



Southern
New Hampshire
University

Title IX Grievance Pool Training

September 23, 2021

Agenda

- Why are you here?
- Where do these laws come from? Why are we doing this?
- SNHU Policy
- Your Role(s)
- Investigation Process
- Hearing Process & Evaluating evidence
- Scenarios

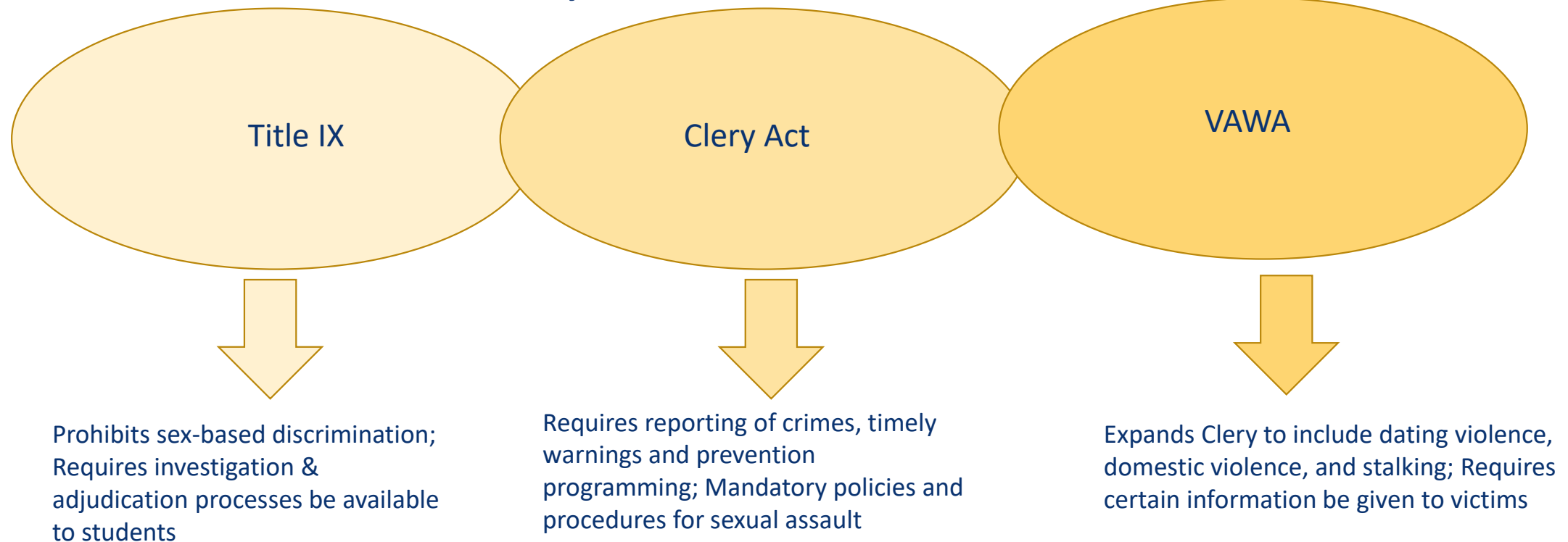
What is Title IX?

“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:

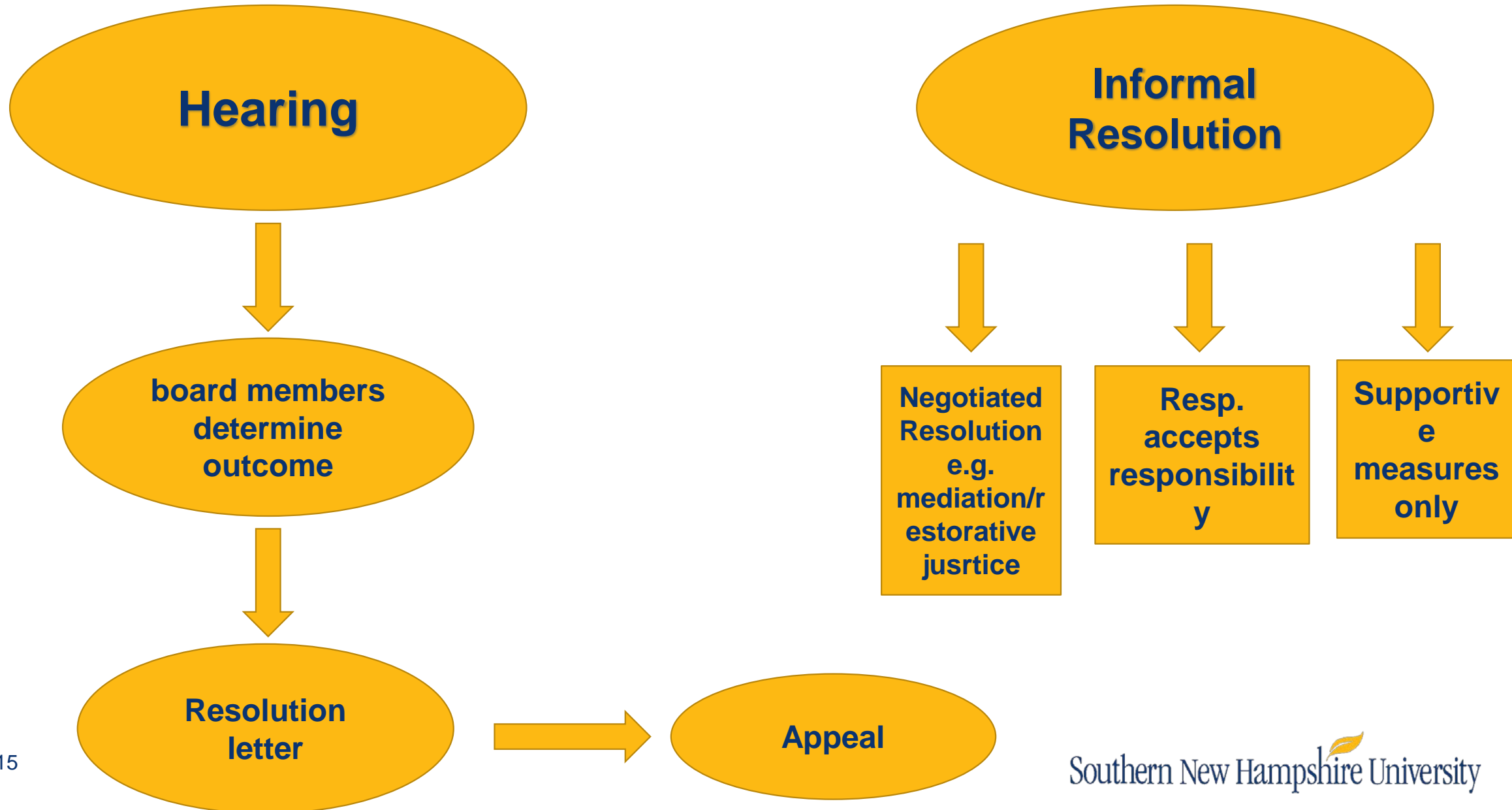
- Off-campus conduct involving SNHU students
- 3rd party alleges misconduct against a SNHU student

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 3rd party (advisor)

Decision Maker's Role

- Listen impartially
 - Do not prejudge parties
- Remain neutral/unbiased
 - Respondent is presumed **not responsible**
- Do not assume gender roles or stereotypes dictate behavior
 - Avoid assumptions about how you expect either party to respond in a particular situation or how you would respond in a certain situation
- Sensitive and Inclusive of all types of scenarios
 - LGBTQ+/Cultural Differences/Neurodiversity
- Fact specific analysis of each case individually
- Evaluating Credibility
- Determining Relevance
- Resolution Letter

Grievance Procedures/Process

How this works:

- You will be outreached regarding availability to participate in a hearing several weeks prior
- Hearings will occur likely at set times and may be conducted in person but most likely, remotely
- If you are available, you will “save the date” for the hearing and may also be asked to participate in a pre-hearing meeting
- You will receive a minimum **of ten days** notice of a hearing but likely more

Your role – decision maker

- You will receive a list of all names of parties involved in the hearing – students, witnesses and advisors 5 business days in advance of hearing.
- If you believe you are unable to make an objective determination due to a pre-existing relationship with any party involved in the hearing, you are required to recuse yourself
- If you are unsure about whether you can remain objective or whether your relationship with any party precludes you serving on this particular board, it is your duty to reach out to the Title IX Coordinator to discuss

Pre-Hearing Meetings

- Chair of the Board may, in their discretion, schedule a pre-hearing meeting with parties and advisors and invite them to submit questions ahead of time so the Chair can consider relevancy of questions
- Questions do not need to be submitted ahead of time
- Also an opportunity to review, particularly with advisors, rules of decorum for the hearing
 - Advisors are allowed to ask questions but cannot otherwise participate in the process & may be removed if they do not adhere to this boundaries

Title IX vs Sexual Misconduct Hearing

- For all intents and purposes, your job is the same regardless of whether a violation is being investigated as “Title IX” or “Sexual Misconduct”
- The biggest difference – there will be no advisors questioning witnesses in Sexual Misconduct cases
 - Advisors may attend but only for support
 - During these hearings, board members are the only parties allowed to ask questions
- In a Sexual Misconduct Hearing –decision makers are allowed to consider statements of parties that did not submit to questioning
 - Prior example involving witness A, Tom & Stacy – In a sexual Misconduct hearing – board members can consider the statement Witness A gave to the investigators even if he does not appear at the hearing

Hearing

1. Introductions
 - Also an opportunity to invite the challenge of any board members
2. Investigator(s) Present a summary of investigation report
 - Will outline facts that are contested
 - Subject to questioning by Board & Parties (through advisor)
 - Will not offer, and should not be asked, opinions on credibility, recommendations for outcome – fact based investigation only
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

Questioning Parties

- Only ask questions that are relevant and probative of the situation i.e. not about a party's character or out of curiosity
- Think about your tone & avoid questions that imply a judgment
- Should be directly related to the incident in question or probative of a pattern of behavior
- Respondent's sexual history is relevant to the extent that it exhibits a pattern of behavior or conduct
- Avoid questions that are repetitive
- Do not assume certain things or "put yourself in their shoes" – ask, do not assume
- Questions should be open-ended and non-accusatory
 - i.e. NO - Didn't you follow her home that night because you were hoping to have sex?
 - YES- Why did you follow her home that night? Or Did you follow her home that night? Wait for an affirmative answer, and then ask why
- 23 • Avoid multi-part questions – confirm 1 fact at a time

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

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

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

Evaluating Credibility

Consider:

- Party's demeanor
 - Only 1 factor to observe and is not generally determinative of credibility alone
- Think about why
 - Is there any particular animus/motive/ill will for or against either party?
- Level of detail provided
- The accuracy of each person's account should be compared in an attempt to evaluate honesty and consistency
- Is there corroboration?
 - Cross-reference parties accounts with all other relevant evidence and witness statements
 - Change to party's demeanor, personality or routine after the incident?
 - Is there contemporaneous evidence such as verbal or electronic communication with friends/family, any other written confirmation, and the timing of such communications
- Common sense
- Changes to Stories
 - Are there inconsistencies? Can different versions be reconciled?

Evaluating Credibility

You are not just evaluating credibility of the involved parties but witnesses as well

- Does the witness have 1st hand knowledge of the events – were they physically present, did they confirm that they were able to see, hear or otherwise have knowledge about these events?
- Does their memory seem complete and can they describe with detail specifics?
- Are there any inconsistencies between witness interview and their hearing testimony?
Between witness testimony and other testimony?
- Do they have any motivation to be untruthful?

Determining Relevance

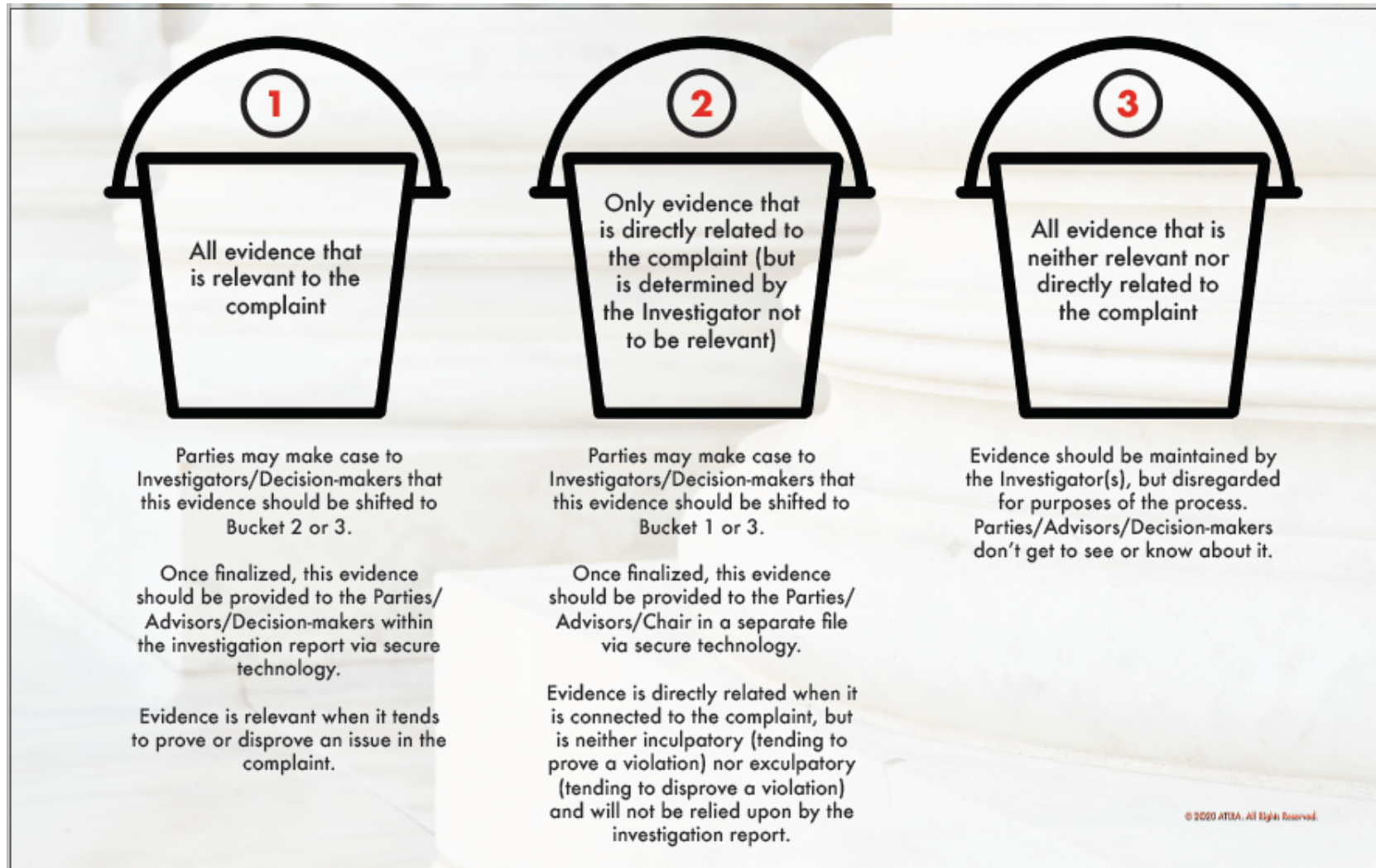
Relevance: not defined by Title IX regs –thus we assume the ‘plain meaning’ applies

- 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 question is not relevant, you must explain to a party the decision to exclude the question

Evidentiary Considerations



Deliberations

You are responsible for answering:

1. Whether the Respondent is responsible for the policy violations alleged
 - Including determinations regarding consent and if applicable, incapacitation
2. If responsible, what the appropriate sanctions would be

In answering these questions, you can and should consider:

- Party's credibility – if facts are in doubt, is there any reason to consider one party more credible than the other?
- Physical or documentary evidence – will be attached to the Investigation Report
- Definition of the policy violation as defined by the SNHU sexual misconduct Policy (will be available for reference at hearing)
- Standard of proof – preponderance of the evidence
 - A.k.a. is it more likely than not that something occur as alleged
 - Also referred to as “50% and a feather”

Evidence that cannot be considered

- If a party chooses not to submit to cross-examination at the hearing, the decision-makers cannot rely on any prior statements made to the investigators
 - Example: Witness A offered a statement to the investigators that he saw Tim leaving with Amy at a party, and Amy was falling over drunk. Witness did not attend hearing so the statement offered to investigators cannot be considered by decision makers
 - Can use other, independent evidence apart from Tim's statement to corroborate Amy's level of intoxication, and the fact that Tim and Stacy left the party together.
- Cannot draw any negative inferences solely from a party's absence from hearing or refusal to answer questions
- *Only applies to hearings relating to Title IX violations (not sexual misconduct)*

Sanctions

Factors to consider (not an exhaustive list):

- Nature, severity of and circumstances surrounding the violation
- Respondent's disciplinary history, if any
- Previous allegations of similar conduct
- Need for sanctions to bring an end to the sexual misconduct, harassment or retaliation
- Need for sanctions to prevent future recurrence
- Discrimination, harassment and/or retaliation
- Need to remedy the effects of the discrimination, harassment and/or retaliation of the complainant and community
- Impact on the parties of the alleged violation
- Any other information deemed relevant

Examples of Sanctions

Warning

Reprimand

Resident Probation

Resident Suspension

University Probation

University Suspension

University Dismissal

Remember: Trauma affects parties in different ways

- Not everyone experiences the same thing in the same way
- 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
- For example: not all rape victims will be emotional about what happened. May disassociate from the event and appear disengaged.
- 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

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
- Once fully trained, you will be contacted when we have an active case that is set for hearing.

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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