

UW Title IX Training
Including Decision-Makers, Advisors, and other Staff

Policy Definitions

Sexual Harassment Policy

Title IX regulations require each recipient to have an umbrella sexual harassment policy and define sexual harassment as conduct on the basis of sex that satisfies one or more of the following:

- **QUID PRO QUO:** An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.
- **SEXUAL HARASSMENT:** Unwelcome conduct determined by a reasonable person to be so severe AND pervasive, AND objectively offensive (SPOO) that it effectively denies a person equal access to the recipient's education program or activity
 - Education program or activity means employment, too!

Severe

"The more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical." – (2001 Guidance)

- Physical contact is more likely to be severe without need for repetition
 - "attempts to grab a female student's breasts or attempts to grab any student's genital area or buttocks" – (2001 Guidance)
- Non-consensual sexual intercourse or contact (e.g., physical/sexual assaults) are almost always sufficiently severe
- Consider the circumstances: e.g. the ability for Complainant to remove themselves from the harassment
 - Accompanied by threats or violence?

Pervasive

"Harassment is pervasive when incidents of harassment occur either in concert or with regularity" (2001 Guidance)

- Widespread
- Openly practiced
- Well-known among students/employees – reputation of a department, etc.
- Occurring in public spaces (more likely to be pervasive)
- Frequency of the conduct is often a pervasiveness variable
 - Intensity/duration
- Unreasonable interference

Objectively offensive

- Reasonable person standard in context
- "I know it when I see it..."

- | | |
|--|--------------------------|
| • Age and relationships of Complainant and Respondents | • Physically threatening |
| • Number of persons involved | • Humiliation |
| • Frequency | • Intimidation |
| • Severity | • Ridicule |
| | • Abusive |

Student Based Examples

Discussion: Do these create a hostile environment?

- Female student “sexts” pictures of herself to a male classmate?
- A student draws a penis on the whiteboard at the front of the class?
- What about a whiteboard on the student’s residence hall door or in a student’s locker?
- “Revenge porn” pictures posted online?
- A student viewing porn on a computer in the library?
- A student calling another a C-nt?

Faculty Based Examples

Discussion: Do these create a hostile environment?

- Giving a student a back-rub?
- Require students to read 50 Shades of Grey and give an assignment to compare their own experiences against those from the book?
- Female faculty member repeatedly referring to male students as “penises?”
- Repeatedly telling “dirty” jokes in class?
- Calling a colleague a “bitch” in a meeting?

Staff Based Examples

Discussion: Do these create a hostile environment?

- Telling dirty jokes: In common area? Staff meeting? To a single individual?
- Sending porn to a colleague?
- Rolling eyes and making masturbation motion with hand at comments during a staff meeting?
- Repeated staring at a colleague of the opposite sex; accompanied by occasional winking?
- A supervisor repeatedly mentioning how much they like a supervisee’s outfits?

Sexual Assault

Sex Offenses, Forcible: Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.

- Forcible Rape
- Forcible Sodomy
- Sexual Assault with an Object
- Forcible Fondling

Sex Offenses, Non-Forcible:

- Incest
- Statutory Rape

Consent

Consent is sexual permission. There must be:

- clear, affirmative, conscious/known, and voluntary permission
- prior to and during sexual activity.
- Consent can be given by word or action, but non-verbal consent is not as clear as talking about what you want sexually and what you don't.
- Consent to some form of sexual activity cannot be automatically taken as consent to any other form of sexual activity.
- Previous consent does not imply consent to sexual activity in the future.
- Silence or passivity, without actions demonstrating permission, cannot be assumed to show consent.
- Consent, once given, can be withdrawn at any time as long as the withdrawal is reasonably and clearly communicated. If consent is withdrawn, that sexual activity should cease within a reasonable time.

People unable to give consent

- Persons who are asleep or unconscious
- Persons who are incapacitated due to the influence of drugs, alcohol, or medication
- Persons who are unable to communicate consent due to a mental or physical condition
- Persons who are under the legal age of consent

More about consent

- People perceive/experience the same interaction in different ways. It's the responsibility of each party to determine that the other has consented before engaging in the activity.
- There must be a clear expression in words or actions that they consented to that specific sexual conduct. Reasonable reciprocation can be implied.
 - Ex: if someone kisses you, you can kiss them back (if you want to) without the need to explicitly obtain their consent to being kissed back.)
- A current or previous intimate relationship is not sufficient to constitute consent
- Consent in relationships must also be considered in context (ex: "safe words" in BDSM/kink relationships)

Dating Violence

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant
 - Existence of relationship determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the people
- For the purposes of this definition:
- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse
 - Dating violence does not include acts covered under the definition of domestic violence

Domestic Violence

- A (felony or misdemeanor) crime of violence committed on the basis of sex:
- By a current or former spouse or intimate partner of the Complainant;
 - By a person with whom the Complainant 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 or family violence laws of Wyoming;
 - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of Wyoming.

Clarification about Domestic Violence

- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates.
- The people cohabitating must be current or former spouses or have an intimate relationship.

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for the person's safety or the safety of others; or
- Suffer substantial emotional distress.

For the purposes of this definition--

- Course of conduct 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.
- Reasonable person means a 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.

Totality of Circumstances

Do not conflate discomfort or being offended with this higher standard of sexual harassment!

Circumstances to consider:

- The nature, pervasiveness, and severity of the conduct
- Was the conduct reasonably physically threatening?
- Was the conduct objectively and subjectively humiliating?
- What was the objective and subjective reasonable effect on the Complainant's mental or emotional state?
- Was there an effective denial of education or employment access?
- If SPOO, a discriminatory effect is presumed (proven)

Also consider

- Is it sex-based?
- Was the conduct directed at more than one person?
- Would a reasonable person see/experience/determine the conduct to be SPOO?
 - What does it mean to be a reasonable person? Who is?
 - A reasonable person sits in the shoes of the Complainant.
- Would the statement only amount to utterance of an epithet that is offensive or offends by discourtesy or rudeness, and thus is not SPOO?
- Would the speech or conduct deserve the protection of academic freedom or of the First Amendment, which means it is not sexual harassment?

Retaliation

- No institution or person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX.
- The exercise of rights protected under the First Amendment does not constitute retaliation.
- Charging an individual with a code of conduct violation for making a materially false statement in bad faith does not constitute retaliation if it is based on more than evidence that a Respondent violated the sexual harassment policy.

Consent, Force,
And Incapacity

Consent is...

- Informed, knowing, and voluntary (freely given),
 - Active (not passive),
 - Affirmative action through clear words or actions,
 - That create mutually understandable permission regarding the conditions of sexual or intimate activity.
-
- Cannot be obtained by use of physical force, compelling threats, intimidating behavior, or coercion
 - Cannot be given by someone known to be – or who should be known to be – mentally or physically incapacitated.

3 Consent Questions

1. Was force used by the Respondent to obtain sexual access?
2. Was the Complainant incapacitated?
 - Did the Respondent know, or
 - Should s/he have known that the Complainant was incapacitated (e.g., by alcohol, other drugs, sleep, etc.)?
3. What clear words or actions by the Complainant gave the Respondent permission for the specific sexual activity that took place?

Q1. Force – Four Types to Consider

- **Physical violence** – hitting, restraint, pushing, kicking, etc.
- **Threats** – anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
- **Intimidation** – an implied threat that menaces and/or causes reasonable fear
- **Coercion** – the application of an unreasonable amount of pressure for sexual access

Consider:

- Isolation
- Frequency
- Intensity
- Duration

Because consent must be voluntary (an act of free will), consent cannot be obtained through any type of force!

Q2. Incapacity

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent.
- Incapacitation is a determination that will be made after the incident in light of all the facts available.
- Assessing incapacitation is very fact-dependent.
- Blackouts are frequent issues.
 - Blackout = no working (form of short-term) memory for a consistent period, thus the person is unable to understand who, what, when, where, why, or how
 - But the "did know/should have known" question must be answered, as blacked out individuals are able to engage in activities that may not make it a definitive "yes"
 - Partial blackout or "brownout" possibilities must be assessed as well

Forms of Incapacity

- Alcohol or other drugs
 - Incapacity ≠ Impaired, drunk, intoxicated, or under the influence
 - Incapacity = an extreme form of intoxication (alcohol)
 - Administered voluntarily or without Complainant's knowledge
 - Rape drugs
- Mental/cognitive impairment
- Injury
- Asleep or unconscious

Incapacity Analysis

- First, **was the Complainant incapacitated** at the time of sex?
 - Could the person make rational, reasonable decisions?
 - Could the Complainant appreciate the situation and address it consciously such that any consent was informed (**Did they know who, what, when, where, why, and how?**)
- Second, **did the Respondent know** of the incapacity (fact)?
- Or, **should the Respondent have known** from all the circumstances (reasonable person)?

Behavioral Cues

Evidence of incapacity may be taken from context clues in the relevant evidence, such as:

- Slurred speech
- The smell of alcohol on the breath in combination with other factors
- Shaky equilibrium; stumbling
- Outrageous or unusual behavior
- Passing out
- Throwing up
- Appearing disoriented
- Unconsciousness
- Known blackout
 - Although memory is absent in a blackout, verbal and motor skills are still functioning

Establishing knowledge

The evidence might also include contextual information to analyze any behaviors by the Complainant that seem "out of the norm" as part of a determination of incapacity:

- Did the Respondent know the Complainant previously?
- If so, was the Complainant acting very differently from previous similar situations?
- Review what the Respondent observed the Complainant consuming (via the report's timeline).
- Determine if Respondent provided any of the alcohol to the Complainant.
- Consider other relevant behavioral cues.

Final Incapacity Analysis

- If the Complainant was not incapacitated, move on to the Consent analysis.
- If the Complainant was incapacitated, but:
 - The Respondent did not know it, AND
 - The Respondent could not have reasonably known it then the policy was not violated for this reason. (Move on to the Consent analysis.)
- If the Complainant was incapacitated, and:
 - The Respondent knew it or caused it then there is evidence to determine that a policy violation occurred.
 - The Respondent could or should have known it then there is evidence to determine that a policy violation occurred.

Q3. Consent

- What clear words or actions by the Complainant gave the Respondent permission for each sexual act as it took place?
- If there are clear words or actions (by a preponderance of the evidence), there is no sexual assault. If there are no words or actions, or they are not clear, then there is no consent, and the finding is that a sexual assault occurred.
- The definition of consent does not vary based upon a person's sex, sexual orientation, gender identity, or gender expression.

Things to remember about Consent

- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated – verbally or nonverbally – by the person withdrawing it.

**Bias,
Conflicts of Interest,
and Recusal**

Remember...

We are not on anyone's side
...other than the truth and the
integrity of the process.

Bias

Any variable that improperly influences a finding and/or sanction

- Pre-determined outcome
- Partisan approach by investigators (in questioning, findings, or report)
- Partisan approach by hearing decision-makers in questioning, findings, or sanction)
- Intervention by senior-level officials
- Stepping outside the scope of your authority
- Improper application of UW procedures
- Improper application of UW policies
- Confirmation bias
- Implicit bias
- Animus of any kind

Bias and Conflicts of Interest

- Expressly prohibited by 2020 TIX Regulations
- Types of bias
 - Role conflict within the process
 - Legal counsel as investigator or decision-maker
 - Decision-makers who aren't impartial
 - Biased training materials
 - Reliance on sex stereotypes
- Simply knowing a student/employee is typically not sufficient to cause a conflict of interest
 - IF objectivity not compromised
- Having disciplined student/employee is often not enough to create conflict of interest

Recusal

- Individuals may determine that they need to recuse themselves from a particular case
- A party might seek someone’s recusal under UW policy. The Title IX Coordinator determines whether or not to accept the request.

If you determine that you are unable to review a case impartially, please contact the Title IX Coordinator immediately.

Due Process and Evidentiary Standards

What is due process? (Public institutions)

Federal and state constitutional and legal protections ensuring no public entity deprives someone of education or employment without substantive and procedural fairness. (5th and 14th Amendment) ”

“Fundamental Fairness” (private institutions):

- Contractual guarantee that to impose discipline, the institution will abide substantially by its policies and procedures.
- Outcome neither arbitrary nor capricious; rationally related to facts and evidence.

Due process (cont.)

Ultimately, both are rights-based protections that accompany disciplinary action by an institution with respect to students, employees, or others.

- Informed by law, history, public policy, culture etc.
- Different expectations in criminal/civil courts vs. higher education
- Due process analysis and protections have historically focused on the rights of the Respondent
- A sexual assault can be a legal deprivation of a Complainant's substantive due process rights
- Perceptions of "due process" can be connected to perceptions of legitimacy of a process's outcome.

Procedural due process

- Consistent, thorough, and procedurally sound review of all allegations.
- Substantial compliance with written policies and procedures.
- Policies and procedures afford sufficient rights and protections to satisfy mandates of all applicable laws.
 - Clear, written notice of the allegations
 - Opportunity to present witnesses and evidence and be heard by the decision-maker

Procedural due process right in 2020 TIX Regs

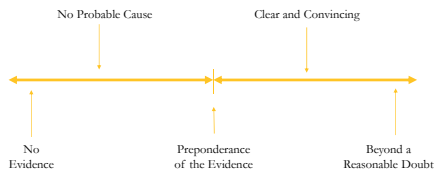
- Present witnesses, including fact and expert witnesses.
- Present and know inculpatory and exculpatory evidence.
- Discuss the allegations under investigation without restriction.
- Gather and present relevant evidence without restriction.
- Have others present during any grievance proceeding/meeting.
- Be accompanied to any related meeting or proceeding by an advisor of their choice, who may be, but is not required to be, an attorney.
- Written notice of allegations, as well as notice of the date, time, location, participants, and purpose of investigative interviews or other meetings, with sufficient time to prepare.
- Inspect and review evidence and draft investigation report before finalized.
- Right to argue for inclusion of "directly related" evidence at the hearing.
- Ask relevant questions of the other party and witnesses through an advisor, in the presence of the decision-maker.

Due process in decision

Decisions must:

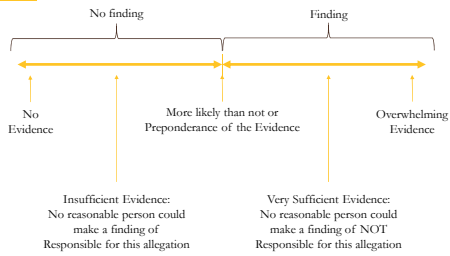
- Be based on a fundamentally fair rule or policy
- Be made in good faith (without malice, ill-will, conflict, or bias)
- Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence
- Not be arbitrary or capricious
- Be impartial and fair (both finding and sanction)

Explaining the Evidentiary Standards



Explaining the Preponderance Standard

- "More likely than not"
- The only equitable standard
- 50.1% (50% plus a feather)
- The "tipped scale"



The Title IX Process and Investigations

Title IX
 20 U.S.C. § 1681 & 34 C.F.R. PART 106

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



Steps in an investigation

- Receive Notice/Complaint
- Initial Assessment and Jurisdiction Determination
- Establish basis for investigation
- Notice of Investigation/Allegations to Parties
- Plan investigation strategy (Incident, Pattern, and/or Culture/Climate)
- Formal comprehensive investigation
 - Witness interviews
 - Evidence gathering
- Draft report

Steps in an investigation (cont.)

- Review draft report and evidence with Title IX Coordinator and General Counsel
- Provide all evidence directly related to the allegations to parties and their advisors for inspection and review with 10 days for response
- Complete final report
 - Synthesize and analyze relevant evidence
 - Send final report to parties for review and written response at least 10 days prior to hearing

Civil Rights Investigation Model

- An active gathering of information by the investigator(s), not intended to "build a case"
- Does not prevent the implementation of informal or alternative dispute resolution approaches
- Enhanced due process
- Based on an intentional effort to make procedural and support mechanisms equitable
- Provides an equal opportunity to appeal for all parties

Advisors

- Can be anyone
- If advisor is also a witness, can affect their credibility as a witness
- Parties must have an advisor at the live hearing to conduct cross-examination
 - If they don't, UW must provide an advisor (of our choosing) at no cost
 - Not required to be an attorney, but can be
 - No prior training required, no mandate for schools to train
- Role is limited during interviews and the hearing – can confer with party and conducts cross-examination

Thorough Cross-examination

- Advisors must conduct thorough cross-examination (most questions should be asked by decision-maker(s))
- If they refuse, UW will appoint an advisor who will do so.
- An advisor appointed for the party is required to conduct thorough cross-examination of the other party(ies)
 - Even if the party being advised doesn't want the advisor to do so, and is non-cooperative.
 - The regulations envision that the advisor may not do more than repeat or rephrase questions framed by the party, but in many hearings, expect that the advisor will be far more active and engaged than that.

Presumption of Non-responsibility

- Title IX regulations require that grievance procedures include a statement of a presumption of non-responsibility for the Respondent until a final determination is made.
- Not a change from previous UW procedures because the determination has always been based on evidence, not presumptions.

Discussion:

- What would it mean to presume neither "guilt" nor "innocence?"
- How is presumption of non-responsibility different than no presumption?
- What does it take to overcome presumption?
- Should there be an equitable presumption for the Complainant?
- If so, what would it be?

Conflict of interest, objectivity, and bias

- Mandate for impartial resolutions with fair procedures
 - Impartial, objective, unbiased, neutral, independent

Discussion:

- What does each of these mean?
- How do we bring these qualities to our processes and decision-making?

- 2020 regulations prohibit conflicts-of-interest or bias with coordinators, investigators, and decision-makers against parties generally or an individual party

Discussion:

- What creates a conflict?
- How can you assure that you don't have one?

Questioning Skills and Guidelines

Questioning

- Your goal is to ensure that you understand information contained in the report:
 - Relevant facts about what happened during the incident
 - Any related events
 - Any corroborating information
- Use your questions to elicit details, eliminate vagueness, fill in the gaps where information seems to be missing.
- Your goal is not:
 - Satisfying your curiosity
 - Chasing the rabbit into Wonderland
- Do not expect the "Gotcha" moment. That is not your role. You are not prosecutorial.

Preparing Questions

- Is the answer already in the report or documentation I have been provided?
 - If not, why not? (Ask the investigator this!)
 - You will still need to ask it again but keep the report in mind.
- What do I need to know?
 - Who is the best person to ask this of? (Usually the Investigator first, and then the original source if available; it may be good to ask the investigator if they asked it already and what answer they got.)
- Why do I need to know it?
 - If it is not going to help you determine whether or not a policy violation occurred and you can explain a rationale for that, then it is not something you need to know!
- What is the best way to ask the question?

Asking Good Questions

- Generally use open-ended questions (tell us...,who...,what..., how...)
- Try to avoid close-ended questions (Did you..., were you...)
- Don't ask Compound Questions ("I have two questions; First,...., Second,....")
- Don't ask Multiple Choice Questions (Were you a or b?)
- Avoid suggesting an answer in your question

Questioning skills

- Listen carefully and adapt follow-up questions.
- Work from your prepared outline but stay flexible.
- Seek to clarify terms (when the report is silent) that can have multiple meanings or a spectrum of meanings such as "hooked up," "drunk," "sex," "acted weird," "sketchy," or "had a few drinks."
- Be cognizant of the difference between what was "heard" (hearsay), what can be assumed (circumstantial), and what was "witnessed" (facts).
- Be aware of your own body language. Stay neutral, even if you hear something you distrust or dislike.

Questioning tips

- Restate/summarize what was said. Helps validate that you are listening and helps ensure you understand what is being said.
- Frame questions neutrally
- Be on the lookout for "cued" responses or rehearsed or memorized answers
- Handle emotions sensitively and tactfully
- Observe body language, but don't read too much into it
- Consider using these phrases:
 - "So it sounds like..."
 - "Tell me more..."
 - "Walk me through..."
 - "Help me understand..."

Role of the Decision-Maker

Oversee Live Hearings

- New regulations require a live hearing to determine responsibility**
- Can be in-person
 - Must allow for video participation options

OVERALL GOAL – An equitable result from an equitable process.

Decision-maker competencies

- Conduct/disciplinary process
- Investigative procedures
- Questioning skills, including relevance
- Weighing evidence, including relevance
- Pre-hearing evidence review
- Pre-hearing investigative report review
- How to prepare for a hearing
- Hearing decorum
- Technology used during hearings
- Applying standards of evidence
- Controlling evidence
- Presumption of innocence
- Due process and fairness
- Bias/Impartiality/Conflicts of Interest
- Deliberation
- Drawing inferences
- Impact of failing to testify/answer
- Sanctioning/Remedies
- Fixing procedural deviations
- Managing impact statements
- Writing decisions/rationales
- Understanding the appeal process
- Analyzing policy
- Managing advisors
- Critical thinking skills
- Title IX and VAWA requirements
- Sexual misconduct/discrimination
- SANE and police reports
- Domestic/Dating Violence
- Stalking/Sexual Assault/Harassment
- Cultural competency
- Intersection with mental health issues
- Manage accommodations during process
- Concurrent criminal prosecutions

Decision-maker/Chair responsibilities

- **Meet with the parties and advisors before pre-hearing to respond to their review/comment on the report**
- **Work with investigator to revise "buckets" of evidence**
- **Rule on any pre-submitted questions, share rulings with parties/advisors in advance of hearing**
- **Ensure finalized report is shared with parties and advisors***
- **Establish order of presentation/questioning for all testimony at hearing***
 - Given to parties/advisors in advance

*(*Some of these functions may be provided by the hearing facilitator.)*

Additional responsibilities

- **Read hearing script sections at the hearing, as necessary**
- **Preside over questioning at hearing**
- **Rule on the relevance of every question (on the record)**
- **Address any issues of fairness, evidence introduction, bias that are raised at hearing**
- **For panel chairs:**
 - Guide deliberations
 - Take the lead on drafting the outcome rationale

*(*Some of these functions may be provided by the hearing facilitator.)*

Expectations of decision-makers

- Community standards identify what constitutes sexual harassment within the UW community.
 - The definitions and procedures we use have been impacted by Title IX requirements.
- It is not a question of right and wrong, but whether there has been a policy violation, proven by the standard of evidence.
- Your role is to impartially uphold the integrity of the process.
- You may not agree with everything in the policy, but you must be willing to uphold it.

Remember...

We have no side other than the integrity of the process.
You represent the process.

Preparing for the Hearing

Things to review

- The written notice (NOIA) to understand all allegations
- The policy alleged to have been violated
 - Parse all the policy elements (what does it take to establish a policy violation?)
 - Identify the elements of each offense alleged
 - Break down the constituent elements of each relevant policy
- Review all the material carefully and thoroughly – get a general overview of the complaint
- Review it a second time and note all areas of consistent information
 - You don't need additional verification or questioning on these issues, assuming the accuracy of consistent information (but beware of suspiciously consistent stories).
- Read it a third time to identify inconsistencies in the information.
 - This is where you will concentrate your questions.

Prehearing Meetings

Can provide an opportunity to:

- Answer questions the parties and advisors have about the hearing and its procedures.
- Clarify expectations regarding logistics, decorum, and technology (when applicable).
- Clarify expectations regarding the limited role of advisors.
- Discern whether parties intend to ask questions of any or all witnesses (in order to evaluate which witnesses should be invited to attend the hearing).
- Invite parties to submit questions in advance, but don't require it.
- Discern any conflicts of interest/vet recusal requests.
- Understand (and perhaps preliminarily respond to) any questions regarding relevance of evidence or questions.

Hearing reminders

- Dress professionally – Jeans, t-shirts, shorts, or sandals are not appropriate
- Arrive prepared and early
- Bring snacks and water/drinks
- Turn off your phone! And put it away!
- Bring a pen and paper or note-taking device
- Clear calendar after the hearing – deliberation could take 30 minutes or it could take much longer.
- Note-writing tips
 - Less is better; record what you need to make a determination.

Hearing Logistics

- ### General logistics
- Recording (how, by whom, etc.)
 - Attendance by parties and witnesses
 - Location and Room set-up
 - Comfort items (water, tissues, meals if needed)
 - Privacy concerns; sound machine
 - Seating arrangements
 - Materials
 - Access to administrative support if needed (phones, copiers)
 - Advisors
 - Parties and witnesses waiting to testify
 - Breaks
 - Use of A/V
 - Waiting for a decision

- ### Hearing decorum
- **Be professional, but not lawyerly or judge-like**
 - This is not Law and Order – this is an administrative process at a school.
 - You are not cross-examining or interrogating, you are striving to determine whether the Respondent(s) violated the institutional policy.
 - **Be respectful**
 - Tone, Manner, Questioning.
 - Sarcasm or being snide are never appropriate.
 - Maintain your composure: Never allow emotion or frustration to show.

More about decorum

- Work to establish a baseline of relaxed conversation for everyone in the room
- Maintain good eye contact; “listen with your eyes and your ears”
- Listen carefully to everything that is said
 - Try not to write too much when people are talking
 - If questioning, focus on the answer, rather than thinking about your next question
- Nod affirmatively
- Do not fidget, roll your eyes, or give a “knowing” look
- Do not look shocked, smug, stunned, or accusing

Tips for Decision-maker(s)

- Recognize the need for flexibility with the order of statements and questioning, depending on the circumstances
- Be familiar with UW’s hearing procedures; review again before each hearing
- If a procedural question arises that must be addressed immediately, take a short break to seek clarification
- Will you have legal counsel available by phone/text/in person?
- Apply all appropriate institutional policies, procedures, and standards

Hearing Testimony: The Role of the Chair/Decision-Maker

- Determine the relevance and appropriateness of questions. Pause after each question to “rule” on relevance. State your rationale for the record.
- When necessary, provide directives to disregard a question or information deemed irrelevant, abusive, or unduly repetitive
- Manage advisors as necessary, including cross-examination
- Maintain the professionalism of all Decision-Makers
- Recognize your positional authority

Decision-making Skills

Understanding evidence

- The formal federal rules of evidence do not apply in Title IX hearings, but rules crafted by OCR for Title IX cases do.
- If the information helps to prove or disprove a fact at issue, it should be admitted.
- If credible, it should be considered.
 - Evidence is any kind of information presented with the intent to prove what took place.
 - Certain types of evidence may be relevant to the credibility of the witness, but not to the alleged policy violation directly.

Evidence

- No restriction on parties discussing case or gathering evidence
- Equal opportunity to:
 - Present witnesses, including experts
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered except that it must be relevant.
- Parties may have access to all gathered evidence that "directly relates" to the allegations available for reference and use at the hearing, but they must make the case for its relevance.

Considering Evidence

Ask yourself...

Is it relevant?

Is it reliable? (Is it credible?)

Will we rely upon it as evidence supporting a rationale/the written determination?

Relevance

- Evidence is generally considered *relevant* if it has value in proving or disproving a fact at issue
 - Regarding alleged policy violation and/or
 - Regarding a party or witness's credibility.
- The investigator will have made initial relevance "decisions" by including evidence in the investigation report...
- But relevance is ultimately up to the decision-maker, who is not bound by the investigator's judgment.
- **All** relevant evidence must be objectively evaluated and considered – inculpatory and exculpatory.

Input from the investigator

- If the investigator indicates an opinion on credibility, outcome, whether policy was violated, how evidence should be weighed, etc., that opinion or recommendation is not binding on the decision-maker.
- The decision-maker may consider it, but has to be objective and independent, and is free to accept or reject any recommendation of the investigator

Understanding Evidence

Decision-maker may consider and assign weight to different types of evidence, when relevant and credible:

- Documentary evidence (e.g. supportive writings or documents)
- Electronic evidence (e.g. photos, text messages, and videos)
- Real evidence (i.e. physical objects)
- Direct or testimonial evidence (e.g. personal observation or experience)
- Circumstantial evidence (i.e. not eyewitness, but compelling)
- Hearsay evidence (e.g. statement made outside the hearing, but presented as important information)

Decision-makers should typically disregard:

- Character evidence (generally of little value or relevance)
- Impact statements (typically only relevant in sanctioning)

Evidence Considerations in 2020 TIX Regs

Evidence of the Complainant's prior sexual behavior or predisposition is explicitly and categorically **not relevant** except for two limited exceptions:

- Offered to prove that someone other than the Respondent committed the conduct alleged, or
 - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition

Additional Evidence Restrictions in 2020 TIX Regs

Additional permissions required for records made or maintained by a:

- Physician
- Psychiatrist
- Psychologist

Questions or evidence that seek disclosure of information protected under a legally recognized privilege must not be asked without permission.

- This is complex in practice because you won't know to ask for permission unless you ask about the records first.

Questioning (Cross-examination)

The live hearing requirement for higher education allows the parties to ask direct questions of the other party and all witnesses through their advisor.

- By advisor of choice or an advisor provided by the institution, at no cost to the parties
- Questioning must be conducted directly, orally, and in real time by the party's advisor (never by a party personally)
- Relevant questions and follow-up questions are allowed, including those challenging credibility. Decision-makers may want an advisor to explain why they think a question is relevant or will lead to a relevant answer.

Relevance of Questions

- Decision-maker must first determine whether a question is relevant and direct party to answer
 - Must explain any decision to exclude a question as not relevant
- If the advisor seeks to ask a question that is potentially answered in the investigation report, that question should typically be permitted if relevant.
- If the question has already been answered by a witness or party at the hearing, the decision-maker or chair may deny the question as "irrelevant because it has already been answered," or may ask the advisor why posing the question again is expected to lead to relevant evidence.

Refusal to Answer Questions

- Per the 2020 TIX regulations, if a party or witness does not submit to cross-examination at the live hearing the decision-maker(s) must not rely on any statement of that party or witness (from the investigation or hearing) in reaching a determination regarding responsibility.
 - This can be question-specific if a witness declines to answer questions about a particular statement, topic, or evidence.
- The decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

Discussion:
 → What is an inference and how does it work?

What is credibility?

- Accuracy and reliability of information
- Ultimately it's the decision-maker's role to determine the credibility of testimony and evidence, and hence its reliability
- "Credible" is not synonymous with "truthful"
- Memory errors, evasion, misleading may impact
- Primary factors: corroboration and consistency
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility
- Credibility assessment may not be based on a person's status as a Complainant, Respondent, or Witness

Assessing credibility

- Inherent plausibility**
 - "Does this make sense?"
 - Be careful of bias influencing sense of "logical"
- Motive to falsify**
 - Do they have a reason to lie?
- Corroboration**
 - Aligned testimony and/or physical evidence
- Past record**
 - Is there a history of similar behavior?
- Demeanor**
 - Do they seem to be lying or telling the truth?

Corroborating evidence

- Strongest indicator of credibility
- Independent, objective authentication
 - Party says they went to dinner, provides receipt
 - Party describes text conversation, provides screenshots
- Corroboration of central vs. environmental facts
- Not simply alignment with friendly witnesses
- Can include contemporaneous witness accounts
 - More "separate" the witness, greater the credibility boost
- Outcry witnesses
 - Does what party said then line up with what they say now?
- Pay attention to allegiances
 - Friends, roommates, teammates, group membership
 - This can work both directions (ex. honest roommate)

Inherent plausibility

- Does what the party described make sense?
 - Consideration of environmental factors, trauma, relationships
- Is it believable on its face?
- "Plausibility" is a function of "likeliness"
 - Would a reasonable person in the same scenario do the same things? Why or why not?
 - Are there more likely alternatives based on the evidence?
- Is the party's statement consistent with the evidence?
- Is their physical location or proximity reasonable?
 - Could they have heard what they said they heard?
 - Were there other impediments? (darkness, obstructions)
- How good is their memory?
 - Temporal proximity based on age of allegations
 - "I think," "I'm pretty sure," "It would make sense"

Triangulating credibility

- Method of understanding credibility, rooted in abductive reasoning: making a probable conclusion based on what you know
- Less dispositive than corroboration
- Triangulation is simply being faced with two plausible explanations (B & C) and deciding which is the more plausible (likely) based on the fact that you know A & D to be true. Based on what you know about A & D, B is more likely than C.
- Triangulation is the formal way of processing what leads you to determine why something is inherently plausible.
- When you determine inherent plausibility, it is because you are comparing, and deciding that B is more likely than C as an explanation or a fact to have occurred.

Motive to falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
 - Think academic or career implications
 - Also personal or relationship consequences
- What if the allegations are false?
 - Other pressures on the reporting party – failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

Past record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations
 - Even if found "not responsible," may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship

Demeanor

- Is the party uncomfortable, uncooperative, resistant?
- Certain lines of questioning – agitated, argumentative
- BE VERY CAREFUL
 - Humans are excellent at picking up non-verbal cues
 - Human are terrible at spotting liars (roughly equivalent to polygraph)
- Look for indications of discomfort or resistance
- Make a note to dive deeper, discover source

Credibility Assessments in Investigative Reports

- Under the 2020 regs, investigators CAN assess credibility but decision-makers are not bound by these
 - Will help to roadmap where decision-makers should look for information critical to a determination
- Language in an investigation report may look like this:
 - "Decision-makers will want to carefully review Mary's testimony as to whether the conduct was welcome, in light of the testimony of W1."
 - "Decision-makers may wish to focus on reconciling the testimony offered by Joe and by Witness 2 with respect to who engaged in the conduct first."

Credibility in the Hearing

- Distinguish performance/presentation skills from believability
 - Make sure key witnesses will be present
 - Make sure evidence has been verified
- If any evidence/testimony must be subject to credibility assessment, and the evidence isn't available or the witness/party does not participate, it may violate due process to consider that evidence/testimony and give it weight
- 2020 regs are quite clear such evidence may not be considered if it relates to a statement previously made. (Other evidence can be considered.)
- What will the effect of that be on the process/decision?

Credibility Post-Hearing

- The decision-maker determines the greater weight of credibility on each key point in which credibility is at issue
- First, narrow to the contested facts, and then make a credibility analysis (by the standard of proof) for each
- Then, weight the overall credibility based on the sum total of each contested fact
- Credibility can be measured on a 100 point scale
- When you write the final determination letter, focus on what facts, opinion, and/or circumstantial evidence supports your conclusion. Offer a cogent and detailed rationale.

Making a Decision

Overview of Deliberations

- Only decision-makers attend the deliberations
 - Parties, witnesses, advisors, and others excused
 - If Title IX Coordinator is present, they do not participate and only serve as a resource to the decision-makers
- Do not record; recommend against taking notes.
- Review the policy again; remind yourselves of the elements that compose each and every allegation.
- Assess credibility of evidence and assess statements as factual, opinion-based, or circumstantial
- Determine whether it is more likely than not that policy has been violated

Deliberations – General Information

- Anticipate that the panel/decision-maker must concretely articulate the rationale for and evidence supporting its conclusions
- With a panel, the Chair must be a voting member
- Typically, there is no specific order in which allegations must be addressed. When in doubt, start with the most serious.
- Chair should ensure that all viewpoints are heard
- Neutralize any power imbalances among panel members, particularly based upon their position at the institution
- Ensure an impartial decision that is free of substantive bias

Foundations of Decisions

- Decisions must be based only upon the facts, opinions, and circumstances provided in the investigation report or presented at the hearing
- Do not turn to any outside "evidence"
- Assess each element in the policy (e.g. intent, sexual contact, voluntary, etc.), separate it out and determine if you have evidence that supports that a violation of that element is proven. Assess evidentiary weight. Measure with the following questions:
 - Is the question answered with fact(s)?
 - Is the question answered with opinion(s)?
 - Is the question answered with circumstantial evidence?

Findings, Impact Information, and Sanctions

- Separate the "Finding" from the "Sanction"
 - Do not use impact-based rationales for findings (e.g.: intent; impact on the Complainant; impact on the Respondent, etc.)
 - Use impact-based rationales for sanctions only.
- Complainant and Respondent should share impact statement(s) only if and after the Respondent is found in violation
- Understand that the question of whether someone violated the policy should be distinct from factors that aggravate or mitigate the severity of the violation
- Be careful about not heightening the evidentiary standard for a finding because the sanctions may be more severe

Sanctioning

- Title IX and case law require:
 - Decision-maker should also decide sanction if credibility will influence the sanction
 - Not act unreasonably to bring an end to the discriminatory conduct (Stop)
 - Not act unreasonably to prevent the future reoccurrence of the discriminatory conduct (Prevent)
 - Restore the Complainant as best you can to their pre-deprivation status (Remedy)
- This may create a clash if the other sanctions only focus on educational and developmental aspects
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the Complainant and the community.

Common Student Sanctions

- Warning
- Probation
- Loss of privileges
- No contact
- Residence hall relocation, suspension, or expulsion
- Limited access to campus
- Service hours
- Online education
- Parental notification
- Alcohol and drug assessment, and counseling
- Discretionary sanctions
- Suspension
- Expulsion

Written Determinations

- The Decision-maker issues a written determination regarding responsibility that includes the following:
- Sections of the policy alleged to have been violated
 - 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
 - Statement of and rationale for the result as to each specific allegation
 - Should include findings of fact supporting the determination and conclusions regarding the application of the policy to the facts
 - Sanctions imposed on Respondent
 - Any remedies provided to the Complainant designed to restore or preserve access to the education program or activity
 - Procedures and bases for any appeal

Logistics for Written Determinations

- The decision-maker should author the written determination.
 - May follow a template provided by the Title IX Coordinator.
- The written determination should be provided to the parties simultaneously.
 - Follows existing VAWA/Clery requirements for higher education institutions, but now extends both to reach sexual harassment cases as well as applying to all K-12 determinations.
- The determination becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- FERPA cannot be construed to conflict with or prevent compliance with Title IX
- This letter will be reviewed by the Coordinator and/or legal counsel

Appeals

Logistics for Written Determinations

- The appeal decision-maker may be an individual or a panel.
 - Cannot be the Title IX Coordinator.
 - Cannot be the investigator or decision-maker in the original grievance process
 - Schools may have a pool of decision-makers who sometimes serve as hearing or appeal decision-makers
 - Schools may have dedicated appeal decision-makers
- When an appeal is filed, must notify the other party and implement appeal procedures equally for all parties.
- Give the parties a reasonable, equal opportunity to submit a written statement in support of or challenging the outcome.

Grounds for an Appeal

All parties may appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

Appeal Outcomes

If an appeal request is denied, the Decision stands.

If an appeal request is granted, the Decision could stand or it could be remanded for:

- A new investigation
- A new hearing
- A sanctions-only hearing

More about appeals

- There is one level of appeal
- There is a short window to request an appeal, but we can grant an extension if necessary
- Document-based and recording review
 - NOT de novo
 - In other words, not a “second-bite of the apple”
- Deference to original hearing authority

Questions?
