

James Madison University: Annual Training

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Disclaimers



- I am not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- Feel free to ask general questions and hypotheticals
- These slides include some statistics. Statistics help us understand the way these crimes may affect the individuals involved, as well as our community. Statistics should never influence your decisions with regard to handling a specific case.

Training Requirements (Clery)



From the Clery regulations:

Proceedings involving sexual assault, dating violence, domestic violence, and stalking must –

- “Be conducted by officials who, at minimum, **receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking, and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability**”

We will discuss safety for all parties – not just victims – and our community.

Training Requirements (Title IX)(1)



“A recipient must ensure that

- Title IX Coordinators,
- investigators,
- decision-makers, and
- any person who facilitates an informal resolution process...”

Training Requirements (Title IX)(2)



- “...receive training on...
 - the definition of **sexual harassment** in §106.30,
 - the scope of the recipient’s **education program or activity**,
 - how to **conduct an investigation and grievance process including hearings, appeals, and informal resolution process, as applicable**, and
 - how to serve **impartially**, including
 - avoiding prejudgment of the facts at issue,
 - [avoiding] conflicts of interest, and
 - [avoiding] bias.”

Training Requirements (Title IX)(3)



- Investigators:
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Decision Makers:
 - Technology to be used at a live hearing,
 - Issues of relevance of questions and evidence
 - Including rape shield provisions in §106.45(b)(6)

Topics for This Training

- Intake and Supportive Measures
- The Investigation
- Relevancy
- Practice!
- Impartiality & Bias
- Clery Training

The Process: Intake

Trauma Informed Basics for Intake



- Assume all parties and witnesses may be dealing with trauma – from this or other incidents
- **Meet them where they are**
- Help them tell their story as part of the process (to the extent appropriate) by asking good questions and documenting the answers
- Signs of trauma ≠ policy violation
- No signs of trauma ≠ no policy violation
- If they didn't act the way you might have, that doesn't mean it isn't true.

Intake Framework: Institutional Response to a Report



Actual knowledge (defined 34 CFR 106.30)

"Must respond promptly in a manner that is not deliberately indifferent."

Response to actual knowledge must be equitable

34 CFR 106.44(a):

- The Title IX Coordinator must promptly contact the complainant to discuss:
 - the availability of 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 to the complainant the process for filing a formal complaint.

Other intake topics

Information about the resolution process

- Necessary for informed decision-making

Discussion of Title IX Jurisdiction

- Necessary to discuss the applicable process and potential for Exit Ramps

Potential discussion of definitions

- Necessary to discuss the applicable process and potential for Exit Ramps

Information about the interactions between the parties

- May be necessary to consider supportive measures

- For Title IX:
 - Complainant must be participating or attempting to participate in the program at the time of the Formal Complaint
 - Conduct must constitute Title IX Sexual Harassment as alleged
 - Conduct must occur within the University's education program/activity
 - Conduct must occur against a person in the United States

Supportive measures (2020 Title IX Regulations) (1 of 2)

34 CFR 106.30(a)

Non-disciplinary, non-punitive

Individualized services

Offered as appropriate, as reasonably available, without fee or charge

Available before or after the filing of a Formal Complaint

Available if no Formal Complaint is filed

"Designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party"

- May include measures designed to protect safety of the parties and the educational environment, or deter sexual harassment

Supportive measures (2020 Title IX Regulations) (2 of 2)

34 CFR 106.30(a)

What do your policy say?

Create a list of commonly used supportive measures and use it during every intake

- Both complainants and respondents
- Provide it to all parties – the person may not realize what they need or what is available to them

Don't overpromise

Remember: Must not unreasonably burden the other party

Confirm the discussion and next steps in a follow-up email after each intake meeting

If a requested supportive measure is not available, explain the rationale and document the decision

Process Discussion

What does this look like for you?

- Review of Policy language
- Step 1, Step 2, Step 3...
- Flowchart

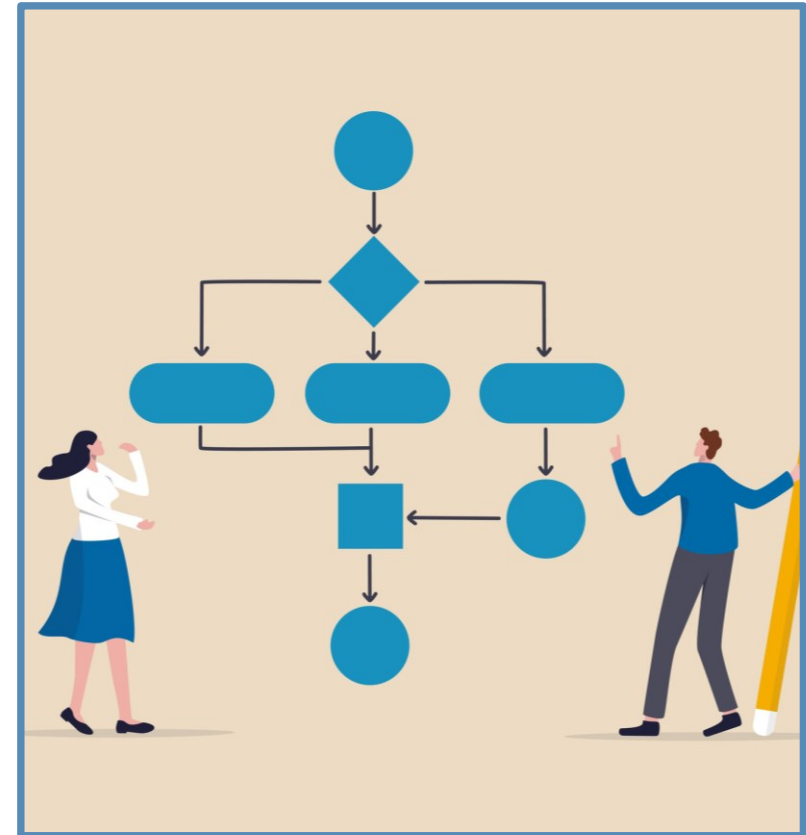
How do you describe the investigation?

How do you describe the hearing process?

- Cross-examination

How do you describe informal resolution?

- Mutual, informed, written consent
- Respondent-employees



Process Flow Chart

Report

Supportive Measures

- Informal Resolution
- Formal Complaint
 - Formal Grievance Process:
 - Investigation
 - Hearing
 - Determination
 - Appeal
- Dismissal

Gathering Necessary Information



Remember the goal – to determine where this report fits and what might be done about it

Think of the basic "W" questions – who, what, where, when, why

Same level of detail needed for an investigative interview? NO.

- What if you are the TIXC *and* the investigator?
- If not, is it better to get fewer details?
 - Remember – meet the person where they are

Things that *aren't* Trauma informed



Multiple meetings to gain additional information

- It is sometimes necessary – particularly if you are meeting the person where they are
- But... getting everything you need in one meeting is best

Shock

Judgment

Skepticism

- "Why are you just now reporting this?"

Initial Meeting with Respondents

Will look a bit different

But should mirror your Complainant intake as much as possible

Supportive measures

- Document

Process Discussion

Gathering Information (?)

- Less necessary than with the initial report
- Meet people where they are

Confirm the discussion and next steps in a follow-up email after each intake meeting

Jurisdiction for TIX Sexual Harassment



“Education program or activity”

“includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. “

§106.30(a)

Not an Education Program or Activity



Locations, events, or circumstances without substantial control:

- **Anything** outside of the United States;
- Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)

Jurisdiction and *Mandatory* Dismissal (Title IX)



“... then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.”

Mandatory Dismissal & Exit Ramps

- Although you may be required to dismiss a Formal Complaint
- Doesn't preclude the institution from taking action under other policies
- Know your exit ramps
 - Examples:
 - Human Resources
 - Student Conduct
 - Provost's Office

Discretionary Dismissal (Title IX)



Dismissal of a formal complaint per §106.45(b)(3)(ii)

- “The recipient **may** dismiss the formal complaint or any allegations therein, if at the time during the investigation or hearing:
 - A complainant notifies the TIXC in writing that **the complainant would like to withdraw the formal complaint** or any allegations therein;
 - The **respondent is no longer enrolled or employed** by the recipient; or
 - **Specific circumstances** prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Dismissal Notice & Timing

34 CFR § 106.45(b)(3)(iii)

- Must promptly send written **notice** of dismissal/**reasons** simultaneously to the parties
- Jurisdictional issues can arise **at any time**, even during the investigation

The Process: Investigation

Investigator Role Per the Regulations (1 of 2)



- Gather the evidence (getting written consent for inclusion when required)
- Give the parties equal opportunity to suggest witnesses and to present other inculpatory and exculpatory evidence
- Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence
- Provide the opportunity to have an advisor present for any meetings, and to provide advance notice of meetings, attendees, and purpose

Investigator Role Per the Regulations (2 of 2)



Provide an equal opportunity to inspect and review any evidence obtained that is directly related to the allegations raised in a formal complaint

Consider parties' written responses to the evidence review

Create an investigative report that fairly summarizes relevant evidence

- Send it to the parties/advisors at least 10 days before the hearing for their review and written response

See 34 CFR 106.45(b)(5) for the full text of the regulations regarding investigations.

Investigator Role: Key Concepts on Writing



Proper grammar, punctuation, spelling, and pronouns (when used)

Neutral tone

Clear statement of origin for all information gathered

Capture voices and perspectives without being judgmental

Teach the file to the parties and the hearing officer

- Disputed and undisputed facts?

Teach the campus and the context to someone who has never been to your institution or worked with your community

- Maps, drawings, and photographs
- Explanations of slang

Responsibilities



- Determine which witnesses and evidence are potentially relevant to the case
- Correspond with parties and relevant witnesses to schedule interviews and gather relevant information
- Seek out relevant evidence from non-witnesses (e.g. police reports, surveillance footage, card swipes)
- Keep track of what information is gathered and from what source
- Write the report that fairly summarizes the relevant evidence

What is Relevant? Policy 1346 and Policy 1324



Evidence is relevant if it has any **tendency to make a fact more or less probable** than it would be without the evidence, and **the fact is of consequence** in determining the outcome of the case. Relevant evidence includes **evidence concerning the credibility** of a party or witness.

What is Relevant?

Preponderance of the Evidence

Does this question, topic, evidence help **move the dial** under the standard of evidence?

Does this help me in deciding if a fact is more likely than not true?

Does it make it more or less likely to be true?

Why or why not?



Issues of Relevancy (Title IX) What isn't relevant?



- Party's medical, psychological, and similar records (unless voluntary written consent)
- Information protected by a legally recognized privilege

Relevancy (Title IX): Legally Privileged Information



Section 106.45(b)(1)(x):

- A **recipient's** grievance process **must...not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of**, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Issues of Relevancy (Title IX): What isn't relevant? – Rape Shield Provision



- Evidence about complainant's prior sexual history (must exclude) unless such questions/ evidence:
 - are offered to prove that someone other than the respondent committed the conduct, or
 - if the questions/evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Issues of Relevancy (Title IX): What isn't relevant? – Rape Shield Provision



- Rape shield protections do not apply to Respondents
 - “The Department reiterates that the rape shield language . . . does not pertain to the sexual predisposition or sexual behavior of **respondents**, so **evidence of a pattern** of inappropriate behavior by an alleged harasser **must be judged for relevance as any other evidence must be.**”
- See Also, JMU’s Sexual Misconduct Accountability Process
 - “Evidence of a pattern of conduct similar in nature by the Responding Party, either prior to or subsequent to the conduct in question may be relevant. Pattern evidence may be deemed relevant if the previous or subsequent incident(s) was substantially similar to the present allegation and the information indicates a pattern of behavior by the Responding Party”

Rape Shield Provision Flowchart



There is a question or evidence about sexual history. **What do you do next?**

Is the evidence about **COMPLAINANT'S** prior sexual history?

- Yes
 - Is it offered to:
 - (1) prove that someone other than the respondent committed the conduct
 - OR
 - (2) Prove consent about specific incidents of the complainant's prior sexual behavior with respect to the respondent
 - Yes
 - Potentially relevant, must be judged for relevance as any other evidence must be
 - No
 - **NOT** Relevant
- No
 - Potentially relevant, must be judged for relevance as any other evidence must be

The gatherer of all relevant evidence

Recipient must ensure that “all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker).”

2020 Title IX Preamble, 30331

Relevancy and the Investigation and Report



Summarize



Evaluate

The requirement for **recipients to summarize and evaluate relevant evidence**, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to section 106.45, appropriately direct **recipients to focus investigations and adjudications on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on that is relevant.)**

Begin Broad

- Elicit a monologue about the incident
 - What happened earlier that day before the incident?
 - What happened with regard to the incident?
 - What happened next?
- Open-ended follow-up questions
- Specific questions

Repeat as needed

Ask Follow-Up Questions



Re-review your notes

Re-review the elements of each charge

- Have you elicited all of the information this witness might have about each element?
- Do you have an understanding of how the witness obtained the information they shared?

Freeze Frames



Ask the witness to “freeze” on the moment and describe details

- What could they see? Feel? Smell? Taste? Hear?
- Where was the other person? How were they positioned?
- Where were you? How positioned?
- What did you say to the other person? Them to you?
- Describe other person’s tone, demeanor, body language

When Consent is at Issue

Common concern of Title IX Coordinator: investigators not asking the questions to get details needed for incapacitation analysis

Consider the wording and tone of your questions

Utilize “freeze frame” strategy

Ask questions about what happened to determine whether there was unspoken consent

Ask questions to identify whether alcohol/drugs may have played a role regarding consent.

Credibility



Gather facts to assist **decision-maker**

Your job: Ask questions to test memory

Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence

Be sensitive to potential trauma experienced by witnesses

Evidence List

If there is a criminal investigation, work with law enforcement to collect and preserve evidence

- Electronic Communications
- Security Information
- Police Reports
- Personnel Files, Student Records
- Pictures, Videos, Audio

Questions about Evidence: Seek to Understand



Authenticity

- Who created it?
- Is it original
- Has it been edited/alterd?
- Where is the original?

Source / Provenance

- How did the party/witness get it?
- Who had access to it?

Reliability

- Is the person who created it available?
- Is it complete?
- Does it align with other evidence?

Context

- What occurred before/after the communication?
- Is it complete?
- A single occurrence or part of a larger pattern?

Completeness

- Are there additional messages?
- Is anything missing?
 - Why?
- Do you have access to the full email/text chain?

Relevance

- Is it related to the allegations?
- Credibility?

Corroboration

- Witnesses?
- Contemporaneous disclosures?
- Establish timelines?
- Other evidence?

Bias

- Firsthand knowledge?
- Relationships?
- Incomplete information?

Investigators should understand:

- What is it? (Authenticity)
- Where did it come from? (Source)
- How was it obtained? (Provenance)
- What is missing? (Completeness)
- What does it prove/disprove? (Relevance)
- What else supports or contradicts it? (Corroboration)

Digital Evidence

- What is this document, image, message, recording, or screenshot?
- Can you describe what this evidence shows?
- Why do you believe this evidence is relevant?
- When did you first become aware of this evidence?
- Who created it?
- Is this the original evidence or a copy?
- Has it been modified in any way?

AI Generated Content



- Explore: origin, authorship, preparation, and accuracy:
 - Did you prepare this document, did anyone assist, did you review the document before you submitted it, does it reflect your own recollection, is this based on your own statement and experience?
 - What tools did you use to prepare this document? Did you use software or AI? If you used AI, what prompts did you give it? Do you have access to your AI inputs? Will you provide them?
 - Did you review the document? Did you make edits? Did you add/remove information? Did you verify the accuracy of statements?
 - What information did you provide the AI tool (bullet points? Timeline? Narrative?)?

Practice!

Tips for Summaries

Your Spiel



This is the procedural information you provide at the start of an interview.
Should you include this in your transcript/summary?

- Pros:
 - Parties can see the same information was provided to everyone.
 - Parties can re-read what you told them in case they were nervous when you went over the information and they need a refresher.
 - Documents that you provided important information, which may be helpful to an appeals officer later.
- Cons:
 - Makes the document longer.
 - Isn't directly relevant to the allegations, even though it is relevant to demonstrate your methodology.

Sample Spiel (1 of 3)



At the outset of the interview, the investigator noted that Complainant was permitted to bring an advisor and asked whether she wished to reschedule the interview so that an advisor could attend. Complainant stated she did not wish to have an advisor at this time and wanted to go forward with the interview without an advisor present.

The investigator stated that while she is a licensed attorney, she is not acting as an attorney for the institution, for Complainant, or for Respondent, nor is she here to advocate for anyone in this case. The investigator explained she is a neutral investigator that has been asked to collect information regarding the allegations that Complainant shared regarding an encounter with Respondent in his dorm room on December 1, 2025.

Sample Spiel (2 of 3)



The investigator stated that she will take notes during the interview and will use those notes to prepare a summary. Complainant will be provided with the **opportunity to review** the summary and **suggest** revisions to ensure that the summary is accurate and complete. After Complainant has had the opportunity to review the summary, the summary will be finalized and put into the evidence file along with other evidence collected in the investigation.

The investigator explained that both the Complainant and Respondent will have the opportunity to review the information in the evidence file and provide feedback to the investigator. The investigator stated she would then prepare a final report that **fairly summarizes the relevant evidence** that was collected. The investigator stated that consistent with her role as a neutral, she will not be making any determinations about whether a policy violation occurred; those decisions will be made by a hearing officer later in the process.

Sample Spiel (3 of 3)



The investigator stated that Complainant is not required to participate in this interview or in any part of the process, but that her participation is **helpful** to ensure that her side of the story is included in the investigative report. The investigator stated that to the extent Complainant chooses to provide information, that information is expected to be truthful. **The institution prohibits** knowingly making false statements or knowingly submitting false information during this process.

The investigator stated that all participants in this process are protected from **retaliation**. The investigator stated that if anyone should treat Complainant uncomfortably because of her participation in this process, she should contact _____. The investigator stated that if Complainant should need **supportive measures** during the process, she should contact _____.

Choosing Your Headings



The headings should help you teach the case to others

If you knew nothing about the case, would the headings help you understand the timeline?

Procedural Headings:

- Background
- Timeline?
- Impact?

Chronological Headings

Thematic Headings

The headings you choose will be helpful in structuring later summaries and your report!

Background

What is the role of the party/witness at the institution?

- Students: Year, major, residence hall (if relevant)
- Employees: Year of employment, position(s) held, supervisor(s), job function

What is the relationship of this person to each party?

- Immediately before the incident?
- As of the date of the interview?

When and how did the parties meet?

Timeline



For timeline-heavy cases, consider whether you should outline a timeline of the person's perspective

Each entry in the timeline will become a heading

The complainant's timeline will give you a list of topics to discuss with the respondent and other witnesses, although they may have other appropriate timeline entries as well!

How a Timeline Becomes a Structure



Complainant	Respondent	Witness	Final Report
Prior to the Bar	Prior to the Bar	<i>(wasn't with either party)</i>	Prior to the Bar
At the Bar	At the Bar	At the Bar	At the Bar
Walk to Dorm	Walk to Dorm	<i>(wasn't with either party)</i>	Walk to Dorm
In the Room	In the Room	<i>(wasn't with either party)</i>	In the Room
<i>(wasn't in the hallway)</i>	Respondent to Bathroom	Respondent to Bathroom	Hallway to Bathroom
After Respondent Returned	After Respondent Returned	<i>(wasn't with either party)</i>	After Respondent Returned
Complainant's Departure	Complainant's Departure	<i>(wasn't with either party)</i>	Complainant's Departure
Texts between Complainant and Witness	<i>(wasn't involved)</i>	Texts between Complainant and Witness	Texts between Complainant and Witness
Impact on Complainant	<i>(no further contact)</i>	Impact on Complainant	Impact on Complainant

What to Include?



Include everything obtained in their monologue

When the investigator asks follow-up questions, document the questions as well as the answers:

- When asked if Joan told Bob whether Jimmy was drunk, Bob stated that Joan told Bob that Jimmy was “completely loaded” and Bob took that to mean that Jimmy was “very drunk.”

Include the “clean up” questions and the responses at the end

Include names of any witnesses they suggest and why

Include a list of evidence they are planning to provide, or evidence they suggest you obtain

“End spiel” – any reminders you give them at the end

A Note on Demeanor

Demeanor can mean different things to different people – culturally and contextually.

Examples of demeanor:

- Pauses
- Eye contact or lack thereof
- Fidgeting
- Crying
- Emotions that are not articulated by the person being interviewed
 - Compare: Bob was angry (reflects judgment of the investigator) vs. Bob said, “These allegations make me angry.” (provides Bob’s perspective)

Is there a purpose in including it? If so, is the purpose appropriate given your role?

How to Integrate Feedback



Fix your typos

If the person adds something you believe was covered in the interview but wasn't included in your summary for whatever reason, go ahead and add it in

If the person adds something that you didn't discuss in the interview, consider specifying that the new details were included in feedback to the summary

If the person contradicts what they said in the interview, double-check your notes to make sure it's not your mistake, and consider including the feedback in its original form

Consider in Integration

Is this relevant?

Is it substantive?

Remember:

- People might remember things after the interview.
- People might make up things after the interview.
- People might forget things after the interview.

Someone else gets to decide how to judge the revisions.

As an investigator, we write it down without judgment.

Create Investigative Report

Summarize **facts**

- **By allegation?**
- **By source?**
- **Chronological?**

No determination

Provide to parties and advisors

Allow 10 days to review prior to hearing

Inspection and Review of Evidence

Provide ALL Evidence to both parties and advisors

- Include everything related to allegations, even if you don't expect decision-maker to rely on it
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report

(106.45(b)(5)(vi))

Prohibited Conduct

Title IX Sexual Harassment

- 3 Classifications



- Sexual harassment means conduct **on the basis of sex** that satisfies one or more of the following:
 - [Quid pro quo] An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - [Unwelcome conduct] 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 recipient's education program or activity; or
 - [Clery crimes] Sexual assault, dating violence, domestic violence, or stalking

Sexual Assault



Sexual assault is defined as “an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation”

Appendix A (Clery) includes definitions from the FBI’s Summary Reporting System (SRS), which was phased out effective December 31, 2020. The FBI now uses *NIBRS*.

The Policy must include in its definition the conduct not permitted by NIBRS, but can be worded differently.

Sexual Assault Types



Forcible:

- Rape
- Sodomy*
- Sexual Assault with an Object*
- Fondling*

Non-forcible

- Statutory rape
- Incest

*NIBRS Update 2025

A Note on NIBRS



The NIBRS User Manual was updated on June 23, 2025.

Key Updates:

- “Fondling” → “Criminal Sexual Contact” (see, pp. 8, 73)
- “Rape” reverted to prior definition under SRS (see, pp. 72-73)(Next slide)
- “Sexual Assault with an object” + “Sodomy” now counted as part of “Rape” definition. (see, pp. 72-73)

Sexual Assault: Rape



NIBRS Update 2025: “Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, or by a sex-related object. This definition also includes instances in which the victim is incapable of giving consent because of temporary or permanent mental or physical incapacity (including due to the influence of drugs or alcohol) or because of age. Physical resistance is not required on the part of the victim to demonstrate lack of consent.”

Sexual Assault: Sodomy



NIBRS 2025 update: “[Sodomy] and [Sexual Assault with an object] may still be reported to the FBI’s UCR Program and will be reclassified and recoded under the broader category of [Rape]”

OLD: 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 with an Object



NIBRS 2025 update: “[Sodomy] and [Sexual Assault with an object] may still be reported to the FBI’s UCR Program and will be reclassified and recoded under the broader category of [Rape]”

OLD:

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.

An “object” or “instrument” is anything used by the offender other than the offender’s genitalia, e.g., a finger, bottle, handgun, stick.

Sexual Assault: Fondling



NIBRS Update 2025:

The intentional touching of the clothed or unclothed body parts without consent of the victim for the purpose of sexual degradation, sexual gratification, or sexual humiliation.

The forced touching by the victim of the actor's clothed or unclothed body parts, without consent of the victim for the purpose of sexual degradation, sexual gratification, or sexual humiliation.

This offense includes instances where the victim is incapable of giving consent because of age or incapacity due to temporary or permanent mental or physical impairment or intoxication for the purpose of sexual degradation, sexual gratification, or sexual humiliation.

Old: The touching of the **private body parts** of another person **for the purpose of sexual gratification**, 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: Attempt



Note that **attempted** sexual assault is considered to be sexual assault under the UCR.

Sexual Assault: Common Concerns



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.

Sexual Assault Data

Women and Men



More than **half of women** and nearly **1 in 3 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.

Nearly **1 in 9 men** were made to penetrate someone (completed or attempted) during his lifetime.

Sexual Assault Data: Timing



Prevalence Data for Postsecondary Institutions

More than **50 %** 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:

Alcohol/Drug Use



“About half of sexual assaults involve survivors drinking alcohol before the assault.”

“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



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.

Preamble, p. 30082 (Official) notes that “Commenters cited: 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).”

Sexual Harassment: Dating Violence



“**Dating Violence**” means **violence** committed by a person **on the basis of sex** 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.

Sexual Harassment: Domestic Violence



“Domestic violence” is felony or misdemeanor crime committed on the basis of sex by:

A current or former spouse or intimate partner 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

Common Concerns in IPV Situations



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.

Sexual Harassment: Stalking



“**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.

As mentioned before, to qualify under Title IX, it must be sex-based stalking. (30172 fn. 772)

Stalking Data



3.4 million individuals aged 16 or older (1.3%) were stalked during 2019. This represents a slight drop from 2016 (1.5%). Females were stalked more than twice as often as males.

1 in 6 women and **1 in 17** men have been stalked at some point in their lives.

Nearly **54%** of female victims and **41%** of male victims experienced stalking before the age of 25.

First statistic: U.S. Department of Justice, Bureau of Justice Statistics, "Stalking Victimization, 2019" published February 2022.

Second and Third statistics: CDC "Preventing Stalking" fact sheet, accessed October 29, 2022.

JMU Policies (1 of 2)



- EEO/Non-Discrimination
 - Policy 1302 – Equal Opportunity and Non-Discrimination
 - Policy 1324 - Discrimination and Retaliation Complaint Procedures (Other than Title IX Sexual Harassment (Policy 1346) and Sexual Misconduct (Policy 1340))
- Sexual Misconduct/Harassment
 - Policy 1340 – Sexual Misconduct Policy
 - Policy 1346 – Title IX Sexual Harassment

JMU Policies (2 of 2)



- EEO/Non-Discrimination
 - Policy 1302 – Equal Opportunity and Non-Discrimination
 - Policy 1324 - Discrimination and Retaliation Complaint Procedures (Other than Title IX Sexual Harassment (Policy 1346) and Sexual Misconduct (Policy 1340))
- Sexual Misconduct/Harassment
 - Policy 1340 – Sexual Misconduct Policy
 - Policy 1346 – Title IX Sexual Harassment

Title IX Sexual Harassment (1346)



Sexual Assault (including: Rape, fondling, incest, statutory rape)

Sexual Harassment (including: Quid pro quo, unwelcome conduct, and sexual assault, dating violence, domestic violence, stalking)

Retaliation

Sexual Misconduct (Policy 1340)



- Sexual Assault (including: Rape, fondling, incest, statutory rape)
- Sexual Harassment (including: Quid pro quo, unwelcome conduct, and sexual assault, dating violence, domestic violence, stalking)
- Non-consensual sexual relationships
- Sexual exploitation
- Sexual violence
- Retaliation

OEO Policy – Prohibited Conduct



Discrimination

Harassment (including hostile environment and term or condition)

Retaliation

Harassment (1324)



Harassment Conduct based upon a person's protected characteristic that is so sufficiently severe, persistent, or pervasive, and objectively offensive that it interferes with the person's work or academic performance or participation in university activities, or creates a working or learning environment that a reasonable person would find hostile, threatening, or intimidating. The conduct can include oral, written, graphic, physical or other conduct. Harassment may also include behavior directed toward stereotypical notions of how a person in a protected classification should appear or behave, or a failure to conform to stereotypes. Harassment is prohibited in the following situations:

1. Term or condition of employment or education. This type of harassment occurs when the terms or conditions of employment, educational benefits, academic grades or opportunities, living environment or participation in a university activity are conditioned upon, either explicitly or implicitly, submission to or rejection of unwelcome conduct, or such submission or rejection is a factor in decisions affecting that individual's employment, education, living environment, or participation in a university program or activity.
2. Hostile environment. This type of harassment occurs when the actions of another create a hostile environment, as defined herein.

Hostile Environment (1324)



A hostile environment is created by oral, written, graphic, physical, or other conduct that is sufficiently severe, persistent, or pervasive, or objectively offensive that it interferes with, limits or denies the ability of a person to participate in or benefit from the institution's educational programs, services, opportunities, or activities or the individual's employment access, benefits or opportunities. Mere subjective offensiveness is not enough to create a hostile environment. In determining whether conduct is severe, persistent or pervasive, and thus creates a hostile environment, the following factors will be considered: (a) the degree to which the conduct affected one or more individuals' education or employment; (b) the nature, scope, frequency, duration, and location of the incident(s); (c) the identity, number, and relationships of persons involved; (d) the perspective of a “reasonable person” in the same situation as the person subjected to the conduct, and (e) the nature of higher education. A hostile environment for a member of the university community can be created by the actions of an employee, a student, an affiliate or a visitor.

Discrimination



Inequitable treatment that conditions any element of a person's employment, enrollment as a student, receipt of student financial aid, or participation in university activities on that person's Protected Characteristics in violation of applicable law.

Discrimination also includes denial of a reasonable accommodation for a disability. As used in this policy, discrimination includes harassment and hostile environment

Retaliation



Intimidation, interference, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege under this policy, or because the individual has made a report or complaint, or has participated or refused to participate in any manner under this policy. Retaliation also includes bringing charges against an individual for policy violations that do not involve discrimination or retaliation, but arise out of the same facts or circumstances as a report or complaint of discrimination or retaliation, or a report or complaint of discrimination or retaliation, for the purpose of interfering with any right or privilege under this policy

Being Impartial and Avoiding Bias, Conflict of Interest, and Prejudgment of Facts

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts (1 of 2)



Section 106.45 **requires** that investigators (and Title IX Coordinators, decision-makers, informal resolution officers and appeals officers)

be free from **conflict of interest, bias**, and

be trained **to serve impartially** and **without prejudging facts**.

(30053)

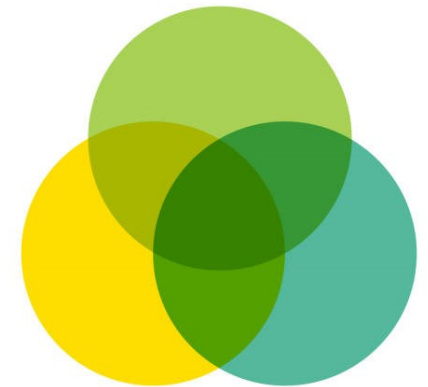
Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts (2 of 2)



We will discuss each of these individually and provide examples, but some of the factors for each overlap.

For example, being impartial is greatly aided by not pre-judging facts.

(30249-30257; 30496)



Impartiality



Be neutral

Do not be partial to a complainant or a respondent, or complainants and respondents generally

Do not judge: memory is fallible [and it's contrary to your neutral role] (30323)

Bias: Concerns raised in comments in preamble



- Neutrality of paid staff in Title IX positions
- Institutional history and “cover ups”
- Tweets and public comments
- Identifying as a feminist



Perceived v. Actual Bias

Both can lead to the same perception (30252)

On appeal of decisions, the Department requires the bias “that could affect the outcome of the matter”

How the Department tried to prevent bias

No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

Bias: Objective Rules and Discretion (1 of 2)



“[R]ecipients *should* have **objective rules** for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the **Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...**” (30250)

Bias: Objective Rules and Discretion (2 of 2)



Discretionary:

Recipients have the discretion to have a process to raise bias during the investigation.

Mandatory: Basis for appeal of decision-maker's determination per 34 C.F.R. 106.45(b)(8)(i)(C).

**Concerns
raised in
comments in
preamble**

CONFLICT OF INTEREST

- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

Example of Unreasonable Conclusion that Bias Exists



“[F]or example, **assuming** that all self-professed **feminists**, or self-described **survivors**, are biased against men, or that a **male** is incapable of being sensitive to women, or that prior work as a **victim advocate**, or as a **defense attorney**, renders the person biased for or against complainants or respondents” is **unreasonable** (30252)

Examples of Bias

An investigator used to supervise one of the parties;

Information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

