

INTRODUCTIONS

- Kimberley Pert, PHR, SHRM-CP
Title IX Coordinator
Interim Head of the Title IX Office
- Lori Watson, PHR
Deputy Title IX Coordinator
- Travis Kearbey, Esq.
Armstrong Teasdale LLP

LEARNING OUTCOMES

This training is designed to address the following subjects:

- Jurisdiction and key definitions under Title IX
- The terms of Webster University's Title IX Policy on Sex Discrimination, Including Sexual Harassment
- Service in Title IX roles with impartiality
 - Avoiding prejudgment of facts
 - Recognizing conflicts of interest
 - Avoiding bias
- Scope and functions of Title IX roles

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.

- 20 U.S.C. § 1681

DISCRIMINATION ON THE BASIS OF SEX

- The University receives “Federal financial assistance”; thus, its education programs and activities are covered by Title IX.
- A university that responds with deliberate indifference to actual knowledge of sexually harassing conduct occurring in its education program or activity has violated Title IX. - *Gebser v. Lago Vista Independent Sch. Dist.*, 524 U.S. 274 (1998).

TITLE IX JURISDICTION

All of the following elements must be satisfied to trigger Title IX jurisdiction:

- Discrimination on the basis of sex, including sexual harassment as defined under Title IX
 - *Quid pro quo* harassment,
 - Severe, pervasive and objectively offensive harassment, or
 - Certain criminal conduct: sexual assault, stalking, domestic violence, dating violence
- Occurring in the University's "education program or activity"
- Occurring against a person in the United States

THE MEANING OF “SEX” UNDER TITLE IX

- The Department of Education defines the term “sex” to mean...
- The definition of sexual harassment is intended to cover “gender harassment” and “unwanted sexual attention” (assuming it is sufficiently severe, pervasive and objectively offensive). – Preamble, p. 440.
- The definition of sexual harassment “applies equally to all persons regardless of sexual orientation or gender identity.” – Preamble, p. 430.
- In June 2020, the U.S. Supreme Court held that the term “sex” in Title VII of the Civil Rights Act provided protection against discrimination with respect to sexual orientation and transgender status.

THE MEANING OF “PROGRAM OR ACTIVITY”

- Title IX broadly defines the concept of “education program or activity” to include all of the following examples:
 - “all of the operations” of the University;
 - locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the harassment occurs;
 - buildings owned or controlled by university recognized student organizations; and
 - off-campus harassment if the University exercised substantial control over the context and the alleged harasser.
- Cyber-based Harassment - “[U]se of e-mail, the internet, or other technologies may constitute sexual harassment as much as use of in-person, postal mail, handwritten, or other communications.”
 - Preamble, p. 441.

SEXUAL HARASSMENT DEFINED

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the University conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (a/k/a "*quid pro quo* harassment");
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. § 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. § 12291(a)(10), "domestic violence" as defined in 34 U.S.C. § 12291(a)(8), or "stalking" as defined in 34 U.S.C. § 12291(a)(30).

QUID PRO QUO HARASSMENT

Quid pro quo harassment under Title IX requires satisfaction of all of the following elements:

- (1) The harassment must have been performed by an **employee** of the University;
- (2) The harassment must have taken the form of a **bargain** for some type of University “aid, benefit, or service” in exchange for any kind of sexual conduct; and
- (3) The sexual contact at issue must have been “**unwelcome.**”

Covers a Broad Range of Sex-Based and Sexual Conduct

- The Department of Education instructs that “[*q*]uid pro quo harassment **should be interpreted broadly.**” – Preamble, p. 447, n. 644 (emphasis added).
- Conduct falling far short of sex may form the basis a *quid pro quo* claim, e.g., “sex-based or other sexual conduct (e.g., back rubs or touching students’ shoulders or thighs).” – Preamble 447, n. 643.

QUID PRO QUO – EMPLOYEE REQUIREMENT

- *Quid pro quo* harassment does not exist under Title IX unless it is carried out by an employee of the University.
- The Department of Education expressly rejected calls to expand this concept to include *quid pro quo* harassment carried out by other non-employees who are part of an institution’s community, including the following:
 - Non-employee students
 - Volunteers
 - All “others not deemed to be a recipient’s employee”
- If the respondent is not an employee of the University, the *quid pro quo* analysis should end.
- “However, the unwelcome conduct of a non-employee individual may constitute sexual harassment under the second or third prongs” of the Title IX definition of that term. – Preamble, p. 448.

QUID PRO QUO – BARGAIN REQUIREMENT

- *Quid pro quo* harassment can occur where the “bargain” proposed is communicated **expressly or impliedly**.
- Context matters when inferring a quid pro quo “bargain” has been proposed.
 - “the **age and position** of the complainant is relevant to this determination.” – Preamble, p. 447, n. 643.
 - a **power imbalance** in the respondent-complainant relationship may, in some circumstances may allow such an inference. – Preamble, p. 446, n.642.

QUID PRO QUO – UNWELCOME REQUIREMENT

- For Title IX purposes, *quid pro quo* harassment must involve conduct that was “unwelcome” when it occurred.
- This is a measure of the complainant’s subjective perspective.
- **Acquiescence** by a complainant does not necessarily undermine a *quid pro quo* claim.
 - “[W]hen a complainant acquiesces to unwelcome conduct in a *quid pro quo* context to avoid potential negative consequences, such ‘consent’ does not necessarily mean that the sexual conduct was not ‘unwelcome’ or that prohibited *quid pro quo* harassment did not occur.” – Preamble, pp. 447-48.
 - “*quid pro quo* harassment does not depend on whether ‘the student resists and suffers the threatened harm or submits and avoids the threatened harm...’” – Preamble p. 448, n. 645.

ILLUSTRATIONS OF THE *QUID PRO QUO* ANALYSIS

Is this an example of *quid pro quo* harassment under Title IX?

- (1) A professor employed by the University tells a student that the student will receive an “A” in the professor’s class if the student allows the professor to perform oral sex on the student, which the student does not want to allow. **YES**
- (2) A supervisory groundskeeper employee of the University tells a custodial employee of the University that the supervisor will approve the custodian’s PTO request in exchange for sex, which the custodian does not consider welcome. **YES**
- (3) A University professor offers to pay for a fellow professor’s ticket to see a Broadway show in exchange for oral sex.

NO

ILLUSTRATIONS OF THE *QUID PRO QUO* ANALYSIS

Is this an example of *quid pro quo* harassment under Title IX?

- (1) A University student (who is not employed by the University) tells a classmate that the student will recommend the classmate for acceptance into the student's sorority in exchange for sex, which the classmate does not want. **NO**
- (2) A coach employed by the University tells a 16-year old student recruiting target that the coach will give the recruit an athletic scholarship in exchange for sex. **YES**
- (3) An administrative assistant employed by the University has been pursuing a sexual relationship with a University professor for weeks. The professor eventually agrees to have sex with the administrative assistant and offers to ask the assistant's supervisor to give the assistant a raise. **NO**

SEVERE, PERVASIVE AND OBJECTIVE OFFENSIVE

To qualify as sexual harassment under the second prong of Title IX's definition of that term, the following elements must be satisfied under a "reasonable person" standard:

- (1) The conduct must be based on sex;
- (2) The conduct must be unwelcome;
- (3) The conduct must effectively deny access to an education program or activity of the University because it is so:
 - a. severe;
 - b. pervasive; **and**
 - c. objectively offensive.

The "[e]lements of severity, pervasiveness, and objective offensiveness must be...determined from the perspective of a reasonable person standing in the shoes of the complainant." – Preamble, p. 477

DIFFERENT STANDARDS UNDER TITLE IX AND TITLE VII

CAUTION: The Title IX standard for sexual harassment differs from the hostile work environment standard under Title VII of the Civil Rights Act.

- The Department of Education explicitly rejected requests to align these legal standards.
- In doing so, the Department observed that “an institution of higher education differs from the workplace.”

ANALYZING WHETHER THE CONDUCT WAS UNWELCOME

- Prohibited “sex-based harassment includes unwelcome conduct of a sexual nature but also includes unwelcome conduct devoid of sexual content that targets a particular sex.”
– Preamble, p. 463, n. 670
- When conducting a jurisdictional analysis, the Title IX Coordinator should identify whether the allegations, if true, would establish that the alleged conduct was welcome or unwelcome by the complainant when it occurred.
- When investigating a formal complaint, the investigator should ask whether each act of alleged harassing conduct was welcome or unwelcome by the complainant when it occurred.

ANALYZING SEVERITY

- A complainant need not “prove severity”; instead, a complainant need only describe what occurred, and the University must then consider whether such occurrence was “severe from the perspective of a reasonable person in the complainant’s position.” – Preamble, p. 508
- Many factors may weigh on whether conduct is “severe” under the second prong of the Title IX definition:
 - Ages of the parties
 - Number of parties involved
 - Disability status of parties
 - Positions of authority of the involved parties
- The Department of Education identifies the following examples of conduct that may not satisfy the “severity” requirement:
 - Rubbing a student’s back – Preamble, p. 447, n. 643.
 - Discussion of “sexual issues even if that offends some people who hear the discussion” - Preamble, p. 460
 - “Vulgar or indecent” speech – Preamble, pp. 460-61
 - Microaggressions – Preamble, p. 495

ANALYZING PERVASIVENESS

- Merriam-Webster defines “pervasive” as “existing in or spreading through every part of something.”
- The Department of Education refused to remove the “pervasive” requirement despite concerns raised that a single incident of severe harassment may never satisfy the requirement.
- Dept. of Education examples of possible “pervasive” conduct:
 - Disseminating “revenge porn,”
 - Conspiring to sexually harass people (such as fraternity members telling new pledges to “score”),
 - Other unwelcome conduct that harms and humiliates a person on the basis of sex, particularly where the unwelcome sex-based conduct involves widespread dissemination of offensive material or multiple people agreeing to potentially victimize others and taking steps in furtherance of the agreement

ANALYZING OBJECTIVE OFFENSIVENESS

- Whether conduct is “objectively offensive” must be evaluated from the perspective of “a reasonable person in the complainant’s position.” – Preamble, p. 511
- This standard may be satisfied regardless of whether the respondent intended to offend. – Preamble, p. 516
- This exercise must not rely on sex stereotypes, e.g., considering offensiveness from a “male perspective” or “female perspective”; applying a “boys will be boys” approach, etc.

ANALYZING WHETHER EDUCATIONAL ACCESS IS IMPACTED

- This inquiry focuses on whether the harassing conduct “deprives the complainant of *equal* access, measured against the access of a person who has not been subjected to the sexual harassment.” – Preamble, p. 524
- “[N]o concrete injury is required,” but evidence of “unequal educational access” may include:
 - Skipping class to avoid a harasser;
 - A declining GPA;
 - Difficulty concentrating in class.
- What is not necessary to satisfy this requirement?
 - Failing a class;
 - Dropping out of school;
 - Experiencing any “particular symptoms” following alleged harassment.
- The nature of the relationship between the harasser and victim can be critically important to this analysis.
 - “Peer harassment, in particular, is less likely to satisfy [the requirement of showing a breach to Title IX’s guarantee of equal access to education benefits] than is teacher-student harassment.” – *Davis*, 526 U.S. at 653.

RESPECTING ACADEMIC FREEDOM

Sexual harassment under Title IX must be understood in a manner that respects academic freedom and First Amendment rights.

- “[B]ecause expressive speech...may be restricted or punished as harassment, it is important to define actionable sexual harassment under Title IX in a manner consistent with respect for First Amendment rights, and principles of free speech and academic freedom, in education programs and activities.” – Preamble, p. 426.

The Department endorses a different standard when speech, rather than conduct, is alleged as sexual harassment:

- **Speech-based harassment** “requires a narrowly tailored formulation that refrains from effectively applying, or encouraging” the University “to apply, prior restraints on speech and expression.”
 - *Quid pro quo* exception: “While *quid pro quo* harassment...involves speech, the speech is, by definition, designed to compel conduct”; thus, it can constitute *per se* actionable harassment.
- **Conduct-based harassment** “raises no constitutional concerns with respect to application of broader prohibitions.”

SEXUAL ASSAULT

- All forcible and nonforcible sex offenses described in the FBI's Uniform Crime Reporting system constitute sexual assault under Title IX.
- Examples:
 - Forcible rape and attempted rape – Preamble, p. 541
 - Forcible sodomy
 - Forcible Fondling
 - Sexual assault with an object
 - Statutory rape
 - Incest
- The offenses constituting sexual assault depend on the absence “of consent of the victim.” – Preamble, p. 470
- The intent of the respondent is relevant to only one form of sexual assault: Fondling, which is touching another person “for the purpose of sexual gratification.”

DOMESTIC VIOLENCE

- The term “domestic violence” is defined by statute to mean:
“felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction”

See 34 U.S.C. § 12291(a)(8).

DATING VIOLENCE

- The term “dating violence” is defined by statute to mean: “violence committed by a person (A) who is or has been in a social relationship of a romantic or intimate nature with the victim; and (B) where the existence of such a relationship shall be determined based on a consideration of the following factors: (i) The length of the relationship[,] (ii) The type of relationship[, and] (iii) The frequency of interaction between the persons involved in the relationship.”

See 34 U.S.C. § 12291(a)(10).

STALKING

The term “stalking” is defined by statute to mean:

“engaging in a course of conduct directed at a specific person that would cause a reasonable person to (A) fear for his or her safety or the safety of others; or (B) suffer substantial emotional distress.”

See 34 U.S.C. § 12291(a)(30).

- Stalking must be “on the basis of sex” to constitute Title IX sexual harassment
- Other forms of stalking that are not sex-based (e.g., stalking an athlete due to celebrity worship rather than sex), no Title IX violation occurs.

CONSENT AND INCAPACITATION

CONSENT AND INCAPACITATION

“In one study, one in 20 (4.7%) women reported being raped in college since the beginning of the year – a period of approximately 7 months – and nearly three quarters of those rapes (72%) happened when the victims were so intoxicated they were unable to consent or refuse.” [emphasis added]

-National Sexual Violence Resource Center (NSVRC), <http://www.nsvrc.org/saam/campus-resource-list>

CONSENT

- Central topic for cases involving sexual misconduct
- What is consent?
- What is not consent?



CONSENT

The term ‘consent’ means an affirmative and willing agreement to engage in a specific form of sexual contact with another person.” (Webster University Title IX Policy, Section VI(B)(3).)

CONSENT

- In other words:
 - clear "yes," verbal or otherwise, is necessary
 - must be ongoing throughout a sexual encounter and can be revoked at any time
- The clearest way to establish consent is through explicit, direct communication between (or among) the parties about the decision to engage in sexual activity

WHAT IS NOT CONSENT

- Consent cannot be inferred from the absence of a “no.”
- Consent to some sexual acts does not constitute consent to others, nor does past consent to a given act constitute present or future consent.
- Consent cannot be obtained by threat, coercion, or force.
- Consent cannot be obtained from someone who is asleep or otherwise mentally or physically incapacitated, whether due to alcohol, drugs, or some other condition.

ANALYZING CONSENT DISPUTES

If consent is placed in dispute by a party, all relevant facts and circumstances, including without limitation the following, should be considered:

- (i) the presence or absence of affirmative words or actions indicating a willingness to engage in sexual contact,
- (ii) whether a reasonable person would have understood the words and acts at issue as expressing consent; and
- (iii) whether there are any circumstances, known or reasonably apparent to any of the involved parties, demonstrating incapacitation or any other inability to make a voluntary choice to engage in sexual contact.

CONSENT TEA



FORCE – INCAPACITY - CONSENT

1. Was force used by the respondent to obtain sexual access?
2. What clear words or actions by the complainant gave the respondent permission for the specific sexual activity that took place?
3. Was the complainant incapacitated?
 - Under Webster University's Title IX Policy, “[a] person is mentally or physically *incapacitated* when that person lacks the ability to make or act on considered decisions to engage in sexual activity.”

FORCE

- Was force used by the respondent to obtain sexual access?
- Because consent must be voluntary (an act of free will) consent cannot be obtained through use of force
- Types of Force to consider:
 - Physical violence – hitting, restraint, pushing, kicking, etc.
 - Threats & Intimidation – anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
 - Coercion – frequency, intensity, duration, isolation

INCAPACITY

- First, was the complainant incapacitated at the time of the sexual activity?
 - Could the complainant make rational decisions?
 - Could the complainant appreciate the situation and address it consciously such that any consent was informed
 - Knowing who, what, when, where, why and how
- Second, did the respondent know of the incapacity?
- Or, should the respondent have known from all the circumstances (reasonable person)?

INCAPACITATION

“The term ‘incapacitation’ means a person’s physical and/or mental inability to make informed, rational judgments to the extent that the individual is incapable of giving consent.” (Webster University, Title IX Policy, Section VI(B)(5).)

ASSESSING INCAPACITATION

- Assessing incapacitation is very fact dependent
- The use of alcohol or drugs may, but does not automatically, affect a person's ability to consent to sexual contact.
- If the degree of intoxication goes beyond the stage of mere reduced inhibition and causes the victim to not understand the nature and consequences of the sexual contact, the person cannot provide consent.

Blackout Example

- Blackout = incapacitation
- Blackout = no working (form of short term) memory, thus unable to understand who, what, when, where, why or how
- Partial blackout must be assessed as well

Respondent Drunkenness

- Whether the complainant consented to sexual contact does not depend on whether the respondent was drunk
- The complainant's incapacitation will be assessed based on whether a reasonable sober person would have been able to ascertain that the complainant was incapacitated.

INCAPACITATION

- If the complainant was incapacitated, but:
 - The respondent did not know it
 - The respondent could not have known it
- If the complainant was incapacitated at the time of sexual contact, and the respondent knew or should have known it, the sexual contact occurred without consent.

CONSENT

What clear words or actions by the complainant gave the respondent permission for the specific sexual activity that took place?

Consent is:

- Positive (affirmative)
- Unambiguous (clear)
- Voluntary (freely given)
- Clear words or actions
- Indicates permission to engage in mutually agreed upon (sexual) activity

ANALYZING EVIDENCE

PERSPECTIVES

- Witnesses may see the same event, but interpret it differently.
- Individual backgrounds may solidify parts of an incident in a witness' mind, while other details remain vague.
- Everyone has assumptions
- It is important to be aware of assumptions so that the hearing is fair



AVOIDING BIAS

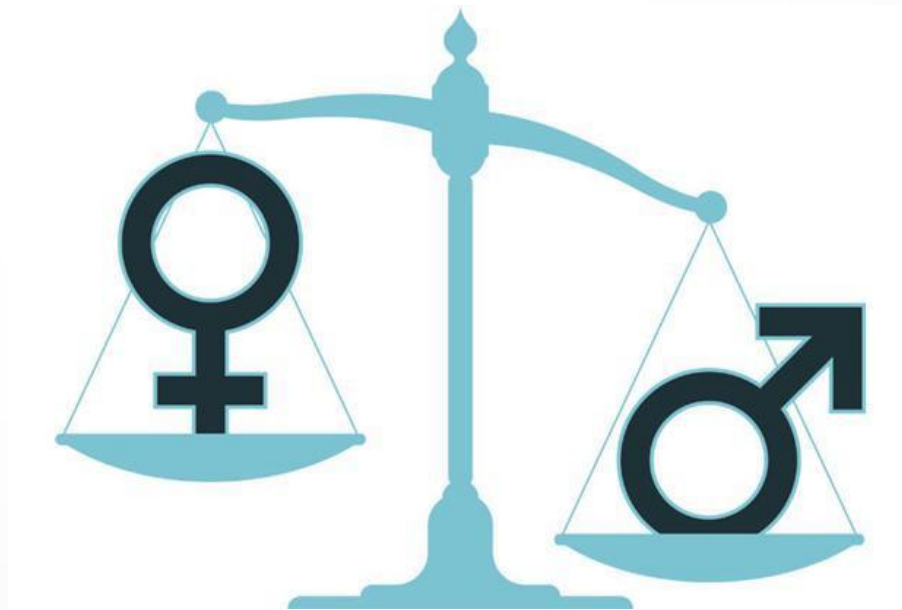
- Defined as: “an inclination of temperament or outlook; *especially* a personal and sometimes unreasoned judgment” (Merriam-Webster Dictionary)

OR simply: a preference



AVOIDING BIAS

- Unchecked bias can negatively impact the Title IX process.
- Title IX process must be fair and evidence based.



AVOIDING BIAS

Recusal is necessary where a Title IX team member (e.g., Title IX coordinator, investigator, decision-maker, mediator, or appeal officer) feels bias for or against a party or with respect to complainants or respondents, generally, in a case.

Examples of where a Title IX team member may not be able to be impartial/unbiased:

- One of the involved individuals is a good friend
- There is a strong personal history (positive or negative) with one or both of the individuals
- One of the individuals may be a previous resident (RA), mentee (OL/CL), student (faculty/staff member).

AVOIDING PREJUDGMENT

Presumption of Non-Responsibility

- Respondents are entitled to a presumption of non-responsibility for violating Webster's Title IX Policy until they are adjudicated otherwise through a Title IX grievance process.
- The presumption of non-responsibility is not interpreted to mean that a respondent is considered truthful or that the respondent's statements are credible or not credible, based on the respondent's status as a respondent. – Preamble, p. 809-10.

Considering the “Stakes”

- Credibility should not be determined based on an individual's status as a complainant or respondent.
- Title IX personnel are not prevented from understanding and taking into account each party's interests and the “stakes” at issue for each party, yet what is at stake does not, by itself, reflect on the party's truthfulness. – Preamble, p. 810

TIMELINE OF A TITLE IX CASE

TITLE IX – TIMING CONSIDERATIONS

- An individual can make a report of sexual harassment to the University at any time.
- The “actual knowledge” (i.e., notice to Title IX Coordinator or CHRO) of sexual harassment triggers these response obligations:
 - Promptly contact the complainant
 - Offer supportive measures
 - Consider the complainant’s wishes with respect to supportive measures,
 - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and
 - Explain how to file a formal complaint

FORMAL COMPLAINTS

- Webster's Title IX Policy defines "formal complaint" as a document alleging sexual harassment against a respondent and requesting that the University investigate the allegation of sexual harassment where such document is:
 - 1) Filed by a complainant with the Title IX Coordinator, or
 - 2) Signed by the Title IX Coordinator
- A **formal complaint** can be filed by a complainant or signed by the Title IX Coordinator in the absence of the complainant choosing to file, subject to these limitations:
 - 1) The complainant must be participating, or attempting to participate, in an education program or activity of the University; and
 - 2) The University may close a case if the respondent is permanently separated from the institution.

FORMAL COMPLAINTS FILED BY A COMPLAINANT

Standards that must be satisfied when a complainant files a formal complaint:

- The complainant must be **participating, or attempting to participate in, the education program or activity** of the University.
- The formal complaint **must be filed with the Title IX Coordinator**. It can be filed in person, by mail, by electronic mail, or by using the contact information for the Title IX Coordinator in the University's Title IX Policy.
- The formal complaint must be **signed physically or digitally by the complainant** or must otherwise indicate that the complainant is filing the formal complaint.
- The formal complaint must **include allegations that, if true, would constitute sexual harassment** as defined under Title IX.

FORMAL COMPLAINTS SIGNED BY THE TITLE IX COORDINATOR

The Title IX Coordinator can sign a formal complaint alleging sexual harassment against one or more respondents and requesting that the University investigate the allegation of sexual harassment.

Before doing so, the Title IX Coordinator will consider these factors:

- the severity and pervasiveness of the alleged sexual harassment;
- any pattern of alleged misconduct attributed to the Respondent (e.g., serial predation);
- the risk of serious harm to any student, employee or other individual associated with the University;
- whether the complainant's allegations involved violence, threats, use of weapons, or similar factors;
- whether the complainant's allegations have prompted the involvement of law enforcement and/or criminal proceedings; and/or
- any other factor, whose consideration is permitted by applicable law, that directly or indirectly implicates the University's interests in providing a safe and productive learning environment.

TITLE IX – RESPONSE TO A FORMAL COMPLAINT

- Upon the filing or signing of a formal complaint, the Title IX Coordinator takes the following actions:
 - Performs a conflict of interest analysis
 - Performs a jurisdictional analysis
 - Provides notice of allegations to the respondent
 - Offers supportive measures to the respondent (note: such supportive measures should already have been offered to the complainant)
 - Assigns an investigator (who does not have a conflict of interest)
 - Identifies the appropriate decision-maker
- A case should be investigated and adjudicated within 90 days of the date on which a formal complaint is filed by a complainant or signed by the Title IX Coordinator.
 - The Title IX Coordinator can extend timelines for good cause
 - The Title IX Coordinator will provide written notice to the parties explaining the reason for any extension.

TITLE IX – MANDATORY DISMISSALS

- **Mandatory Dismissal.** The Title IX Coordinator must dismiss a formal complaint insofar as it contains allegations that fit into any of the following categories:
 - 1) conduct that would not constitute sexual harassment under Title IX
 - 2) conduct that did not occur in the University's education program or activity, or
 - 3) conduct that did not occur against a person in the United States

- **Permissive Dismissal.** The University has discretion to dismiss a formal complaint (or any part thereof) at any time (during an investigation or hearing) for the following reasons:
 - 1) the complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - 2) the respondent is no longer enrolled or employed by the recipient; or
 - 3) specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein

- When deciding to dismiss a formal complaint, the Title IX Coordinator should transfer the dismissed allegations to the University's Student Conduct office or Human Resources if such allegations may implicate policies administered by either of those departments.

TITLE IX – PERMISSIVE DISMISSALS

- **Permissive Dismissal.** The University has discretion to dismiss a formal complaint (or any part thereof) at any time (during an investigation or hearing) for the following reasons:
 - 1) the complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
 - 2) the respondent is no longer enrolled or employed by the recipient; or
 - 3) specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein

EXAMPLES OF “SPECIAL CIRCUMSTANCE” DISMISSALS

- **Examples of “specific circumstances” permitting dismissal:**
 - Circumstances “where the complainant has ceased participating in the process.” - Preamble, pp. 293, 938-39
 - Circumstances where the “passage of time” results in the University’s “inability to gather evidence sufficient to reach a determination regarding responsibility.” – Preamble, p. 373 n. 562
 - “When a formal complaint contains allegations that are precisely the same as allegations the recipient has already investigated and adjudicated.” – Preamble, p. 689 n. 939
 - If the respondent is not under the University’s authority (e.g., a non-student, non-employee individual who came onto campus and allegedly sexually harassed a complaint), and the University “has no way to gather evidence sufficient to make a determination.” - Preamble, p. 966

TITLE IX – PROCEDURE UPON DISMISSAL

- The Title IX Coordinator must inform the complainant(s) and respondent(s) simultaneously in writing of any decision to dismiss a formal complaint (or any part thereof), including the reason(s) for that decision.
- The Title IX Coordinator should transfer the dismissed allegations to the University's Student Conduct office or Human Resources if such allegations may implicate policies administered by either of those departments.

TITLE IX – EMERGENCY REMOVALS & ADMIN LEAVE

Emergency Removals

The University has the discretion to implement an emergency removal of a respondent where an individualized assessment reveals:

- (1) An immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment; however,
- (2) A respondent must receive an immediate opportunity to challenge the emergency removal

Administrative Leave for Employee-Respondents

- Non-student employees can be placed on administrative leave;
- Administrative leave can be paid or unpaid, at the University's discretion

THE INVESTIGATOR'S ROLE

Following the filing of a formal complaint, the assigned investigator must perform the following tasks:

- Analyze and disclose whether the investigator has any conflicts of interest;
- Evaluate relevant evidence (according little, if any, weight to relevant evidence that would be excluded under the Federal Rules of Evidence);
- Provide the parties with the same opportunities to be accompanied to any related meeting or proceeding by the advisor of their choice;
- Provide written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings to any party whose participation is invited or expected with at least ten (10) calendar days for the party to prepare to participate.

The investigator shall not restrict any complainant or respondent from discussing the allegations under investigation or gathering and presenting relevant evidence.

COLLECTING EVIDENCE IN AN INVESTIGATION

- The type and extent of evidence available will differ based on the facts of each incident. - Preamble, p. 808.
- All relevant evidence must be objectively evaluated (regardless of it consists of the parties' own statements, statements of witnesses, or other evidence).
- Corroborating is good, but it is not necessary in every case. A party's statement, if credible, is evidence regardless of whether additional objective, corroborating evidence is available.
- Provide both parties equal opportunity to inspect any evidence directly related to the allegations raised in a formal complaint regardless of whether the University intends to rely on it in reaching a determination regarding responsibility and inculpatory or exculpatory evidence (regardless of the source).
- The evidence given to the parties for inspection and review must consist of all evidence directly related to the allegations; determinations as to whether evidence is "relevant" are made when finalizing the investigative report.

INVESTIGATIVE REPORTS

- Before completing an investigative report, the investigator shall send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy.
- The parties will have at least 10 calendar days to submit a written response, which the investigator will consider prior to completion of the investigative report.
- The investigator must create an investigative report that fairly summarizes relevant evidence.
- At least 10 days prior to a hearing on the formal complaint, the investigator must send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

TITLE IX – STANDARD OF EVIDENCE

Preponderance of the Evidence Standard.

- The preponderance of the evidence standard governs all cases alleging “sexual harassment” as defined in Title IX
- Preponderance of the evidence means that the evidence is enough to cause the decision-maker to believe that a particular fact is more likely than not to be true
- This standard must be used uniformly for all cases regardless of respondent

Presumption of Innocence.

- There is a presumption that the respondent did not violate the policy until a determination otherwise is reached through the grievance process

Burden of Proof.

- The University bears the burden of proof and of collecting relevant information

TITLE IX – ROLE OF HEARING OFFICER

- The hearing officer is the decision-maker for all Title IX cases
- In preparation of a hearing, the hearing officer should complete the following steps:
 - Analyze and disclose any conflict of interest
 - Review the hearing packet (which the Title IX Coordinator will provide) prior to the hearing:
 - Investigation Report
 - Statements
 - Incident Report(s)
 - Letters
 - Guidelines for Hearing
 - Give both parties (and their advisors) an equal opportunity to attend a pre-hearing conference to discuss hearing procedures and expectations

HEARING PROCEDURES AND RULES

- The hearing officer will preside over the hearing, administer procedural rules and maintain order during the hearing
 - Webster's Title IX policy requires all parties, witnesses and advisors to maintain professional decorum throughout a hearing
- For hearings occurring virtually, the hearing officer or such individual's delegate will act as the host for the virtual meeting platform
- The parties will receive an equal opportunity to appear for and participate in the hearing (with an advisor)
- Witnesses will be called for testimony
 - The hearing officer will administer direct questioning
 - Each party's advisor will receive an opportunity to cross-examine each witness and testifying party
 - Before a witness or testifying party is required to answer a cross-examination question, the hearing officer will rule upon whether the question will be allowed
- Each complainant and respondent will have an opportunity to address the hearing officer with a verbal statement of up to 5 minutes in length

RULING ON CROSS-EXAMINATION QUESTIONS

- The hearing officer will permit all questions seeking “relevant” evidence with the following exceptions:
 - Questions seeking legally privileged information will not be permitted
 - Questions about a complainant’s sexual predisposition will not be permitted, and
 - Questions about a complainant’s prior sexual behavior will not be permitted unless such questions are (1) offered to prove that someone other than the respondent committed the alleged sexual harassment, or (2) focused on sexual behavior between the complainant and the respondent and offered to prove consent

RULING ON CROSS-EXAMINATION QUESTIONS

- The hearing officer will provide a brief explanation for each ruling on whether a question will be permitted
- Title IX regulations do not require a hearing officer to give a lengthy or complicated explanation of a ruling on whether a question will be allowed
- Instead, it is sufficient, for example, for a decision-maker to explain
 - 1) that a question is irrelevant because the question calls for prior sexual behavior information without satisfying one of the two applicable exceptions, or
 - 2) that, because the question asks about a detail that is not probative of any material fact concerning the allegations, it is irrelevant. – Preamble, p. 1161

REFUSALS TO SUBMIT TO CROSS-EXAMINATION

- If a party or witness does not submit to cross-examination at the live hearing, the hearing officer will not rely on any statement of that party or witness in reaching a determination regarding responsibility
- However, the hearing officer 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

WRITTEN DETERMINATION

- The Hearing Officer must issue a written determination of whether a Title IX Policy violation has occurred in each case.
- The Hearing Officer must send the written determination to all parties simultaneously.
- The written determination must include:
 - the allegations potentially constituting sexual harassment;
 - a description of the procedural steps taken from the receipt of the formal complaint through the determination;
 - findings of fact supporting the determination;
 - conclusions regarding the application of the University's Title IX policy to the facts;
 - the result (and rationale) as to each allegation, including a determination regarding responsibility;
 - any disciplinary sanctions the University imposes on the respondent;
 - any remedies to be provided to the complainant; and
 - The procedures and permissible bases for an appeal.

TITLE IX – APPEALS

- Must be offered to both parties on the following grounds
 - 1) Procedural irregularity that affected the outcome
 - 2) New evidence not reasonably available that could affect the outcome
 - 3) Conflict of interest by institutional participants that affected the outcome

- The Title IX Coordinator shall notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties.

- The non-appealing party must be given a chance to respond

TITLE IX – ROLE OF THE APPEAL OFFICERS

- A panel of three appeal officers will decide a Title IX appeal.
- The Title IX Coordinator will notify those who are selected to serve as appeal officers on a case.
- An appeal officer must do the following:
 - Analyze and disclose any conflict of interest.
 - Review all appeal materials relating to the case, including (without limitation) the notice(s) of appeal and briefing submitted by each party, all of which the Title IX Coordinator will provide to the appeal officer.
- The presiding Appeal Officer will convene a meeting of the appeal officers to confer about the issues on appeal.
- Each Appeal Officer will vote on whether to affirm or overturn the challenged decision based on a review of each issue on appeal and upon considering only issues that have been properly appealed under the University's Title IX Policy.
- The Appeal Officer chairing the appeal board will issue a written decision based on the majority vote of the Appeal Officers.

TITLE IX – APPELLATE BRIEFING

Briefing Schedule

Webster University's Title IX Policy establishes a default briefing schedule:

- Each party may submit to the Title IX Coordinator an appellate brief within 10 calendar days following the date on which the Title IX Coordinator has provided notice of the appeal to the parties.
- Each party should submit the party's appellate brief electronically (in MS Word format) to the Title IX Coordinator, using the email address for such person provided in the University's Title IX Policy.
- The Appeal Officer presiding over the case may grant an extension of time to submit such briefing.

Briefing Standards

- An appellate brief should not exceed 15 pages of double-spaced text (exclusive of any attachments). The presiding Appeal Officer has the discretion to extend this page limitation.
- An appellate brief should take the form of a written statement in support of, or challenging, the outcome of a live-hearing in a case that is appealed under the University's Title IX Policy.

APPEALS OFFICERS

- The University shall appoint three individuals (none of whom can be the person who served as the decision-maker for the underlying formal complaint) to serve as appeal officers to hear and decide any appeal that is filed under this Policy. The University shall designate one appeal officer to chair the appeal panel.
- The appeal officers shall apply the preponderance of evidence standard in deciding an appeal and shall decide the outcome of the appeal by majority vote. However, in instances where a total of three individuals are not available to serve as appeal officers, the University shall appoint a single appeal officer to decide the outcome of an appeal, and such person's decision shall be final.

APPEALS-WRITTEN DECISION AND FINALITY

- Following the briefing period, the appeal officer presiding on the panel shall issue a written decision describing the result of the appeal and the rationale for the result. Such written decision shall be provided simultaneously to the parties by the Title IX Coordinator.
- A determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or on the eleventh (11th) calendar day following the University's provision of the written determination to the parties (if no appeal is filed by either party during the 10-day period for filing an appeal).

TITLE IX – INFORMAL RESOLUTION

- Permissible only after a formal complaint is filed
 - Parties must provide voluntary, written consent after receiving detailed notice of allegations and explanation of informal resolution process
 - Cannot compel students to agree to informal resolution as a condition of enrollment
 - Never permitted where accusation is that employee sexually harassed a student

www.webster.edu/titleix/

CONFIDENTIALITY

- Except where required otherwise by law or to carry out a grievance procedure or grievance process under Webster University's Title IX Policy, those holding roles in the Title IX process must maintain strict confidentiality regarding Title IX cases.
- This includes:
 - Names
 - Details
 - References to hearing and/or incident



QUESTIONING

QUESTIONING

- In-depth questioning helps investigators ascertain the facts pertaining to the allegation and clarify vague or unclear issues.

The purpose of questioning:

- To help the decision-maker have sufficient information to render a fair, impartial, and well-informed finding, and when applicable, determine appropriate sanctions.

QUESTIONING

Open-ended questions:

- Carefully phrase questions as open-ended (i.e., who, what, how, etc.) rather than close-ended (i.e., Did you...? Were you...?).
 - Avoids yes/no answers
 - Encourages narration

Close-ended questions:

- Use less frequently.
 - Best used to pin-down specific or elusive points
 - Or to get party to commit to a statement

QUESTIONING

Multiple Choice

- Avoid asking questions that offer answers or choices.
- Multiple choice questions may skew responses

QUESTION: “What were you feeling when you stole the book? Were you stressed, angry, or just confused? Did you feel you had no other option?”

ANSWER: “I didn’t feel like I had any other option. I was confused and stressed out.”

QUESTIONING

Silence

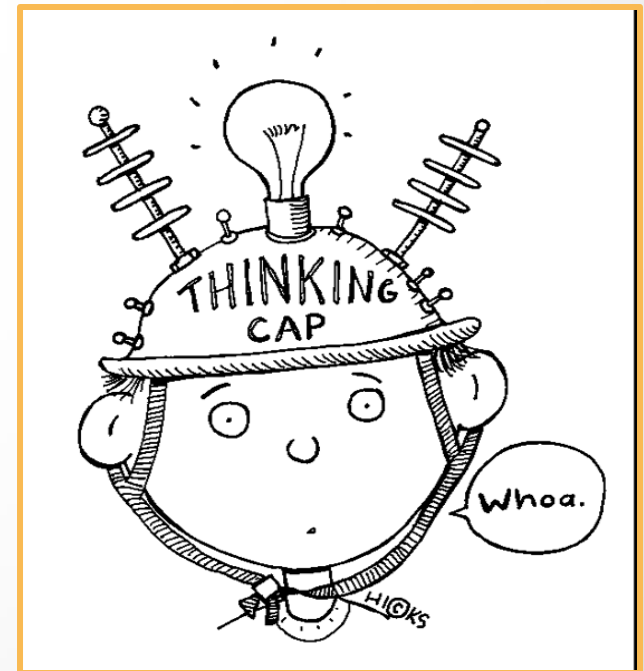
- Don't be afraid of silence
- Natural for one to think before answering, especially in stressful situation
- If the person needs clarification, let him or her ask for it
- Don't assume he or she doesn't understand the question
- Don't let your discomfort with silence make you rephrase your question



QUESTIONING

Pursuing a “Line of Questions”

- Series of pre-arranged, related questions asked in a row
- Usually when you have a “hunch” about something from earlier testimony or information
- Be careful, can seem accusatory
- Use carefully



QUESTIONING REMINDERS

- Listen carefully
- Use open-ended questions
- Avoid multiple choice
- Don't be afraid of silence
- Don't be accusatory
- Watch non-verbals
- Follow up on time/date sequence contradictions
- Avoid jumping from one line of questioning to another
- Avoid writing
- Remain attentive

DETERMINATIONS

EVIDENCE AND RELEVANCE

EVIDENCE: THE STANDARD OF PROOF

- The standard of proof has central weight and importance to competent hearing board decision-making.
- The standard of proof is the measure of evidence needed to convince a hearing board that the policy has been violated.
- The main standard of proof in use is the PREPONDERANCE OF THE EVIDENCE, also known as “more likely than not.”
 - A feather more than 50-50

PERPONDERENCE OF EVIDENCE

- Defined as that amount of evidence that makes it more likely than not that the facts demonstrate a violation of policy
- “More likely than not” is variously defined at “50.01%” or “51%.”
 - It means that there is slightly more evidence favoring one side than the other.
 - Remember that “feather”



EVIDENCE EXERCISE

- Each of the lines on the next slide represents the progression of introduction of facts at a hearing. Indicate at what level you are *persuaded* (using preponderance) to find a violation, at what level you are *convinced* of a violation, and at what level do you reach the beyond a reasonable doubt standard.
- Assume that you know that the end result is that Todd and Amy have had sexual intercourse. Amy alleges that it was nonconsensual, and therefore in violation of our campus policy.

EVIDENCE EXERCISE

Prompt		50.1%
1	Todd and Amy meet at a bar. Todd asks Amy to sleep with him. She refuses, but agrees to go back to his room.	
2	Todd is charming and persuasive, but Amy barely knows him. She is attracted to him and fools around with him, but draws a line.	
3	Todd at first heeds her “No,” to intercourse but she continues to fool around with him and induces him into a frenzy of arousal. He thinks she is a tease.	
4	Todd realizes that she doesn’t want to have intercourse, but he’s had a few beers, and he says he is unable to control his lust. She lets him go further, but not to the point of intercourse.	
5	Amy had nine beers over three hours at the bar, and it has been 2 hours since they left the bar.	
6	Todd testifies that he noticed that Amy stopped saying “No” and started crying during the intercourse, so he hurried up to finish.	
7	Instead of the testimony in #6, Todd testifies that he thinks Amy passed out for a short time during the intercourse...	

EVIDENCE AND DECISION MAKING

- Evidence is any kind of information presented with the intent to prove what actually took place
- EVIDENCE and PROOF are not the same
- Proof is simply the effect of evidence
- Evidence can prove something or nothing at all
- Be fair and use good judgment
- Responsibility does not have to be established “beyond any reasonable doubt”

TYPES AND VALUE OF EVIDENCE

- Direct or Testimonial Evidence
- Circumstantial Evidence
- Documentary Evidence
- Real and Demonstrative Evidence
- Hearsay Evidence
- Character Evidence
- Use past record...?

Only if credible allegations of similar nature, but decision must be based on facts of this individual case.

RELEVANCE

- Title IX regulations do not define “relevance.” Thus, the ordinary meaning of the word should be understood and applied. – Preamble, p. 811, n. 1018.
- Investigators and hearing officers should deliberate only upon evidence that is relevant to the issue(s) being addressed in a formal complaint.
- Relevance must be controlled by the Hearing Officer.
 - Inform those testifying if the information they are providing is irrelevant and inadmissible.
 - relevant evidence submitted at a hearing (whose consideration is not prohibited by the Title IX Regulations) would be inadmissible under the Federal Rules of Evidence, the decision-maker should accord such evidence little, if any, weight or credibility.
- To test for relevance, ask yourself: Is the information being offered likely to prove/disprove an issue presented by the allegations of sexual harassment in the formal complaint?
 - If it is likely to lead to proof/disproof, even indirectly, it is relevant.
 - If it is not likely to do so, it should be excluded.

RELEVANCE EXERCISE

- Test your familiarity with the concept of relevance on the following examples.
- In each situation, ask yourself, what is at issue that this fact speaks to?
- Then ask whether considering that fact would tend to prove or disprove the issue. If it would, it is relevant. If it would not, it is not.

RELEVANCE

1. Is the fact that an individual failed to heed a campus no-contact order relevant in a later hearing where the individual is charged by a partner (who requested the order) with a violent attack?
 - Would it be relevant in a hearing in which the individual is accused of an attack on an unrelated third person?

SANCTIONS AND REMEDIES

IDENTIFYING APPROPRIATE SANCTIONS

- Title IX regulations grant broad discretion to the University to determine the appropriate sanctions when the University's grievance process results in a finding that the Title IX policy has been violated.

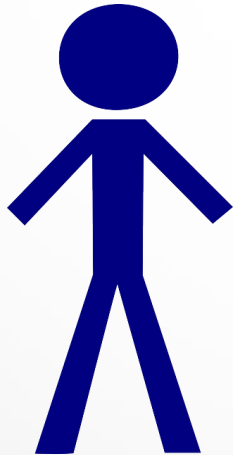
Relevant Considerations:

- Precedent in similar circumstances, if any;
- The severity of the conduct and its impact on the complainant;
- Whether the respondent can be rehabilitated;
- The Department of Education also suggests:
 - a respondent's "genuine lack of understanding" that the conduct constituting sexual harassment violated the bodily or emotional autonomy and dignity of a victim may "factor into the sanction decision."
 - An instructor's failure to realize that conduct that the employee believed was "friendly" actually "had sexual overtones that made students feel uncomfortable" may be relevant when determining sanctions.

SANCTIONING EXAMPLES

Individual

- Educational
- Student Development
- Protect involved students



Community

- Restore the community/repair the harm incurred
- Protect the community
- Protect the educational environment



SANCTIONING EXAMPLES

Individual - Examples

- Complete a workshop on [SUBJECT] to be approved by the University. At the end of the workshop, write a paper on what you learned and how to apply it to Webster.
- Reflection/research essays
- Complete training and discuss with Chief Diversity Officer and/or CHRO.
- Mutual No Contact Directives

Community - Examples

- Relocation
- Suspension/Dismissal
- Limitations on campus access

SANCTIONING EXAMPLES - *THOUGHTS*

- Be specific in sanctioning:
 - “Write a double-spaced 3-5 page paper using 12 point Times New Roman font. The paper must contain at least 5 peer reviewed sources utilizing APA format.”
 - “The paper must be submitted electronically as a Word document to the Title IX Office at [e-mail address] by [time] on [day/date].”
 - “You are not permitted to be in any residential facility including, but not limited to: East Hall, West Hall, Maria Hall, the Webster Village Apartments, the WVA Clubhouse, Glen Park Apartment, Big Bend Apartments, and/or adjacent parking areas. This does not include Marletto’s Dining area.”

DETERMINING APPROPRIATE SANCTIONS

- Beneficial questions:
 - Which portion of the policy has the student been found responsible of violating?
 - Does the student have a previous Title IX history?
 - Is there a concern the behavior will be repeated?
 - Is there a threat to the community?
- Start at one end of the spectrum and work backward.



COMPLAINANT

Questioning the Complainant:

- Recognize that it may be difficult for a complainant to talk about what happened.
- Use open-ended, non-leading, nonjudgmental questions, such as, “What happened?” or “Tell me more,” rather than “Why were you wearing such skimpy clothing?” “Do you think that was a smart decision?” or “Why didn’t you scream, hit him, or try to leave?” (which is both compound and blaming).
- Do not ask about prior or current sexual conduct or activities of the complainant (except in very limited circumstances, i.e., with the respondent, to the extent relevant and/or where necessary to establish communication patterns for purposes of determining consent).
- Use trauma-informed interviewing techniques.

RESPONDENT

Questioning the Respondent:

- Assure respondents that they will have an opportunity to talk about what happened.
- Be aware that the allegations, whether accurate or not, may lead to anxiety and to defensiveness.
- Use open-ended, nonjudgmental questions, such as “Please tell me about that night?”, “Tell me more,” or “What happened next?” rather than “Why would you do something like that?”
- Give the respondents the opportunity to **fully understand, comment on, and respond** to the accusations.
- If the respondent denies the allegations, ask why the individual thinks the allegations were made.

CREDIBILITY

CREDIBILITY

- Hearings are, by nature, uncomfortable for everyone involved, including hearing officers.
- Be sensitive to the discomfort of parties and witnesses.



CREDIBILITY

“People are people” BUT...

...there is no one physical response to that automatically indicates whether or not a person is lying, exaggerating, telling the truth, etc.

Look at the total package:
WHAT, HOW, WHY



READING WITNESSES

Tips for hearing officers:

- Establish a baseline – make the parties and witnesses comfortable
- Solid eye contact (no glaring, staring)
- Listen, try not to write
- Really listen, don't think ahead
- Nod affirmatively to keep them talking
- Don't shake your head “no”
- Don't look shocked, stunned or accusingly – they'll shut down
- Don't fidget with hands and feet

Credibility

- To assess credibility is to assess the extent to which you can rely on a witness's testimony to be accurate and helpful in your understanding of the case.

Quality, or credibility, of testimony is more important than the quantity of testimony.

Credibility Considerations

- Witness's relationship to other parties (motives, attitudes)
- Errors in memory do not necessarily destroy credibility; however, a memory lapse may result in giving less weight to testimony
- Don't focus on irrelevant inaccuracies
- Don't get drawn into irrelevant actions of parties involved *unless they bear directly on determining if the University's Title IX Policy was violated.*

READING WITNESSES

- Demeanor: diversity in cultural expectations, nervousness, etc. Rarely enough to discount testimony. Ask more questions.
- Logic/Consistency: Does this testimony make sense?
- Corroborating Evidence: Does the testimony or other documentation “back up” what the witness is saying?
- Circumstantial Evidence: Indirect but may be powerful.
- Expertise: What knowledge base does this person have?
 - Example: Public Safety officer says the Respondent seemed intoxicated, but witness who also admits being drunk at the time says the Respondent seemed sober.

DETERMINATIONS

- Once the facts have been identified using the “preponderance of the evidence” standard, the hearing officer will need to determine if the behavior/facts violated the University’s Title IX Policy
- This will also need to be based on the “preponderance of the evidence” standard.

THANK YOU!

Kimberley Pert, PHR, SHRM-CP

Title IX Coordinator/Interim Head of the Title IX Office

200 Hazel Ave.

[p^uertk61@webster.edu](mailto:pertk61@webster.edu)

314-246-7780

Lori J. Watson, PHR

Deputy Title IX Coordinator

200 Hazel Ave.

[l^oriwatson@webster.edu](mailto:loriwatson@webster.edu)

314-246-7951