

Wittenberg University
Title IX Investigator Training
May 2, 2023

with Melissa M. Carleton



1

Posting is Permitted



- The recipient is required by 34 C.F.R. 106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website.
- You have permission to post these slides!

2

Agenda



- Annual Clery training topics
- Review of University hearing procedures
- Mock hearing
- Looking ahead to the potential regulations

3

Annual Clery Training

Required for all team members handling:

- sexual assault,
- dating violence,
- domestic violence, and
 - stalking



4

Training Requirements



- 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.

5

Data Disclaimer



- We will be discussing statistics regarding sexual assault, dating violence, domestic violence, and stalking
- 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.

6

Sexual Assault



- Sexual assault is defined as “an offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s UCR program and included in Appendix A of this subpart”
- Appendix A 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.

7

Types of Sexual Assault



- Rape
- Sodomy
- Sexual Assault with an Object
- Fondling
- Incest
- Statutory Rape

Note: Wittenberg has merged the first three into a single definition of “rape.”

8

Wittenberg: Rape and Fondling Definitions



- Rape: The 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, without the consent of the complainant, including instances in which the complainant is incapable of giving consent.
- Fondling: The touching of the private body parts of another person *for the purpose of sexual gratification*, forcibly and/or against that person's will; or, not forcibly or against the person's will where the complainant is incapable of giving consent because of their youth or because of their temporary or permanent mental incapacity.

9

Wittenberg: Incest and Statutory Rape



- Incest: Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law. In Ohio, marriage is prohibited between individuals nearer of kin than second cousins. [Your second cousin shares a great-grandparent with you.]
- Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent. In Ohio, no person may have sex with a child under the age of thirteen, nor may a person over the age of eighteen have sex with a child under the age of sixteen.

10

Sexual Assault Hypos



- Assuming no consent, do the following count as sexual assault under your Policy?
 - Kissing
 - French kissing
 - Grinding on a dance floor
 - Slap on the butt on the way out to the football field
 - Slap on the butt on the way onto the dance floor
 - Mouth-to-vagina oral sex

11

Sexual Assault Hypos



- Assuming no consent, do the following count as sexual assault under your Policy?
 - Kissing
 - French kissing
 - Grinding on a dance floor
 - Slap on the butt on the way out to the football field
 - Slap on the butt on the way onto the dance floor
 - Mouth-to-vagina oral sex

12

Sexual Assault: Attempt



- Note that attempted sexual assault is considered to be sexual assault under the UCR.
- What constitutes “attempt”?
- Ohio Revised Code Section 2923.02(A) gives some guidance: “engag[ing] in conduct that, if successful, would constitute or result in the offense.”

13

Sexual Assault: Attempt Hypotheticals



Which of the following do we believe constitute attempted rape?

- Respondent stranger pulls Complainant into the bushes, begins to undress Complainant, and then is disrupted by passersby and runs away
- Respondent attempts to penetrate Complainant with genitalia but does not aim correctly and misses, then is disrupted
- Respondent attempts to fondle Complainant for sexual gratification but actually fondles Complainant’s roommate, for whom Respondent has no sexual attraction

14

Sexual Assault Data: Disclaimer



The data provided here is presented in binary gendered terms because that is how it was collected.

It is our hope that future data collections are more specific as to whether individuals were categorized by gender identity or gender assigned at birth.

15

Sexual Assault Data: Current Stats



- More than **1 in 2 women** and almost **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** was made to penetrate someone (completed or attempted) during his lifetime.

Statistics from [CDC.gov/violenceprevention/sexualviolence/fastfact.html](https://www.cdc.gov/violenceprevention/sexualviolence/fastfact.html) (last accessed May 1, 2023)

16

Sexual Assault Data: Transgender/NB

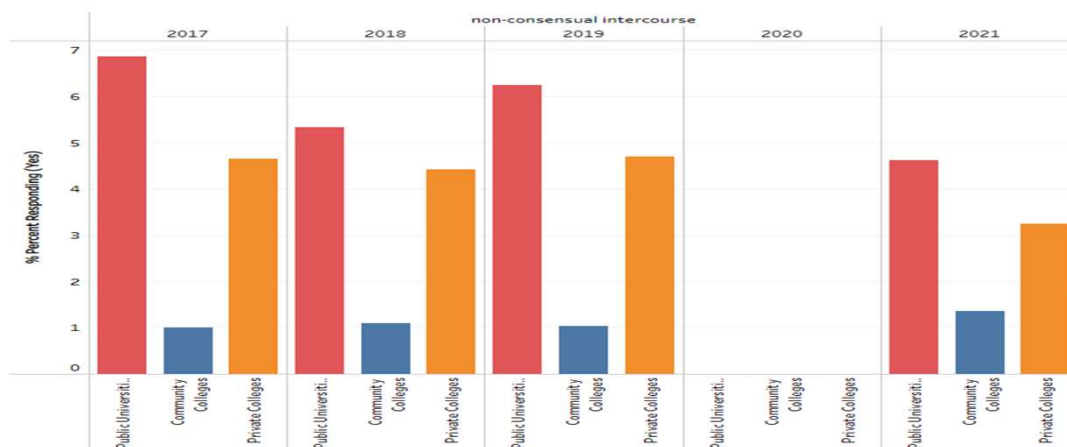


- Almost **half** of all transgender people have been sexually assaulted at some point in their lives. Rates are higher in certain subgroups:
 - 65% - American Indian
 - 59% - Multiracial
 - 58% - Middle Eastern
 - 53% - Black
 - 72% - Had engaged in sex work
 - 65% - Had been homeless
 - 61% - Had lived with disabilities

Statistics from https://www.nsvrc.org/sites/default/files/publications/2019-02/Transgender_infographic_508_0.pdf (last accessed May 1, 2023)

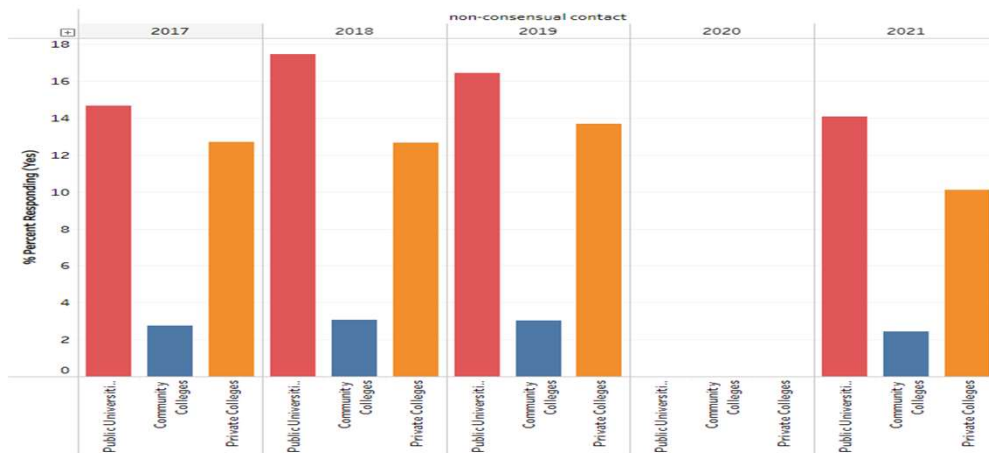
17

Sexual Assault – ODHE Survey Non-Consensual Intercourse



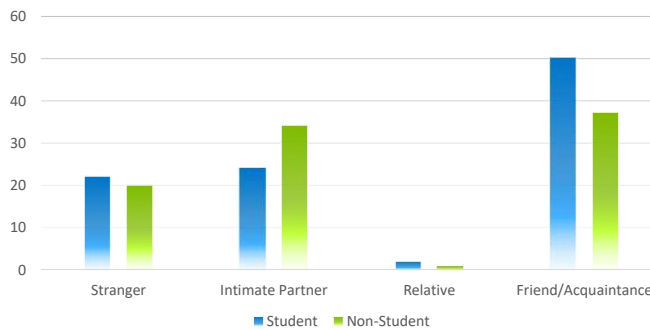
18

Sexual Assault – ODHE Survey Non-Consensual Contact



19

Perpetrator Data



Preamble, p. 300767 (Official) notes that "Commenters cited: U.S. Dept of Justice, Office of Justice Programs, Bureau of Justice Statistics Special Report: Rape and Sexual Assault Victimization of College Age Females, 1995-2013 (2014).

20

When Do They Occur?



- 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.

Preamble, p. 30076 (Official) notes that “Commenters cited: Rape, Abuse & Incest National Network (RAINN), *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence>.”

21

Under What Conditions?



- “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.

22

To What Effect?



- Approximately **70 percent** of rape or sexual assault victims experience moderate to severe distress, a larger percentage than for any other violent crime.

Preamble, p. 30080 (Official) notes that "Commenters cited: U.S. Dep't of Justice, Bureau of Justice Statistics, *Special Report: Socio-emotional impact of violent crime (2014)*."

- **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).

Preamble, p. 30080 (Official) notes that "Commenters cited: 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)."

23

Sexual Assault: Common Concerns



- Individuals who blame themselves for what happened are less likely to participate fully in the investigation.
- Be cautious of questions that may trigger self-blame: alcohol/drug use, what someone was wearing, etc.
- Better options:
 - Explain why the information is relevant before you ask the question.
 - Explain the concept of consent so they can understand where the information may fit into the bigger picture.
 - Check your tone constantly to encourage continued sharing of information.

24

Dating Violence: Wittenberg Definition



- Violence committed by a person:
 - Who is or has been in a social relationship of a romantic or intimate nature with the victim;
 - Where the existence of such relationship shall be determined based on a consideration of the following factors:
 - The length of the relationship
 - The type of relationship
 - The frequency of interaction between the persons involved in the relationship

25

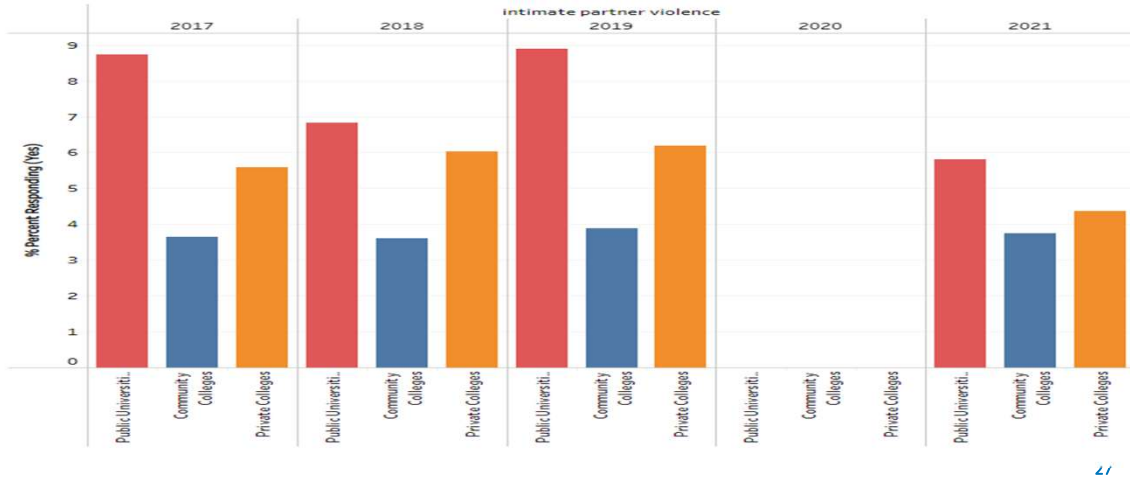
Domestic Violence: Wittenberg Definition



- Felony or misdemeanor crimes of violence committed on the basis of sex:
 - By a current or former spouse 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;
 - By a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction; 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 [e.g. elderly, intellectually disabled, children]

26

ODHE Data: Intimate Partner Violence



27

Domestic Violence: Clark Co.



2020	DVI Charge	Other Charge	No Charge
Springfield PD	403	7	284
Clark County Total	412	7	298
Grand Total (All Ohio)	31,800	3,204	36,503

2022	DVI Charge	Other Charge	No Charge
Springfield PD	384	15	70
Clark County Total	593	116	504
Grand Total (All Ohio)	30,199	2,739	33,717

28

IPV and Healthy Relationships



- 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.
- Not every unhealthy behavior merits discipline by the University. This is true in every aspect of student life, not just with regard to IPV, or Clery crimes, or Title IX.
 - Is where you draw the line appropriate?

29

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.

30

IPV Hypothetical



- Neighbor reports that the couple that lives next door, A and B, argue violently.
- Neighbor does not have enough information to determine who may be initiating the violence.
- Neighbor is disturbed.
- When police arrive, both A and B have bruises.
- What are your next steps?

31

Tricky Issues in IPV



- How should mutual combat be handled?
- Was one person the initiator and the other acting in self defense?
- Should an investigation be opened against both parties?
- Did one person significantly escalate the violence?

32

Stalking: Wittenberg Definition



- A course of conduct on the basis of sex directed at a specific person that would cause a reasonable person to:
 - Fear for the person's safety or the safety of others;
 - Suffer substantial emotional distress.

Note: This includes Cyber-stalking which is the use of e-mail, internet, instant messaging, social media, or other electronic devices to harass or abuse another person.

33

Course of Conduct: Wittenberg Definition



- A course of conduct 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.

34

Reasonable Person: Wittenberg Definition



- This definition only applies to Stalking.
- A reasonable person means a reasonable person under similar circumstances and with similar identities to the victim.
- Question:
 - What types of circumstances might make you more likely to find that fear or emotional distress is reasonable?
 - What types of identities might make you more likely to find that fear or emotional distress is reasonable?

35

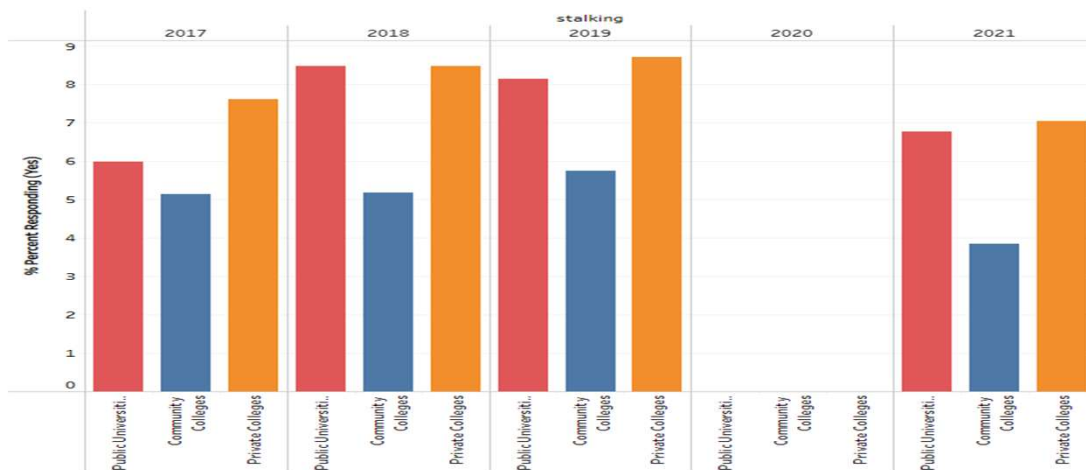
Substantial Emotional Distress: Wittenberg Definition



- Substantial emotional distress means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

36

Stalking: ODHE Data



Stalking Data



- During a 12-month period, 3.4 million individuals over the age of 18 are stalked in the United States.
- Three in four stalking victims are stalked by someone they know.
- Individuals ages 18 to 24 experience the highest rate of stalking.
- Protective actions taken by stalking victims:
 - Changing day-to-day activities (22%)
 - Staying with family (18%)
 - Installing call blocking or caller ID (18%)
 - Changing their phone number (17%)
 - Changing their email address (7%)

Source:

https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/helpseries/HelpBrochure_Stalking.html (last accessed May 1, 2023)

Stalking: How Would You Handle?



- Student A reports stalking by Student B via phone calls, text messages from multiple numbers, direct messages through social media, and a note on Student A's door.
- All communications indicate Student B's distress that Student A will not date them.
- What are likely to be Student A's main concerns?
- What can be done to make Student A feel safer?

39

Stalking: How Would You Handle – Pt. 2?



- Student B reports they having been dating Student A since last month, but things have “gotten weird” in the last two weeks and Student A has not been responsive to Student B's requests to talk.
- Student B is trying to talk with Student A so they can properly break up.
- What types of information do you want to gather from Student A? From Student B?
- What will you need to know to show whether Student A's fear is reasonable, or whether they have substantial emotional distress?

40

Stalking: Investigations



- Stalking cases are often heavy on documentation
- Because stalking involves multiple instances, there may be many witnesses who only saw part of the course of conduct
- Outline a timeline of the “course of conduct”
- Ensure any mutual no contact order is as specific as possible

41

Review of Wittenberg’s Hearing Procedures



42

Good Investigation is the Foundation



- Offer all parties and relevant witnesses the opportunity to be interviewed and submit evidence
- Ask parties who they think should be interviewed (but don't limit yourself to that list)
- Gather evidence from other sources, such as security footage or police reports
- Draft an investigative report that fairly summarizes the relevant evidence collected
- The key is transparency. Let the parties review what you've found and offer their responses to help ensure the record is complete.

43

Decision-Makers



- Cannot be the Title IX Coordinator or Investigator
- Cannot have bias or conflict of interest

44

Advisors



- Each party must declare their advisor of choice
- If no advisor of choice, the University will provide one

45

Pre-Hearing Conferences



- Policy permits these – held separately for each party’s advisor
- Advisors can be required to attend, parties are welcome
- Purpose is to discuss procedures and decorum rules, obtain witness lists, and address any other concerns

46

Hearing Logistics



- Policy permits in-person or via technology
- Hearing must be recorded
- All evidence must be available for parties to refer to it during the hearing

47

Questioning



- Decision-maker may ask questions of all parties and witnesses
- Advisor may ask questions of other party and any witnesses
- Questions must be relevant and may challenge credibility
- Questions are asked directly, orally, and in real time
- Parties do not ask questions
- Questions must be relevant, respectful, and non-abusive
- Disruptive behavior may result in being removed from the hearing

48

Relevancy



- Decision-maker must verbally rule each advisor question to be relevant before it may be answered
- Decision-maker must explain decision that a question is not relevant
- Not relevant:
 - Repetitive/duplicate evidence
 - Privileged information (unless privilege is waived)
 - Medical/counseling records, unless the patient has provided written permission
 - Information about the complainant's sexual predisposition or prior sexual behavior, unless:
 - Offered to prove someone other than the Respondent committed the alleged conduct;
 - Information concerns specific incidents with respect to the parties and are offered to prove consent

49

Get On The Plane Or Your Luggage Stays Here



- If a party or witness does not submit to cross-examination at the live hearing, the Decision-Maker cannot rely on any statement of that party or witness in making a determination.
 - No inferences on refusal to participate.
 - Video evidence of the conduct may still be considered
 - Statements of a non-participating party can be considered where the statements are the conduct at issue.

50

Credibility



- Credibility analysis is primarily based on:
 - Specific details
 - Inherent plausibility
 - Internal consistency
 - Corroborative evidence
- Credibility is not based on:
 - Party's status in the case as a complainant, respondent, witness
 - Solely on demeanor
- Corroborating evidence is not required.

51

Written Decision



- Must contain all of the elements outlined in the Policy (pp. 29-30)
- Use preponderance of the evidence standard
- “Show your work”
- Sanctions included in the decision
- Provided to all parties simultaneously
- Must include information on how to appeal

52

**Mock Hearing:
Tessa Tasker and
Michael Murphy**



53

Key Issues



- Did Tessa consent?
- Was Tessa incapacitated?

54

Key Disputed Facts



- How much did Tessa drink?
- What other factors may have affected her ability to understand the nature and consequences of her actions?
- If Tessa was in fact incapacitated, did Michael have reason to know this?

55

Final Regs?
Our Next Frontier



56

Scoop



- The Unified Regulatory Agenda, released in January 2023, stated that the regulations would be finalized in May 2023.
- To finalize the regulations, they must be presented to OIRA for review.
- OIRA can take 90+ days to review. It can be shorter. Last time it was longer.
- Once OIRA reviews the regulations, they are sent back to ED to finalize.
- Only then can they be published in the Federal Register as a final rule.
- How many days are left in May? (Not 90+...)

57

Highlights



- More protection for individuals based on sexual orientation and gender identity
- More protection for pregnant/parenting individuals, including post-abortion protections
- Protections expand to encompass more off-campus misconduct
- Mandatory reporting shifts to a reporting vs. notice structure
- Emergency removal becomes easier, as does burdening respondent with supportive measures – but must provide process for appeal
- Informal resolution would be permissible even before a formal complaint
- Formal complaints could be oral or written
- Dismissal process streamlined
- Review process streamlined

58

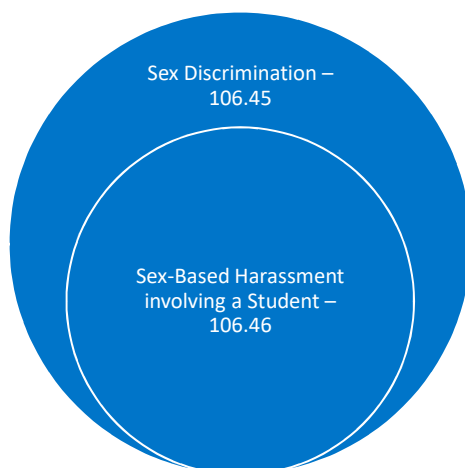
“Sex-Based Harassment”



- Sexual harassment
- Harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity
- Other conduct on the basis of sex that is:
 - Quid pro quo harassment
 - Hostile environment harassment (severe or pervasive)
 - Sexual assault, dating violence, domestic violence, stalking

59

Hearings?



60

Sex-Based Harassment Grievance Procedure



2020 Final Rule	2022 NPRM
Applies to Title IX Sexual Harassment that occurs against any person in the U.S.	Applies to Sex-Based Harassment complaints* involving student complainants or student respondents at postsecondary schools
No Single Investigator Model	Permits Single Investigator Model
Hearing Required for Title IX Sexual Harassment	Hearing OPTIONAL for Sex-Based Harassment Involving Students <ul style="list-style-type: none"> BUT requires mandatory process for assessing credibility
Advisor-conducted questions at live hearing	Advisor-conducted questions at live hearing
Relevance determinations by decision-maker	Relevance determinations by decision-maker
Emphasis of relevance, but no definition	Relevance definition
Exclusion of certain evidence (rape shield, treatment records, privileged communications)	Exclusion of certain evidence (rape shield, treatment records, privileged communications)
Simultaneous written determination to the parties	Simultaneous written determination to the parties (required components reorganized)
Opportunity to Appeal on a minimum of 3 grounds	Opportunity to Appeal on a minimum of 3 grounds

Start Thinking About



- Will you do hearings for sex discrimination cases not subjected to the higher procedural standards?
 - Will these parties be permitted to have advisors? [Still required in Clery cases]
- Will you do hearings for SBH cases involving students?
- If not, how will you evaluate credibility in SBH cases involving students?
- What stakeholders should be involved in making these decisions?