive environment

Other RAINN Statistics

- 3 in 5 perpetrators are known to the victim
  - Among known perpetrators, 69% of victims described their perpetrator as an acquaintance or friend
  - Source: Lindo, Jason M., Peter Siminski, and Isaac D. Swensen. 2018. “College Party Culture and Sexual Assault.” American Economic Journal: Applied Economics 10 (1): 236–65. DOI: 10.1257/app.2016003
- 10% of college students in partnered relationships reported experiencing intimate partner violence while in college
  - Source: AAU 2019 Campus Climate Survey
- 6% of students reported experiencing stalking while in college
  - Identity of the perpetrator:
    - 31% of perpetrators were someone the victim recognized
    - 25% of perpetrators were someone the victim considered a friend
    - 33% of perpetrators were someone who dated the victim
  - Source: AAU 2019 Campus Climate Survey

Sexual Assault: Common Concerns

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- 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 – University of Dayton Definition

- Violence committed by a person:
  - Who is or has been in a social relationship of a romantic or intimate nature with the victim;
  - Where the existence of such a relationship shall be determined based on consideration of the following factors: (1) length of the relationship; (2) the type of relationship; and (3) the frequency of the interaction between the persons involved in the relationship.

Domestic Violence – University of Dayton Definition

- "Domestic violence" is violence committed:
  - A current or former spouse or intimate partner of the victim, or person similarly situated to a spouse of the victim;
  - By a person with whom the victim shares a child in common;
  - By a person who is cohabitating with, or has cohabitated with the Complainant as a spouse or intimate partner;
  - By a person similarly situated to a spouse of the Complainant under the domestic/family violence laws of Ohio; or
  - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic/family violence laws of Ohio.
- *Note: Because the Policy cites to statutory language, it uses "victim" and "Complainant" interchangeably throughout some of the prohibited conduct definitions

Stalking – University of Dayton Definition

- Engaging in a course of conduct directed at a specific person on the basis of sex that would cause a reasonable person to (1) Fear for the person's safety or the safety of others; or (2) Suffer substantial emotional distress.
  - For the purposes of this definition:
    - Course of conduct must be on the basis of sex
    - Course of conduct means two or more acts, including, but not limited to, acts in which the Respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
    - A reasonable person means any reasonable person under similar circumstances and with similar identities to the Complainant
    - Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

CDC Intimate Partner Violence Data 2023-2024 (1)

- Reports of experiencing some form of contact sexual violence, physical violence, or stalking by an intimate partner in their lifetime:
  - 34.0% of women (more than 1 in 3 women)
  - 17.0% of men (more than 1 in 6 men)
- Reports of experiencing some form of contact sexual violence, physical violence, or stalking by an intimate partner in the 12 months prior to the survey:
  - 5.2% of women (1 in 20 women)
    - 3.0% experienced contact sexual violence by an intimate partner
    - 1.4% experienced any physical violence by an intimate partner
    - 2.4% experienced stalking by an intimate partner

CDC Intimate Partner Violence Data 2023-2024 (2)

- Reports of experiencing some form of contact sexual violence, physical violence, or stalking by an intimate partner in the 12 months prior to the survey:
  - 2.3% of men (1 in 44 men)
    - 0.3% experienced sexual coercion by an intimate partner
    - 0.8% experienced any physical violence by an intimate partner
    - 1.4% experienced stalking by an intimate partner
    - No statistically stable data available for experiences of contact sexual violence, completed or attempted rape, being made to penetrate, and unwanted sexual contact

CDC Intimate Partner Violence Data 2023-2024 (3)

- Reports of experiencing some form of psychological aggression (expressive aggression, coercive control, and/or entrapment) by an intimate partner in the 12 months prior to the survey:
  - 3.4% of women
  - 2.5% of men
- Experiences of IPV with at least one IPV-related impact* in the 12 months prior to the survey:
  - 3.4% of women (1 in 30)
  - 1.4% of men (1 in 70)
- *IPV-related impact: being fearful, being concerned for safety, and PTSD symptoms, injury, need for medical care, filed a police report, missing at least one day of work or school

CDC Stalking Data 2023-2024 (1)

- Reports of experiencing stalking in the 12 months prior to the survey:
  - 5.5% of women (1 in 20 women)
  - 3.0% of men (1 in 33 men)

CDC Stalking Data 2023-2024 (2)

Stalking Tactics – Lifetime Prevalence						
	Followed you around, watched or spied on you	Approached you or showed up to places (ex: home, school, work)	Unwanted cards, letters, flowers, presents	Unwanted phone calls, emails, voice/text messages	Unwanted social media messages	Used social media to monitor or track you, your communication, or your location
Women	78.3%	74.2%	37.3%	69.2%	46.8%	36.6%
Men	75.9%	63.9%	26.0%	69.1%	53.9%	43.8%

CDC Stalking Data 2023-2024 (3)

Other experiences of stalking victims – Lifetime Prevalence			
	Felt afraid, threatened, or concerned for your safety or the safety of others	Threatened with physical harm (even if the threat was not taken seriously)	Experienced mental or emotional harm (ex: anxiety or depression) after the incident
Women	98.7%	52.4%	85.2%
Men	91.4%	63.8%	71.6%

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: 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?

Sexual Harassment Resolution Process vs. Equity Compliance Resolution Process

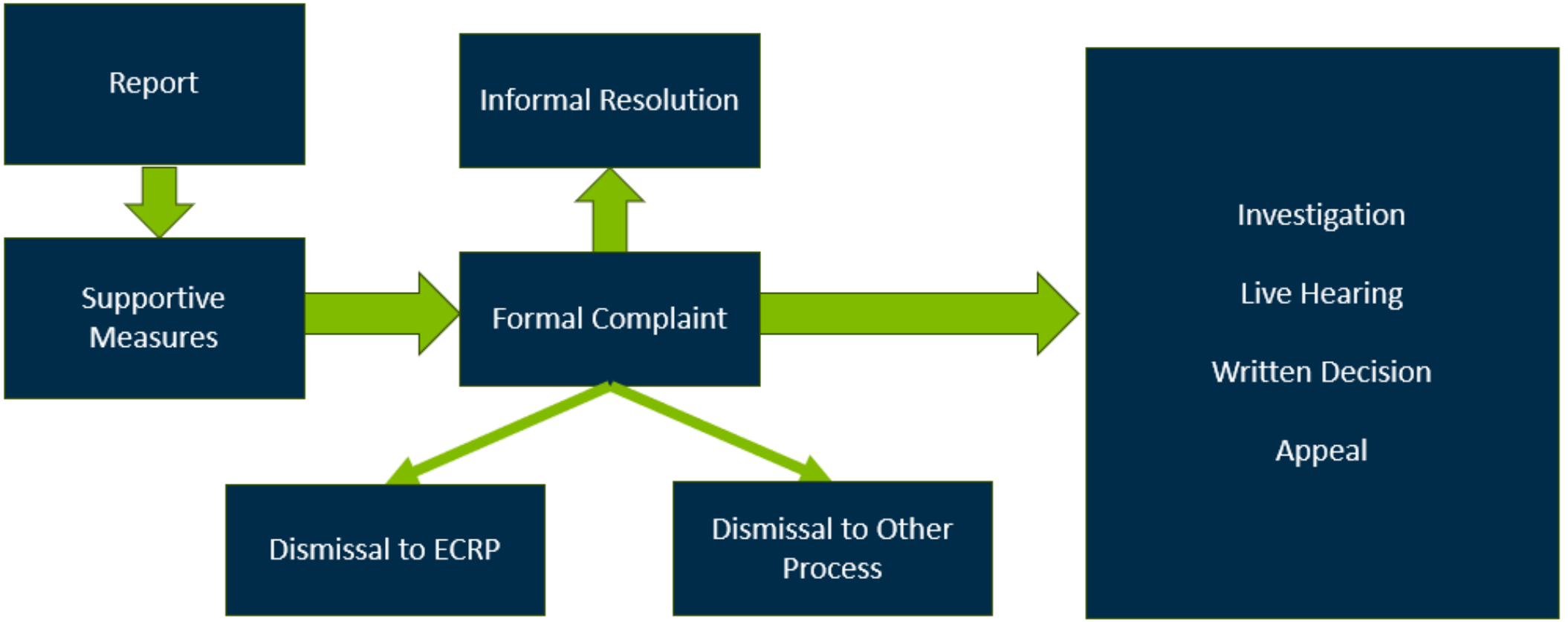
When does the Sexual Harassment Resolution Process Apply?

- Reported behavior constitutes potential Sexual Harassment under the Nondiscrimination and Anti-Harassment Policy and
- Behavior is reported to have occurred within the scope of UD's education programs or activities and
- Behavior is reported to have occurred against a Complainant while they were physically present in the United States and
- Complainant was participating or attempting to participate in UD's education programs or activities when the Formal Complaint was filed

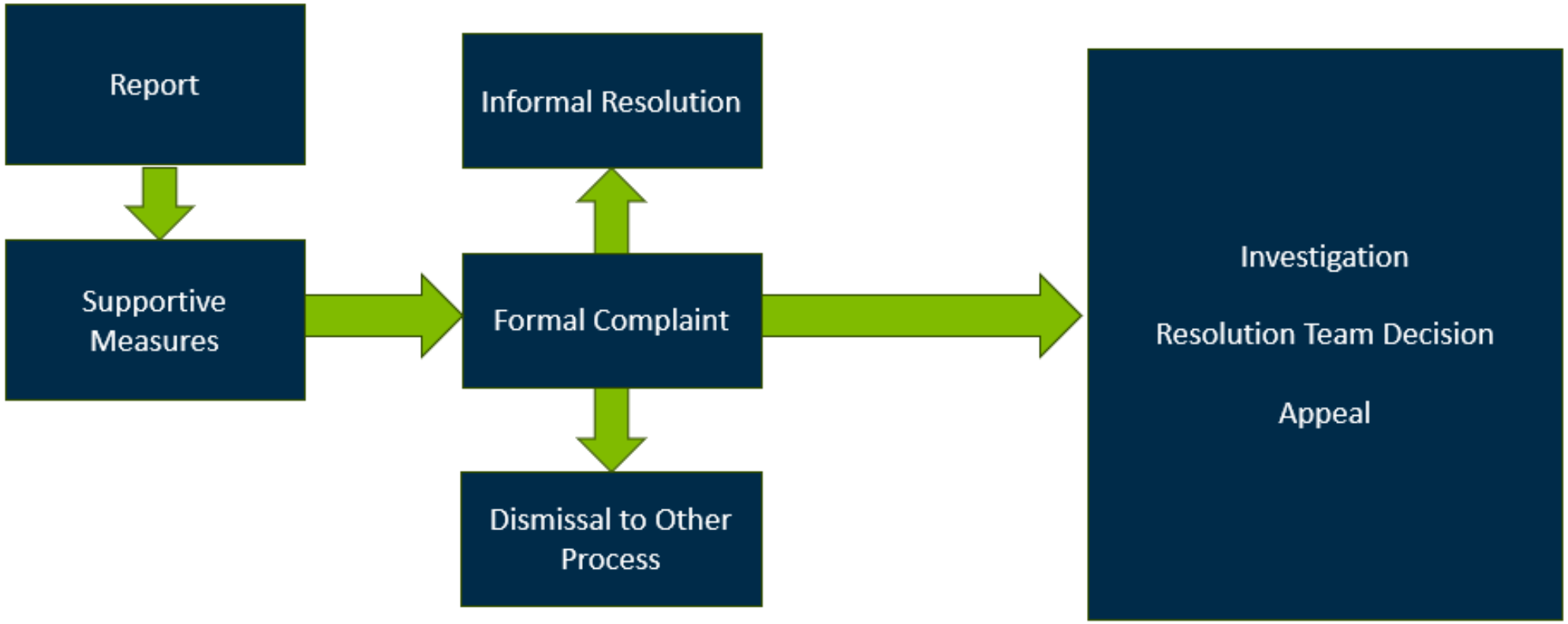
When does the ECRP Process Apply?

- Reported behavior constitutes potential prohibited conduct under the Nondiscrimination and Anti-Harassment Policy and
- Sexual Harassment Resolution Process does not apply

SHRP Outline



ECRP Outline



Roles in the Process

Title IX Coordinator

- Conduct intake meetings
- Answers questions about policy and procedures
- Provides supportive measures
- Evaluates concerns about bias/conflicts
- Supervises process

Investigators

- 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!
- SHRP: Prepare Final Investigation Report (no decision included) to be given to the Decision-Maker
- ECRP: Become part of the Resolution Team

ECRP: Resolution Team Members

- Investigators + Third, Neutral Person
  - Role: Anything missing? Any more investigation to do?
- Together, they decide whether the policy was violated and prepare a written decision
  - Responsible: A preponderance of the evidence supports that Respondent engaged in a policy violation.
  - Not Responsible: There is insufficient evidence to support that Respondent engaged in a policy violation.
- Decision includes written rationale and other elements to help explain the findings.

SHRP: Single Decision-Maker or Three-Member Panel

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- Reviews the Final Investigation Report and evidence
- Conducts pre-hearing conferences to prepare the parties for hearing
- Holds a hearing with live cross-examination
  - Makes relevancy determinations after every question asked by an advisor
  - Maintains decorum standards
  - Asks questions of parties and witnesses who are present
- Prepares a written determination as to whether Respondent is responsible/not responsible

Advisors

- First…
  - You are not their lawyer
  - You are not their boss
  - You are not the investigator
  - You are not a judge
  - They are human, which means by definition they are not perfect
- You are there…
  - To accompany them to meetings (if they wish)
  - To provide support (if they wish)
  - To help connect them with resources (if they wish)
  - To ask their questions at the live hearing (mandatory)
  - Note: You may never actually meet your party, and that's OK!
- SHRP only: Attend the hearing and ask questions of the parties and witnesses

Advisors (2)

- The advisor walks with the party through a storm.
- The storm is not pleasant and can make for difficult travel.
- Just remember: it is not your storm.
- If you find yourself struggling, don’t forget you have access to the EAP.

SHRP Process: An Advisor's Perspective

First…

- You are not the party's lawyer* or boss.
- And…your party is human, which means by definition they are not perfect, and their account may not be perfect

Reminders For Your Party – Tips for both the Investigative Interview and Hearing

- Listen to the question that is being asked and don't interrupt before it's finished.
- Be thoughtful and truthful in your responses.
- If you have something more to add, let the investigator or decision-maker know.
- The goal is to tell your story as completely as possible, and that will be easier if you:
  - Remember to breathe
  - Take breaks when needed
  - Be thorough in your response to questions

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

Advisors and Relevancy

- What if your party wants to submit irrelevant evidence?
- What do you do if your party wants the investigators to gather evidence and you don’t know if it is relevant?
- What do you do if the party wants the investigators to interview a witness and you don’t know how they could be relevant?

Advisors and Informal Resolution

- Either party can request Informal Resolution at any time after a formal complaint is filed.
- Informal Resolution Pathways
  - Alternative Resolution Mechanism: parties reach a mutually agreed upon resolution of an allegation
    - All parties must consent
    - Title IX Coordinator will determine whether ARM is appropriate
  - Respondent accepts responsibility for the alleged misconduct
    - Respondent may accept responsibility for all or part of the alleged misconduct at any point during the resolution process.
    - Title IX Coordinator will determine whether this process is applicable, based on the Policy criteria
    - Title IX Coordinator will determine the sanctions and/or remedies, and then determine whether all parties and the University agree on those outcomes.

Advisors: Being Trauma Informed

- You want your party to be in the best possible place, mentally, to be able to answer questions thoughtfully, completely, and truthfully.
- Watch for signs of stress in your party:
  - Talking too fast
  - Rambling or off topic
  - Emotional responses
  - Not listening to the question completely
- Remind them that they can take a break if they wish. (This will help them calm down and make sure they can provide their best responses during the grievance process.)

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 Title IX

- A party may have experienced trauma from the underlying allegations in this case.
- A party may previously have experienced trauma.
- A party may have previously experienced similar trauma.
- A party may have experienced trauma after the underlying allegations in this case occurred.

- [Why do I say “a party” and not “a complainant”? Because both parties may have experienced trauma!]

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
- Trauma can also affect the way an individual chooses to engage with the process, as well as the support they may need to do so

How Can We Be Trauma-Informed?

- Meet the person where they are
- Offer support, regular breaks, etc. to help keep the person engaged in the process
- Recognize that people don't always act the way that:
  - We think they should
  - We think we would
  - We think is logical
  - They think is logical
  - It's not your job to judge!
- Parties may have difficulty recalling facts, chronology, and details, and that's normal (even for non-traumatic situations)

Decision-Making Process

ECRP vs. SHRP

- ECRP: You may be part of the Resolution Team
  - You are neutral
  - You think about whether any additional information is needed
  - You confer with the investigators to reach a decision
  - You assist in preparing the written report
- SHRP: You may be an advisor or panel member at the hearing
  - As an advisor: you ask questions on behalf of your party
  - As a Decision-Maker panelist
    - You ask questions of the parties and witnesses at the live hearing
    - You assist in determining the findings of fact and findings of responsibility for the written outcome

Roles and Goals

- Resolution Team Member (ECRP – No Hearing)/Decision Maker Panelist (SHRP – Live Hearing)
  - Be thoughtful in your review of the report and evidence
  - What else might be helpful here?
  - Weigh the evidence using a preponderance of the evidence standard
    - Find facts to let you know what has occurred
    - Apply the policy language to what occurred and determine if a policy was violated
- Advisor during an SHRP Hearing:
  - Ask the relevant, permissible questions your party wishes you to ask while being mindful of the decorum standards
  - Encourage party to take breaks as needed

SHRP: Hearings

Hearings: Role of the Title IX Coordinator

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- 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

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- 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 Investigation/Allegations
- Determine sanctions (in consultation with appropriate administrators)

Hearings: Role of the Advisor

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- Support your party
- Attend pre-hearing conference
- Attend hearing
- Say nothing at the hearing except to ask relevant questions of the parties 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

- Pre-hearing conferences can help reduce the anxiety of the parties/advisors and prepare better for the hearing.
- These help parties and advisors better understand the procedure, what to expect on the day of the hearing, and discuss witnesses they wish to call.
- This is a time that can help to answer procedural questions and address procedural disputes.

On the Day of the Hearing

- Decision Maker
- Hearing Facilitator (non-voting member, appointed by the Title IX Coordinator)
- Parties
- Advisors
- Witnesses will be admitted only for their testimony
- Breakout rooms will be used during breaks so each advisor may confer with their party

Order of the Hearing

- Chair explains procedures and introduces all participants
- Investigator presents the Final Investigation Report
  - Opportunity for questioning by the Decision-maker and the parties (through their Advisors)
- Questioning of parties and witnesses by the Decision-maker and Advisors
  - All questions are subject to relevance determinations by the Chair
- Closed session deliberation with Decision-maker(s) to determine findings of responsibility, if any
- Notice of Outcome
- Opportunity to Appeal

Responsibilities When Writing a Decision

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- Include all the required topics outlined in the 2020 Title IX Regs
- Resolve Disputed Material Facts
  - Determine the amount of weight to give to each piece of evidence, including party and witness accounts
  - Show your work
- Apply Findings of Fact to your Policy Definitions
- Make sure that someone unfamiliar with the case will understand what happened during the investigation and at the hearing
- Make sure that someone unfamiliar with the case will understand your rationale for the findings of fact and application to the Policy

Requirements of a Written Decision

- 34 C.F.R. 106.45(b)(7)(ii)(A)-(B)
- (ii) The written determination must include -
- (A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
- (B) A 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;

Requirements of a Written Decision (2 of 4)

- 34 C.F.R. 106.45(b)(7)(ii)(C)-(D)
- (ii) The written determination must include -
- (C) Findings of fact supporting the determination;

  - (D) Conclusions regarding the application of the recipient's code of conduct to the facts;

Requirements of a Written Decision (3 of 4)

- 34 C.F.R. 106.45(b)(7)(ii)(E)
- (ii) The written determination must include -
- (E) A statement of, and rationale for, the result as to each allegation, including:
  - a determination regarding responsibility,
  - any disciplinary sanctions to be imposed on the Respondent, and
  - whether remedies designed to restore or preserve equal access to the education program or activity will be provided to the Complainant

Requirements of a Written Decision (4 of 4)

- 34 C.F.R. 106.45(b)(7)(ii)(F)
- (ii) The written determination must include -
- (F) The recipient's procedures and permissible basis for the complainant and respondent to appeal.

Tips for Case File Review

- Advisors and Decision Maker:
  - Make a list of questions you want to ask each witness
  - Note when the questions refer to particular documents
  - Plan for the documents to be pulled up on the screen during the hearing – write down page numbers!
  - Identify undisputed facts (and write down citations)
  - Identify disputed facts (and write down citations)
    - Questions should help resolve or clarify disputed facts
  - Ensure that there is sufficient information on all elements of the charged policy violations (e.g. impact?)

Resolving Factual Disputes

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Fact Finding Process:

1
- List undisputed facts – what do parties agree on? = **findings of fact**
- List disputed facts – what do parties disagree on?

2
- What undisputed facts address each element?
- What disputed facts must be resolved for each element?

3
- Weigh the evidence for each **relevant** disputed fact
- Resolve disputed facts = **findings of fact**

Fact Finding Process – Step 1

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

Fact Finding Process – Step 2

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

Fact Finding Process – Step 3

- Resolve remaining factual disputes:
- Weigh the evidence for each relevant disputed fact
  - Remember the funnel – your list of relevant disputed facts should be pared down by this point

What is Relevant?

- The Title IX Regulations don't tell us directly, but it may include evidence that is:
  - "…probative of any material fact concerning the allegations." (Preamble, 30343).
  - "…pertinent to proving whether the facts material to the allegations under investigation are more or less likely to be true." (Preamble, 30294).
- Key Question: Does this question/topic/ piece of evidence help tip the scale to make an alleged fact more likely true or less likely true?

Weighing the Evidence

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

Quality Versus Quantity

- It is the weight of the evidence, or its strength in tending to prove the issue at stake, that is important
- The quality of the evidence is not determined by its quantity
    - Quantity can be a factor, but it should not be automatic

Even Weight Distribution

- If nothing tips the scale:
- No finding of violation
- Remember your standard of evidence: Preponderance of the Evidence

Selecting Witnesses

- Did a witness say something during the investigation that was unclear or that contradictory other testimony/evidence?
- Does the witness have a bias for/against a party that is not clear from the investigative report?
- Parties should request witnesses for whom they have relevant questions

Preparing Questions

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- Advisors are not expected to write all of the questions for their parties
- Advisors are expected to read the questions for their party
  - Be mindful of decorum standards
  - Decision-maker will make relevancy rulings
- Advisors can assist in drafting questions, or asking questions that occur to them during the hearing

Asking Good Questions

- Does the decision maker 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.
- If the question refers to a document in the record, write down the page number!

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 question that seeks to resolve disputed information and stay within decorum expectations.

Boiling It Down

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- 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.

Hearing Preparation

Group Exercise

- 4 small groups:
  - Decision-maker questions for Complainant
  - Decision-maker questions for Respondent
  - Advisor questions for Complainant
  - Advisor questions for Respondent
- Remember: Regardless of your role, the Policy definition is your guide for the kinds of questions that are most material to the outcome of the case.
  - Watch out for rabbit holes and impermissible topics
- Large group debrief
  - We'll review each small group's list of questions to discuss relevancy, phrasing of the question, and why the question is material to the outcome of the case

Room for Improvement

Comparing Question Phrasing

Decision-Maker: Alright everyone, now that I've reviewed the purpose of the hearing, the order of the hearing, and some key procedural information, it's now time for my questions of Complainant, Cam Carter. Cam, are you ready to begin answering my questions today?

Cam: I'm ready.

Decision-Maker: My first question is about your report to the Title IX Office. According to the investigation report, you first reported your concerns about Dr. Reed in March of 2026, correct?

Cam: Yes.

Decision-Maker: But you reported that Dr. Reed started making you uncomfortable back in November 2025, right?

Cam: Yes, I believe that's what I told the investigator. It was definitely last fall.

Decision-Maker: Why didn't you report this as soon as you felt uncomfortable?

Decision-Maker: Alright everyone, now that I've reviewed the purpose of the hearing, the order of the hearing, and some key procedural information, it's now time for my questions of Complainant, Cam Carter. Cam, are you ready to begin answering my questions today?

Cam: I'm ready.

Decision-Maker: My first question is about your report to the Title IX Office. According to the investigation report, you first reported your concerns about Dr. Reed in March of 2026, correct?

Cam: Yes.

Decision-Maker: You reported that Dr. Reed started making you uncomfortable back in November 2025, right?

Cam: Yes, I believe that's what I told the investigator. It was definitely last fall.

Decision-Maker: Can you help me understand what prompted you to report this when you did?

Group Exercise - Debrief

- For Discussion:
  - What were your objective(s) for the questions you prepared?
  - How did the questions you drafted help us better understand the facts of the case?
    - Does the question help establish one of the elements of the Sexual Harassment definition? Does it help the decision-maker assess plausibility, accuracy, consistency, reliability? Something else?
  - Any rabbit holes you identified but chose to avoid?
  - Any rabbit holes that may actually be material to the outcome?
  - Any impermissible topics to avoid? (Complainant's prior sexual history or sexual predisposition, privileged information, medical/counseling records)
  - Any questions that your group was on the fence about asking?

Reaching a Decision

Reminders

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

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.

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

Upcoming Free Webinars

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- All of these are free
- Sign up at www.bricker.com/events
  - November 19, 1:00 p.m. – Title IX Litigation Update
  - Dec. 16, 12:00 p.m. – End of Year Employment Update & What's to Come in 2027
  - January 28, 12:00 p.m. – AI, Privacy, and Trust on Campus
  - February 17, 12:00 p.m. – Clery Compliance Best Practices
  - February 25, 1:00 p.m. – Understanding Neurodivergence in Title IX Investigations
  - March 17, 12:00 p.m. – Accreditation: Effects on Legal Compliance
  - March 25, 12:00 p.m. – FERPA and Public Records Considerations in Title IX Cases
  - April 21, 12:00 p.m. – Athletics Hot Topics
  - April 29, 1:00 p.m. – Sexualized Hazing and Title IX
  - May 27, 1:00 p.m. – Title IX Litigation Update
  - June 9, 12:00 p.m. – Complex Accommodation Issues

Thank You

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