



Southern  
New Hampshire  
University

# Title IX Grievance Pool Training Investigators December 3, 2021

# Agenda

- Why are you here?
- Where do these laws come from? Why are we doing this?
- SNHU Policy
- Investigation
- Key Concepts – Consent and Incapacitation
- Hearing Procedure
- Next Steps

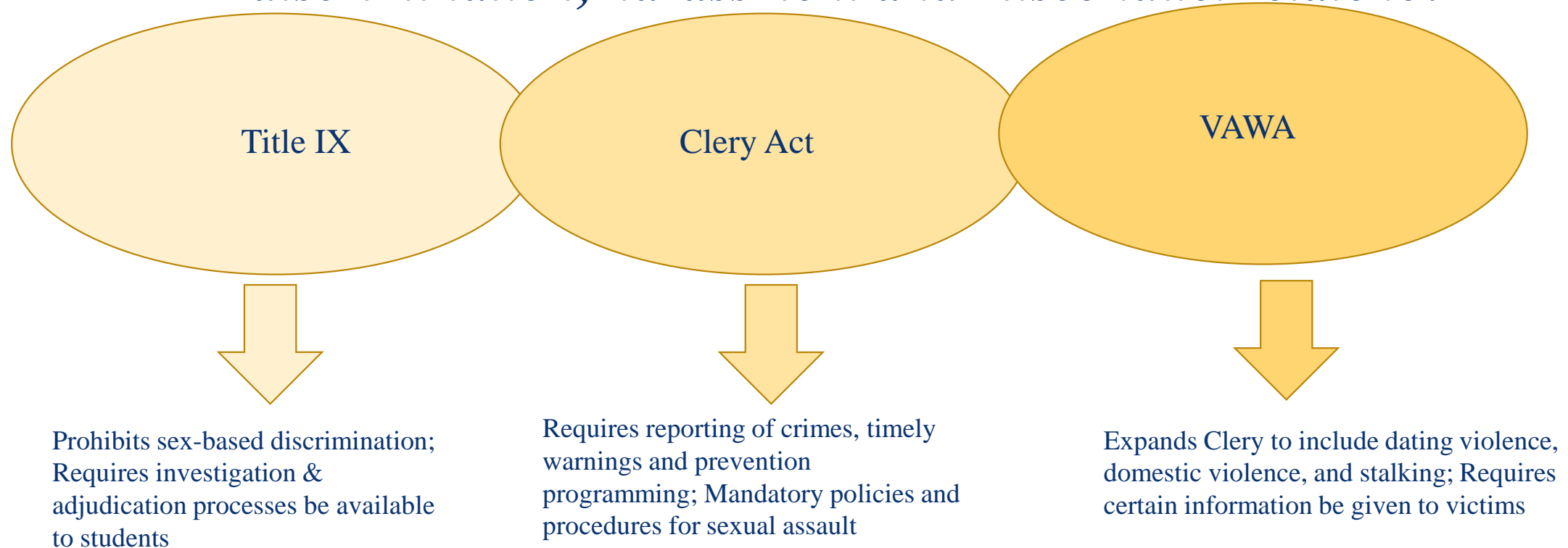
# What is Title IX?

*“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 education program or activity receiving Federal financial assistance”*

- Federal Civil Rights Law from 1972 that prohibits sex-based discrimination in schools or educational programs
- Sexual Harassment and Assault are forms of sex-based discrimination
- Since the early 2000s, Title IX guidance from the government has obligated Institutions of Higher Ed to address any form of sexual discrimination that occurs within its educational programs through an investigation and resolution process

# Not Just Title IX

*The Universities obligations surrounding incidents of sex-based discrimination, harassment and misconduct relate to:*



# VAWA (Violence Against Women Reauthorization Act)

- Requires providing prompt, fair, and impartial process
- Accused/Accuser have equal opportunities to have an advisor present (also now required under Title IX)
- Timely Notice of meetings
- Timely and Equal Access to information
- Proceedings are completed in a reasonably prompt timeframe but may be extended with good cause & written notice to both parties
- Simultaneous notification of the results, rationale, sanctions, and available appeal procedures

# Clery Act

- How a University responds to sexual assault, dating violence, domestic violence and other non-sex-based crimes
- Requires a University to report Clery-defined crimes reported to campus security authorities that occur within a University's "Clery geography"
- Requires procedural requirements and education beyond what is required of Title IX
- Requires crime logs and annual reporting as well as "timely warnings"

# Title IX

What: Title IX of the Educational Amendments of 1972

How:

- 2020 Regulations “Nondiscrimination on the Basis of Sex in Education Programs or Activities Received Federal Financial Assistance”
- Guidance from Federal Government
  - Dear Colleague Letter(s)
- OCR guidance
  - Blog/webinars/resolution agreements
- Preamble to Title IX regulations
  - Not technically a governing document
- Other key factors:
  - Case law
    - Example: Victim Rights Law Center e.g. v. DOE – US District Court of Massachusetts struck down a key provision of the federal Title IX guidance prohibiting schools from considering statements not subject to cross examination

# Key Changes to Title IX

- Rules and Grievance Process now applies to both employees and students
- Requires Formal Written Complaint in order to initiate an investigation
- Sexual Harassment definition has changed – narrowed
  - Cross-examination required by Advisors
    - Requires specific definitions provided in Regs (replacing our previous state law definitions)
- Availability of alternative processes
- Changed Role of Title IX Coordinator – oversee process, does not (can't) do investigations
- Reports do not make credibility determination – fact finding only
- Allows for separate procedure for Title IX matters and those that do not fit into that
- Emergency Removal now requires a show-cause hearing
- Actual Notice standard (compared to knew/should have known)



# Title IX Grievance Pool Roles



Title IX Coordinator – Facilitator of the process, Intake of all Title IX, works directly with students to guide through the process & provide supportive measures

Investigator – gathers facts, writes investigation report, presents report at grievance hearing

Adjudicator/Board Member – determines facts and credibility, facilitates process, determines sanctions, and writes outcome report w/ credibility assessment

Advisor – advises parties on the process, serves as support role throughout investigation (“potted plant”), does cross-examination of witness at hearing

Appeals Officer -Hears and determines appeal after adjudication

# 1 Policy, 2 Procedures

- Section 9 of our Policy addresses Title IX Matters, Section 10 addresses sexual misconduct matters that do not meet the jurisdictional requirements of Title IX
- Both require signed formal complaint to pursue an investigation or informal resolution
  - No formal complaint required for supportive measures
- Responsible Penman Policy: amnesty policy required by NH law unless a University official determines it was not made in good faith or violation was egregious

# Title IX vs. Sexual Misconduct

## Title IX

- Must occur in a SNHU educational program or activity, or activity controlled by the University
  - SNHU must have “control” over respondent
    - Occurs in the United States
- Complainant must be participating or “attempting to participate” in a SNHU program or activity
  - Definition of sexual harassment: severe, pervasive **and** objectively offensive

### Examples:

- On-campus conduct involving 2 SNHU students
- Conduct occurring online e.g. Brightspace involving SNHU students or employees

# Title IX Definition: Sexual Harassment

1. An employee of the University conditioning the provisions of aid, benefit or service of the University on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conducted determined by a reasonable person to be so severe, pervasive **and** objectively offensively that it effectively denies a person equal access to the University's education program or activity
3. Sexual Assault
  - Forcible Sex offenses
  - Rape
  - Forcible Sodomy
  - Sexual Assault with an Object
  - Forcible Fondling
  - Incest
  - Statutory Rape
  - Dating Violence
  - Domestic Violence
  - Stalking

# Title IX vs. Sexual Misconduct

## Sexual Misconduct

- Conduct that would otherwise violate policy but does not meet Title IX “jurisdiction” requirements
  - off-campus conduct
  - Could involve a non-SNHU complainant
- Incidents that do not occur in a SNHU educational program or activity but do have an affect
  - Applies to conduct that may not meet the higher standard of Title IX sexual harassment

### Examples:

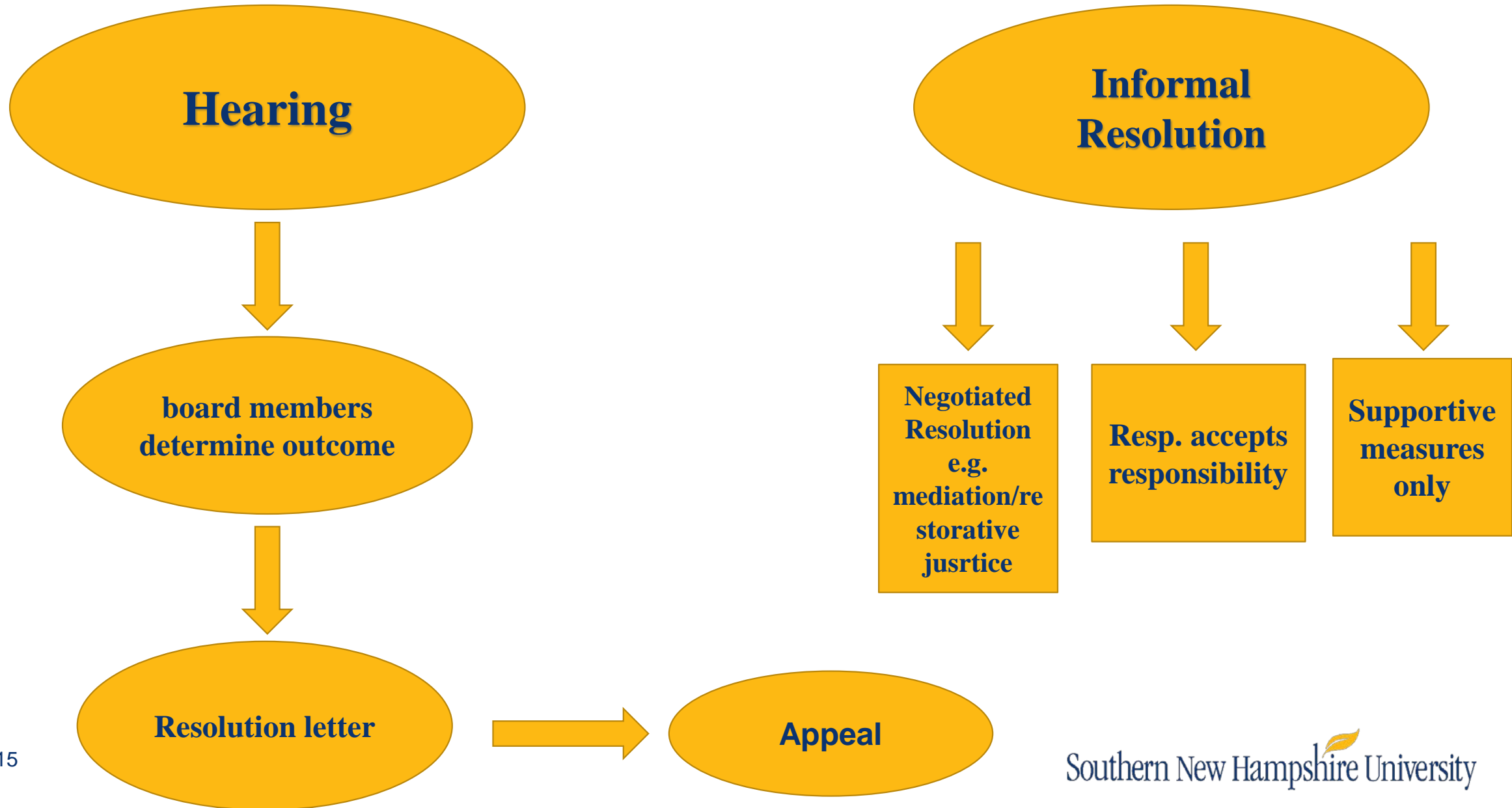
- Off-campus conduct involving SNHU students
- 3<sup>rd</sup> party alleges misconduct against a SNHU student

# The Title IX process at SNHU

- Notice/Intake
  - Report made to Title IX Officer
  - Initial reach out to complainant to discuss the process, offer supportive measures and determine whether complainant wants to file a formal complaint
  - Title IX Coordinator determines jurisdiction and which procedure applies
- Formal Complaint filed
  - Title IX office assigns investigators
  - Title IX office sends Respondent Notice of Investigation

Investigation → Draft Report →  
Complainant/Respondent Review & feedback →  
Final investigative report incorporating comments

# Hearing Process/Informal resolution



## What if a Party Does not want to file a complaint?:

- Policy now requires a written, signed formal complaint to proceed with investigation
- If a party does not want to file a complaint – inquiry ends there – we offer supportive measures
- There is no time limit for a complainant to change their mind and file a complaint
- There are limited circumstances in which a Title IX Coordinator can sign a complaint
  - When minors are involved
  - When the Respondent is a repeat offender
  - Respondent is in a position of authority
- Must not show deliberate indifference to Complainant's wishes – they cannot be forced to participate in the process



## Procedural Safeguards under Title IX/SNHU Policy

- Notice to Respondent of allegations
- Equal support and opportunity for both parties
  - Availability of supportive measures for both, access to advisors
- Timely process – resolution concluded within 60-90 days absent extenuating circumstances
- Mandatory Dismissal under Title IX
  - If the alleged conduct would not constitute Sexual Harassment even if proven
  - Conduct did not occur in a SNHU educational program or University does not have ‘control’ over Respondent, or conduct did not occur in U.S.
  - If dismissed- matter could be adjudicated under sexual misconduct policy
- Notification to both parties of interviews, opportunity for both to provide witnesses
- Opportunity to review interview notes and review draft and final investigative report/provide feedback.
- Access to evidence
- Under Title IX – ability to ‘cross examine’ witness through a 3<sup>rd</sup> party (advisor)

# Investigation

- Receipt of Formal Complaint
  - Must be signed by the complainant
- Notice of Investigation and Allegations
  - Document sent by Title IX Coordinator to Respondent putting him or her on notice of the allegations, including who filed the formal complaint, the substance of the allegations and when/where they occurred
  - Must include certain information as outlined in the policy (see policy section 9.7)
  - Subject to revision if facts change
- Once the NOIA is sent out, Investigations will be appointed within 2 days
- Investigation timeline
  - 30 business days but can be extended for good cause **but**
  - Title IX Coordinator must communicate with parties if delay will not be completed in the prescribed time frame (so must be kept in the loop if there will be delays)

# Role of Investigator

- Conduct a thorough, prompt, reliable and impartial investigation
- Following witness interviews, investigator (in coordination with Title IX Office) must provide access to both parties to witness and interview notes
- Notify parties of interviews with other witness
  - i.e. notify complainant of scheduled interview with respondent and vice versa
- Provide regular status updates to involved parties
- Draft comprehensive investigation report summarizing all relevant evidence
- Following drafting of the report, provide both parties and their advisors access to all available evidence and copy of the draft report
- Incorporate any relevant feedback into the final version of the report
- Participate as a witness in the hearing process

# Role of Investigator

- Set expectations with the witness:
  - You are a neutral fact gatherer
  - You are going to ask difficult questions, but they can ask for a break at any time
  - Parties will be mutually respectful during the interview process
  - You expect honesty
  - You will allow them to ask questions or seek clarification if they need to
- Respectful and empathetic
  - Respect and empathy will lead to feeling of safety with the interviewee
  - Giving them space and time to remember and share information
- Avoid questions that indicate blame or doubt
  - Instead, consider questions such as:
    - Help me understand...
    - Can you tell me more about...
    - Is there anything else you can share?

# Investigation continued

- Develop an investigation roadmap
  - Who are the relevant witnesses?
  - In what order will be they interviewed?
  - As you are working, prepare a timeline of the events in question
    - Pre – history between the parties, any prior relationship
    - Incident in question – what type of contact occurred, whether consent or capacitation are at issue
    - Post incident – any communications with the parties after the fact, changes in behavior or level of communication; Knowledge of 3<sup>rd</sup> parties

# Role of Advisors in the Investigation

- Parties are allowed an *advisor of choice* throughout the process, including the investigation interviews
  - This can include a party's friend, family member or another SNHU faculty or staff member
- However, advisors should act as support but not actively participate in the interview by answering questions, interrupting the interview or being disruptive

# Investigation Report

- Investigation report under new Title IX regulations is strictly a summary of relevant facts
  - No credibility determinations or policy analysis – the hearing panel will now determine credibility and make determinations of whether a policy has been violated
- Report should reflect summary of each party's statement, any witness statements, summarize any physical or electronic evidence, and indicate where there are discrepancies
- Any evidence should be attached as an appendix
- Report should be consistent, concise, and without editorial or commentary
- Must be provided to parties at least 10 days before the hearing

## Determining Relevance

Relevance: not defined by Title IX regs –thus we assume the ‘plain meaning’ applies

- Includes inculpatory (tending to incriminate/prove violation of policy) or exculpatory (evidence that exonerates or tends to support that a violation **did not occur**)

Ask – does this make a material fact more or less probable than it would without this piece of evidence

- If yes – it is relevant
- If a fact is not relevant, you must explain to a party the decision to exclude the question
- Specific information that is considered not relevant - any information protected by privilege (such as communications with an attorney)



## Evidence re: Prior Sexual History of *Complainant*:

This evidence is precluded from being presented at a hearing, however, Title IX regulations allow it when being offered to establish that someone other than the respondent was responsible

- Evidence of prior sexual history between the parties may be relevant if the questions speak to the issue of consent
  - Ex: A Respondent may offer evidence of a prior sexual encounter between the parties wherein the circumstances were similar, and consent was deemed to have existed if offered to prove that Respondent felt as if consent was offered in this similar situation at hand
- Evidence of complainant's prior or subsequent sexual activity is generally deemed non-relevant

## Types of Evidence

**Direct evidence-** evidence based on personal knowledge or observation and that, if true, proves a fact without inference or presumption

**Circumstantial Evidence** – evidence based on inference and not on personal knowledge

**Corroborating evidence** – evidence that strengthens or confirms what other evidence shows

Physical evidence, such as written communications between the parties, video or photos, etc. may fall into any of these categories

Remember –parties will have access to all evidence that the investigators collect during the process

# Key Concepts: Consent

The equal approval – given freely, willingly, and knowingly of each participant to desired sexual involvement. Consent is an affirmative conscious decision indicated clearly by words or actions to engage in mutually accepted sexual contact.

- A person forced to engage in sexual activity by force, threat of force or coercion has not consented
- Consent to some form of sexual activity does not necessarily constitute consent to a different sexual activity
- Consent may be withdrawn at any time

As Board members you will evaluate whether consent was given by evaluating the totality of the facts and circumstances by considering several factors (not exhaustive list) such as:

- To what extent a complainant affirmatively indicates a willingness to engage in sexual contact without the presence of intimidation, fear or coercion
- Whether a reasonable person would have understood the complainant's actions or words as indicating freely given consent
- Whether incapacitation was known or reasonably apparent

# Key Concepts: Incapacitation

- Consent is not valid when a person is incapacitated, or a disability prevents a person from having capacity to consent.
  - Incapacitated = lacking capacity to consent because party is asleep, unconscious, mentally or physically helpless, or otherwise unaware that sexual contact is occurring.
- When evaluating incapacitation, consider whether the person in question had the ability to make informed rational judgments
- Incapacitation is determined from the perspective of a reasonable, sober person
- Beyond that of mere intoxication

## Remember: Trauma affects parties in different ways

- “Trauma informed” – what does this mean?
  - An understanding of the impact that a traumatic event may have on brain function and a person’s ability to recall specific details
- Trauma impacts how we process. Traumatic situations can result in:
  - Change in attitude or behaviors
  - Outbursts, threats, or otherwise disruptive behavior
  - Changes in academic performance
- Can impact how we respond to situations
  - Eliminate pre-conceived notions of how you would respond or how you would expect someone to respond in a certain situation

## Remember: Trauma affects parties in different ways

- For example: not all rape victims will be emotional about what happened. May disassociate from the event and appear disengaged.
- May not remember all details
- There is no “right” way to respond. Some things may trigger a trauma response in certain people that you might not think is traumatic.
- Complainants are not the only ones experiencing trauma. Being accused or, or a witness to, certain events can cause trauma
- *Allow witnesses to tell their own story in their way*

# Hearing

1. Introductions
2. Investigator(s) Present a summary of investigation report
3. Complaining party makes statement
  - Can be questioned after statement by Respondent's Advisor
  - After question – pause to allow Chair to determine relevancy, then allow party to answer if question is relevant
  - Hearing Board members may also directly ask questions
4. Witness and/or Respondent Statement(s)
5. After all parties present their 'case', the parties are "dismissed" (otherwise, all parties are to remain throughout the hearing) to allow the Board to deliberate

# Investigator's role at hearing

Investigator(s) Present a summary of investigation report

- Will outline facts that are contested
- Subject to questioning by Board & Parties
- **Will not offer, and should not be asked, opinions on credibility, recommendations for outcome – fact-based investigation only**
- Should be available for the entire hearing in case additional questions arise for investigator after initial statement



## Written Determination/Resolution Letter

The Board Chair is responsible for issuing a written determination of the outcome of the hearing and finding of responsibility

- Identification of the allegations potentially constituting sexual harassment
- Description of the procedural steps taken from formal complaint through hearing
- Findings of fact supporting the final determination – including any credibility determination
- Conclusions regarding application of policy to the facts
- Final determination of responsibility
- Any sanctions issue
- Basis and steps to appeal
- Submitted to Title IX coordinator within 2 days of hearing to submit to parties within 7 days of hearing

## Next Steps

- Review the Policy – Reach out with any questions
  - [SNHU Sexual Misconduct Policy](#)
- You will be assigned further training that must be completed before participating in a hearing
  - Thompson Colburn Title IX Training via Compass
  - This is completed annually and is about to be rolled out again

# Thank You!

You are an **invaluable** part of this process and I greatly appreciate your time and dedication to our learners by committing to participating in our Title IX process.

## Contact Info

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