

# DECISION MAKER TRAINING



NCSA

Nebraska Council of  
School Administrators

## PRELIMINARY DEFINITIONS

- **Complainant:** an individual who is alleged to be the victim of conduct that could constitute sexual harassment
  - A complainant must be participating in or attempting to participate in the education program or activity of the School with which the formal complaint is filed.
- **Respondent:** an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
- **Formal Complaint:** a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment

## PRELIMINARY DEFINITIONS-SUPPORTIVE MEASURES

- **Supportive Measures:** non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed. **Such measures are designed to restore or preserve equal access to the School's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the School's educational program or activity, or deter sexual harassment**

## SUPPORTIVE MEASURES EXAMPLES

- Counseling
- extensions of deadlines or other course-related adjustments
- modifications of work or class schedules
- campus escort services
- mutual restrictions on contact between the parties
- changes in work or housing locations
- leaves of absence
- increased security and monitoring of certain areas of the campus
- other similar measures

## THE ULTIMATE QUESTION

- Did Sexual Harassment occur within the scope of an educational program or activity?

## DECISION-MAKER'S REPORT INCLUDES:

- The portion of the school's policies that was violated
- A description of the procedural steps that were taken by the school on the way to getting to the decision
- A findings of fact section
- A section that draws conclusions after applying the facts to the portion of the school's policy that applies
- A statement of rationale for the ultimate determination of responsibility
- Any disciplinary sanctions that the school will impose on the respondent, and state whether the school will provide remedies to the complainant
- A statement of rationale for any remedies for the complainant, addressing how those remedies will restore or preserve equal access; and
- A statement of the recipient's procedures, a statement that the parties have a right to appeal the initial determination regarding responsibility, and the permissible bases for appealing.



# YOUR ROLE AS A JUDGE

## YOUR ROLE



Think of the Title IX  
process like a court of  
law



**YOU ARE THE JUDGE**



# WHAT DOES A JUDGE DO?



Listens to trial testimony



Reviews exhibits



Determines credibility



Applies facts to the law



Orders a decision

Decision Maker	Judge
Reviews interviews from investigator's report	Listen to Trial Testimony
Reviews Exhibits gathered by investigator	Reviews Exhibits
Determines credibility based on investigator report	Determines Credibility
Applies facts to the definitions of "sexual harassment" and "scope of educational program or activity"	Applies facts to the law
Orders a Decision	Orders a Decision

## DIFFERENCES BETWEEN YOUR JOB AND A JUDGE



# “THE LAW”

IMPORTANT DEFINITIONS

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TITLE IX  
SEXUAL  
HARASSMENT  
DEFINITION

- Employee Quid Pro Quo
- Hostile Environment\*\*
- VAWA “Big Four”

# SEXUAL HARASSMENT-QUID PRO QUO

- **Definition:** An employee of the District conditioning an aid, service, or benefit of the District on an individual's participation in unwelcome sexual contact
- In this situation- you do not have to analyze severity or harm. It is presumed.
- This definition only applies to employees (not volunteers, or other students, etc.)

## SEXUAL HARASSMENT – VAWA BIG 4

- Sexual Assault 20 U.S.C. 1092(f)(6)(A)(v)
- Domestic Violence 34 U.S.C. 12291(a)(8)
- Dating Violence 34 U.S.C. 12291(a)(10)
- Stalking 34 U.S.C. 12291(a)(30)

## SEXUAL ASSAULT 20 U.S.C. 1092(f)(6)(A)(v)

- The term “sexual assault” means an offense classified as forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation



# SEXUAL ASSAULT

## 20 U.S.C. 1092(f)(6)(A)(v)

- **Forcible 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 victim.

<b>Important Points:</b>	Rape by an object can be as traumatic as penile/vaginal rape
Includes instances in which the victim is unable to give consent because of temporary or permanent mental or physical incapacity	Recognizes that a victim can be incapacitated by drugs or alcohol and thus unable to consent
Physical resistance is not required to demonstrate lack of consent	Rape can occur to any gender
Recognizes legal incapacity to consent because of age	Nebraska: Age of sexual consent is 16. Statutory Rape = person below 15 + person 20 years or older. Sexual Assault of a child includes victim twelve years or younger

# DOMESTIC VIOLENCE 34 U.S.C. 12291 (a)(8)

- **Definition:** The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner 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 or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction



# DOMESTIC VIOLENCE 34 U.S.C. 12291 (A)(8)

**How does “Domestic Violence” occur in a elementary or secondary school setting?**

**This definition is much more likely to occur in a post-secondary school environment.**

# DATING VIOLENCE 34 U.S.C. 12991 (a)(10)

- The term “**dating violence**” means violence committed by a person:
  - Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
  - Where the existence of such a 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
- **Takeaway: Do not dismiss complaints of violence or sexual assault if the victim and alleged perpetrator are “dating”**

## STALKING 34 U.S.C. 12291 (a)(30)

- The term “**stalking**” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to
  - Fear for his or her safety or the safety of others; or
  - Suffer substantial emotional distress



**THIS NEXT ONE  
IS A BIT  
COMPLICATED...**

# SEXUAL HARASSMENT-HOSTILE ENVIRONMENT

- **Definition:** 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 District's education program or activity.

# FACTORS TO ANALYZE

- SEVEREITY
- PERVASIVENESS
- OBJECTIVE OFFENSIVENESS



BUT REMEMBER

■ “Determined by a reasonable person to be ...”

## SCOPE OF EDUCATION PROGRAM OF ACTIVITY

- **Education Program or Activity Means:**  
locations, events, or circumstances over which the School exercised substantial control over both the respondent and the context in which the sexual harassment occurs.

## SCOPE OF EDUCATION PROGRAM OF ACTIVITY

- Title IX applies to **all** of a school's operations, including all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere within the United States.
- **A school may address sexual harassment affecting its students or employees that falls outside Title IX's jurisdiction in any manner the school chooses, including providing supportive measures or pursuing discipline.**



IMPARTIALITY

# IMPARTIALITY

- Impartial means that you do not have any **prejudice** towards the complainant or respondent i.e. lack of bias
- Impartial means that you will render a decision based **ONLY** on the **evidence**
- Impartial means you do not opine about the facts before considering **ALL** the **facts**
- Impartial means you avoid **conflicts of interest**: an investigator or decision maker should recuse themselves from a particular case if they have a conflict of interest

# AVOIDING BIAS



**Confirmation Bias**: placing more value on information that supports our existing belief



**Anchoring Bias**: being overly influenced by the first piece of evidence/information we receive



**Misinformation effect**: the tendency for post-event information to interfere with the memory of the original event. Knowledge of this effect has led to a mistrust of eyewitness information.



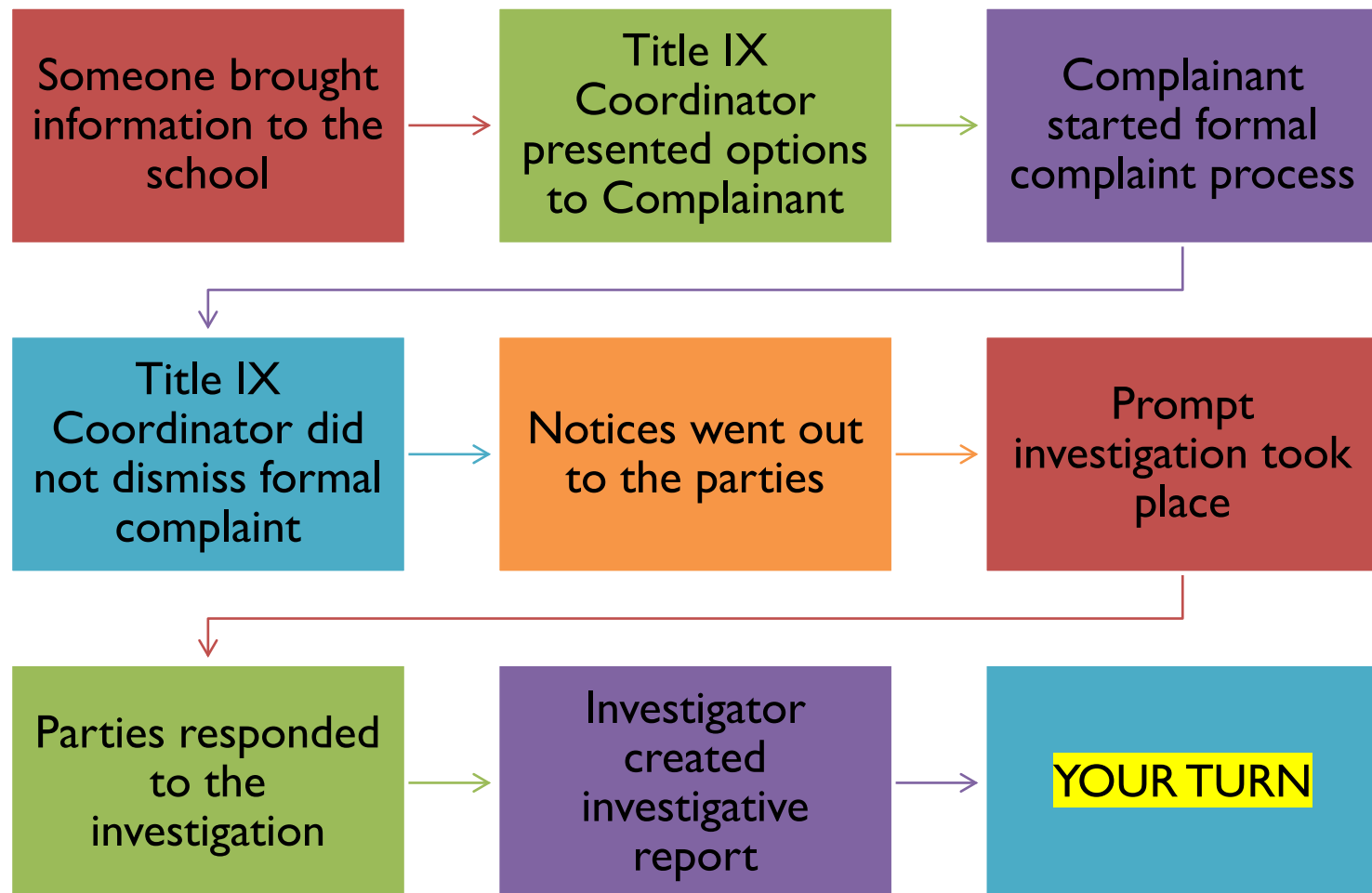
**Halo** effect: your overall impression of a person influences how you feel and think about their character. This especially applies to physical attractiveness influencing how you rate their other qualities.



# THE DECISION MAKER IN ACTION

ANSWERING  
QUESTIONS  
AND  
DRAFTING  
THE REPORT

# WHAT TOOK PLACE BEFORE YOU GOT INVOLVED?







The Formal  
Complaint

The  
Investigative  
Report

TOOLS AT YOUR DISPOSAL

# FACILITATING WRITTEN QUESTIONS


- Prior to coming to a determination, the decision-maker must afford each party the opportunity to:
  - **submit** written, relevant questions that a party wants asked of any party or witness,
  - **provide** each party with the answers, and
  - allow for additional, limited **follow-up** questions from each party.

# FEDERAL RULES OF EVIDENCE 401: TEST FOR RELEVANT EVIDENCE

- Evidence is relevant if:
  - (a) it has a tendency to make a fact more or less probable than it would be without the evidence; and
  - (b) the fact is of consequence in determining the action.

# SEXUAL PREDISPOSITION

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are **NOT** relevant
- UNLESS:
  - Offered to prove that someone other than the respondent committed the conduct alleged by complainant
  - Concern specific incidents of the complainant's prior sexual behavior with respect to the respondent AND are offered to prove consent

- 
- The decision maker must explain to the party proposing the questions any decision to exclude a question that is not relevant

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**BURDEN OF  
PROOF**

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# BURDEN OF PROOF- PREPONDERANCE OF THE EVIDENCE

**“More likely  
than not”**

**“Greater  
Weight of  
Evidence”**

BURDEN OF  
PROOF-  
CLEAR AND  
CONVINCING  
EVIDENCE



Evidence that is highly and substantially more likely to be true than untrue



The fact finder must be convinced that the contention is highly probable



Closer to beyond a reasonable doubt than preponderance of the evidence



“85 to 90 percent certainty” versus “51 percent certainty”

## CREDIBILITY OF COMPETING FACTS

- The decision maker shall not consider the credibility of the evidence solely based on a person's status as the complainant, respondent, or witness.

## FACTORS TO HELP DETERMINE CREDIBILITY

- Did the witness have an opportunity to see or hear the events about which he or she testified?
- Did the witness have the ability to recall those events accurately?
- Was the testimony of the witness plausible and likely to be true?
- Was the testimony of the witness consistent or inconsistent with other testimony or evidence in the case?
- Did the manner in which the witness testified reflect upon the truthfulness of that witness's testimony.
- To what extent, if any, did the witness's background, training, education, or experience affect the believability of that witness's testimony.
- Did the witness have a bias, hostility or some other attitude that affected the truthfulness of the witness's testimony?

## MOTIVE

If a witness had a motive to lie, you may consider whether and to what extent, if any, that motive affected the truthfulness of that witness's testimony.



You may consider whether a witness has any interest in the outcome of the case



You are **NOT REQUIRED** to reject the testimony of an interested witness or accept the testimony of a witness with no interest in the outcome

## IN GENERAL

There is no formula for evaluating the truthfulness and accuracy of another person's statements or testimony.

You bring to this process all of your varied experiences.

In life, you frequently decide the truthfulness and accuracy of statements made to you by other people.

The same factors used to make those statements, should be used when evaluating testimony in the formal complaint process.