



**Utah State University:
Title IX Hot Topics
November 11, 2022**



Agenda



- Prior Sexual History
- Retaliation
- Boundaries of “Severe, Pervasive, and Objectively Offensive”
- Boundaries of the University Sponsored Program or Activity
- Elements of a Policy Violation



Prior Sexual History

Rules, Relevancy, and Use in Credibility Analyses

First, the Rule



- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that:
 - Someone other than the respondent committed the conduct alleged by the complainant, or
 - If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

34 CFR 106.45(b)(6)(i)

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Does Not Apply to Respondents



- “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 or respondents, so evidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

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Pattern Evidence



Per USU Policy, “The investigator may seek information on the Respondent’s prior or subsequent conduct if relevant to establish a pattern, knowledge, intent, motive, or absence of mistake.”

Also per USU Policy, similar complaints may be combined against a Respondent if they are “similar enough to appear to be part of a discernable and concerning pattern”

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Tips



- Every evaluation is case by case, and that evaluation differs based on role.
 - Coordinator – Do I give this to the investigators?
 - Investigators – Do I include it in the file?
 - Decision-Maker – Do I rule that it is relevant?
- Is the reported behavior substantially similar in nature?
- Is the reported behavior such that if you didn't know who the Respondent was, you'd think that the two incident descriptions pointed to the same person?

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What Do You Do If...?



- The Complainant wants to bring up their *own* sexual disposition or prior sexual history to support their argument that they never would have consented (e.g. "I'm gay," "I'm religious", "I'm a virgin")
- Respondent wants to argue that Complainant has brought nearly identical sexual harassment claims against other individuals at previous institutions

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Retaliation

Standard, Threshold, and Examples

The Regulatory Definition (pt 1)



No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX... or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing...

34 CFR 106.71(a)

The Regulatory Definition (pt 2)



Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX... constitutes retaliation.

34 CFR 106.71(a)

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Retaliation and First Amendment



The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under [the regulations].

34 CFR 106.71(b)

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Examples for Discussion: #1



Employee reports Supervisor for sexual harassment. Supervisor fires Employee three days later, after getting notice of the investigation.

- Could this be retaliation on its face?
- As an investigator, what questions do you need to ask Supervisor?
- As an investigator, what questions do you need to ask Employee?

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Examples for Discussion: #2



Student accuses Peer of sexual assault. Student writes a series of Instagram posts about the incident, calling Peer a rapist. Peer accuses Student of retaliation.

- Could this be retaliation on its face?
- Does it matter if Student has filed a Formal Complaint?

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Examples for Discussion: #3



Friend accuses Upperclassman of sexual assault. Upperclassman goes to a party at Friend's Greek house, but is turned away at the door because of Friend's allegations.

- Did the doorman engage in retaliation?
- Did Upperclassman engage in retaliation?

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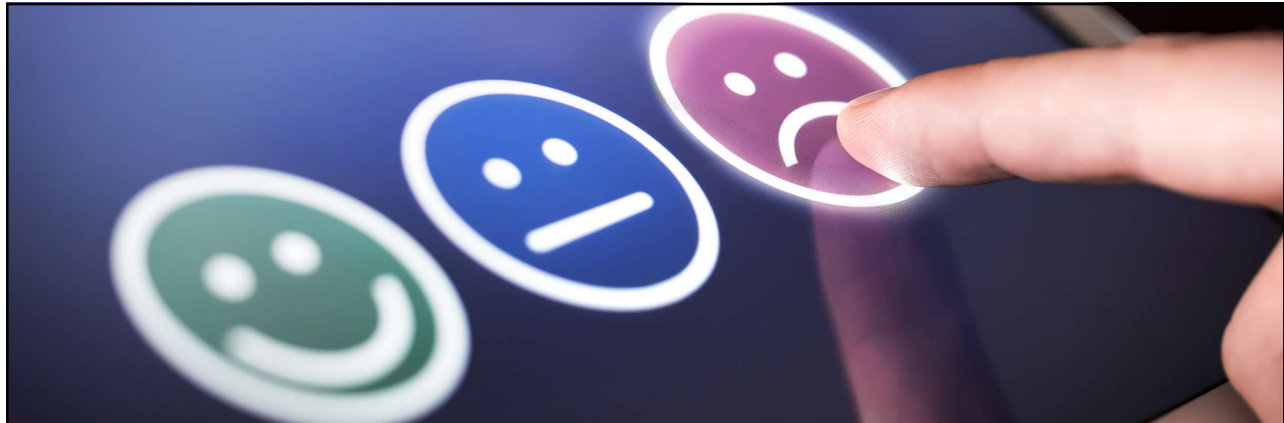
Examples for Discussion: #4



Sophomore is accused of sexual assaulting Junior during a drug deal gone wrong. Junior doesn't want to file a Formal Complaint and isn't willing to participate in the process just yet. In the meantime, Student Conduct Boss charges Sophomore with drug dealing and dismisses Sophomore from the institution after proceeding on those charges.

- Has retaliation potentially occurred?
- What might have been another option to handle this case?

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Boundaries of Severe, Pervasive, and Objectively Offensive

“Unwelcome Conduct”



USU Policy defines Sexual Harassment to include:

“Unwelcome sex-based conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to an Employment or Education Program or Activity.”

“Severe”



- Takes into account the circumstances facing a particular complainant
 - Examples: age, disability status, sex, and other characteristics
- Factors to consider:
 - Physical contact?
 - Force?
 - Teasing and name-calling – not considered sufficient by the U.S. Supreme Court (*Davis*)

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“Pervasive”



- Preamble to the 2020 regulations indicates that to be pervasive, it must occur more than once.
 - “The Department disagrees that an investigation into every offensive comment or joke is necessary in order to discern whether the isolated comment is part of a pervasive pattern of harassment.”
- Examples of things that may meet pervasive requirement, per Preamble: Disseminating “revenge porn,” conspiracy to sexually harass others, and conduct that “harms and humiliates a person on the basis of sex” (30166)

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“Objectively Offensive”



- “Whether a reasonable person, in the position of the particular complainant, would find the conduct offensive” (30167)
 - Reasonable person *in the position of the particular complainant*
- The Preamble acknowledges that “different people may reach different conclusions about similar conduct, but this is not unreasonable because the specific facts and circumstances of each incident and the parties involved may required different conclusion.

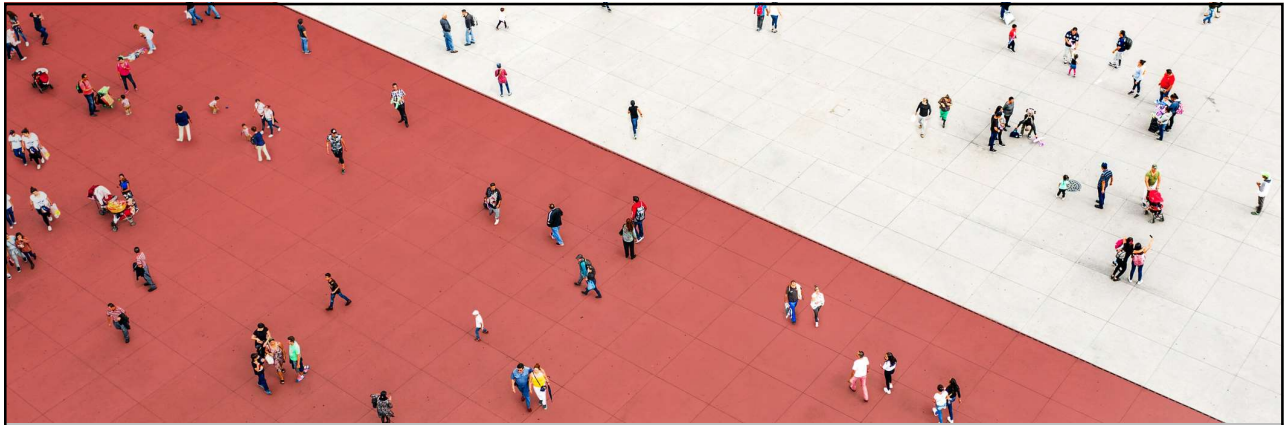
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Examples for Discussion



- Bob calls Sally a gender-based slur. The next day, Chip calls Sally a gender-based slur. The next day, Jake does it. Sally files a Formal Complaint.
- In February, Employee asks Peer to go on a date. Peer says no. Employee asks again in May, and again in October. Peer says no both times. In December, Peer asks Employee on a date. They date for four months and break up. Peer then files a Formal Complaint.
- Student repeatedly asks Partner for sex during relationship, even after Partner says no many times. The parties break up, and Partner files a Formal Complaint.

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Boundaries of the Educational Program/Activity

Two definitions – 106.2 and 106.44

106.2



Program or activity and program means all of the operations of:

- A college, university, or other postsecondary institution

106.44(a)



For purposes of 34 CFR 106.30, 106.44, and 106.45, “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 occurs, and
- Also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

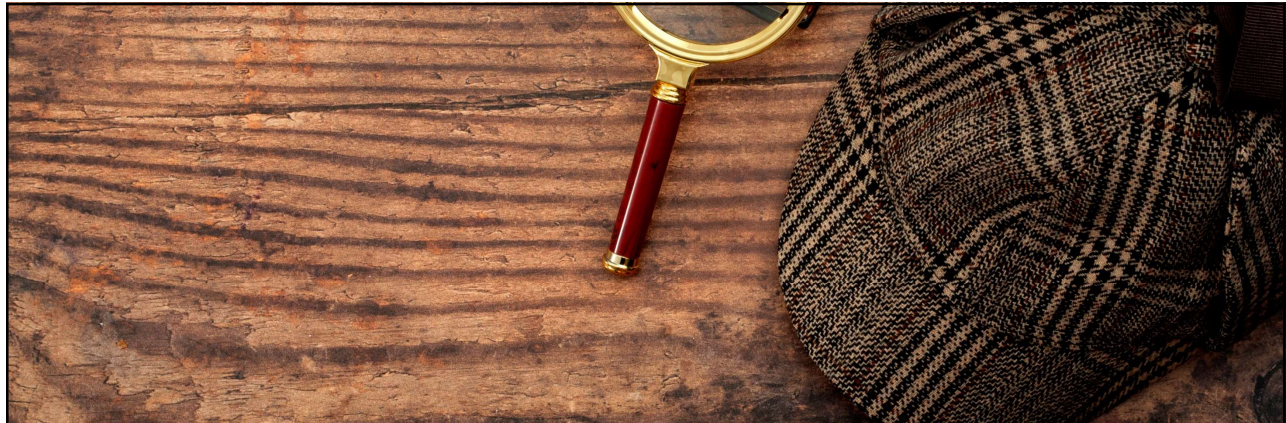
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Examples for Discussion



- Study abroad trip to Guatemala organized by a professor
- Convention in New Jersey attended by a team of staff members
- Professor invites students to house for an end-of-semester gathering
- Holiday party in a local restaurant, sponsored by an academic department
- Aggies away game at University of Wyoming
- Student organization carpooling to an event in Salt Lake City
- Party at the “annex” building of a recognized fraternity

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Elements of a Policy Violation

It's Elementary, Dear Watson

Roles in the Process



- Coordinator: Facilitate the process. Ensure compliance. Offer supportive measures.
- Investigator: Gather relevant evidence and put it on the table. Try to make sure that the Decision-Maker has enough on each element to make a reasoned decision even if no one shows up to the hearing.
- Decision-Maker: Review the evidence on the table, compare it with the information presented at hearing, and make a decision.

What Goes On The Table?



Is the evidence relevant to the allegations?

- Does it “move the needle” as to whether something occurred?
- Does it “move the needle” as to whether a party or witness is credible with regard to the allegations?

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Decision-Maker’s Role



What are the undisputed facts?

What are the disputed facts that are necessary to resolve, and how does each one resolve based on a preponderance of the evidence?

Given the facts:

- What facts are established with regard to each element of the potential policy violation?
- Weigh the facts and make a determination on each element by a preponderance of the evidence.
- If every element is met → policy violation.
- If one element is not met → no policy violation.

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Element Cheat Sheet



This is based on the definitions in Interim University Policy 339: Sexual Misconduct in an Employment or Education Program or Activity.

Investigators – review this sheet while planning your questions, and again at the end of the interview to make sure you have asked all appropriate questions.

Tip: The number one thing people forget to ask is about the impact of the conduct, which is an element of a Policy violation for both Stalking and Hostile Environment. Make sure it is on your list!

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Upcoming Free Webinars (10:00 MT)



- November 16: Title IX Litigation Update
- December 21: Potential Implications for the U.S. Supreme Court's Decision Impacting Affirmative Action (Higher Ed)
- February 16: Clery Hot Topics
- March 15: Athletic Compliance Update (Higher Ed)
- June 6: Whistleblowers and Retaliation Claims (Higher Ed)

Register for all at www.bricker.com/events.

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