

NSU

Florida

NOVA SOUTHEASTERN
UNIVERSITY

Title IX Training: Investigators & Decision-Makers

NSU University School

June 2022

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UNIVERSITY

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Title IX Policy Review

Definition of Title IX Sexual Harassment

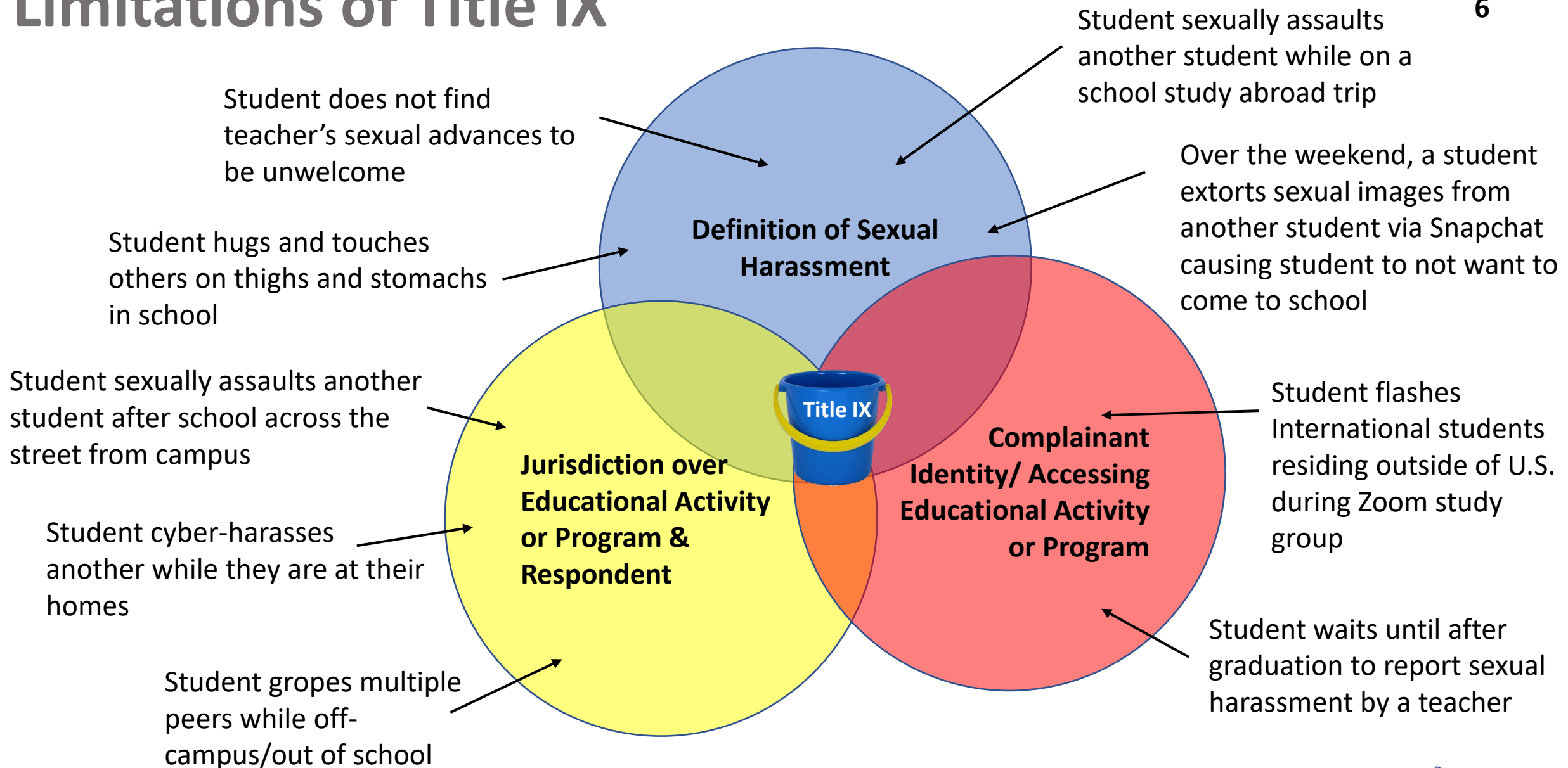
Limited to:

- Unwelcome “**quid pro quo**” sexual harassment by a school employee against a student;
- Sexual harassment that is “so severe, pervasive, and objectively offensive that it effectively **denies a person equal access**” to educational programs; or
- Acts that meet the VAWA definition of a **sex offense** of sexual assault, dating violence, domestic violence, or stalking.
- In addition, Title IX prohibits **retaliation** against any person for pursuing their rights under Title IX.

Jurisdiction of Title IX (i.e. where and when)

- The complainant must be a student/person accessing NSU's educational programs **in the United States**, and
- NSU must have **substantial control over the alleged perpetrator and the context of harassment**, and
- A formal complaint must be made by an affected person who is **enrolled or trying to access** an NSU program/activity
 - Parents may file a complaint on behalf of an under 18-year-old student

Limitations of Title IX



Title IX Jurisdiction

Additional Sexual Misconduct

SEX OFFENSES

sexual assault, dating violence, domestic violence & stalking

HOSTILE ENVIRONMENT

denying access to education

limits, disrupts or adversely affects access

SEXUAL HARASSMENT

“Quid pro quo” by NSU Employee

“unwelcome conduct of a sexual nature”

In the United States
NSU has control over context
NSU has control over respondent
Complainant still part of NSU



SEXUAL EXPLOITATION

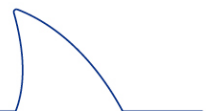
taking sexual advantage of another person

GENDER-BASED HARASSMENT

unwelcome conduct based on gender
expression/identity or sexual orientation

Other Prohibited Misconduct

- **Non-Title IX Sex Offense** – Essentially a type of sexual harassment under Title IX that is outside of the jurisdiction of Title IX
- **Sexual harassment** – “unwelcome conduct of a sexual nature”
- **Gender-based harassment** – unwelcome nonsexual conduct on basis of gender, expression, stereotypes, etc.
- **Sexual exploitation** – taking advantage of another for the benefit of anyone other than that person
- **Hostile environment** – that *limits* a person’s ability to participate



Definition of Consent

- Consent is informed, voluntary, and mutual agreement to engage in sexual activity. Giving consent means that a person understands a specific behavior that someone wants to do with them and they voluntarily give that person permission to engage in that behavior.



Definition of Consent

- Consent must be sought by the initiator of each act
- Consent can be withdrawn at any time.
- There is no consent when force, whether expressed or implied, is used.
- There is no consent when coercion, intimidation, threats, and/or duress is applied.
- Whether a person has taken advantage of a position of influence over another person may be a factor in determining consent.
- Silence or absence of resistance does not imply consent.
- If a person is mentally or physically incapacitated or impaired so that such person cannot understand the fact, nature, or extent of the sexual situation, there is no consent. This includes impairment due to alcohol or drug consumption that reaches the level of incapacitation, being asleep or unconscious or being under the legal age to give consent.



Other Standards of Analysis

- Hostile environment
- Unwelcome conduct:
 - Conduct is considered unwelcome if the person did not request or invite it and considered the conduct to be undesirable or offensive. In addition, unwelcome conduct:
 - May occur through a variety of forms, including, name-calling, graphic or written statements (including the use of cell phones or the Internet), or other conduct that may be physically threatening, harmful, or humiliating.
 - Does not have to include intent to harm, be directed at a specific target, or involve repeated incidents.
 - May involve persons of the same or different sexes or gender identities.
 - May have occurred even if an individual participated in the conduct (if they were coerced or treated into doing so, for example) or failed to report/complain about the conduct.
 - May have occurred, even if a person welcomed similar conduct previously or welcomed a portion of the conduct but not all of it.

Title IX Procedures Review

Procedural Requirements Upon Notice of Incident

- Actual notice = notice of allegations of sexual harassment to any NSU University school employee
- Must offer supportive measures to a victim/affected student
- Must explain the option to file a formal complaint under Title IX
 - *A formal complaint must come from the victim (or parent of a victim under the age of 18) or the Title IX Coordinator*
- Report of a sex crime (stalking, sexual assault, dating/domestic violence) also require notice of rights and options under VAWA, *regardless of where or when it occurred.*

Supportive Measures

- Non-disciplinary, non-punitive individualized services offered as available and appropriate for no cost to the parties
- Designed to preserve students' access to their educational activities without “unreasonably burdening” the respondent
 - Counseling, mutual no-contact orders, change in schedules, virtual participation, extension of class assignments, etc.
 - Does NOT include suspension from athletic team or student club

Requirements for Emergency Removal

Limits interim removal of a student (removal from campus, suspension from program including athletic participation, etc.) **only** if it is determined that the student poses an immediate threat to health or safety of any individual. Requires:

- An individualized safety and risk analysis
- Determination that an immediate threat to the physical health or safety of any student arising from the allegations that justifies removal
- Notice and an opportunity to challenge immediately following the removal

Scenario

Mary reports that Johnny raped her while their families were vacationing in Vail, Colorado, during last Winter break. She and her parents want Johnny immediately expelled from school because Mary does not feel safe.

1. Does Title IX apply?
2. What are your options?
3. What steps do you take?
4. Does this meet standards for emergency removal?

Scenario

Mary reports that Johnny punched her in the face, yesterday in the hallway after she made a joke about his hair. She and her parents want Johnny immediately removed all of their shared classes. Mary feels unsafe when Johnny is nearby.

1. Does Title IX apply?
2. What are your options?
3. What steps do you take?
4. Does this meet standards for emergency removal (shared classes)?

Scenario

Mary reports that Johnny punched her in the face, last weekend, when they were at the mall. Mary stated that Johnny was upset because she would not kiss him. She and her parents want Johnny immediately removed all of their shared classes. Mary feels unsafe when Johnny is nearby.

1. Does Title IX apply?
2. What are your options?
3. What steps do you take?
4. Does this meet standards for emergency removal(shared classes)?

Scenario

Johnny reports that Mary will not stop messaging him. They were just friends but stopped hanging out a couple of weeks ago. Johnny reports that Mary messages him on Instagram 20-30 times a day, from multiple accounts. Johnny and his parents feel frustrated and do not know what to do.

1. Does Title IX apply?
2. What are your options?
3. What steps do you take?
4. Does this meet standards for emergency removal?

Scenario

What supportive measures might be helpful in these situations?



Notice & Investigation Process

- Detailed notice of investigation provided in writing to parties
- Student may have an advisor of their choice at any meeting
 - *Must be equitable. If you allow two parents or a parent and a separate advisor, must do that for other student.*
- All evidence must be provided to the students and their advisors
- Interview transcripts/summaries may be viewed by other party

Procedural Requirements: Investigation

- Must investigate all complaints that fall under Title IX jurisdiction using Title IX procedures
- May address non-Title IX allegations outside of Title IX process, including invoking interim actions for any non-Title IX allegations
- Must provide written notice of investigation, allowing time for a party to prepare for any interview
- May not restrict students from talking about the allegations
- Burden of proof is on the institution, not the parties, to gather information
- Parties must be allowed to present information and witnesses

Procedural Requirements: Investigation Report

- Must provide all evidence to the students and their advisors and allow for at least 10 days for the students to provide a response before completing the investigation report
- Report must summarize relevant evidence
- Must provide a copy of the investigation report to the parties and their advisors and allow for review and written response

Procedural Requirements: Before Adjudication

- After providing the investigation report and before reaching a decision, the parties may submit questions they want asked of any party or witness.
- The decision-maker determines if questions are relevant or not
 - *A complainant's sexual predisposition or prior sexual behavior is not relevant unless sought to prove someone other than the respondent committed the act, or it relates to relevant prior behaviors between the two.*
- May need to be go-between to ask follow up questions

Procedural Requirements: Written Determination

- Decision-maker's written determination must include:
 - Allegation(s)
 - Description of the procedural steps taken
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the policy/code of conduct
 - The result of each allegation, including a determination of responsibility and rationale for each
 - Any sanctions imposed & rationale
 - Whether remedies will be provided to complainant
 - Appeal procedures and grounds

Procedural Requirements: Informal Resolution

- Cases may be resolved informally if the parties agree.
- Informal resolution can occur until a determination of responsibility has been made.
- Informal resolution requires a document signed by the parties (and their parents, if under 18).



Appeals

The parties have an opportunity to appeal the final decision and/or dismissal of any part of a complaint on the basis of:

- Procedural irregularity that affected the outcome;
- New evidence not reasonably available at the time the decision was made that could affect the outcome; or
- The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias that affected the outcome.

Dismissal of Complaints by Title IX Coordinator

- Complaints **MUST** be dismissed under Title IX when:
 - Even if true, does not meet Title IX definition of sexual harassment, or
 - Did not occur towards person accessing NSU programs or activities in the U.S.
- Complaints **MAY** be dismissed under Title IX when:
 - Complaint provides notice in writing of withdrawing complaint, or
 - Respondent is no longer enrolled or employed by NSU, or
 - Circumstances prevent NSU from gathering enough information to reach a determination.

Dismissal under Title IX does not preclude NSU from addressing the behavior under a different policy and/or procedure.

Case Study: Mary & John

When you see/learn about a potential issue.....

1. Address immediate/in-the-moment concerns
2. Get initial information
3. Follow any mandatory reporting requirements
4. Offer supportive measures
5. Offer right to file a formal complaint
6. Contact Title IX Coordinator to discuss situation
7. Provide written summary of information (including student names) to Title IX Coordinator



Role of Investigator(s)

- Conduct an impartial, appropriately prompt and thorough investigation, in accordance with NSU procedures
- Conduct interviews and generate interview summaries
- Collect evidence
- Determine what is relevant to the allegations
- Write a summary report



Role of Decision-Maker(s)

- Read investigation report and review all evidence
- Determine if parties' questions are relevant and ensure questions are posed if so
- Determine a finding of responsibility for each allegation
- Provide and send written outcome letters (using template) to parties

Role of Title IX Coordinator

- Oversees process
- Determines if a complaint meets Title IX jurisdiction
- Review/finalize/send notice of investigation/outcomes
- Provide guidance to investigators and decision-makers regarding procedural questions
- Assist with obtaining evidence or working with law enforcement
- Approves investigation report
- Assists with sanction ideas and supportive measures

Initial Report

Immediate Responses

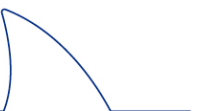
- What do you do?
- Is this “actual notice”? Is this a “formal complaint”?
- What are your obligations under Title IX?
- Who should you report this to?
- What are the policy implications/what applies?
- What are your next steps?



Meeting with Mary

Discussion Questions

- What resources, information, and options do you give to Mary?
- Who should you report this to?
- What follow-up should you do in writing?
- How do you deal with Mary not wanting her parents involved?



Email from Mary's Father

Discussion Questions

- What are the allegations?
- Is this a formal complaint under Title IX?
- If so, what does that mean?
- What are your next steps?
- What support can be offered to Mary?
- Are there grounds for emergency removal?



Next Steps

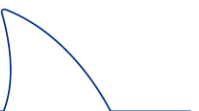
- Notice of Investigation issued to both parties
- Notice of Emergency Removal issued to John
- Mary's father calls to inform you that they have been advised by the Detective not to talk to anyone about this

What do you do now?

Meeting with John & Parents

Discussion Questions

- How do you prepare for this meeting?
- What might they ask about?



Preparing for the Investigation

Discussion Questions

What is the investigation strategy?

What should you communicate at the start of the meeting?

How do you build rapport with the individuals?

What if you are stumped by a question?

If advisor is not a guardian or NSU employee, utilize a written FERPA release.

Interview Reminders

- Start open-ended, let the interviewee talk freely, in any order.
- Don't interrupt.
- Remind that you are trying to get the most accurate understanding you can, not that your questions show doubt in what they are reporting.
- "I don't remember" or "I don't know" is better than trying to fill in a gap.

"Help me understand what happened here...."

Interview Reminders

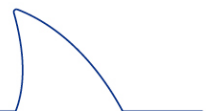
- Be cautious of language and “why” questions that may cause someone to feel judged.
- Ask sensory questions, What did you feel, what did you hear when your eyes were closed, etc.
- Use pictures when helpful.
- Get details/use specific language the student uses:
 - Body parts
 - Length of time/amount of times
 - Level of pressure

Interview Reminders

- Ask about specific behaviors surrounding consent:
 - What was asked/answered/articulated
 - How was consent communicated or not
 - What body language was observed/exhibited
- Ask about effects or impacts
 - Beyond “how did this affect you”
 - Have you been able to study/focus?
 - How are you sleeping, feeling in class, etc.

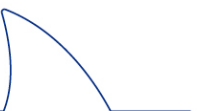
Details....

- Ask about events out of order
- Focus on details – who took off what clothing, where was the touch, how long did something last
- Ask about what happened immediately afterwards
- Ask who the person may have told or spoken to
- Ask if there are any screenshots or other related information



After the Interview

- Create an interview summary shortly after the interview.
- Avoid names – use “respondent”, “witness 1,” etc.
- Keep track of dates of interviews and correspondence
- Start a witness key and evidence list
- May need to start a timeline of incidents
- Provide regular updates to the parties



First Interview with Mary

Discussion Questions

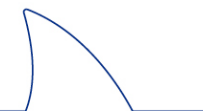
- What questions might Mary have for you?
- What if Mary wants her advisor to be someone who may also be a witness?



Witness Interview: Teresa

Discussion Questions

- What do you need to inform witnesses about the process?
- What questions should be commonly asked of witnesses?
- How much do you share with witnesses about why they are there?
- What questions do you have for Teresa?



Back to Mary

Discussion Questions

- What follow up questions do you have?
- How do you conclude the interview?

- How do you get information about impacts on a Complainant?



Update from Detective

First Interview with John

Discussion Questions

- What limits can/should you set for advisors?
- How can you get more detailed information from an unwilling party?
- What other questions do you have?



Preparing for Follow-Up Interviews

Discussion Questions

- What information is in agreement?
- What is in dispute?
- What is not relevant?
- What other evidence might you be able to obtain?
- What are your questions?



Follow Up Interview with Mary

New Evidence from Frank

Weighing Evidence

What does the new evidence tell you?

How do you verify accuracy of the information?

Do you have any follow up questions?



Follow Up Interview with John

Preparing the Evidence

Evidence Packet

Redacted versions sent to parties and their advisor:

- Formal complaint
- All interview summaries
- Screenshots, photos, or other relevant information
- All information obtained in investigation, whether relevant or not

Parties may respond in writing within 10 days.

Evidence Responses

Writing Investigation Reports

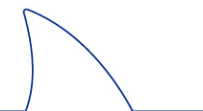
Investigation Report Content

- Template will be provided
- Summarize all points that support or refute the allegations (i.e. relevant information)
- Focus on pieces of information, not “gut” feelings
- Describe any credibility/reliability indicators
- Investigation report is sent to parties & advisors for review and written response 10 days prior to decision

Reviewing for Relevance

Determinations

- Not relevant (must give explanation why)
- Relevant
- May ask for explanation or alternate wording



Questions from John for Mary

1. *Didn't you come into the stairwell with me willingly?*
2. *Why did you send me the sexy bikini photos?*
3. *Why did you ignore my Snapchats?*
4. *You never said "no" in the stairwell, did you?*
5. *Teresa said that you said that I called you a slut, why did you lie about that?*

Questions from Mary for John

- 1. Why are you lying about putting your hand in my pants?*
- 2. Did you ever ask if you could touch my breast?*
- 3. I heard you did something to Sally, did you touch her too?*
- 4. Did you say anything to me when we were in the stairwell, after you touched me?*
- 5. Did you send my photo to Frank with that caption?*

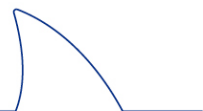
Determining Responsibility

Reminders

- Standard of proof: preponderance or >50%
- Must determine “findings of fact” and make a determination of responsibility for each allegation
- Rationale must be provided for each determination, including rationale for any sanctions
- Outcomes must be issued in writing simultaneously to the parties

Findings & Determinations

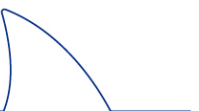
- What are the key findings of fact?
- How do you find for each allegation?
- What is the rationale for each?
- How do any findings of responsibility relate to policy violations?



Determining Sanctions

Sanctioning

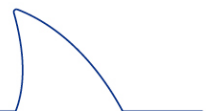
- Standard sanctions
- What warrants suspension/expulsion?
- Educational sanctions
- What is the rationale for the sanction(s) selected?
- Sanctions vs remedies



Monkey Wrenches

Possible Issues

- What if something needs more investigation/there is new evidence?
- What if the decision-maker has questions for the parties?
- What if respondent wants to withdraw from USchool?
- What if the complainant wants to withdraw the complaint?
- What if another incident occurs?



Questions & Discussion