

University System
of New Hampshire

Plymouth State University

Training for Decision-Makers

Title IX and Related Sexual Misconduct Matters

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Role: Title IX/504 Coordinator

University System
of New Hampshire



Welcome

Title IX Training Series

Training Overview

➤ Thanks!

➤ Goal:

- Narrow: Hearings regarding matters of Sexual Violence, Sexual Harassment and Related Offenses, including matters falling within the scope of 2020 Federal Title IX Regulations
 - Broad: structure for addressing civil rights based complaints
- Decision Maker role
- Due process
- Definition of Sexual Harassment
- Scope of the university's educational program or activity
- The adjudication process (may differ for employee matters)
- How to serve impartially without conflicts of interest or bias
- Relevancy determinations at live hearings
- Written determination regarding responsibility



Acknowledgement

- ▶ Examples in this training use references to explicit sexual behavior or body parts
- ▶ These references are a common occurrence in this work.
- ▶ Such references must not easily offend decision-makers. Please discuss concerns with Title IX Coordinator.

Purpose of Decision Maker Role

(fill in based on group feedback; discuss)

Placing your role: keep in mind that the student conduct hearing is one part of the larger Title IX complaint/remedy process.



Title IX Overview

Title IX Definitions

▶ Title IX

▶ Sexual Harassment is defined by Title IX as:

- ▶ An employee or graduate student in an employment role conditioning the provision of an aid, benefit, or service of the university on an individual's participation in unwelcome sexual conduct (commonly known as *quid pro quo* sexual harassment); OR
- ▶ Unwelcome conduct on the basis of sex determined by a reasonable person to be so severe, and pervasive, and objectively offensive that it effectively denies a person equal access to the university's education program or activity; OR

▶ Sexual assault as defined in the Clery Act, or dating violence, domestic violence, or stalking as defined in VAWA.

▶ "Institutional Policy" – USNH institutions continue to hold community members responsible for their behavior toward fellow community members through the student code of conduct and/or discriminatory harassment policy:

- ▶ Severe "or" pervasive sexual harassment
- ▶ Incidents that fall outside of the criteria for Title IX are dismissed as Title IX matters and addressed through institutional policy

▶ Same investigative and adjudication process is used for **both** "Title IX" and institutional policy for cases alleging violation by a student. (Process may differ for cases alleging violation by an employee based on certain conditions.)



Mandatory Dismissal of a Formal Complaint Under Title IX

- ▶ The university must review the Formal Complaint to determine if it constitutes sexual harassment as defined by Title IX. If it does not fit the definitions of sexual harassment under Title IX, even if proven true, the university must dismiss the Formal Complaint
- ▶ Nonetheless, the university can pursue the complaint otherwise under its code of conduct. If a mandatory dismissal occurs, your advisee will receive a letter letting them know the university has dismissed the Title IX Formal Complaint but will investigate and adjudicate the matter pursuant to the Equal Opportunity, Harassment, Nondiscrimination Policy
- ▶ The complainant or respondent can appeal a dismissal of a Title IX Formal Complaint



Scope of the University's Education Program or Activity

- ▶ It is a fact specific inquiry. The key question is whether the institution exercised “substantial control over the respondent and the context in which the incident occurred”
- ▶ There is no bright-line geographic test, and off-campus sexual misconduct is not categorically excluded from Title IX protection.
- ▶ For example, Title IX applies to sexual harassment that occurred in an off-campus building owned or controlled by a student organization that the university has officially recognized.
- ▶ However, PSU Policy makes clear the university will pursue misconduct that meets a broader definition of sexual harassment or occurs outside of its program or activity

Title IX Process Requirements

- ▶ “Formal Complaint” by complainant (Reporting Party) or Title IX Coordinator
 - ▶ Title IX Coordinator reviews and must dismiss a formal complaint if it does not meet the Federal definitions, but PSU can still address the matter under institutional policies
 - ▶ Parties can appeal the dismissal decision
- ▶ Investigation by institution
- ▶ Parties review evidence and investigation report
- ▶ Institution presents case
- ▶ Live hearing with cross-examination (questioning)
- ▶ Responsibility determination, impact statements, and sanctions (if applicable)
- ▶ Appeal
- ▶ Supportive measures are offered to the parties throughout the investigation and adjudication process
- ▶ *Note: sexual identity, gender or gender identity are legally neutral in Title IX: any person may commit or be impacted by sexual violence*

Advisor of Choice

- ▶ Both parties may have up to two advisors of their choice (who can be an attorney)
- ▶ PSU must appoint an advisor if a student/employee does not have one
- ▶ The advisor may accompany a party to interviews and hearings
- ▶ The advisor may also inspect evidence and review the investigative report
- ▶ The advisor cross-examines parties and witnesses
 - ▶ Relevant questions
 - ▶ Follow-up questions
 - ▶ Including challenges to credibility
- ▶ Advisor must follow the rules of decorum

Phases of the Process

Disclosure

- Review by Title IX Coordinator for mandatory or permissive dismissal
- If dismissed, parties can appeal decision
- Supportive measure provided to impacted party; formal complaint not required for supportive measures

Formal Complaint

- Investigation
 - Notice of investigation to Respondent/Supportive measures
- Parties review & respond to evidence gathered during investigation
- Parties review & respond to report by investigator

Adjudication

- Live hearing with questioning by advisors
- Responsibility determination by decision makers
- Impact statements (if applicable)
- Sanctions (if applicable)
- Appeal
- *Informal resolution options first require a formal complaint

Remedies

- Continuation of supportive measures
- Long term remedies
- Individual, community, program based
- *Remedies at the program/department level do not require formal complaint

Phases of the Formal Complaint Process

Formal Complaint

- Review by Title IX Coordinator for mandatory or permissive dismissal
- If dismissed, parties can appeal decision

Notice of Investigation


- Investigation
- Parties review & respond to evidence gathered during investigation and draft of the report prior to hearing
- PSU focuses on a live, iterative report review process for each party

Hearing Notification

- Live hearing with questioning by advisors
- Responsibility decision by decision-maker(s) (3-person panel for student Respondents)
- Impact statement (if applicable)
- Sanctions (if applicable)
- Appeal



Serving Impartially and Avoiding Conflicts of Interest



Equity

- ▶ Principal Goal of Title IX & Institutional Policy
 - ▶ Complainant has a right to fair process, free from bias
 - ▶ Respondent has a right to fair process, free from bias
 - ▶ Generally, supports and procedural adjustments for one side are offered to the other side
- ▶ Respondent is presumed not responsible throughout adjudication process
 - ▶ Avoid prejudgments about the merits of the claim or strength of witnesses
- ▶ Investigative and adjudication process designed to protect the fairness and integrity of the decision on responsibility

Conflicts of Interest & Bias

- ▶ Conflicts of Interest
 - ▶ Small campus, finite resources- requires proper planning for roles in advance
 - ▶ Goal: no one person in the process is wearing too many hats (or hats that conflict) at the same time
 - ▶ To the best of our ability- consider what hats you are wearing for parties now- and in the future as they continue their PSU experience
- ▶ Impartial
 - ▶ Treat all parties equally
 - ▶ No conflicts – direct relationship to party, role in advocacy groups, publications favoring complainants or respondents
 - ▶ Confer with Title IX Coordinator if you have any concerns about serving impartially and without bias
- ▶ Be especially vigilant to avoid bias or generalizations including, but not limited to, any of the following:
 - ▶ Gender, gender identity
 - ▶ Sexual orientation
 - ▶ Race, ethnicity
 - ▶ Age
- ▶ Avoid the “if it were me” fallacy: focus on the facts of the case before you

Conflicts of Interest (continued)

- ▶ Duty to be fair to both parties and avoid bias against either party
- ▶ A conflict may occur when a decision-maker's personal interest is inconsistent with or interferes in any way with their ability to impartially weigh information and evidence
- ▶ Examples
 - ▶ Student is advisee, current member of your class, employee you supervise
 - ▶ Employee is your co-worker/supervisee/supervisor
 - ▶ Familial relationship, close family friend
 - ▶ Direct financial interest, like a shared business, or someone who has input on your merit pay
- ▶ What are likely not conflicts of interest:
 - ▶ Former student or co-worker with no other connection to you
 - ▶ Student in your department who may take a course with you in the future

Conflicts of Interest (continued)

- ▶ Decision-maker's perception that the interest does not create a conflict or bias is not legally sufficient
 - ▶ Perceived conflicts
 - ▶ Potential conflicts
- ▶ But not every relationship creates a conflict of interest
 - ▶ Case by case analysis
 - ▶ Time matters
 - ▶ Closeness of the interest matters
- ▶ If you think you might have a conflict of interest, contact the Title IX Coordinator
 - ▶ Addressing the potential COI in advance is helpful in reaching prompt, equitable resolution

A Word on Confidentiality

- ▶ Student conduct is part of educational record
- ▶ Employee personnel matters are generally confidential
- ▶ Breach of confidentiality can be a form of retaliation
- ▶ Witnesses, investigators, staff and decision-maker(s) are required to maintain the privacy and confidentiality of the proceedings
- ▶ However, parties have the right to discuss the incidents or the allegations
 - ▶ They may be cautioned to avoid litigating the case through gossip, innuendo, social media (retaliation)
 - ▶ They may be cautioned about retaliation, libel, and slander
 - ▶ Cautionary messages are best discussed along with an advisor so as to not be construed as either chilling or threatening.



A Word on Retaliation

- ▶ Act of punishment, revenge or recrimination
- ▶ Every party and every witness in a Title IX or related investigation has a legal right to be free from retaliation
- ▶ Title IX expressly prohibits retaliation against any individual exercising rights under Title IX, specifically protecting any individual's right to participate or refuse to participate in a Title IX grievance process
- ▶ The institution can caution all parties and witnesses about the prohibition on retaliation
- ▶ PSU does not tolerate retaliation of any kind, whether or not the complaint is ultimately determined to be a violation



Relevance

Relevance

Investigation structure and work of the investigator serve a primary function in relevancy determinations; at a hearing additional information may come forward that a panel will need to weigh.


- ▶ Dictionary: closely connected or appropriate to what is being done or considered
- ▶ Legal: evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence
- ▶ The evidence is pertinent to proving whether facts material to the allegations are more or less likely to be true
- ▶ Merriam-Webster Dictionary defines “relevant” as “affording evidence tending to prove or disprove the matter at issue or under discussion.”

Basic Relevance

- ▶ Dangers of irrelevant information
 - ▶ Wastes time, prejudice and faulty findings
 - ▶ Irrelevant evidence may deny a party of their right to fair decision
- ▶ Focus on the incident(s) itself
 - ▶ Information connected with the incident probably is relevant
 - ▶ Information that is not directly connected to the incident is more likely not to be relevant
 - ▶ Exceptions: course of conduct, demographic information (introductions), threat
- ▶ If you have questions, consult with Title IX Coordinator
- ▶ Be prepared to separately document information that you determine is not relevant during a hearing.

Summarizing Relevant Evidence

- ▶ Investigators must summarize relevant evidence in the investigative report
 - ▶ Made by applying logic and common sense, but not against a backdrop of legal expertise
 - ▶ Probative- demonstrates a fact at issue, but *does not* necessarily resolve the issue
 - ▶ Material fact- necessary to decide an issue in the case
 - ▶ If not relevant, investigator will not include information in the report but maintain it on file as directly related evidence
 - ▶ Evidence being used for the purpose of suggesting that a person acted on the occasion in question consistently with their poor character in unrelated circumstances raises questions of relevancy or the weight given to such evidence
 - ▶ Investigators will work with the Title IX Coordinator to resolve issues of relevancy



Relevant Evidence v. Directly Related Evidence

- The investigator is charged with gathering evidence “directly related to the allegations” raised in the Formal Complaint.
- Directly related evidence is more broad than “relevant” evidence.
- The investigator may gather evidence that is directly related to the matter at issue, but ultimately decide that it is not relevant to include in the investigative report.

Relevant Evidence v. Directly Related Evidence (continued)

- ▶ However, parties and their advisors will have the opportunity to inspect and review evidence gathered by the investigator that is directly related as well as relevant evidence summarized in the investigative report
- ▶ The parties will have the opportunity to argue to the investigator and to the decision-makers that evidence directly related to the allegations is in fact relevant, and parties will not have a robust opportunity to do this if evidence related to the allegations is withheld from the parties by the investigator
- ▶ The Title IX Coordinator will provide information regarding how to store evidence gathered during the investigation as well as facilitate the opportunity for parties to review evidence and the report



Advanced Relevance for Decision-Makers

- ▶ Decision-makers determine whether questions and evidence are relevant
 - ▶ Made by applying logic and common sense, but not against a backdrop of legal expertise.
 - ▶ “Probative” – tends to prove, but is **not** necessarily dispositive
 - ▶ “Material fact” – necessary to decide an issue in the case
 - ▶ If not relevant, do not allow the question or use the information in your decision
 - ▶ Evidence being used for the purpose of suggesting that a person acted on the occasion in question consistently with their poor character in unrelated circumstances raises questions of relevancy or the weight given to such evidence.

Decisions on Relevance

- ▶ For matters adjudicated pursuant to the Equal Opportunity, Harassment, Nondiscrimination policy where a student is the Respondent, a panel of three persons is designated by the Title IX Coordinator as the decision-makers.
 - ▶ One panel member may lead the discussion and state the hearing panel's ruling on relevance, but all panel members must be involved in the decision
- ▶ If the decision-maker(s) decide something is not relevant, no lengthy explanation is required
 - ▶ Simply say, "this is not probative of any material fact"
- ▶ Both parties are permitted, through their advisor, to discuss the decision on relevance with the decision-maker(s) during the hearing
 - ▶ However, after receiving the explanation, both parties advisors' are prohibited from further challenging the decision during the hearing.



Rape Shield Principles

- ▶ Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- ▶ Exceptions:
 - ▶ Evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - ▶ Specific incidents of the complainant's prior sexual behavior with respect to the respondent are offered to prove consent

Examples

- ▶ In case where consent is an issue, respondent offers testimony, subject to cross-examination, of complainant's former partner, that complainant and former partner had consensual sexual intercourse
 - ▶ Not admissible (excluded under the Rape Shield protections – deemed irrelevant)
- ▶ In case where it is alleged that respondent used force during sexual interaction, complainant offers testimony of respondent's former partner, subject to cross-examination, that on two occasions respondent choked the partner during sexual intercourse, which caused the break-up
 - ▶ Rape Shield protections do not apply to respondent's prior sexual behavior
 - ▶ Determine if the evidence is relevant
 - ▶ If relevant, then determine what weight it is afforded

Character

- ▶ In standard conduct hearings we generally exclude information about a party's good or bad character.
- ▶ In sexual misconduct hearings character evidence is admissible only if it is **relevant**
 - ▶ The party offering character evidence can be asked to explain how the character evidence that is being offered is relevant
 - ▶ The closer the connection to the incident at issue, the more likely it is admissible
- ▶ “Badgering” or abusive, intimidating and/or disrespectful questioning of witnesses is never permitted, including to get them to admit to bad character
- ▶ Cumulative information about character may be excluded

Examples

- ▶ Respondent offers evidence through a witness, that they participated extensively in Scouting, which tends to prove that they would not assault another, because of the Scout oath
 - ▶ Excluded, not relevant to the incident at hand, assault is not part of the Scout oath
- ▶ Respondent offers evidence through a witness that they are kind, to support the contested fact of whether they gave the complainant a ride home and helped nurse the complainant's hangover the morning after the reported incident
 - ▶ Admitted, relevant to a disputed fact about the incident
- ▶ Complainant offers evidence that respondent was found responsible for plagiarism, to support the claim that respondent is lying about the incident.
 - ▶ Admitted, if the witness has personal knowledge about the plagiarism (for instance, respondent admitted it to them) and can be cross-examined



Prejudicial Information

- For example, in “standard” adjudications unfairly prejudicial information is generally excluded
- In sexual misconduct adjudications, prejudicial information is admitted only if it is **relevant**
- “Badgering” or abusive, intimidating and/or disrespectful questioning of witnesses is never permitted
- Cumulative information regarding prejudicial information may be excluded

Example

- ▶ Complainant offers evidence, through a witness, that respondent owns a gun. Respondent objects, stating that the decision-maker may be unfairly biased against gun owners and possession of a gun on campus violates other conduct rules.
 - ▶ Not relevant to the incident unless facts of case make it relevant
 - ▶ Relevant to the incident if complainant has testified that respondent threatened them with force, and they consented to sexual acts because they believed that the threat of force was backed by implicit threat to use a gun



Prior Acts

- ▶ In standard conduct adjudication, evidence of a person's previous misconduct is not generally admitted, rather a conduct history is considered at the time of sanctioning
- ▶ In sexual misconduct cases, evidence of prior bad acts is admitted only if it is **relevant**
- ▶ “Badgering” or abusive, intimidating and/or disrespectful questioning of witnesses is never permitted, including to get them to admit to prior bad acts
- ▶ Cumulative information about prior bad acts may be excluded

Examples

- ▶ Complainant offers evidence, through a witness, that respondent touched another person without permission, through clothing, over a sexual organ
 - ▶ Evidence being used for the purpose of suggesting that a person acted on the occasion in question consistently with their poor character in unrelated circumstances raises questions of relevancy or the weight given to such evidence
 - ▶ Determine if the evidence is relevant
 - ▶ If relevant, determine what weight it is afforded
- ▶ Respondent offers evidence, through a witness, that complainant falsely accused their same-sex roommate of theft
 - ▶ Admitted, relevant to whether complainant is truthful

Weight

- ▶ Courts of law are suspicious of character evidence, prejudicial evidence and prior bad acts evidence for very good reasons:
 - ▶ Distract from focusing on the case at hand
 - ▶ Create a disrespectful atmosphere
 - ▶ Unfairly disadvantage one party or the other
 - ▶ Increases risk of error
- ▶ We recommend that decision-makers use caution with these 3 kinds of evidence :
 - ▶ You may choose to give such evidence less “weight” than direct evidence about the incident (weight is what will convince you one way or the other)
 - ▶ Be scrupulously careful to be fair to both parties both in admitting and weighing this kind of evidence



Consent



Consent

- ▶ Agreement to sexual interaction is essential
- ▶ “Expressed consent”
 - ▶ Verbal
 - ▶ By conduct
- ▶ Consent can be revoked at any time
- ▶ Consent may not be:
 - ▶ Coerced by threat, violence or manipulation
 - ▶ Given by a person who is incapacitated
- ▶ Institutional policies (Equal Opportunity, Harassment, Nondiscrimination) define consent, incapacity and related terms

PSU's Definition of Consent

- ▶ Consent is:
 - ▶ knowing, and
 - ▶ voluntary, and
 - ▶ clear permission
 - ▶ by word or action
 - ▶ to engage in sexual activity.
- ▶ Since individuals may experience the same interaction in different ways, it is the responsibility of each party to determine that the other has consented before engaging in the activity.
- ▶ If consent is not clearly provided prior to engaging in the activity, consent may be ratified by word or action at some point during the interaction or thereafter, but clear communication from the outset is strongly encouraged.
- ▶ For consent to be valid, there must be a clear expression in words or actions that the other individual consented to that specific sexual conduct. Reasonable reciprocation can be implied. For example, 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.
- ▶ Consent can also be withdrawn once given, as long as the withdrawal is reasonably and clearly communicated. If consent is withdrawn, that sexual activity should cease within a reasonable time.
- ▶ Consent to some sexual contact (such as kissing or fondling) cannot be presumed to be consent for other sexual activity (such as intercourse). A current or previous intimate relationship is not sufficient to constitute consent.
- ▶ Proof of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on the University to determine whether its policy has been violated. The existence of consent is based on the totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

Common Issues with Consent

- ▶ Consent by conduct
 - ▶ Physical passivity is not consent, but expressed consent does not require verbal consent at any stage of a sexual interaction
 - ▶ Would a reasonable sexual partner understand that consent was given?
- ▶ Revocation of consent – how clearly must a person communicate that their mind/intention has changed?
 - ▶ It must be communicated, but it does not have to be communicated verbally
 - ▶ Would a reasonable sexual partner understand that consent was revoked?
- ▶ Incapacity
 - ▶ Intoxication is not incapacity
 - ▶ Physical manifestations of incapacity in presence of partner: slurred speech, loss of motor control, falling asleep during sexual interaction, incoherent speech, vomiting
 - ▶ Would a reasonable partner know (or should they have known) that the other was incapacitated?



Trauma Informed Practice



Impact of Trauma

- ▶ There is a body of scientific research that suggests that physical and emotional trauma can interfere with the formation of memory
 - ▶ Trauma during an event may help explain gaps in a person's memory of the event
 - ▶ This research has influenced training of investigators and decision-maker(s)
- ▶ There also is a scientific and policy critique of the “trauma informed” approach
 - ▶ There are other causes of gaps in memory
 - ▶ Risk of gender bias
 - ▶ Risk of assuming that gaps in memory are themselves evidence of trauma
 - ▶ In the context of campus sexual assault, violent sexual assault is rare, but disputes about whether consent was expressed are very common



What we can learn from trauma informed principles

- ▶ People do not necessarily form stronger memories during a stressful event, in fact
 - ▶ People often do not remember events in precise, detailed chronological order
- ▶ Start by asking witnesses what they do remember about an event, don't interrupt as they relate their memories, and allow them to report what they do remember
- ▶ Gaps in memory are not proof that someone is lying – or that they are telling the truth



Recommendations regarding trauma informed techniques

- Use the trauma informed questioning techniques with *all* parties, regardless of their role in the case
- Treat all parties with respect, regardless of their role in the case
- Gather the information that is available, compare it to the other information and evaluate the case based on all the evidence
- Be fair to everyone in the process
- Don't substitute any assumption about what gaps in memory mean for a careful, thoughtful, fair assessment of the facts



Live Hearing

Live Hearings Can Be Held Virtually

► Tips for Online Hearings

- > **Log On Early:** Sign into the hearing a little early to make sure you can connect without issues!
- > **Internet Stability:** We can't control the internet...if yours goes out, simply reconnect to the hearing as quickly as you can. We will pause the hearing if anyone leaves unannounced.
- > **Share Your Screen:** If you want to reference a photo or document, or even draw a diagram, ask to share your screen.
- > **Breakout Rooms:** We will use breakout rooms often in online hearings. We jump around from room to room coordinating things...so hang tight...we haven't forgotten about you.
- > **Viewing Documents:** It may be useful to have a second screen or device to look at hearing documents on. This way you aren't trying to do everything on one screen.
- > Let the Title IX Coordinator know if you are unfamiliar with Zoom or need equipment for the hearing.

Hearing Outline

- ▶ Introductions
- ▶ Process overview/Review Agenda
- ▶ Opening Statements (optional)
- ▶ Investigative Report Delivery
 - ▶ Questions for Investigator
- ▶ Witness Questions
- ▶ Panel Questions for Reporting (Complainant) and Responding (Respondent) Parties
- ▶ Cross-Examination by the advisors
- ▶ Closing statements
- ▶ Panel deliberations
- ▶ Finding delivered
- ▶ Impact Statements (if applicable)
- ▶ Sanctioning deliberations (if applicable)
- ▶ Sanction(s) delivered (if applicable)
 - ▶ Findings with rationale also provided in writing to both parties; appeal rights included in written outcome



Rules of Decorum

- In essence: rules for good meetings
 - Fairness
 - Politeness
 - Mutual respect
- Apply to everyone: parties, advisors, decision-makers

Topics Included in Rules of Decorum (partial list)

Required

- ▶ Preparation
- ▶ Promptness
- ▶ Cell phones silenced
- ▶ Listening
- ▶ Speaking in turn
- ▶ Focus on relevant topics
- ▶ Courtesy, respect
- ▶ Maintain confidentiality

Prohibited

- ▶ Outbursts
- ▶ Profanity
- ▶ Threatening
- ▶ Disorderly behavior
- ▶ Disruptive conversations/
interruptions
- ▶ Disobeying rules of decorum

Questions by Decision Makers

By investing in the report review process, PSU relies heavily upon the investigator delivery of the report to the panel. Decision Makers may first have questions for the investigator.

- ▶ Details regarding consent or sexual encounters often are important to the determination regarding responsibility.
- ▶ Allow witness time to speak before asking question
- ▶ Listen carefully, try not to get distracted by questions you plan to ask
- ▶ Who, what, where, when, & how
- ▶ Rarely 'why?'
- ▶ "Help me to understand . . ."
- ▶ "I'm sorry to have to pry into intimate details, but it is important for us to know . . ."
- ▶ "It seems that you are having difficulty recalling some details, but please tell me, if you can what happened"
- ▶ Be careful not to "telegraph" your feelings regarding the evidence being offered at the hearing

Reluctant Parties and Witnesses

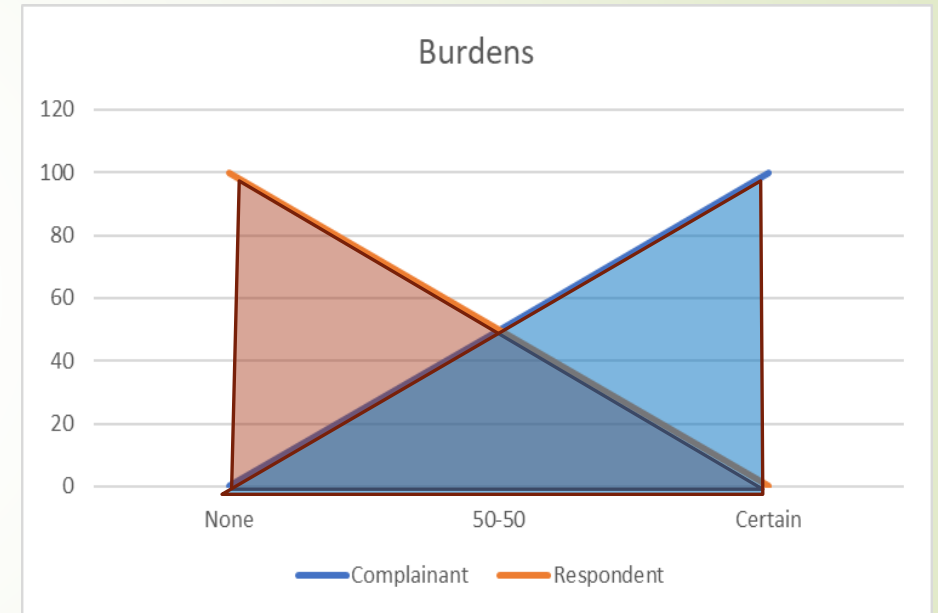
- ▶ Institution cannot compel the parties or any witnesses
 - ▶ Courts can – and do compel parties and witnesses
- ▶ Usually the complainant and respondent will be present
- ▶ Respondent has Fifth Amendment and conduct process right to silence
- ▶ Witnesses may choose to not attend the live hearing
 - ▶ Do not hold that against anyone
 - ▶ Decision-maker(s) have to disregard any information that is not subject to cross-examination, even (or especially) if it was in the investigative report



Burden of Proof

Burden of proof

- ▶ Respondent presumed not to be responsible for the violation until it is proven
- ▶ Institution has to prove the matter “by a preponderance” of the evidence
 - ▶ More likely than not
 - ▶ “50% and a feather”
- ▶ Not required to prove to certainty



Burden of Proof

- ▶ To make a finding of responsibility, decide which evidence was more convincing
 - ▶ If report presented more persuasive evidence on the elements of the charge(s), then the respondent should be found responsible
 - ▶ If not, or if the evidence is equally balanced, the respondent should be found NOT responsible
 - ▶ Consider each “element” of each violation
- ▶ Simply means “more likely than not” – you may have doubts, but believe that it is more likely than not that the incident occurred
- ▶ Greater weight of the evidence
 - ▶ Quality and persuasiveness
 - ▶ Not number of witnesses or documents

[Adapted from Federal Civil Jury Instructions]

Written Determination Regarding Responsibility

- The decision-maker(s) must issue a written determination regarding responsibility by applying the preponderance of the evidence standard of proof
- The written decision must contain all of the following:
 - Identification of the allegations potentially constituting sexual harassment
 - 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
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the policy to the facts
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the institution imposes on the respondent (if applicable), and whether remedies designed to restore or preserve equal access to the education program or activity will be provided to the complainant
 - The institution's procedures and permissible bases for the complainant and respondent to appeal

Appeal

- An appeal can be based on one or more of the following purposes:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonable available at the time of determination that would affect the outcome of the matter;
 - The sanction was not appropriate for the violation (may not be applicable for standard sanctions); or
 - The investigator or hearing decision-maker had a conflict of interest for or against either party that affected the outcome of the matter
- Appeals must be submitted within the timeframe determined in the EOHN policy; the specific appeal window should be noted in the original outcome letter
- Appeal outcomes are determined by a decision maker that has had not other involvement in the case



Thank you.

- ▶ Decision-makers play a central role in Plymouth State University's response to formal Title IX complaints and related misconduct.
- ▶ We appreciate your participation in this process