

# University of Cincinnati Title IX Team Training

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# Disclaimer

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- Change is constant in this field. Expect new guidance and case law to be issued regularly after this training.
- Check with legal counsel regarding specific situations.
- Yes, you have permission to post these materials on your website as required by 34 C.F.R. 106.45(b)(10)(i)(D).

# Today's Agenda

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09:00 – 10:30	Title IX Overview and Clery Training
10:30 – 10:40	Break
10:40 – 12:00	Review of Final Investigation Report; Meet with Panels to Discuss Issues and Come up with Questions for Hearing and Discuss as a Large Group
12:00 – 01:00	Lunch Break
01:00 – 02:00	Questioning of Complainant
02:00 – 03:00	Questioning of Respondent
03:00 – 04:00	Deliberations by Panel of Determination (in panels and then as a group)
04:00 – 05:00	Debrief, takeaways

# Introductions

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- Name
- Institution
- Role(s) on your Title IX team
- Primary job, if you're not full-time in Title IX
- First music you purchased and in what format

# Training Requirements – Title IX

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“A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training of sexual harassment in §106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution process, as applicable, and how to serve impartially, including avoiding prejudgment of the facts at issue, conflicts of interest, and bias.”

§106.45(b)(1)(iii)

# Training Requirements - Clery

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- From the Clery regulations:
- Proceedings involving sexual assault, dating violence, domestic violence, and stalking must –
  - “Be conducted by officials who, at minimum, receive **annual** training on the issues related to dating violence, domestic violence, sexual assault, and stalking, and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability”
- We will discuss safety for all parties – not just victims – and our community.

# Where does Clery fit?

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- Title IX policies handle sexual assault, dating violence, domestic violence, and stalking when:
  - The complainant is currently participating or attempting to participate in your education program or activity and
  - The conduct occurred in your education program or activity and
  - The conduct occurred against a person in the United States
- If any one of these things is not true, the case is subject to “mandatory dismissal” from the Title IX process (and likely into your Equity Compliance Resolution Process) – but if the case is addressed through another policy, the Clery Act still applies.

# Training Themes

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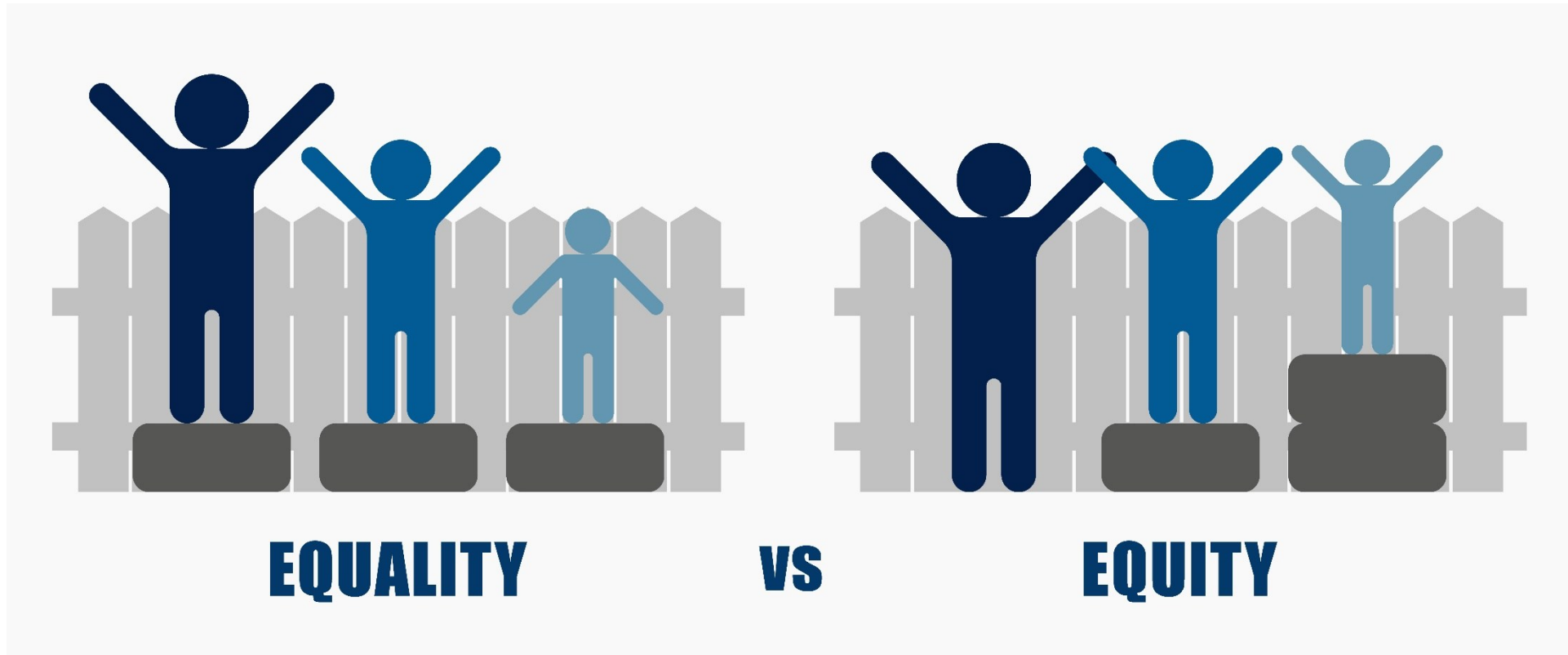


- “Follow your policies. Follow your process.”
- Monitor the emotional temperature of the case.
- Provide regular updates.
  - “If they don’t hear from you, they’ll assume that you’re doing nothing or actively working against them.”
- Maintain neutrality
  - Be mindful of any language that might suggest predetermination (e.g. use of terms like “perpetrator” or “victim”)



# Title IX Themes and Statistics

# Title IX is an Equity Statute



# Overview of Themes

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Access



Protection



Transparency



Evidence



Improvement



No Bias

## What we do for one, we do for the other

- Title IX is meant to ensure ACCESS to your programs and activities, regardless of sex
- "What we do for one, we do for the other"
  - Or at least consider whether it is appropriate under the circumstances
- Why are you treating someone differently?
  - Can you put your rationale in writing
  - If you can't - reconsider
- Policy considerations related to ACCESS
  - Supportive Measures

# Themes – Duty to Protect

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- All members of your campus community
  - Institutions have an obligation to protect their campus
  - **“They are all our students.”**
  - Policy considerations related to Protection:
    - Supportive measures
    - Training & Education on Campus
- What about interim emergency measures?
  - Any action by a recipient that results in changes or removal of access to education for respondents will require an appeal process for respondents to respond

# Themes - Transparency

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## Help Others Trust the Process

- **TRANSPARENCY** is key to trusting the process.
- Know your grievance process
- Help others understand your process
- Policy considerations related to Transparency:
  - Access to training materials
  - Providing an evidence packet in a case

If participants don't know what is happening, they will assume nothing is happening.

# Themes – Evidence Based Decisions

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- Outcomes must be based on **EVIDENCE**.
- “Don’t weigh your gut.”
- Make reasonable inferences and credibility determinations, but be mindful of implicit bias, stereotypes, and using our own behavior as a yardstick.
- Policy considerations related to Evidence:
  - Providing an evidence packet

# Themes – Always Room for Improvement

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- Always be working to **IMPROVE**:
  - Yourself as a neutral
  - Your campus as a healthy and fair place to be
  - Your policy to provide a better process informed by case law, regulations, guidance, and experience
  - Your resources for all involved
- Policy considerations related to Improvement:
  - Training & Education
  - Recognizing the processes that do and do not work for your community



# Themes – Avoiding Conflicts of Interest and Bias

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- Always be working to avoid actual or perceived:
  - Conflict of interest
  - Bias
- Institutional Duties and Interests vs. Personal interests
  - Take periodic self-inventories
  - Be mindful of your activities, involvements, social media, etc.
  - Check your biases constantly, and talk with others to gain perspective and ensure you remain neutral
- Policy considerations related to No Bias
  - Training & Education
  - Providing evidence packets

# Data and Statistics - Disclaimer

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- 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

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- “An offense classified as a forcible or nonforcible sex offense under the Uniform Crime Reporting System of the Federal Bureau of Investigation”
  - Forcible: Rape, Sodomy, Sexual Assault with an Object, Fondling
  - Nonforcible: Statutory Rape, Incest

# Sexual Assault - Rape

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- “The carnal knowledge of a person, without the consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.”

## Sexual Assault – Rape (1 of 2)

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Black's Law Dictionary, 6th ed., defines carnal knowledge as “the act of a man having sexual bodily connections with a woman; sexual intercourse.” There is carnal knowledge if there is the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis). However, for UCR purposes, this offense includes the rape of both males and females if at least one of the offenders is the opposite sex of the victim.

## Sexual Assault – Rape (2 of 2)

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- Not a fan of the gendered language in those definitions? Neither are we.
- Dept. of Ed. has previously provided guidance that as long as your policy language encompasses all of the behavior listed in the definitions, you can change it up.

# Sexual Assault - Sodomy

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- Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

# Sexual Assault – Sexual Assault with an Object

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To 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 unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.



# Sexual Assault – Fondling

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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 unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

# Sexual Assault Data 1 of 3

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- 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.

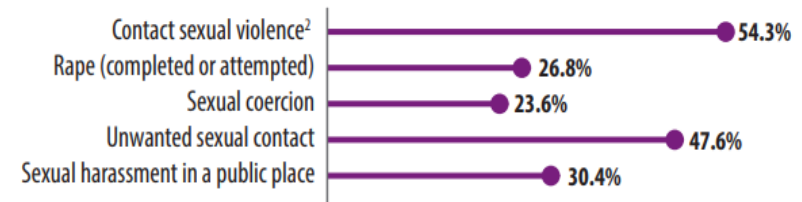
Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last 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 Estimates<sup>1</sup>**



<sup>1</sup> All percentages are weighted to the U.S. adult population.

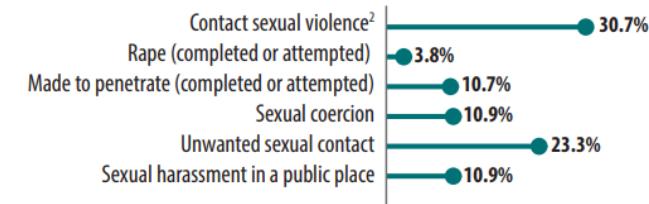
<sup>2</sup> Contact sexual violence includes rape, sexual coercion, and/or unwanted sexual contact.

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

**Figure 2**

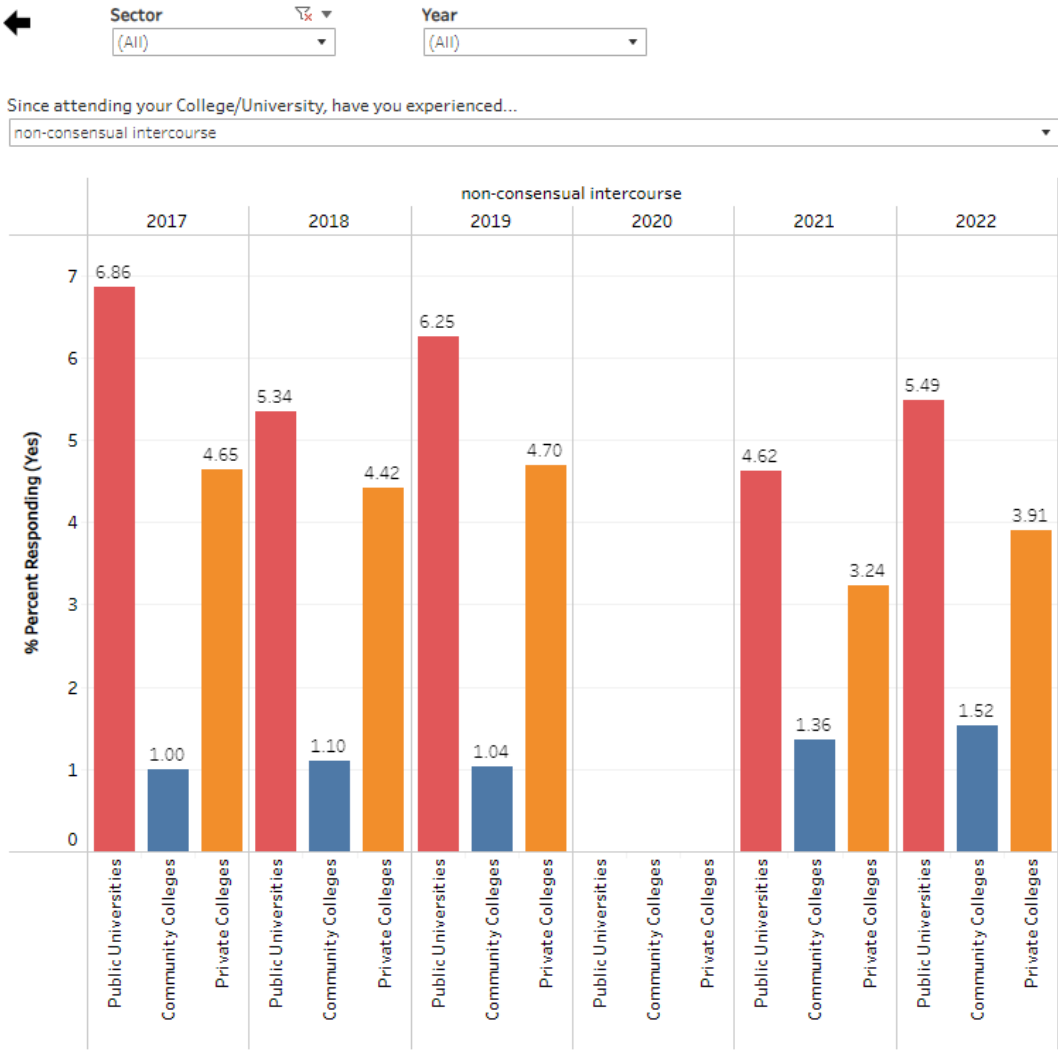
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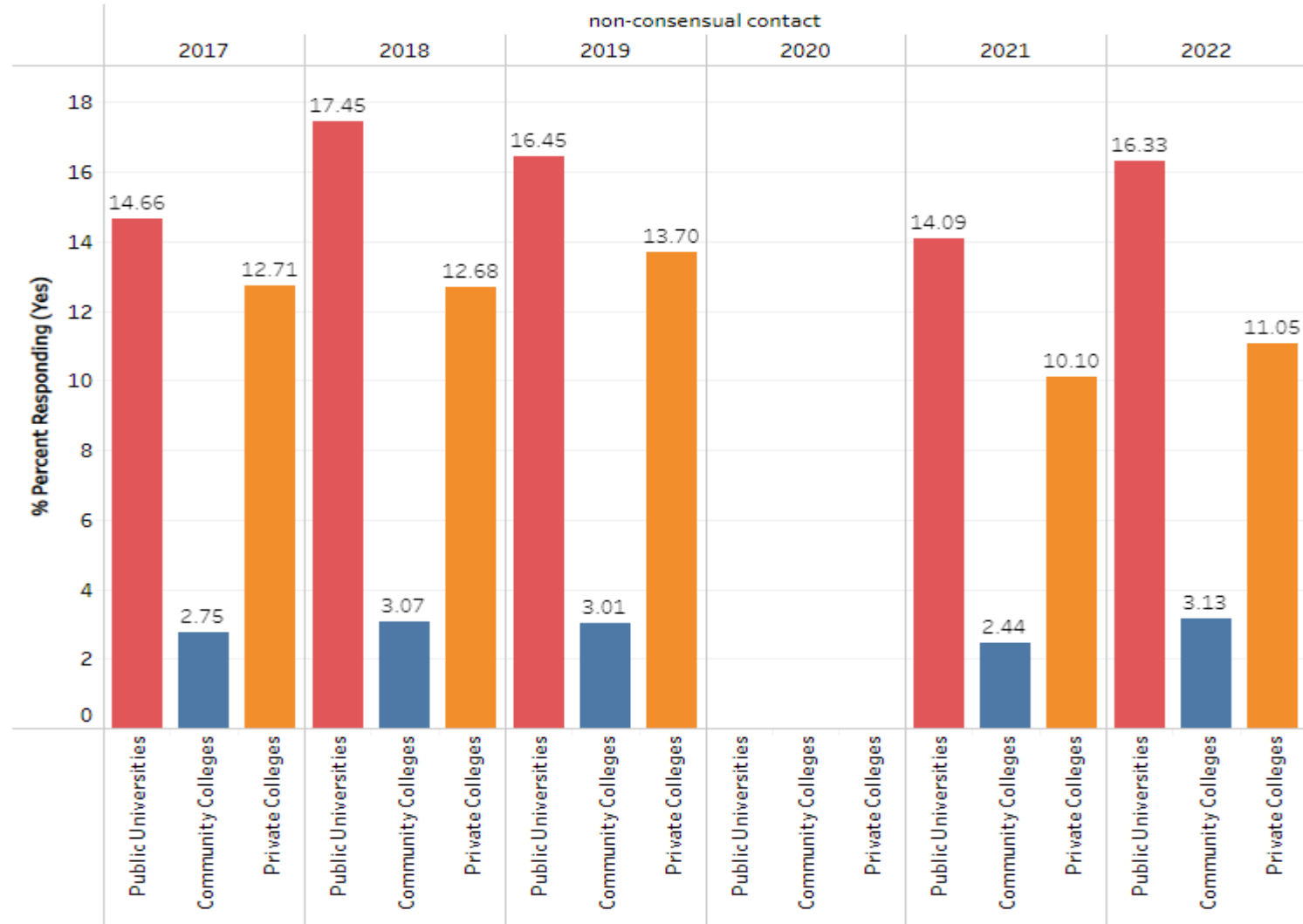
<sup>1</sup> All percentages are weighted to the U.S. adult population.

<sup>2</sup> 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

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- 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.**

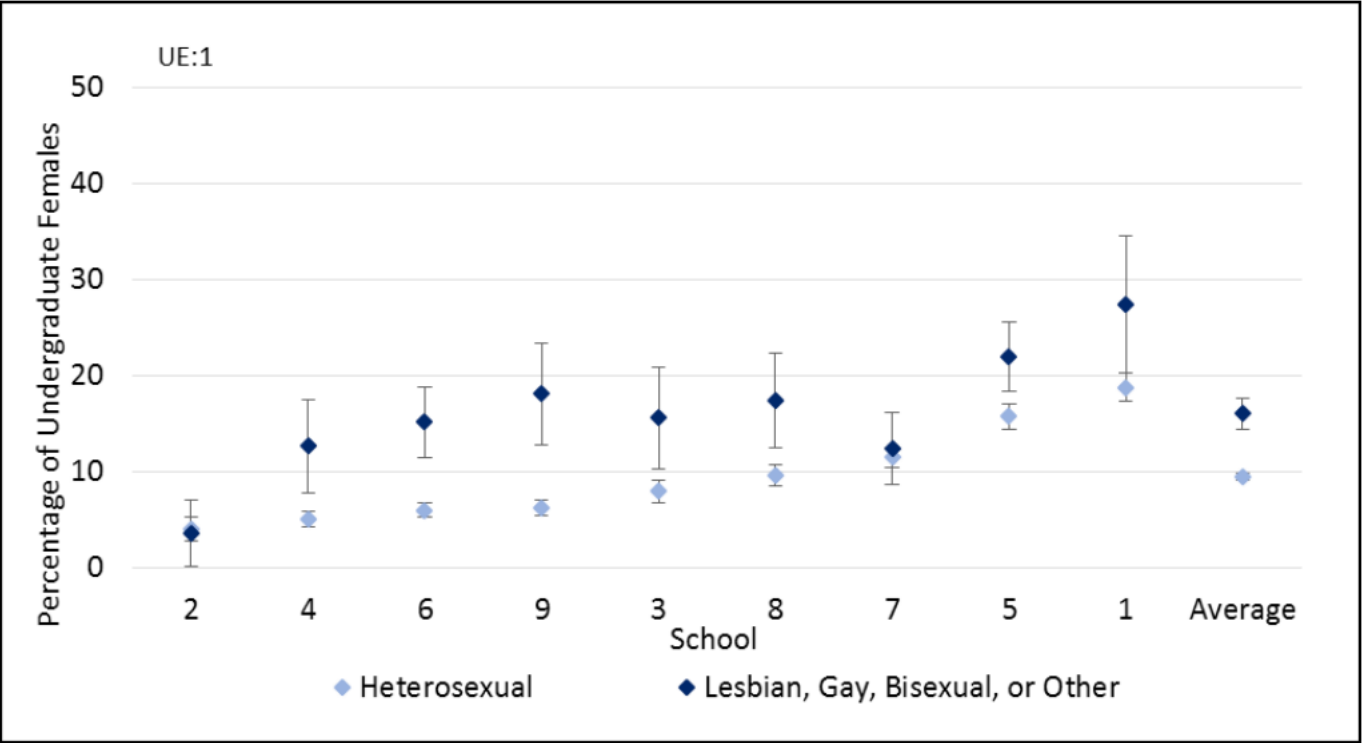
Statistic one: "Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics.*" RAINN Sourced from: "Campus Sexual Assault Study, 2007; Matthew Kimble, Andrada Neacsiu, et. Al, *Risk of Unwanted Sex for College Women: Evidence for a Red Zone*, Journal of American College Health (2008)."

Statistic two: Campus Climate Survey Validation Study (CCSVS), 2015

# Sexual Assault Data



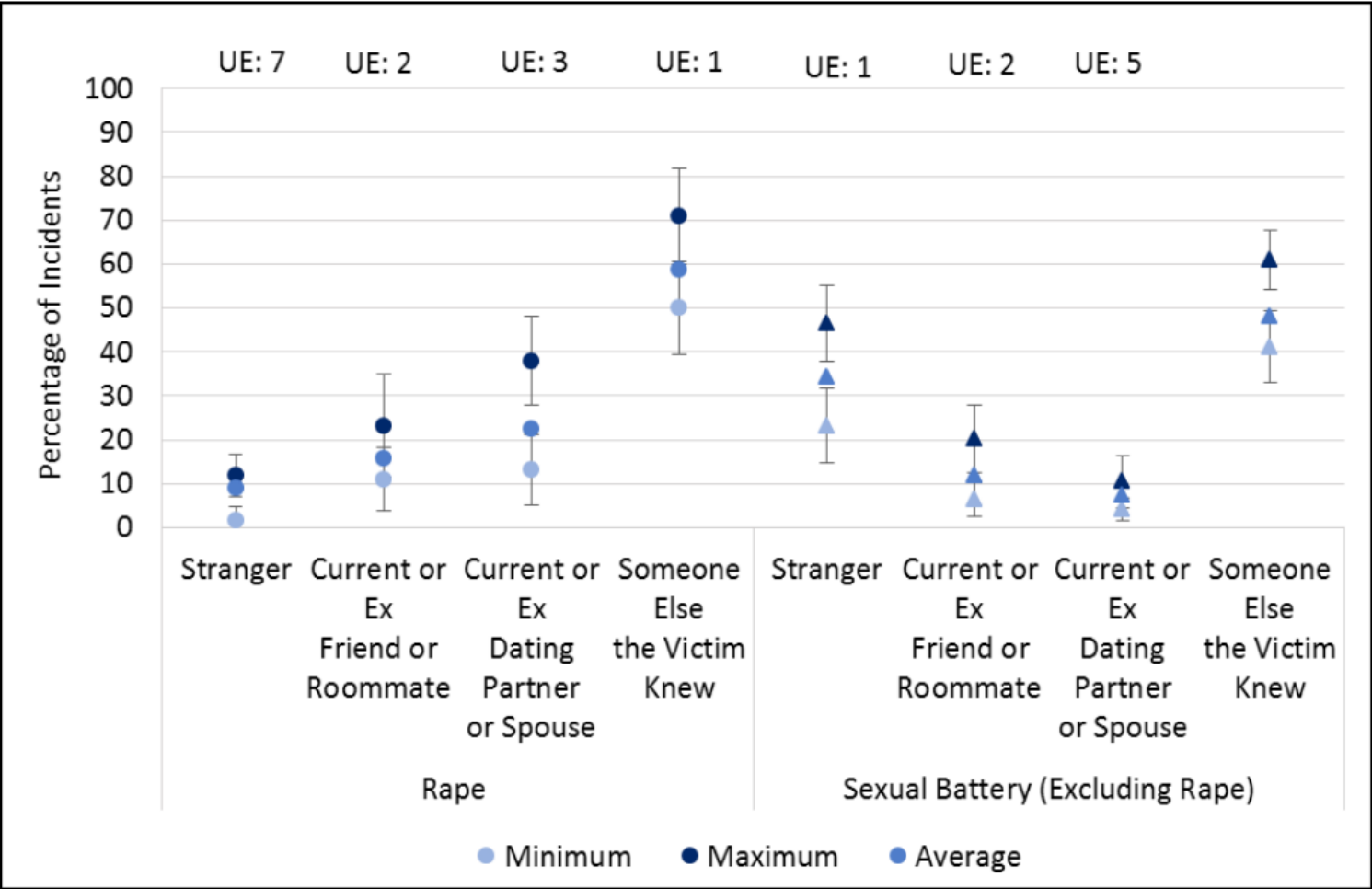
Prevalence of Sexual Assault reported by Non-heterosexual female students



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



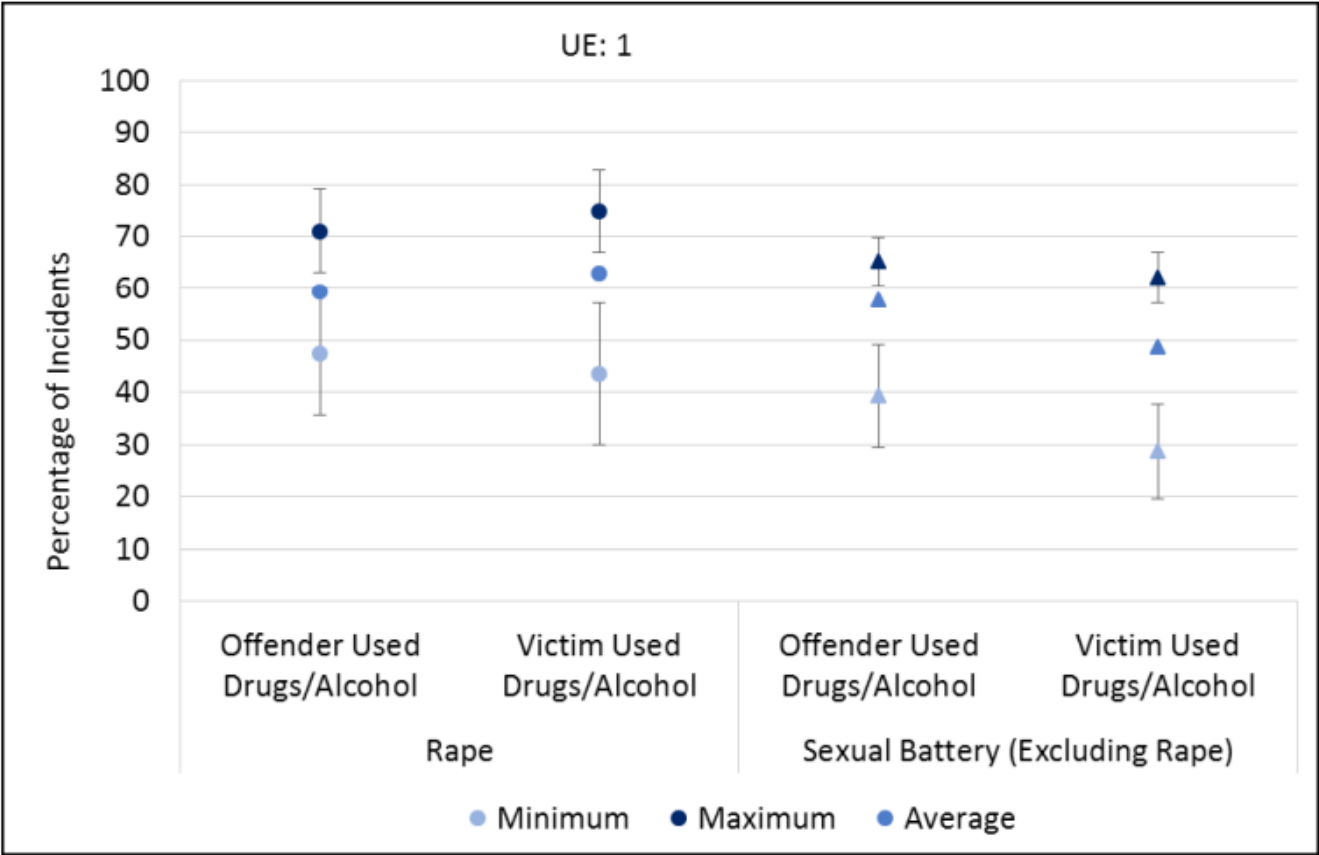
# Sexual Assault Data: Identity of Perpetrator



# 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

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“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

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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)

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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)

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**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

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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

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**“Dating Violence”** means **an act of 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

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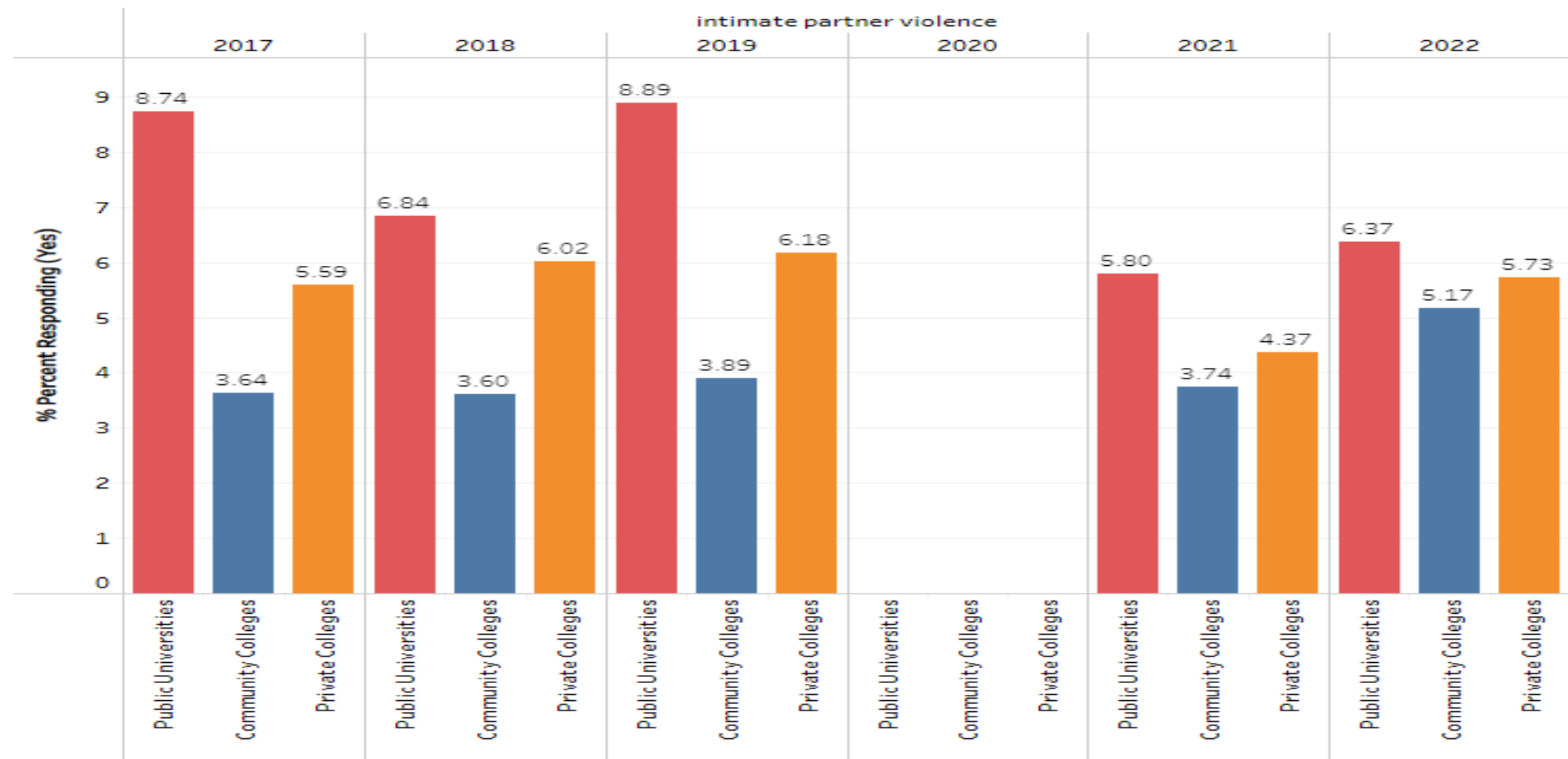
- **“Domestic violence”** is an **act of violence** committed on the basis of sex by:
  - A **current or former spouse** or **intimate partner** of the complainant;
  - A person with whom the complainant **shares a child in common**;
  - A person who is **cohabitating with, or has cohabitated with**, 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

# IPV vs. Healthy Relationships

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- 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

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- 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

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- 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

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- “Stalking” is engaging in a course of conduct directed at a specific person on the basis of sex that would cause a reasonable person with similar characteristics under similar circumstances to:
  - Fear for the person’s safety or the safety of others; or
  - Suffer substantial emotional distress.
- To qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)

# Stalking: Course of Conduct



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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

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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

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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

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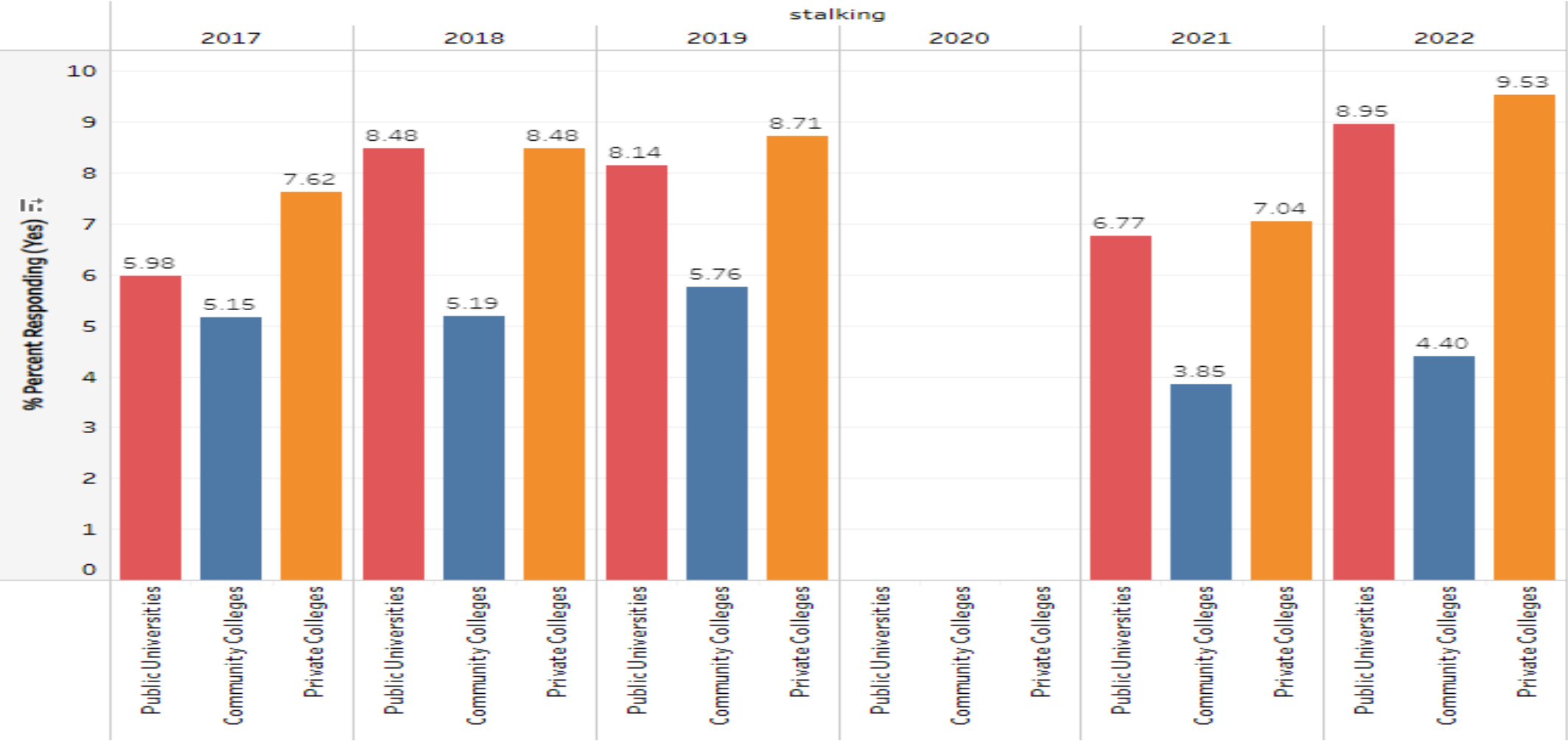
- **11%** of stalking victims have been stalked for 5 years or more.
- **46%** of **stalking** victims experience at least one unwanted contact per week.

[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:BJJS, 2009).]

# ODHE Data - Stalking



# Stalking: Common Concerns

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- 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

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- 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?

# Trauma Informed Approaches

# Role Reminders

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- If your friend tells you something terrible happened to them, it's not your job to interrogate them or figure out what happened.
  - In this situation, be supportive and listen.
- If you are in your role as a Title IX team member and someone tells you something terrible happened to them, it might actually be your job to ask detailed questions and make a determination regarding a policy violation.
  - The institution still provides support to people during the process.
  - That being said, you may still be required to ask tough questions and make tough decisions.



# Goal: Don't Make This Any Harder

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- The process is difficult.
- Telling your story is difficult. Telling your story *multiple times* is difficult.
- Reliving trauma is difficult.
- Being accused of something is difficult.
- Everyone brings their own burdens into the process. They also bring their own history into the process—including past trauma that may be triggered.
- Our goal is to get the best evidence on the table for consideration when a decision is made. How can we do that when *everyone* we talk to may be traumatized?

# First: Make No Assumptions

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- Treat everyone as though they may be traumatized, so you aren't picking and choosing who you *think* may be responding to trauma—and then subconsciously holding them to different standards.
- Different people who undergo trauma may present and behave differently. Some may cry, or be angry, or be calm. This makes demeanor a poor indicator as whether someone is traumatized, particularly because people can display all of these traits for other reasons.
- Title IX Coordinators - don't assume only those who are crying or angry need supportive measures!

## Second: They Are Not You

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- There is no “right way” to behave.
- If you think there is a “right way” to behave, you are imposing your own values and judgments—informed by your background—on others, when you should be neutral.
- A value judgment is different than evaluating the *plausibility* of behavior. Compare:
  - Complainant cried during the sexual encounter. (plausible)
  - Complainant said nothing during the sexual encounter. (plausible)
  - Complainant had a Facetime conversation with a third party during the sexual encounter, but that person had no indication that Complainant was engaged in sexual activity. (Huh? We have questions.)

## Third: Neurobiology of Trauma Is A Thing

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- Individuals who experience a traumatic event may have difficulty processing the event as it is happening and after it is happening.
- Trauma may make it difficult to sequence events in a chronological order.
- People can have these same issues for many other reasons not related to trauma.
- Signs of trauma  $\neq$  policy violation
- No signs of trauma  $\neq$  no policy violation
- Being aware of the effects of trauma gives us a broader definition of what behavior might be *plausible* in a particular situation.

# So... What Does This Mean, Practically?

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- Make interviewees comfortable and offer to take breaks when needed.
- Give *everyone* the space to tell their own narrative in their own way.
  - “What happened? And then what happened? What happened next?”
  - “Tell me more about...”
- Once the person has completed their monologue, ask follow-up questions for clarification.
- If details are still unclear, ask specific yes/no questions. (Write down the question and the answer.)
- When someone has trouble giving details, sensory cues are sometimes helpful.

# Emotions During Interviews

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- Individuals may experience a range of emotions being interviewed, including sadness, frustration, and anger (maybe at you!). It's normal.
- The goal is to keep the emotional temperature turned down to the point that the interviewee feels able to engage and provide information.
- Recognize that certain topics may trigger negative responses (e.g. what someone was wearing, alcohol/drug use). Introduce these topics by explaining why the information is needed in the context of your investigation.
- If an individual's emotions become a barrier, consider taking a break, explaining why you are asking what you are asking, and restarting.
- Main goal: keep people talking and sharing their stories.

# First Interview vs. Second Interview

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- The first interview is space to tell a person's story. Get all the details. Be curious.
- Often, a second interview may be necessary where other information significantly contradicts that person's story—which can be hard for that person to hear. Again, get all the details and be curious.
- Always walk into an interview assuming there are logical explanations for everything. This keeps you asking questions, and it keeps people answering them (because you don't maintain an accusatory tone!).
- Above all – keep your interviewees talking. The more information they give, the more helpful it will be to your decision maker.

# Trauma and Decision Making

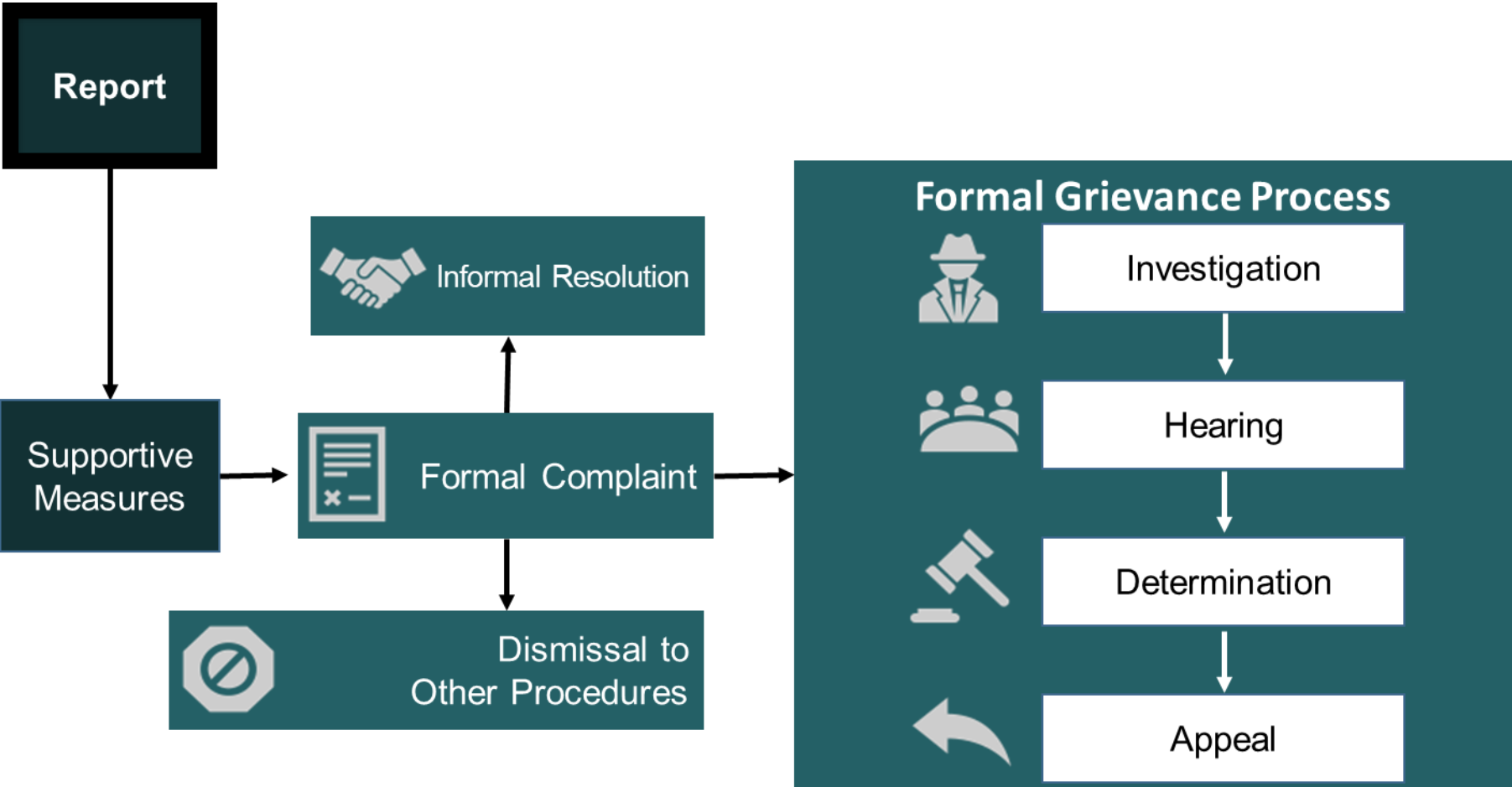
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- Focus on corroboration, consistency, and plausibility.
  - Is there anything else in the file that backs up this assertion?
  - Has the person been consistent over time (recognizing that it is hard to say exactly the same words when telling the story multiple times)?
  - Is the person's story plausible?
- Avoid making decisions based on demeanor, as there are too many reasons—including cultural norms—that may affect how some people behave and how you perceive it.
- These are good practices regardless of whether anyone may be traumatized.



# Overview of the Grievance Process

# Overview of the Process



# A Report versus a Formal Complaint

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- Report – Any information received regarding potential policy violation
  - Result of report: Coordinator sends an email to the potential reporting party, inviting further discussion
  - Supportive measures are offered
- Formal complaint – A written document that:
  - Is filed by the reporting party or signed by the Title IX Coordinator
  - Alleges sexual harassment against a responding party
  - Requests that University investigate the allegation of sexual harassment

# Role: Coordinator

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- Conducts intake regarding new reports
- May determine it is necessary to proceed with a process even if complainant does not wish to sign the formal complaint
- Ensures both parties have access to supportive measures
- Monitors process to regarding policy compliance
- Assists with questions and concerns about potential bias or conflict of interest
- Maintains a neutral status throughout the procedures

# Role: Investigator

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- Offers the opportunity to parties and witnesses to sit for an interview, submit written statements
- Allows parties to submit witness lists and questions for particular parties or witnesses
- Collects evidence from parties, witnesses, and other sources (e.g. security footage, police records)
- Prepares evidence file for review and response by the parties
- Reviews the responses from the parties and conducts follow-up investigation as necessary
- Prepares final investigation report
- Ensures that if new allegations arise, the parties are notified as the scope of the investigation expands
- Maintains a neutral status throughout the process

# Role: Hearing Panel Member

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- Review the evidence file, final investigation report, and responses of the parties
- Consider what is missing, what is unclear, and what elements are disputed
- Ask relevant questions at hearing, adjusting as other questions are asked
- Maintain neutrality (tone, body language, and word choice)

# Hearing Panel Member: Your Goal

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- Have enough information on every element of every charge so that you can render a decision by a preponderance of the evidence.
- Have enough information to make decisions regarding the credibility of the parties and witnesses.
- Make relevancy determinations after every question asked by the advisors.
- Maintain decorum at all times, by all participants.

# Role: Advisor

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- Reviews the evidence file, final investigation report, and responses of the parties.
- Assists their party with preparation of relevant questions for hearing.
  - Goals is to assist the Decision-Makers with understanding the case from their party's perspective.
- Asks relevant questions at hearing, adjusting as other questions are asked.
- Is not neutral, as the role is inherently biased towards their party, but still maintains decorum standards at all times.



# Role: Appeals Officer

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- Reviews the evidence file, final investigation report, responses of the parties, and evidence at hearing
- Reviews appeal documents
- Uses the bases for appeal in the policy to determine whether the standard has been met
- Prepares a written decision explaining the outcome
- Maintains neutrality and is careful not to predetermine the case

# Role: Informal Resolution Facilitator

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- May or may not review the file (it may not be available yet)
- Usually meets separately with each party and their advisor
- Helps the parties reach a mutually acceptable agreed outcome that is also acceptable to the University for enforcement
  - If no agreement is reached, that's OK too.
- Helps to document agreement and obtain signatures of the parties

# Overview of the Hearing Process

# Hearing Process at University of Cincinnati – Enter Hearing Panel

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- Parties and panel will have received a hearing case file including:
  - Relevant evidence gathered during the investigation;
  - Any responses of the parties to the evidence (interview summaries, text messages, photos, etc.);
  - An investigation report (see the one for our mock hearing).

# Hearing Process at University of Cincinnati – Investigation Report

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- The Investigation Report will include:
  1. A summary of alleged conduct in violation of the Title IX Policy, including a description of the impact or effect alleged to have been caused;
  2. A summary of the response to the allegations;
  3. A summary of facts found during the investigation; and
  4. Analysis of the application of this Policy to the facts found in the investigation.

# Hearing Process at University of Cincinnati – The Hearing Logistics

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- Under the Policy, may be in person or virtual and at the discretion of the Hearing Chair.
- Hearing will be recorded; Panel deliberations are not recorded.
- Hearings are closed to the public and limited to parties, advisors, approved witnesses, the Panel, the investigator, and any appropriate administrative University personnel.

# Hearing Process at University of Cincinnati – Pre-Hearing Requirements

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- A party must notify the Chair three days before the hearing if their advisor is an attorney.
- A party may submit to the Chair a list of witnesses they wish to provide testimony at the hearing three days prior to the hearing.

# Hearing Process at University of Cincinnati – Procedure – Hearing Script (1)

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- Step 1: The Chair will complete the attendee roster located at the beginning of the Hearing Script.
- Step 2: The Chair will begin testing any technology at least 30 minutes prior to the hearing start time.
- Step 3: The Chair will read the introduction of the Hearing Script portion that is not yet recorded.
- Step 4: The Chair begins recording and reads the hearing opening statement and introduction and receives affirmation of parties and advisors.



# Hearing Process at University of Cincinnati – Procedure – Hearing Script (2)

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- Step 5: The Chair reads the hearing procedures:
  - Request submission of any impact statements that have not already been produced;
  - Explain the hearing process and identify parties and advisors for the record;
  - Discuss federal regulations regarding consideration of prior statements not subject to cross-examination;
  - Discuss next steps and appeal rights;
  - Provide opportunity for questions.

# Hearing Process at University of Cincinnati – Procedure – Hearing Script (3)

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- Step 6: The Chair reviews allegations – we'll come back to this in a minute to discuss the allegations in our mock investigation report
  - Acknowledge and obtain affirmation from Respondent on whether accepts/does not accept responsibility
- Step 7: The Chair calls the Investigator for the Investigator's summary and testimony
  - Hearing Panel may question
  - Complainant may question (through advisor)
  - Respondent may question (through advisor)

# Hearing Process at University of Cincinnati – Procedure – Hearing Script (4)

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- Step 8: The Chair begins party testimony
  - Confirm which parties are present for participation in hearing
  - Provide for Complainant to make opening statement
  - Questions for Complainant by Panel
  - Questions of Complainant by Complainant's advisor
  - Questions for Complainant by Respondent's advisor
  - Opportunity for additional questions from Panel and/or advisors

Then same process as above for Respondent (except Respondent's advisor questions Respondent first, then Complainant's advisor)

# Hearing Process at University of Cincinnati – Procedure – Hearing Script (5)

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- Step 8 (continued): Questioning of witnesses
  - Introduction of matter to witness
  - Review grievance process and ask witness to affirm understanding
  - Ask witness to explain how they know the parties
  - Witness may offer statement regarding their knowledge of the allegations
  - Questioning by Panel
  - Questioning by Complainant (through advisor)
  - Questioning by Respondent (through advisor)
  - Additional questions

**Repeat these steps for every witness**

# Hearing Process at University of Cincinnati – Procedure – Hearing Script (6)

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- Step 8 (cont.) - Additional questioning for Complainant and Respondent (as needed)
  - After testimony from parties and witnesses – Chair asks if Panel has an additional questions for Complainant, then Complainant’s advisor may question, then Respondent’s advisor
  - **Same Process for Respondent but Respondent’s advisor questions the Respondent and then the Complainant’s advisor**

# A Note on Relevancy Determinations

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- After every single question asked by an advisor, the Panel must make a relevancy determination before a party or witness (including the Investigator) can answer the question
  - Chair will facilitate this process
- Generally, questions are relevant if they help the Panel understand if a violation was more or less likely to have occurred (this is your standard of review, which will discuss more in a moment)

# Another Note on Relevancy Determinations

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Questions that tend to come up that are NOT relevant:

- Prior sexual history (sexual predisposition or prior sexual behavior) of the **Complainant** is NOT relevant unless:
  1. It is offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant; or
  2. It is offered to provide evidence of prior sexual history between the Complainant & Respondent to prove consent.
- Privileged information (attorney-client, counselor or spiritual leader communications)
- Medical records of a party without the party's written waiver

# Hearing Process at University of Cincinnati – Procedure – Hearing Script (7)

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- Step 9: The Chair calls a break for the participants so that parties may prepare closing statements
- Step 10: The Chair then provides for closing statements and the close of the hearing
  - The Chair allows the Complainant to make a closing statement
  - The Chair then allows the Respondent to make a closing statement
  - The Chair then reads the remainder of the script explaining next steps to close the hearing



# Preparation for Mock Hearing

# What Don't You Know?

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- Hearing Panel: If you need to know it to make a determination, you have the obligation to ask the question.
- Advisors: If you don't know the answer to the question before you ask it, it may harm your party. Weigh the benefits of asking carefully before proceeding.

# What Do You Know?

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- Hearing Panel: It can be helpful to ask questions when you think you already know the answer, to ensure that you are able to sequence events correctly and that you understand nuances in the testimony.
- Advisors: If the testimony is going to help tell your party's story, it can be helpful to bring it to the forefront of the Hearing Officer's mind.

# Disputed Facts?

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- Hearing Panel: Question on disputed facts so that you can weigh credibility, make a determination, and explain your rationale.
  - So what are the disputed facts between the parties? (let's limit this to just the investigation report – I know some actors have more details)
- Advisors: Help the Panel understand your party's perspective by:
  - Highlighting important evidence to help your party prove that the elements are met/not met;
  - Highlighting discrepancies in the evidence that disprove the other party's story;
  - Highlighting credibility issues of the other party and witnesses where they are testifying against your party.

# Make Your Plans

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- Hearing Panel:
  - What themes do you wish to draw out?
  - What disputed points do you need information on?
  - Who will cover which topics?
  - Which questions will be asked?
- Advisors:
  - Use this discussion to help frame your questions. What key points do you think need to be addressed with each witness to highlight your party's story?
  - What information is most critical of your party's story, and what can help highlight the weaknesses in that information as compared to the strengths in your information?

# Collect Data for your Timeline

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- Text messages unrelated to the incident itself, but that give time stamps and other valuable information
- Videos/pictures of parties with time stamps
- Card swipes for the parties and anyone with the parties on the evening of the incident
- Security footage

# Pick a Goal

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- Consider choosing a goal for yourself to try to reach through questioning:
  - Advisor: “By questioning Moxy, I will try to show that Ryan was more aware of Chloe’s intoxication level than the report suggests.”
  - Hearing Officer: “In questioning Chloe, I will try to better understand what effects she felt from intoxication on May 7 compared to prior occasions on which she’s consumed alcohol.”
  - Etc.

# Remember: Credibility Factors



- Credibility is determined based on a “totality of the circumstances.” Factors to consider:
  - Witness statements
  - Detail and consistency of accounts
  - Corroborating evidence or the lack thereof, if it should logically exist
  - Information about how the reporting person acted following the incident, both immediately and over time
  - Information about whether the complainant told others about the incident soon after it occurred
  - Other contemporaneous evidence of accounts
  - Credible reports of similar incidents by the respondent (careful here!)
  - Whether the reporting person has been shown to make false reports (again, careful here!)



# Mock Hearing

# Deliberations

# Post-Hearing Procedures – Deliberating and Voting

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- Hearing Panel votes – must be a majority if no consensus
- This is not a recorded discussion or vote

So how do you do this?

# Deliberating Reminders (1 of 3)

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- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

## Deliberating Reminders (2 of 3)

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- **Withhold pre-judgment:** The parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases

## Deliberating Reminders (3 of 3)

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- Burden of gathering the evidence on the recipient, not the parties (30333)
  - Don't penalize a party for the questions no one asked them.

# Standard of Proof

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- Standard of Proof: Preponderance of the Evidence
  - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly “50-50,” the tie goes to the Respondent.

*Tip when discussing and voting – go through each element of each allegation considering the standard of evidence*

# Objectively Evaluating Relevant Evidence

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- As addressed in the preamble and discussed earlier, the Hearing Panel should evaluate:
  - “consistency, accuracy, memory, and credibility (30315)
  - “implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility” (030330)
  - Standard of proof



# Tips for Evaluating Evidence – Keep an Open Mind

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- Keep an open mind until all statements have been tested at the live hearing.
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all the evidence AND consider only the evidence that can remain (statements in the record might have to be removed from consideration if not tested in live-hearing).

# Tips for Evaluating Evidence – Sound, Reasoned Decision

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- You must render a sound, reasoned decision on every charge.
- You must determine the facts in this case based on the information presented.
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence.

# Tips for Evaluating Evidence – Consider All/Only Evidence

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- You must make a decision based solely on the relevant evidence obtained in this matter and only statements in the record that have been tested in cross-examination.
- You may consider nothing but this evidence.

# Tips for Evaluating Evidence – Be Reasonable and Impartial

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- You must be impartial when considering evidence and weighing the credibility of parties and witnesses.
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party.
- Identify any actual or perceived conflict of interest.

# Tips for Evaluating Evidence – Weight

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- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the “weight” of the evidence, meaning its strength, that impacts how much it tends to prove/disprove a fact or finding in the case.
- You must evaluate the evidence as a whole, based on your own judgment.

# Tips for Evaluating Evidence – Credibility

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- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
  - Consider and compare the level of detail and consistency of each person's account.
  - Consider whether corroborative evidence is lacking where it should logically exist.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.
- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

# Other Credibility Considerations

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- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
  - But - failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur
- Other contemporaneous evidence:
  - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
  - Did the complainant tell others (friends, parents) about the conduct and their reaction soon after it occurred?

# If you're having trouble

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- Consider making a list of what you are sure about that relates to the question you are considering.
  - Example: Joe brought Chloe and Ryan two bottles of Smirnoff Ice and saw them both “chug” the bottles.
- Make a list of what facts are disputed.
  - Example: Chloe says that she froze when Ryan touched her breast; Ryan said Chloe continued kissing him and leaning toward him while he touched her.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.



# Tips for Evaluating Evidence – Draw Reasonable Inferences (1)

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- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning.
- Use your standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.

# Tips for Evaluating Evidence – Draw Reasonable Inferences (2)

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- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether the burden has been met.
- Any time you make a decision, use your standard of evidence.

# Tips for Evaluating Evidence – Don't Consider Impact

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- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.
- Do not consider the impact of your decision.

# Writing the Decision

# Elements in the Policy for the Written Decision (1)

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1. Identification of the allegations potentially constituting sexual harassment as defined in this Policy;
2. 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;
3. Findings of facts supporting the determination;

# Elements in the Policy for the Written Decision (2)

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4. Conclusions regarding the application of the Policy to the facts;
5. Rational for the result of each allegations and any determination about the responsibility;
6. Any sanctions and whether the remedies designed to restore or preserve equal access to the University's education program or activity will be provided by the University to the Complainant; and
7. Appeal procedures and bases for appeal.

# Timely decision

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Policy provides 10 business days for Hearing Panel to issue written decision.

# If you are having trouble

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- Consider making a list of what you are sure about that relates to the question you are considering.
- Make a list of what facts are disputed.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.



# Questions?

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# Thank You

