

# **Two-Day Title IX Conference Day 2: Mock Hearing**

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June 18, 2025



## Reminders for Today

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- We have built in breaks, but we know life happens. Step away when you need to.
- Today we are "all in." We're going to do a mock hearing, and we need full concentration and participation.
- Your goal for today is to participate and to try something new. Practice, practice, practice!

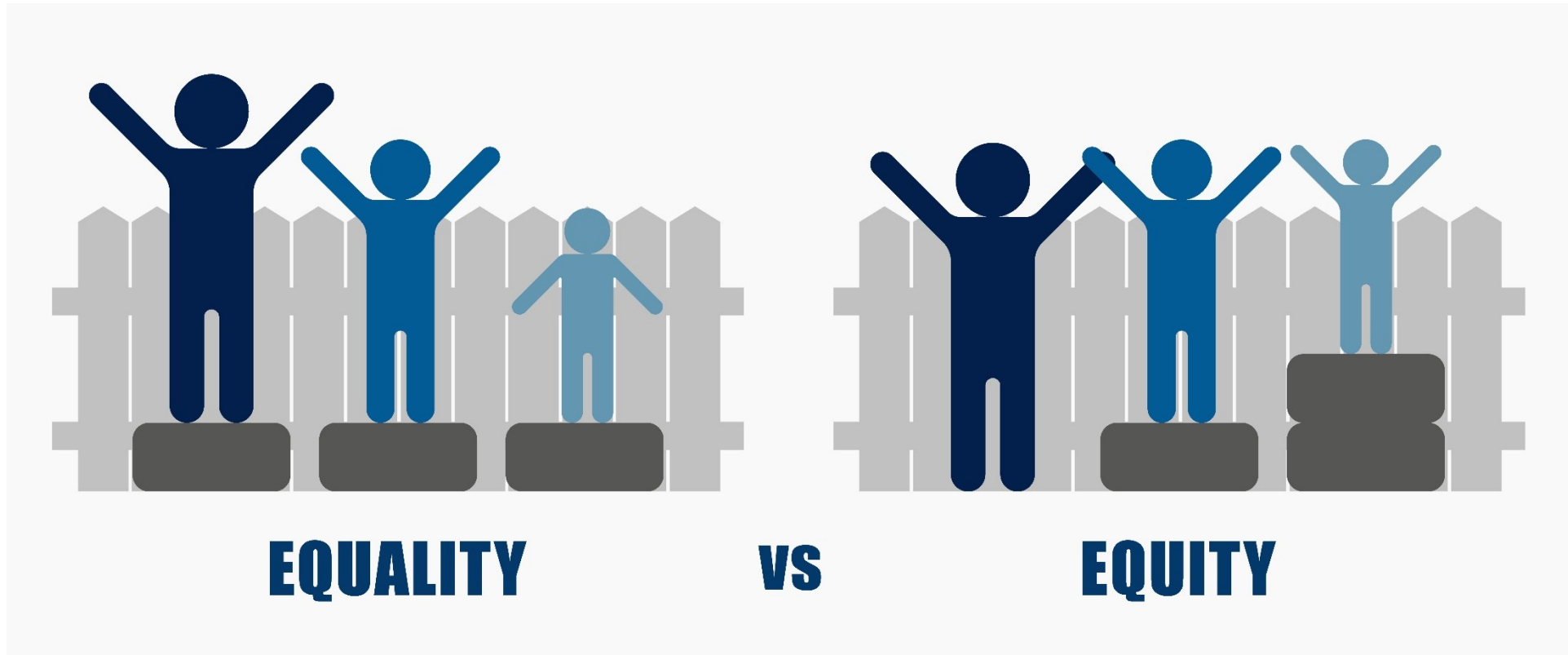
## Agenda for Today

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- Title IX Overview and Annual Clery Training
- 10:30 – Break
- Review of Final Investigation Report; Plan Questions; Large Group Discussion
- 12:00 – Lunch
- Mock Hearing
- 2:30 – Break
- Deliberations
- Writing the Decision

# **Title IX Overview and Annual Clery Training**

# Title IX is an Equity Statute



# Overview of Themes

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- Access
- Protection
- Transparency
- Evidence
- Improvement
- No Bias

# Themes - Access

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- What we do for one, we do for the other
- Title IX is meant to ensure ACCESS to your programs and activities, regardless of sex
- "What we do for one, we do for the other"
  - Or at least consider whether it is appropriate under the circumstances
- Why are you treating someone differently?
  - Can you put your rationale in writing
  - If you can't - reconsider
- Policy considerations related to ACCESS
  - Supportive Measures

# Themes – Duty to Protect

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- All members of your campus community
- Institutions have an obligation to protect their campus
- “They are all our students, Melissa.”
- Policy considerations related to Protection:
  - Supportive measures
  - Training & Education on Campus
- What about interim emergency measures?
  - Any action by a recipient that results in changes or removal of access to education for respondents will require an appeal process for respondents to respond



# Themes - Transparency

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- Help Others Trust the Process
  - **TRANSPARENCY** is key to trusting the process.
  - Know your grievance process
  - Help others understand your process
  - Policy considerations related to Transparency:
    - Access to training materials
    - Providing an evidence packet in a case

If participants don't know what is happening, they will assume nothing is happening.

# Themes – Evidence Based Decisions

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- Outcomes must be based on EVIDENCE.
- “Don’t weigh your gut.”
- Make reasonable inferences and credibility determinations, but be mindful of implicit bias, stereotypes, and using our own behavior as a yardstick.
- Policy considerations related to Evidence:
  - Providing an evidence packet
  - Allowing the parties to engage with the evidence and respond to let you know what’s missing, what’s wrong, etc.

# Themes – Always Room for Improvement

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- Always be working to IMPROVE:
  - Yourself as a neutral
  - Your campus as a healthy and fair place to be
  - Your policy to provide a better process informed by case law, regulations, guidance, and experience
  - Your resources for all involved
- Policy considerations related to Improvement:
  - Training & Education
  - Recognizing the processes that do and do not work for your community

# Themes – Avoiding Conflicts of Interest and Bias

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- Always be working to avoid actual or perceived:
  - Conflict of interest
  - Bias
- Institutional Duties and Interests vs. Personal interests
  - Take periodic self-inventories
  - Be mindful of your activities, involvements, social media, etc.
  - Check your biases constantly, and talk with others to gain perspective and ensure you remain neutral
- Policy considerations related to No Bias
  - Training & Education
  - Providing evidence packets

# Data and Statistics - Disclaimer

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- More Disclaimers
  - These should not influence your decision in any particular Title IX case
  - We didn't do the research ourselves and can't vouch for it
  - Some of the studies use the terms Offender, Victim, and Rape. Please use policy definitions (complainant, respondent) when you handle Title IX cases.
  - Okay but **really**, statistics SHOULD NOT influence your decision in any particular Title IX case

# Sexual Assault

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- “An offense classified as a forcible or nonforcible sex offense under the Uniform Crime Reporting System of the Federal Bureau of Investigation”
  - Rape
  - Sodomy
  - Sexual Assault with an Object
  - Fondling
  - Incest
  - Statutory Rape

# Sexual Assault: Rape - NIBRS

- The carnal knowledge of a person, without the consent of the victim, including instances, where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- Black's Law Dictionary, 6th ed., defines carnal knowledge as "the act of a man having sexual bodily connections with a woman; sexual intercourse." There is carnal knowledge if there is the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis). However, for UC purposes, this offense includes the rape of both males and females if at least one of the offenders is the opposite sex of the victim.

# Sexual Assault: Sodomy - NIBRS

- Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.



# Sexual Assault: Sexual Assault With An Object - NIBRS

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- To use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

## **Sexual Assault – Fondling: NIBRS**

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- The touching of the private body parts of another person for the purpose of sexual gratification, without consent of the victim, including instances where the victim is unable to give consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

## Sexual Assault – Incest: NIBRS

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- Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

Note: Under Ohio law, marriage is prohibited between anyone closer in kin than second cousins. Also note that the criminal definition of incest under Ohio law is more narrow than this definition.

# Sexual Assault – Statutory Rape: NIBRS

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- Nonforcible sexual intercourse with a person who is under the statutory age of consent.

In Ohio:

- Under 13 – can't consent
- 13 to under 16 – can consent to people who are under 18
- 16 and up – can consent

# Sexual Assault Data 1 of 3

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- Nearly 1 in 2 women and about 1 in 4 men have experienced sexual violence involving physical contact during their lifetimes.
- 1 in 4 women and about 1 in 26 men will experience completed or attempted rape during their lifetimes.

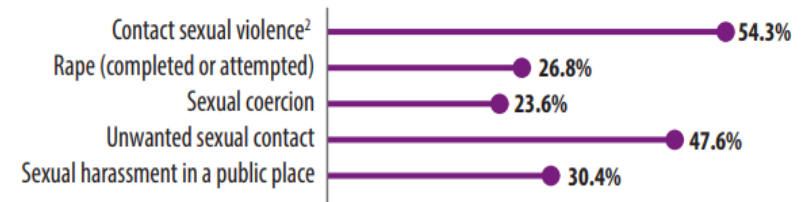
Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)  
Located at: <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualViolence.pdf>

# Sexual Assault Data 2 of 3

- Types of Sexual Contact Reported by U.S. Women:
- 54.3% reported sexual violence;
- 26.8% experienced completed or attempted rape;
- 23.6% experienced sexual coercion;
- 47.6% reported experiencing some form of unwanted sexual contact other than those specifically identified elsewhere.
- Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)
- Located at: [Link to survey; CDC website](#)

**Figure 1**

**Lifetime Reports of Sexual Violence — U.S. Women, National Intimate Partner and Sexual Violence Survey, 2016/2017 Annualized Estimates<sup>1</sup>**



<sup>1</sup> All percentages are weighted to the U.S. adult population.

<sup>2</sup> Contact sexual violence includes rape, sexual coercion, and/or unwanted sexual contact.

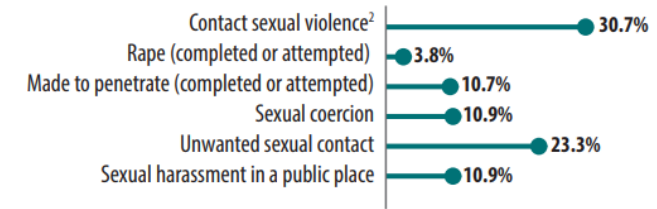
# Sexual Assault Data 3 of 3

- Types of Sexual contact reported by U.S. Men:
- 30.7% reported some form of sexual violence
- 3.8% experiencing completed or attempted rape,
- 10.7% made to penetrate, 10.9% experiencing sexual coercion,
- 23.3% experiencing some other form of unwanted sexual contact.

- Statistics from: Basile, K.C., Smith, S.G., Kresnow, M., Khatiwada S., & Leemis, R.W. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Sexual Violence*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention. (last visited January 2023)
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**Figure 2**

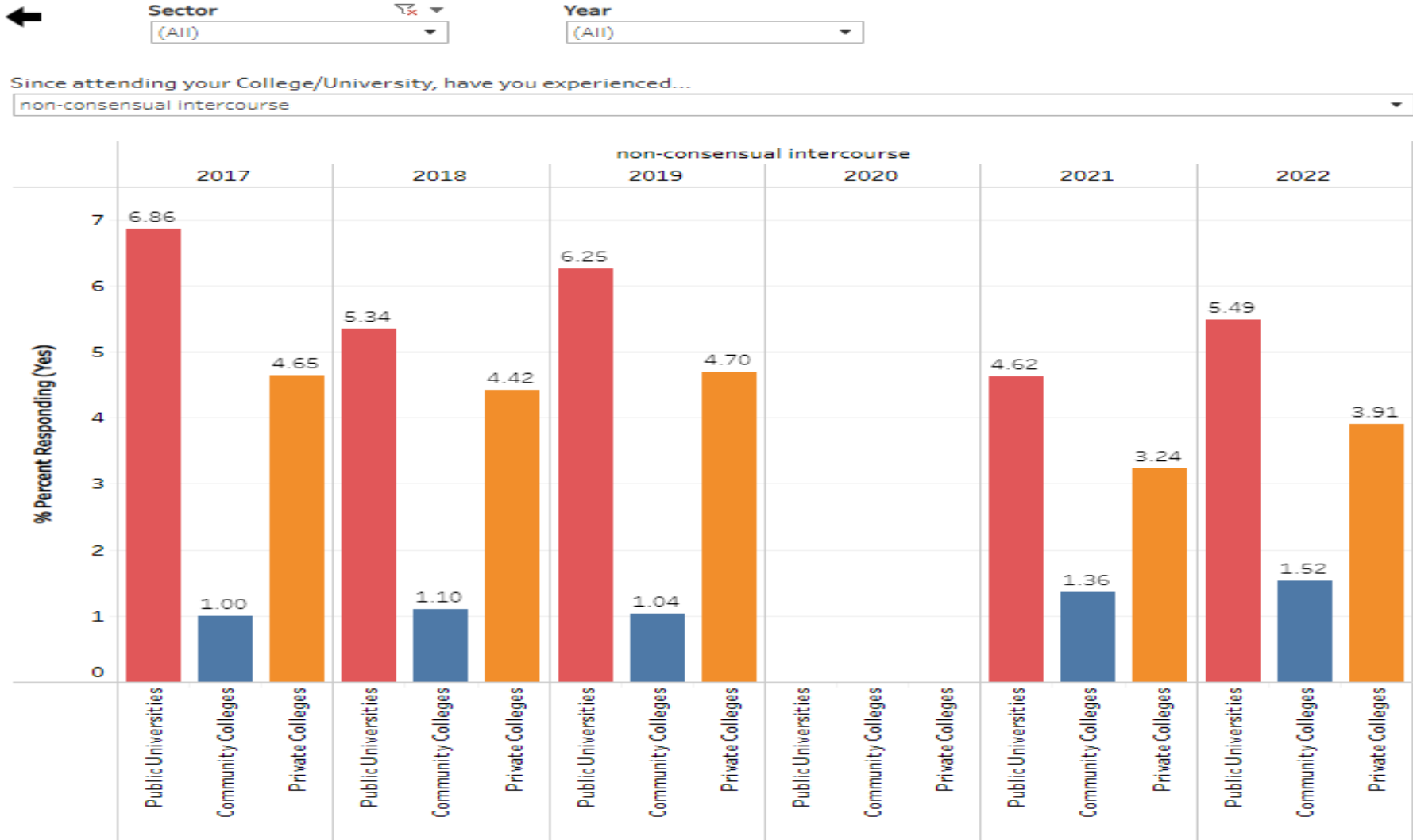
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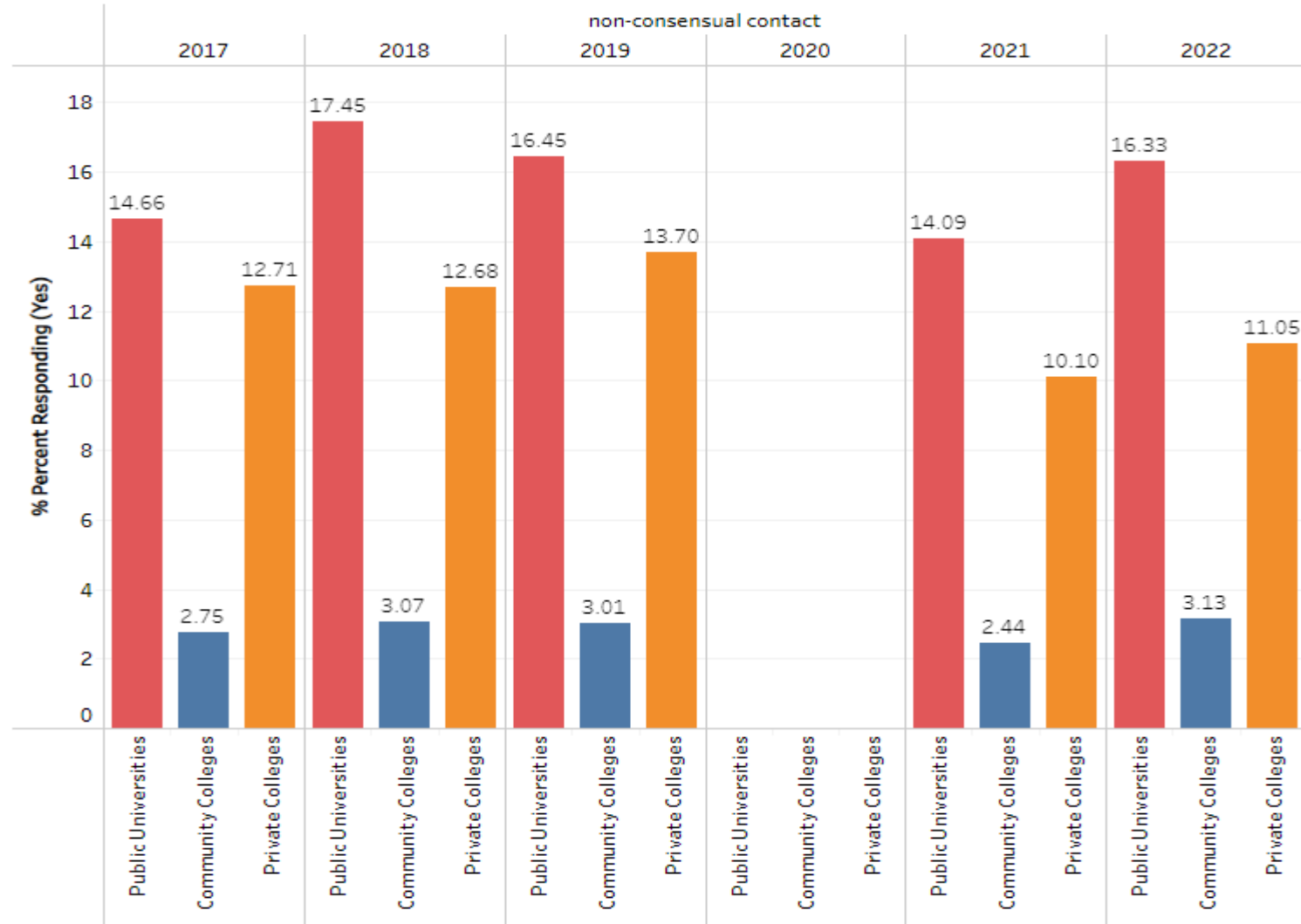
<sup>2</sup> Contact sexual violence includes rape, being made to penetrate, sexual coercion, and/or unwanted sexual contact.

# ODHE – Non-Consensual Intercourse





# ODHE – Non-Consensual Sexual Contact

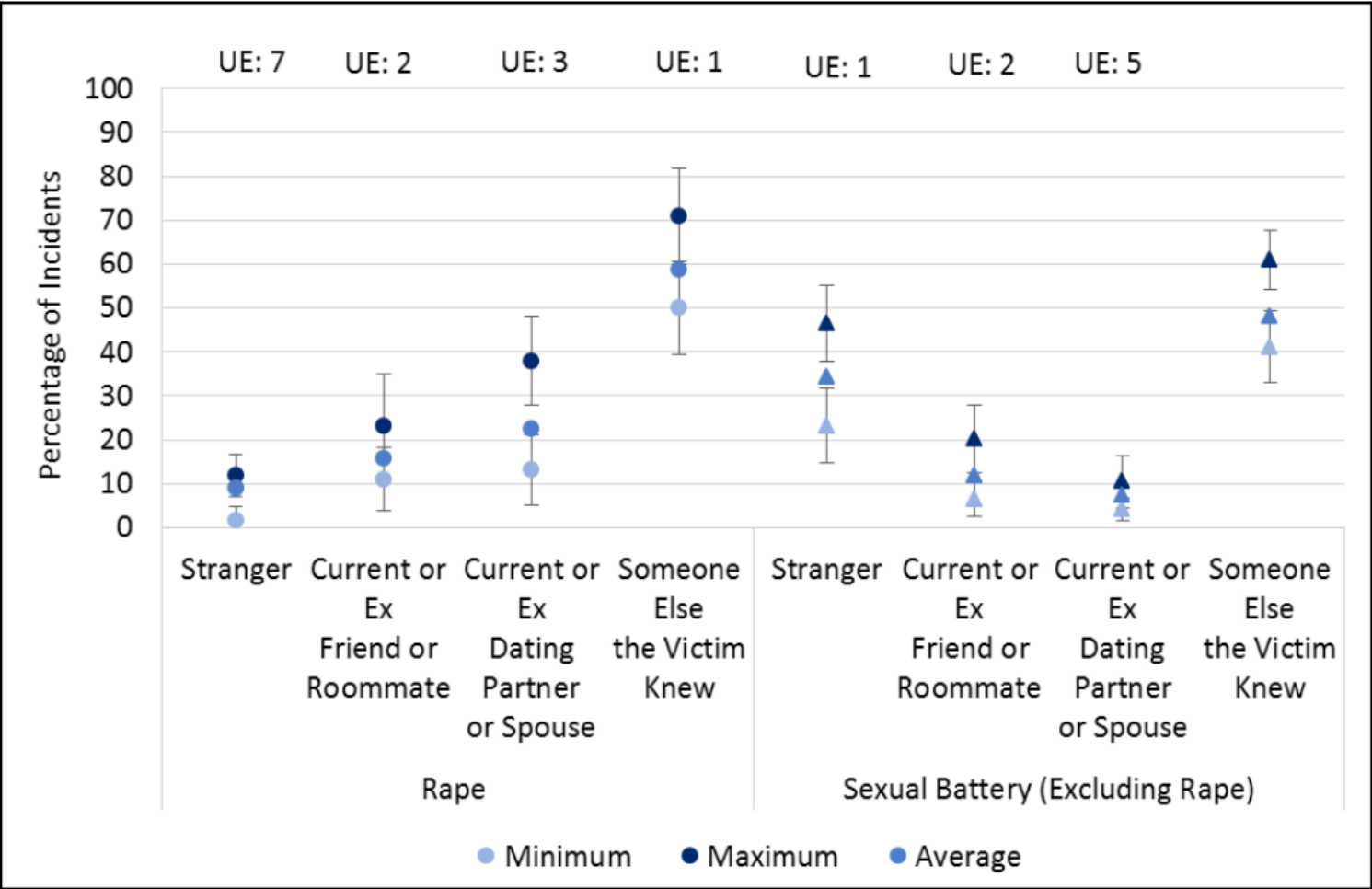


# Sexual Assault Data: Prevalence Data in Higher Ed

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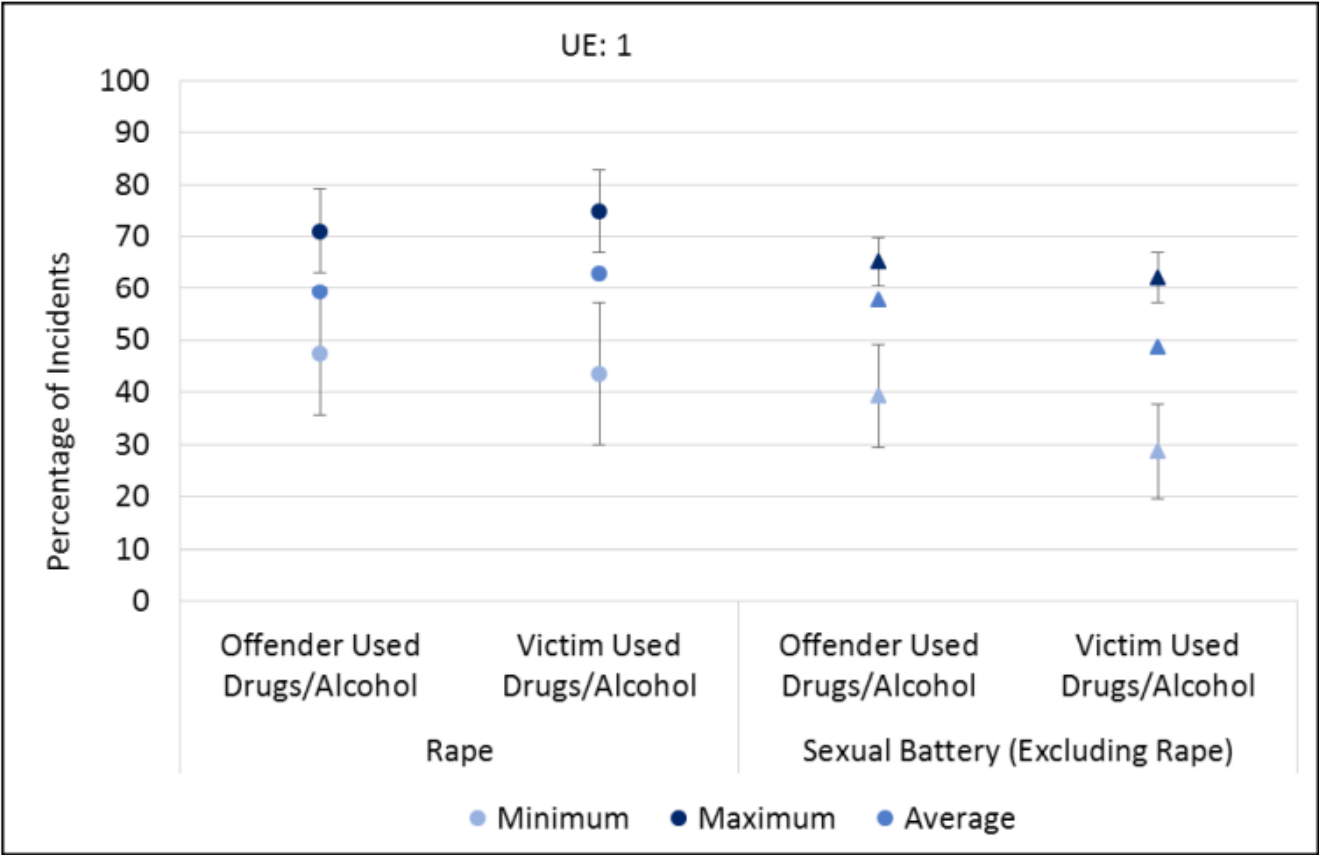
- More than 50 percent of college sexual assaults occur in August, September, October, or November, and students are at an increased risk during the first few months of their first and second semesters in college.
- For the 2014-2015 academic year, a large portion of incidents reported by females occurred in September or October, particularly for first year students.
- Statistic one: “Rape, Abuse & Incest National Network (RAINN), Campus Sexual Violence: Statistics.” RAINN Sourced from: “Campus Sexual Assault Study, 2007; Matthew Kimble, Andrada Neacsiu, et. Al, Risk of Unwanted Sex for College Women: Evidence for a Red Zone, Journal of American College Health (2008).”
- Statistic two: Campus Climate Survey Validation Study (CCSVS), 2015

# Sexual Assault Data: Identity of Perpetrator



# Sexual Assault Data: Alcohol/Drug Use

**Figure 28.** Minimum, maximum, and overall average estimates of the percentage of rape and sexual battery incidents experienced by undergraduate females that were believed to involve offender and victim alcohol/drug use, 2014–2015 academic year



Source: Campus Climate Survey Validation Final Technical Report (2016)

# Sexual Assault Data: Alcohol/Drug Use

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- “Survivors impaired by alcohol are more likely to disclose to informal, but not formal support sources than are non-impaired victims.”
- Lorenz, Katherine, and Sarah E Ullman. “Exploring Correlates of Alcohol-Specific Social Reactions in Alcohol-Involved Sexual Assaults.” *Journal of aggression, maltreatment & trauma* vol. 25,10 (2016): 1058-1078. doi:10.1080/10926771.2016.1219801.

# Data and Statistics: Reporting Data

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- About **65 percent** of surveyed rape victims reported the incident to a friend, a family member, or roommate but only **ten percent** reported to police or campus officials.
- U.S. Dep't of Justice, Office of Justice Programs, Office for Victims of Crime, *2017 National Crime Victims' Rights Week Resource Guide: Crime and Victimization Fact Sheets* (2017).

# Data and Statistics: Impact Data

(1 of 2)

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- Approximately **70 percent** of rape or sexual assault victims experience moderate to severe distress, a larger percentage than for any other violent crime.
- U.S. Dep't of Justice, Bureau of Justice Statistics, *Special Report: Socio-emotional impact of violent crime (2014)*.

# Data and Statistics: Impact Data

## (2 of 2)

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- **81% percent** of women and **35% percent** of men report significant short- or long-term impacts of sexual assault, such as post-traumatic stress disorder (PTSD).
- Centers for Disease Control and Prevention, National Center for Injury Prevention and Control, The National Intimate Partner and Sexual Violence Survey (NISVS); 2010 Summary Report (Nov. 2011).



## Sexual Assault: Common Concerns

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- Be cautious of questions that appear to blame the party for what happened, or they will shut down and stop engaging.
- Better options:
  - Explain why you need information on alcohol/drug use, what the party was wearing, etc. before you ask the questions.
  - Explain the concept of consent to the parties so that they can understand why you need detailed information on the sexual encounter.
  - Check your tone constantly so as to encourage continued sharing of information.

# Dating Violence

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- “**Dating Violence**” means **violence** committed **on the basis of sex** by a person who **is or has been in a romantic or intimate relationship with the complainant**. The existence of such a romantic or intimate relationship is determined by the length of the relationship, the type of relationship, and the frequency of interactions between the individuals involved in the relationship.

# Domestic Violence

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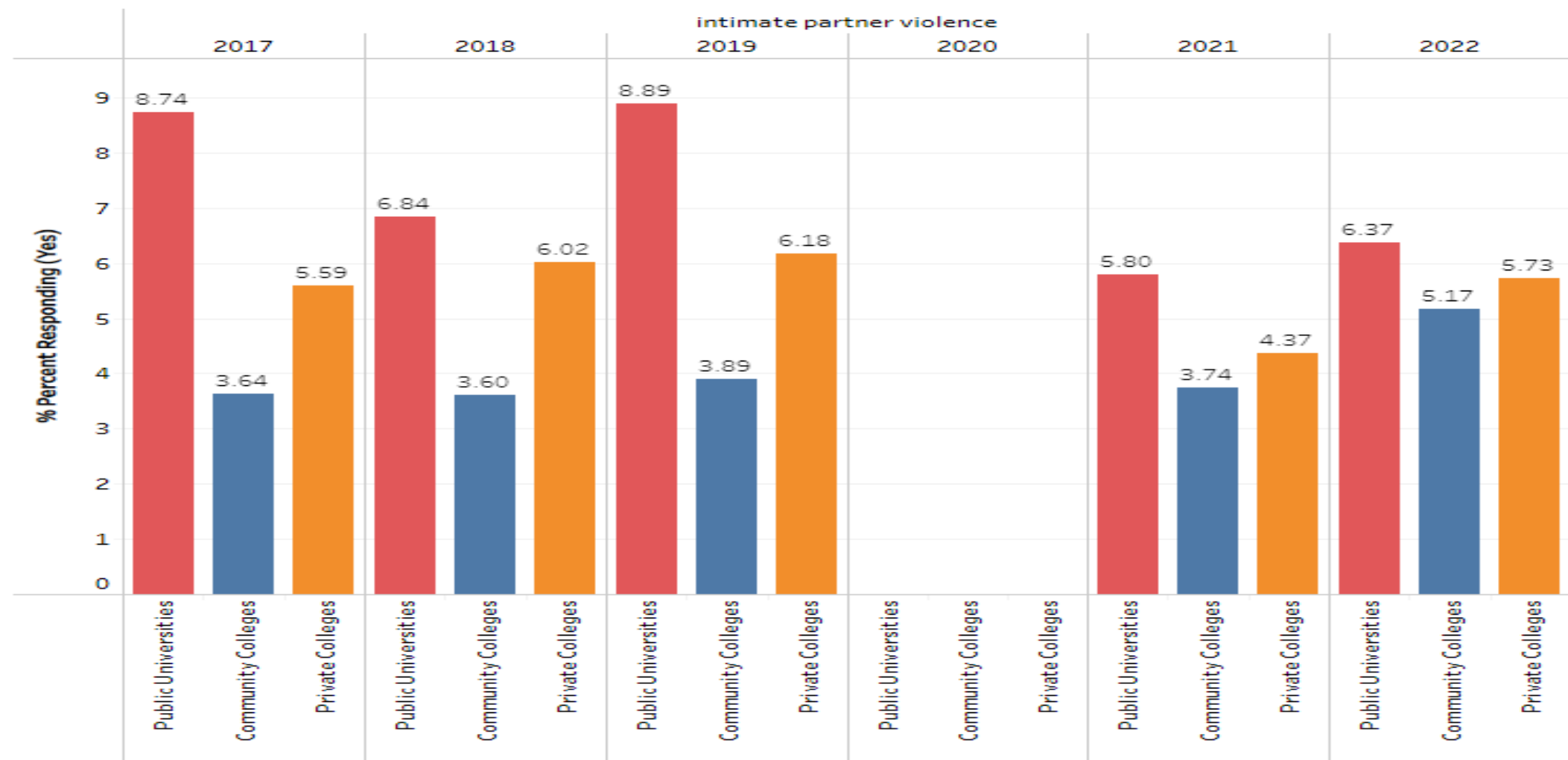
- “**Domestic violence**” is **violence** committed on the basis of sex by:
  - A **current or former spouse** of the complainant;
  - A person with whom the complainant **shares a child in common**;
  - A person who is **cohabitating with, or has cohabitated with**, the complainant as a spouse or intimate partner;
  - A person **similarly situated to a spouse** of the victim under the domestic/family violence laws of the jurisdiction;
  - Any other person against an adult or youth victim who is protected from that person’s acts under the domestic/family violence laws of the jurisdiction

# IPV vs. Healthy Relationships

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- Counseling individuals on healthy and unhealthy relationships will teach them about warning signs and how to handle problematic behavior.
- The line between healthy and unhealthy is not typically where your policy draws the line for disciplinary purposes.
  - How do you partner with your counseling center and local domestic violence shelter to ensure consistent messaging with regard to the policy, as opposed to healthy relationship dynamics?

# ODHE Data - IPV



# Common Concerns in IPV Situations

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- Supportive measures are important to ensure the parties can be separate and feel safe
- Retaliation is often a critical concern – parties may still have a relationship
- Consider whether parties need contingency plans as part of their supportive measures if safety concerns arise
- Balancing third-party reports of violence and safety concerns with complainant's refusal to participate in the process
- No contact order violations as continued evidence of underlying policy violation allegation
- It is not uncommon for both parties to be complainants and respondents. Watch for this scenario and ensure you provide appropriate intake for both.

# IPV: Questions

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- What is the relationship between the parties? Do they agree?
- What is the act of violence described?
- Under what circumstances did the act of violence occur?
- If the situation involved mutual combat:
  - Was one person the initiator and the other acting in self defense?
  - Should an investigation be opened against the complainant as well, if there was violence alleged to have been completed by the complainant?

# Stalking

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- “Stalking” is engaging in a course of conduct directed at a specific person on the basis of sex that would cause a reasonable person with similar characteristics under similar circumstances to:
  - Fear for the person’s safety or the safety of others; or
  - Suffer substantial emotional distress.
- To qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)



# Stalking: Course of Conduct

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- Under VAWA regulations: means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

# Stalking: Reasonable Person

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- Under VAWA regulations, for purposes of the stalking definition: means a reasonable person under similar circumstances and with similar identities to the victim.

# Stalking: Substantial Emotional Distress

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- Under VAWA regulations means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

# Stalking Data 1 of 2

- 31.2% of women and 16.1% of men in the U.S. reported stalking victimization at some point in their lifetime.
- 43.4% of female victims and 32.4% of male victims of stalking are stalked by a **current or former intimate partner**.
- Over **85%** of stalking victims are stalked **by someone they know**.
- **First and second statistics:** Smith, S.G., Basile, K.C., & Kresnow, M. (2022). *The National Intimate Partner and Sexual Violence Survey: 2016/2017 Report on Stalking — Updated Release*. Atlanta, GA: National Center for Injury Prevention and Control, Centers for Disease Control and Prevention.
- **Third statistic:** National Intimate Partner and Sexual Violence Survey: 2010-2012 State Report (CDC)

# Stalking Data 2 of 2

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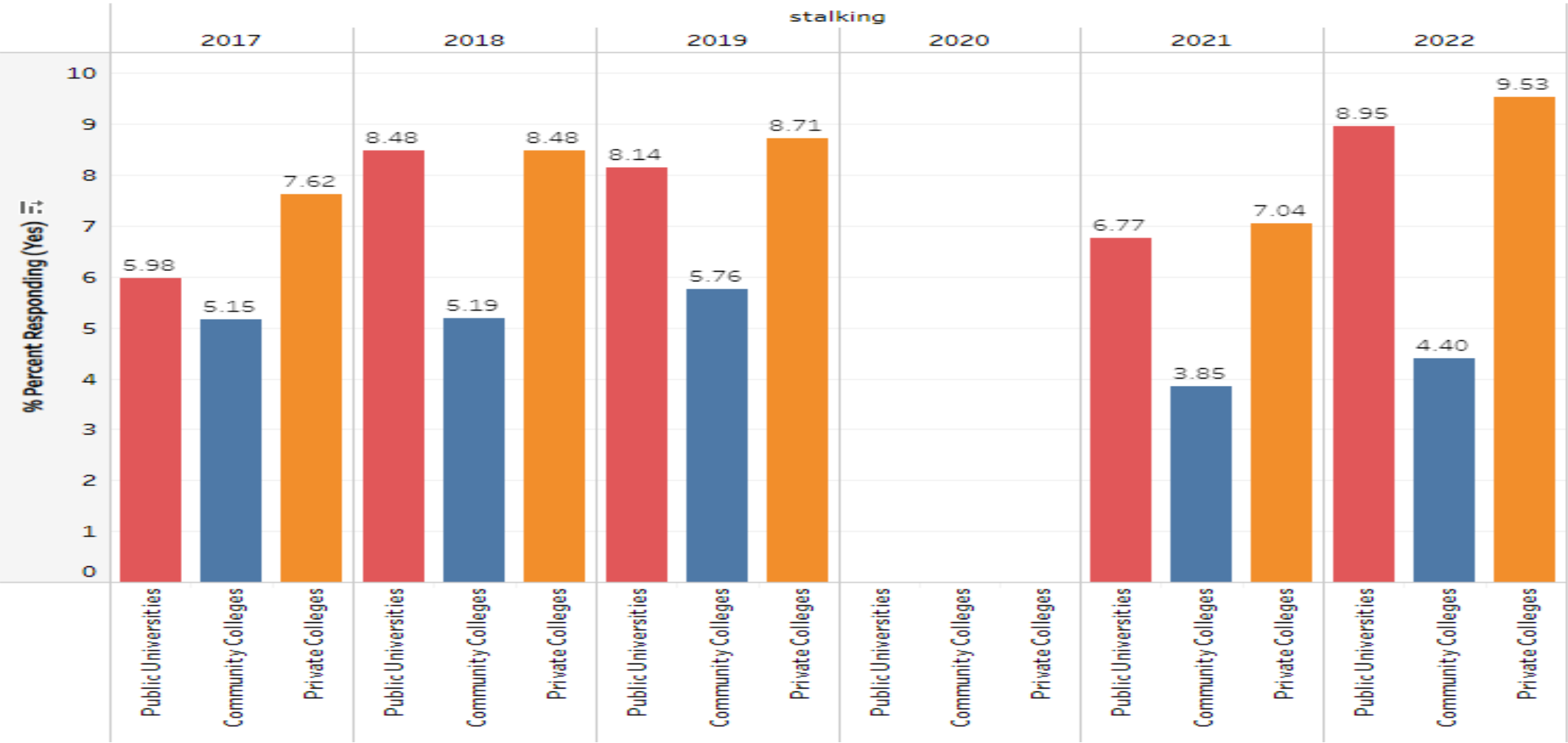
- **11%** of stalking victims have been stalked for 5 years or more.
- **46%** of **stalking** victims experience at least one unwanted contact per week.

[Matthew J. Breiding et al., "Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011")]

Centers for Disease Control and Prevention Morbidity and Mortality Weekly Report, Vol. 63, No. 8 (2014): 7]

[Katrina Baum et al., (2009). "Stalking Victimization in the United States," (Washington, DC:BJA, 2009).]

# ODHE Data - Stalking



# Stalking: Common Concerns

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- Clearly defined no-contact orders can be helpful to keep the parties apart and help calm the situation.
- Complainants are often concerned that the respondent may not respect no-contact orders, especially if they have already asked the respondent to stand down. Think of ways to help address this concern through supportive measures.
- Stalking after a no contact order may constitute additional instances of the underlying alleged policy violation, which may mean you need to run it through your Title IX process.

# Stalking: Considerations

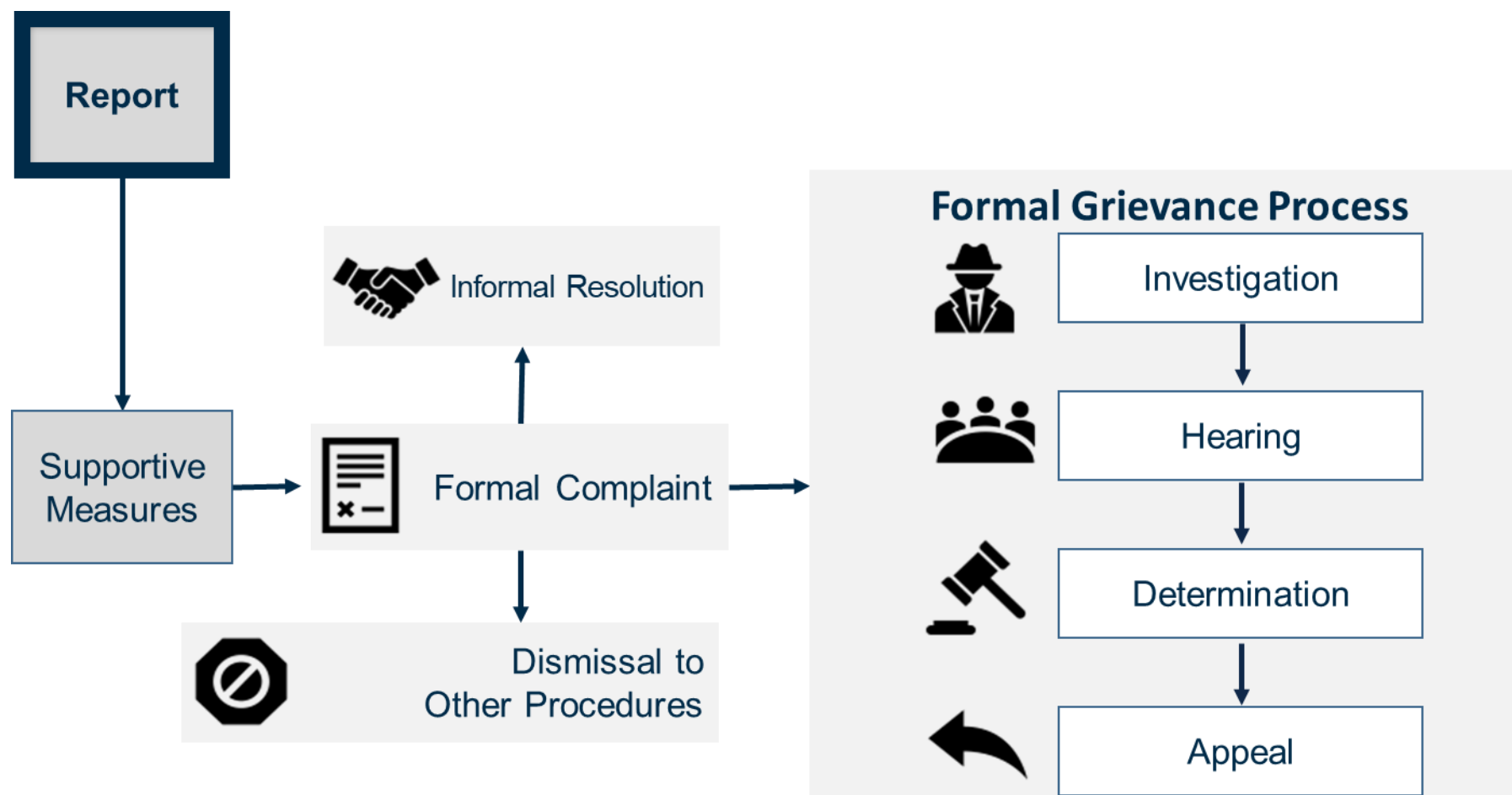
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- Outline a timeline of the “course of conduct” aspect of the allegations
- Cases are often documentation-heavy
- May have multiple contacts and multiple witnesses that must be considered
- Have you asked questions of parties and witnesses regarding the potential impact of the conduct on the complainant?

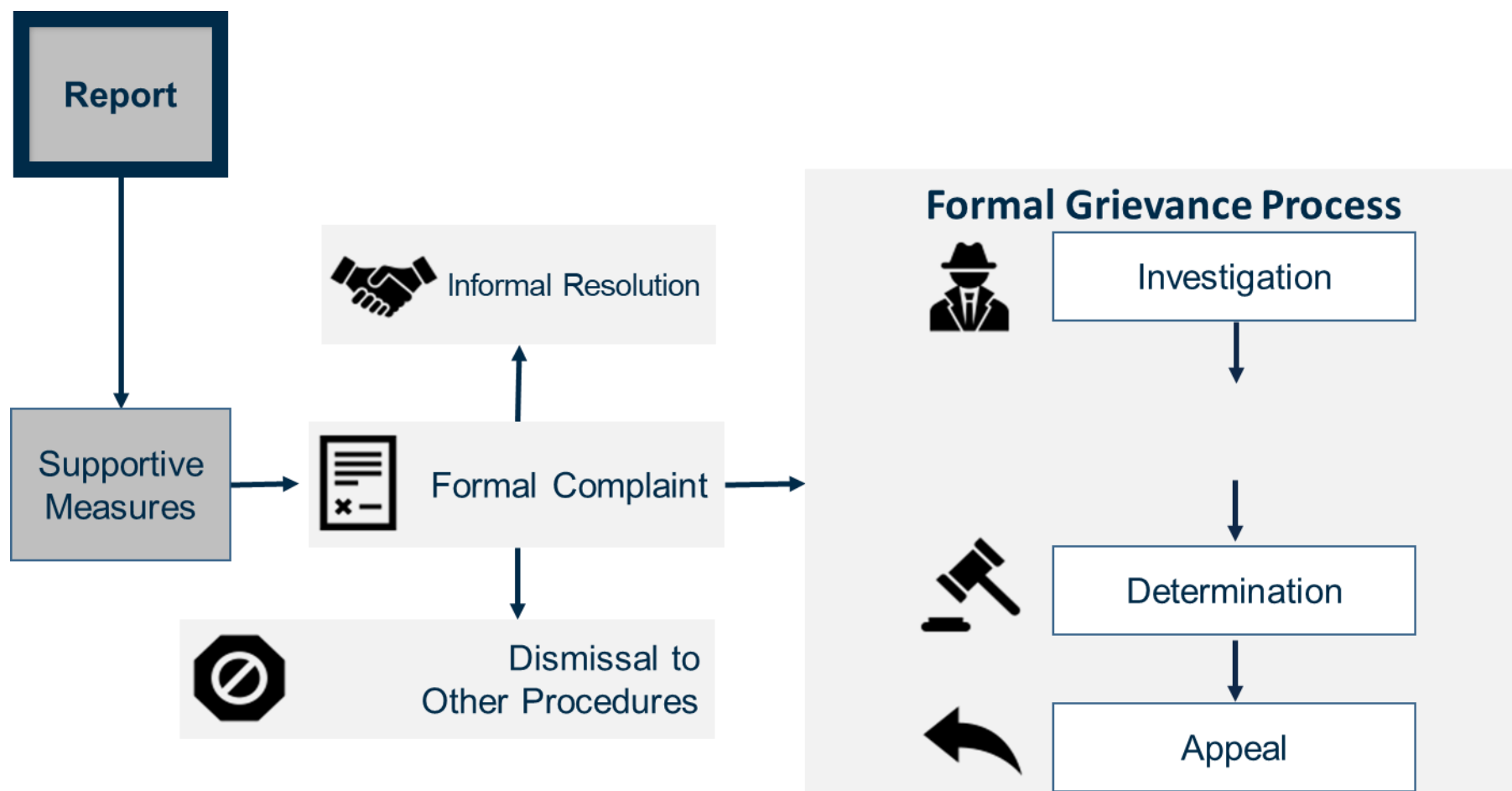


# Planning for Our Hearing

# Overview of the Process – Title IX



# Overview of the Process – NOT Title IX



# A Report versus a Formal Complaint

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- Report – Any information received regarding potential policy violation
  - Result of report: Coordinator sends an email to the potential reporting party, inviting further discussion
  - Supportive measures are offered
- Formal complaint – A written document that:
  - Is filed by the reporting party or signed by the Title IX Coordinator
  - Alleges sexual harassment against a responding party
  - Requests that University investigate the allegation of sexual harassment

## Role: Coordinator

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- Conducts intake regarding new reports
- May determine it is necessary to proceed with a process even if complainant does not wish to sign the formal complaint
- Ensures both parties have access to supportive measures
- Monitors process to regarding policy compliance
- Assists with questions and concerns about potential bias or conflict of interest
- Maintains a neutral status throughout the procedures

## Role: Investigator

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- Offers the opportunity to parties and witnesses to sit for an interview, submit written statements
- Allows parties to submit witness lists and questions for particular parties or witnesses
- Collects evidence from parties, witnesses, and other sources (e.g. security footage, police records)
- Prepares evidence file for review and response by the parties
- Reviews the responses from the parties and conducts follow-up investigation as necessary
- Prepares final investigation report
- Ensures that if new allegations arise, the parties are notified as the scope of the investigation expands
- Maintains a neutral status throughout the process
- [Depending on your policy, may make a decision if the case is NOT Title IX]

## Role: Decision-Maker

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- Review the evidence file, final investigation report, and responses of the parties
- Consider what is missing, what is unclear, and what elements are disputed
- Ask relevant questions at hearing, adjusting as other questions are asked
- Maintain neutrality (tone, body language, and word choice)

## Decision-Maker: Your Goal

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- Have enough information on every element of every charge so that you can render a decision by a preponderance of the evidence.
- Have enough information to make decisions regarding the credibility of the parties and witnesses.
- Make relevancy determinations after every question asked by the advisors.
- Maintain decorum at all times, by all participants.



## Role: Advisor

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- Reviews the evidence file, final investigation report, and responses of the parties.
- Assists their party with preparation of relevant questions for hearing.
  - Goals is to assist the Decision-Makers with understanding the case from their party's perspective.
- Asks relevant questions at hearing, adjusting as other questions are asked.
- Is not neutral, as the role is inherently biased towards their party, but still maintains decorum standards at all times.

## Role: Appeals Officer

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- Reviews the evidence file, final investigation report, responses of the parties, and evidence at hearing
- Reviews appeal documents
- Uses the bases for appeal in the policy to determine whether the standard has been met
- Prepares a written decision explaining the outcome
- Maintains neutrality and is careful not to predetermine the case

## Role: Informal Resolution Facilitator

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- May or may not review the file (it may not be available yet)
- Usually meets separately with each party and their advisor
- Helps the parties reach a mutually acceptable agreed outcome that is also acceptable to the University for enforcement
  - If no agreement is reached, that's OK too. The investigation would continue at that point.
- Helps to document agreement and obtain signatures of the parties

- Parties and Decision-Maker will have received a hearing case file including:
  - An investigation report (see the one for our mock hearing)
  - Relevant evidence gathered during the investigation (interview summaries, text messages, photos, etc.) Any responses of the parties to the evidence

# Tips for Case File Review

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- Advisors and Hearing Officer:
  - Make a list of questions you want to ask each witness
  - Note when the questions refer to particular documents
  - Plan for the documents to be pulled up on the screen during the hearing – write down page numbers!
- Hearing Officer:
  - Identify undisputed facts (and write down citations)
  - Identify disputed facts (and write down citations)
    - Questions should help resolve or clarify disputed facts
  - Ensure that there is sufficient information on all elements of the charged policy violations (e.g. impact?)

# Good Practices for Hearing

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- Pre-hearing conferences
  - Identify witnesses to be called
  - Determine whether there are any evidentiary concerns
- Tech-check upon signing onto hearing
- Script for hearing
  - Rights and Responsibilities
  - Expectations
  - Schedule and Logistics
  - Relevancy Reminder

## A Note on Relevancy Determinations

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- After every single question asked by an advisor, the Decision-Maker must make a relevancy determination before a party or witness (including the Investigator) can answer the question
- Generally, questions are relevant if they help the Decision-Maker understand if a violation was more or less likely to have occurred

# Impermissible Questions

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Questions that tend to come up that are NOT relevant by definition:

- Prior sexual history (sexual predisposition or prior sexual behavior) of the Complainant is NOT relevant unless:
  1. It is offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant; or
  2. It is offered to provide evidence of prior sexual history between the Complainant & Respondent to prove consent.
- Privileged information (attorney-client, counselor or spiritual leader communications)
- Medical records of a party without the party's written waiver



# What Don't You Know?

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- Decision-Maker: If you need to know it to make a determination, you have the obligation to ask the question.
- Advisors: If you don't know the answer to the question before you ask it, it may harm your party. Weigh the benefits of asking carefully before proceeding.

# What Do You Know?

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- Decision-Maker: It can be helpful to ask questions when you think you already know the answer, to ensure that you are able to sequence events correctly and that you understand nuances in the testimony.
- Advisors: If the testimony is going to help tell your party's story, it can be helpful to bring it to the forefront of the Decision-Maker's mind.

# Disputed Facts?

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- Decision-Maker: Question on disputed facts so that you can weigh credibility, make a determination, and explain your rationale.
  - So what are the disputed facts between the parties? (let's limit this to just the investigation report – I know some actors have more details)
- Advisors: Help the Decision-Maker understand your party's perspective by:
  - Highlighting important evidence to help your party prove that the elements are met/not met;
  - Highlighting discrepancies in the evidence that disprove the other party's story;
  - Highlighting credibility issues of the other party and witnesses where they are testifying against your party.

# Make Your Plans

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- Decision-Maker:
  - What themes do you wish to draw out?
  - What disputed points do you need information on?
  - Who will cover which topics?
  - Which questions will be asked?
- Advisors:
  - Use this discussion to help frame your questions. What key points do you think need to be addressed with each witness to highlight your party's story?
  - What information is most critical of your party's story, and what can help highlight the weaknesses in that information as compared to the strengths in your information?

# Pick a Goal

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- Consider choosing a goal for yourself to try to reach through questioning:
  - Advisor: “I will question Nadine about her state of intoxication immediately prior to the encounter under the stairs.”
  - Hearing Officer: “In questioning Alan, I will try to learn more about what signs of intoxication he witnessed on the night of September 16th.”
  - Etc.

# Remember: Credibility Factors

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- Credibility is determined based on a “totality of the circumstances.” Factors to consider:
  - Witness statements
  - Detail and **consistency** of accounts
  - **Corroborating** evidence or the lack thereof, if it should logically exist
  - Information about how the reporting person acted following the incident, both immediately and over time
  - Information about whether the complainant told others about the incident soon after it occurred
  - Other contemporaneous evidence of accounts
  - Credible reports of similar incidents by the respondent (careful here!)
  - Whether the reporting person has been shown to make false reports (again, careful here!)
  - Is it **plausible**?

# Mock Hearing

# Deliberations



# Deliberating Reminders (1 of 3)

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- Individual cases are not about statistics
- Decision in every case must be based on preponderance of evidence or clear and convincing evidence presented
- Cannot fill in evidentiary gaps with statistics, personal beliefs or information about trauma
- Process must be fair and impartial to each party
- Institution may proceed without active involvement of one or both parties; base conclusions on impartial view of evidence presented

## Deliberating Reminders (2 of 3)

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- **Withhold pre-judgment:** The parties may not act as you expect them to
- Be aware of your own biases as well as those of the complainant, respondent, and witnesses
- Let the available facts and standard of proof guide your role in overseeing the live cross-examination hearing, not unfair victim-blaming or societal/personal biases

## Deliberating Reminders (3 of 3)

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- Burden of gathering the evidence on the recipient, not the parties (30333)
  - Don't penalize a party for the questions no one asked them.

# Standard of Proof

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- Standard of Proof: Preponderance of the Evidence
  - Use this standard to make every factual determination!
- Must begin with a presumption of no violation by Respondent.
- If the case is truly “50-50,” the tie goes to the Respondent.

*Tip when discussing and voting – go through each element of each allegation considering the standard of evidence*

# Objectively Evaluating Relevant Evidence

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- As addressed in the preamble and discussed earlier, the Decision-Maker should evaluate:
  - “consistency, accuracy, memory, and credibility (30315)
  - “implausibility, inconsistency, unreliability, ulterior motives, and lack of credibility” (030330)
  - Standard of proof

# Tips for Evaluating Evidence – Keep an Open Mind

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- Keep an open mind until all statements have been tested at the live hearing.
- Don't come to any judgment, opinion, conclusion or belief about any aspect of this matter until you've reviewed or heard all the evidence AND consider only the evidence that can remain (statements in the record might have to be removed from consideration if not tested in live-hearing).

# Tips for Evaluating Evidence – Sound, Reasoned Decision

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- You must render a sound, reasoned decision on every charge.
- You must determine the facts in this case based on the information presented.
- You must determine what evidence to believe, the importance of the evidence, and the conclusions to draw from that evidence.

# Tips for Evaluating Evidence – Consider All/Only Evidence

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- You must make a decision based solely on the relevant evidence obtained in this matter and only statements in the record that have been tested in cross-examination.
- You may consider nothing but this evidence.



# Tips for Evaluating Evidence – Be Reasonable and Impartial

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- You must be impartial when considering evidence and weighing the credibility of parties and witnesses.
- You should not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party.
- Identify any actual or perceived conflict of interest.

# Tips for Evaluating Evidence – Weight

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- The quality of evidence is not determined by the volume of evidence or the number of witnesses or exhibits.
- It is the “weight” of the evidence, meaning its strength, that impacts how much it tends to prove/disprove a fact or finding in the case.
- You must evaluate the evidence as a whole, based on your own judgment.

# Tips for Evaluating Evidence – Credibility

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- You must give the testimony and information of each party or witness the degree of importance you reasonably believe it is entitled to receive.
  - Consider and compare the level of detail and consistency of each person's account.
  - Consider whether corroborative evidence is lacking where it should logically exist.
- Identify all conflicts and attempt to resolve those conflicts and determine where the truth (standard or review/proof) lies.
- Consider the reasonableness or unreasonableness, or probability or improbability, of the testimony.
- Does the witness have any motive?
- Is there any bias?

# Other Credibility Considerations

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- Evidence about whether the complainant filed the complaint or took other action to protest the conduct soon after the alleged incident occurred
  - But - failure to immediately complain may merely reflect a fear of retaliation, a fear that the complainant may not be believed, etc. rather than that the alleged harassment did not occur
- Other contemporaneous evidence:
  - Did the complainant write about the conduct and reaction to it soon after it occurred (e.g. in a diary, email, blog, social media post)?
  - Did the complainant tell others (friends, parents) about the conduct and their reaction soon after it occurred?

## If you're having trouble

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- Consider making a list of what you are sure about that relates to the question you are considering.
- Make a list of what facts are disputed.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.

# Tips for Evaluating Evidence – Draw Reasonable Inferences (1)

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- Inferences are sometimes called “circumstantial evidence.”
- It is the evidence that you infer from direct evidence that you reviewed during the course of reviewing the evidence.
- Inferences only as warranted and reasonable and not due to decision to opt out of cross-examination or questioning.
- Use your standard of evidence as defined by your policy when evaluating whether someone is responsible for each policy violation and ALWAYS start with presumption of no violation.

## Tips for Evaluating Evidence – Draw Reasonable Inferences (2)

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- Look to all the evidence in total, and make judgments about the weight and credibility, and then determine whether the burden has been met.
- Any time you make a decision, use your standard of evidence.

# Tips for Evaluating Evidence – Don't Consider Impact

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- Don't consider the potential impact of your decision on either party when determining if the charges have been proven.
- Focus only on the charge or charges brought in the case and whether the evidence presented to you is sufficient to persuade you that the respondent is responsible for the charges.
- Do not consider the impact of your decision.



# Writing the Decision

# Elements of a Written Decision (1)

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1. Identification of the allegations potentially constituting sexual harassment as defined in this Policy;
2. A description of the procedural steps taken, from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held;
3. Findings of facts supporting the determination;

## Elements of a Written Decision (2)

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4. Conclusions regarding the application of the Policy to the facts;
5. Rationale for the result of each allegations and any determination about the responsibility;
6. Any sanctions and whether the remedies designed to restore or preserve equal access to the University's education program or activity will be provided by the University to the Complainant; and
7. Appeal procedures and bases for appeal.

## Timely decision

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- How many days does your policy provide for the decision-maker to issue their decision?

## If you are having trouble

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- Consider making a list of what you are sure about that relates to the question you are considering.
- Make a list of what facts are disputed.
- Focus on resolving the disputed facts by a preponderance of the evidence.
- When you have the facts decided, the policy language should be much easier to apply.

# Sanctioning – Things to Consider

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- Respondent's prior conduct history
- How the University has sanctioned similar incidents in the past
- Nature and violence of the conduct at issue
- Impact of the conduct on the complainant
- Impact of the conduct on the community, its members, or its property
- Whether the respondent has accepted responsibility for their actions
- Whether any part of the conduct involved the violation of a no contact order
- Any other mitigating or aggravating circumstances

**Thank You**

