

University System
of New Hampshire

Advisors Training

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Role: Title IX/504 Coordinator

University System
of New Hampshire



Welcome

Title IX Training Series

Granite State College Keene Plymouth State University of
STATE COLLEGE UNIVERSITY New Hampshire

University System
of New Hampshire



Training Overview

- Thank you.
- Goal:
 - Hearings regarding matters of Sexual Violence, Sexual Harassment and Related Offenses, including matters falling within the scope of 2020 Federal Title IX Regulations
 - Definition of sexual harassment
 - Scope of the university's educational program or activity
 - The adjudication process (may differ for employee matters)
 - How to conduct cross-examination.
 - Relevancy determinations at live hearings.
 - Written determination regarding responsibility.
 - Appeal



Acknowledgement

- ▶ Examples in this training use references to explicit sexual behavior or body parts
- ▶ These references are a common occurrence in this work
- ▶ Such references must not easily offend. Please discuss concerns with Title IX Coordinator



Title IX Overview

Title IX Definitions

▶ Title IX

▶ Sexual Harassment is defined by Title IX as:

- ▶ An employee or graduate student in an employment role conditioning the provision of an aid, benefit, or service of the university on an individual's participation in unwelcome sexual conduct (commonly known as *quid pro quo* sexual harassment); OR
- ▶ Unwelcome conduct on the basis of sex determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the university's education program or activity; OR

▶ Sexual assault as defined in the Clery Act, or dating violence, domestic violence, or stalking as defined in VAWA.

▶ "Institutional Policy" – USNH institutions continue to hold community members responsible for their behavior toward fellow community members through the student code of conduct and/or discriminatory harassment policy:

- ▶ Severe "or" pervasive sexual harassment
- ▶ Incidents that fall outside of the criteria for Title IX are dismissed as Title IX matters and addressed through institutional policy

▶ Same investigative and adjudication process is used for **both** "Title IX" and institutional policy for cases alleging violation by a student. Process may differ for cases alleging violation by an employee



Mandatory Dismissal of a Formal Complaint Under Title IX

- ▶ The university must review the Formal Complaint to determine if it constitutes sexual harassment as defined by Title IX. If it does not fit the definitions of sexual harassment under Title IX, even if proven true, the university must dismiss the Formal Complaint
- ▶ Nonetheless, the university can pursue the complaint otherwise under its code of conduct. If a mandatory dismissal occurs, your advisee will receive a letter letting them know the university has dismissed the Title IX Formal Complaint but will investigate and adjudicate the matter pursuant to the Equal Opportunity, Harassment, Nondiscrimination Policy
- ▶ The complainant or respondent can appeal a dismissal of a Title IX Formal Complaint



Scope of the University's Education Program or Activity

- ▶ It is a fact specific inquiry. The key questions are whether the institution exercised “substantial control over the respondent and the context in which the incident occurred”
- ▶ There is no bright-line geographic test, and off-campus sexual misconduct is not categorically excluded from Title IX protection
- ▶ For example, Title IX applies to sexual harassment that occurred in an off-campus building owned or controlled by a student organization that the university has officially recognized, such as Greek housing
- ▶ However, PSU Policy makes clear the university will pursue misconduct that meets a broader definition of sexual harassment or occurs outside of its program or activity as part of the Equal Opportunity, Harassment, Nondiscrimination Policy

Title IX/Civil Rights Investigation Process Requirements

- ▶ “Formal complaint” by complainant or Title IX coordinator
 - ▶ Title IX Coordinator reviews and can dismiss if it does not meet the Federal definitions for Title IX, but PSU can still address the matter under institutional policies
 - ▶ Parties can appeal a dismissal decision
- ▶ Notice of Investigation Issued to parties
- ▶ Investigation by institution
- ▶ Parties review evidence and investigation report
- ▶ Institution presents case
 - ▶ Live hearing with cross-examination for Title IX matters
 - ▶ Responsibility determination
 - ▶ Sanctioning (if applicable)
- ▶ Appeal
- ▶ Supportive measures are offered to parties throughout the investigation and adjudication process

- ▶ *Note: sexual orientation, gender, and gender identity are legally neutral in Title IX: any person may commit or be impacted by sexual violence.*

“Advisor of Choice”

- Each party may have up to two advisors of their choice from within or outside of the institution; an advisor may be an attorney
- PSU must appoint an advisor if student does not have one
- The advisor may accompany a party to interviews, investigative report and evidence review, and adjudication proceedings
- One advisor is required to serve in cross-examiner role –
 - Relevant questions
 - Follow-up questions
 - Including challenges to credibility
- Advisor(s)- *and all participants in the hearing-* must follow rules of decorum

Phases of the Process

Disclosure

- Review by Title IX Coordinator for mandatory or permissive dismissal
- If dismissed, parties can appeal decision
- Supportive measure provided to impacted party; formal complaint not required for supportive measures

Formal Complaint

- Investigation
 - Notice of investigation to Respondent/Supportive measures
- Parties review & respond to evidence gathered during investigation
- Parties review & respond to report by investigator

Adjudication

- Live hearing with questioning by advisors
- Responsibility determination by decision makers
- Impact statements (if applicable)
- Sanctions (if applicable)
- Appeal
- *Informal resolution options first require a formal complaint

Remedies

- Continuation of supportive measures
- Long term remedies
- Individual, community, program based
- *Remedies at the program/department level do not require formal complaint

Phases of the Formal Complaint Process

Formal Complaint


- Review by Title IX Coordinator for mandatory or permissive dismissal
- If dismissed, parties can appeal decision

Notice of Investigation


- Investigation
- Parties review & respond to evidence gathered during investigation and draft of the report prior to hearing
- PSU focuses on a live, iterative report review process for each party

Hearing Notification

- Live hearing with questioning by advisors
- Responsibility decision by decision-maker(s) (3-person panel for student Respondents)
- Impact statement (if applicable)
- Sanctions (if applicable)
- Appeal



Equity



- Principal Goal of Title IX & Institutional Policy
 - Complainant has a right to fair process, free from bias
 - Respondent has a right to fair process, free from bias
 - Generally, supports and procedural adjustments for one side are offered to the other side
- Respondent is presumed not responsible throughout investigation
- Investigative and hearing process designed to protect the fairness and integrity of the decision on responsibility

A Word on Confidentiality

- ▶ Student conduct is part of educational record
- ▶ Employee personnel matters are generally confidential
- ▶ Breach of confidentiality can be a form of retaliation
- ▶ Witnesses, investigators, staff and decision-maker(s) are required to maintain the privacy and confidentiality of the proceedings
- ▶ However, parties have the right to discuss the incidents or the allegations
 - ▶ They may be cautioned to avoid litigating the case through gossip, innuendo, social media (retaliation)
 - ▶ They may be cautioned about retaliation, libel, and slander
 - ▶ Cautionary messages are best discussed along with an advisor so as to not be construed as either chilling or threatening



A Word on Retaliation

- ▶ Act of punishment, revenge or recrimination
- ▶ Every party and every witness in a Title IX or related investigation has a legal right to be free from retaliation
- ▶ Title IX expressly prohibits retaliation against any individual exercising rights under Title IX, specifically protecting any individual's right to participate or refuse to participate in a Title IX grievance process
- ▶ The institution can caution all parties and witnesses about the prohibition on retaliation
- ▶ PSU does not tolerate retaliation of any kind, whether or not the complaint is ultimately determined to be a violation



Role of Advisors



Campus Supports for your Student-Advisee

Confidential:

- ▶ Voices Against Violence (off-campus service; primary resource referral)
- ▶ University Counseling Center
- ▶ Health Services

Not Confidential:

- ▶ Title IX Coordinator
- ▶ Dean of Students
- ▶ Academic Student Advocate
- ▶ Campus Accessibility Services
- ▶ Academic advisor(s)
- ▶ Residence Hall Director
- ▶ Writing Center, Math Activities Center, Pass/Tutoring



Supports for your Employee-Advisee

- Employee Assistance Program (EAP) (confidential)
- Human Resources
- Grievance Rep from collective bargaining unit (if applicable)

- *Voices Against Violence also serves PSU employees; their services are confidential



Role of Advisor

- ▶ Become familiar with policies applicable to the matter you are advising
 - ▶ Contact the Title IX Coordinator if you need help accessing the policy documents
- ▶ Explain the processes to advisee
 - ▶ Expect your advisee to ask the same question more than once
 - ▶ Importance of relevance to admissibility of information
 - ▶ Importance of cross-examination to findings of fact
- ▶ Help advisee make choices about
 - ▶ How best to participate and engage in the adjudication process
 - ▶ Providing statements or asserting right to silence
 - ▶ Accompany advisee to meetings or interviews
 - ▶ Supportive measure needs and adjustments to request from Title IX Coordinator
- ▶ Review evidence gathered by the investigator
- ▶ Review investigative report and help advisee respond to it if desired



Relevance




Relevance

- ▶ Dictionary: closely connected or appropriate to what is being done or considered
- ▶ Legal: evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence
- ▶ The evidence is pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true
- ▶ Merriam-Webster Dictionary defines “relevant” as “affording evidence tending to prove or disprove the matter at issue or under discussion.”




Basic Relevance

- ▶ Dangers of irrelevant information
 - ▶ Waste time, prejudice & faulty findings
 - ▶ Irrelevant evidence may impact impartiality, perpetuate bias, and lead to erroneous outcomes
- ▶ Focus on the incident(s) itself
 - ▶ Information connected with the incident probably is relevant
 - ▶ Information that is not directly connected to the incident is more likely not to be relevant
 - ▶ Exceptions: course of conduct, demographic information (introductions), threat
- ▶ If you have questions, consult with Title IX Coordinator
- ▶ Be prepared to separately document information that you determine is not relevant.



Relevant Evidence v. Directly Related Evidence

- The investigator is charged with gathering evidence “directly related to the allegations” raised in the Formal Complaint
- Directly related evidence is more broad than “relevant” evidence
- The investigator may gather evidence that is directly related to the matter at issue, but ultimately decide that it is not relevant to include in the investigative report



Relevant Evidence v. Directly Related Evidence (continued)

- ▶ However, parties and their advisors must have the opportunity to review evidence gathered that is directly related as well as relevant evidence included in the investigative report
- ▶ Parties can argue to the decision-maker that evidence directly related to the allegations is in fact relevant
- ▶ This includes evidence upon which the institution does not intend to rely in reaching a determination regarding responsibility

Relevant Evidence v. Directly Related Evidence (continued)

- ▶ However, parties and their advisors will have the opportunity to inspect and review evidence gathered by the investigator that is directly related as well as relevant evidence summarized in the investigative report
- ▶ The parties will have the opportunity to argue to the investigator and to the decision-makers that evidence directly related to the allegations is in fact relevant, and parties will not have a robust opportunity to do this if evidence related to the allegations is withheld from the parties by the investigator
- ▶ The Title IX Coordinator will provide information regarding how to store evidence gathered during the investigation as well as facilitate the opportunity for parties to review evidence and the report

Rape Shield Principles

- ▶ Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant
- ▶ Exceptions:
 - ▶ information 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
 - ▶ specific incidents of the Complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- ▶ The Title IX Coordinator can assist with articulating information about prior sexual history in a manner that is appropriate for the investigative report

Character

- ▶ In standard conduct hearings we generally exclude information about a party's good or bad character.
- ▶ In sexual misconduct hearings character evidence is admissible only if it is **relevant**
 - ▶ The party offering character evidence can be asked to explain how the character evidence that is being offered is relevant
 - ▶ The closer the connection to the incident at issue, the more likely it is admissible
- ▶ “Badgering” or abusive, intimidating and/or disrespectful questioning of witnesses is never permitted, including to get them to admit to bad character
- ▶ Cumulative information about character may be excluded



Prejudicial Information

- For example, in “standard” adjudications unfairly prejudicial information is generally excluded
- In sexual misconduct adjudications, prejudicial information is admitted only if it is **relevant**
- “Badgering” or abusive, intimidating and/or disrespectful questioning of witnesses is never permitted
- Cumulative information regarding prejudicial information may be excluded



Prior Acts

- ▶ In standard conduct adjudication, evidence of a person's previous misconduct is not generally admitted, rather a conduct history is considered at the time of sanctioning
- ▶ In sexual misconduct cases, evidence of prior bad acts is admitted only if it is **relevant**
- ▶ “Badgering” or abusive, intimidating and/or disrespectful questioning of witnesses is never permitted, including to get them to admit to prior bad acts
- ▶ Cumulative information about prior bad acts may be excluded



Consent



Consent

- ▶ Agreement to sexual interaction is essential
- ▶ “Expressed consent”
 - ▶ Verbal
 - ▶ By conduct
- ▶ Consent can be revoked at any time
- ▶ Consent may not be:
 - ▶ Coerced by threat, violence or manipulation
 - ▶ Given by a person who is incapacitated
- ▶ Institutional policies (Equal Opportunity, Harassment, Nondiscrimination) define consent, incapacity and related terms

PSU's Definition of Consent

- ▶ Consent is:
 - ▶ knowing, and
 - ▶ voluntary, and
 - ▶ clear permission
 - ▶ by word or action
 - ▶ to engage in sexual activity.
- ▶ Since individuals may experience the same interaction in different ways, it is the responsibility of each party to determine that the other has consented before engaging in the activity.
- ▶ If consent is not clearly provided prior to engaging in the activity, consent may be ratified by word or action at some point during the interaction or thereafter, but clear communication from the outset is strongly encouraged.
- ▶ For consent to be valid, there must be a clear expression in words or actions that the other individual consented to that specific sexual conduct. Reasonable reciprocation can be implied. For example, if someone kisses you, you can kiss them back (if you want to) without the need to explicitly obtain *their* consent to being kissed back.
- ▶ Consent can also be withdrawn once given, as long as the withdrawal is reasonably and clearly communicated. If consent is withdrawn, that sexual activity should cease within a reasonable time.
- ▶ Consent to some sexual contact (such as kissing or fondling) cannot be presumed to be consent for other sexual activity (such as intercourse). A current or previous intimate relationship is not sufficient to constitute consent.
- ▶ Proof of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on the University to determine whether its policy has been violated. The existence of consent is based on the totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

Common Issues with Consent

- ▶ Consent by conduct
 - ▶ Physical passivity is not consent, but expressed consent does not require verbal consent at any stage of a sexual interaction
 - ▶ Would a reasonable sexual partner understand that consent was given?
- ▶ Revocation of consent – how clearly must a person communicate that their mind/intention has changed?
 - ▶ It must be communicated, but it does not have to be communicated verbally
 - ▶ Would a reasonable sexual partner understand that consent was revoked?
- ▶ Incapacity
 - ▶ Intoxication is not incapacity
 - ▶ Physical manifestations of incapacity in presence of partner: slurred speech, loss of motor control, falling asleep during sexual interaction, incoherent speech, vomiting
 - ▶ Would a reasonable partner know (or should they have known) that the other was incapacitated?



Trauma Informed Practice



Impact of Trauma

- ▶ There is a body of scientific research that suggests that physical and emotional trauma can interfere with the formation of memory
 - ▶ Trauma during an event may help explain gaps in a person's memory of the event
 - ▶ This research has influenced training of investigators and decision-maker(s)
- ▶ There also is a scientific and policy critique of the “trauma informed” approach
 - ▶ There are other causes of gaps in memory
 - ▶ Risk of gender bias
 - ▶ Risk of assuming that gaps in memory are themselves evidence of trauma
 - ▶ In the context of campus sexual assault, violent sexual assault is rare, but disputes about whether consent was expressed are very common



What we can learn from trauma informed principles

- ▶ People do not necessarily form stronger memories during a stressful event, in fact
 - ▶ People often do not remember events in precise, detailed chronological order
- ▶ Start by asking witnesses what they do remember about an event, don't interrupt as they relate their memories, and allow them to report what they do remember
- ▶ Gaps in memory are not proof that someone is lying – or that they are telling the truth



Recommendations regarding trauma informed techniques

- Use the trauma informed questioning techniques with *all* parties, regardless of their role in the case
- Treat all parties with respect, regardless of their role in the case
- Gather the information that is available, compare it to the other information and evaluate the case based on all the evidence
- Be fair to everyone in the process
- Don't substitute any assumption about what gaps in memory mean for a careful, thoughtful, fair assessment of the facts



Live Hearing

Live Hearings Can Be Held Virtually

► Tips for Online Hearings

- > **Log On Early:** Sign into the hearing a little early to make sure you can connect without issues!
- > **Internet Stability:** We can't control the internet...if yours goes out, simply reconnect to the hearing as quickly as you can. We will pause the hearing if anyone leaves unannounced.
- > **Share Your Screen:** If you want to reference a photo or document, or even draw a diagram, ask to share your screen.
- > **Breakout Rooms:** We will use breakout rooms often in online hearings. We jump around from room to room coordinating things...so hang tight...we haven't forgotten about you.
- > **Viewing Documents:** It may be useful to have a second screen or device to look at hearing documents on. This way you aren't trying to do everything on one screen.
- > Let the Title IX Coordinator know if you are unfamiliar with Zoom or need equipment for the hearing.

Hearing Outline

- ▶ Introductions
- ▶ Process overview/Review Agenda
- ▶ Opening Statements (optional)
- ▶ Investigative Report Delivery
 - ▶ Questions for Investigator
- ▶ Witness Questions
- ▶ Panel Questions for Reporting (Complainant) and Responding (Respondent) Parties
- ▶ Cross-Examination by the advisors
- ▶ Closing statements
- ▶ Panel deliberations
- ▶ Finding delivered
- ▶ Impact Statements (if applicable)
- ▶ Sanctioning deliberations (if applicable)
- ▶ Sanction(s) delivered (if applicable)
 - ▶ Findings with rationale also provided in writing to both parties; appeal rights included in written outcome



Rules of Decorum

- In essence: rules for good meetings
 - Fairness
 - Politeness
 - Mutual respect
- Apply to everyone: parties, advisors, decision-makers

Topics Included in Rules of Decorum (partial list)

Required

- Preparation
- Promptness
- Cell phones silenced
- Listening
- Speaking in turn
- Focus on relevant topics
- Courtesy, respect
- Maintain confidentiality

Prohibited

- Outbursts
- Profanity
- Threatening
- Disorderly behavior
- Disruptive conversations/
interruptions
- Disobeying rules of decorum

Obligation to Cross-Examine


- ▶ Important for you to know what your advisee wants to communicate to the decision-maker
- ▶ Cross-examine to
 - ▶ Follow-up and make sure that important details are included in the hearing record
 - ▶ Assure that witnesses acknowledge facts that are damaging to their narrative but helpful to your advisee's narrative
- ▶ You will be asked to submit cross-examination questions in advance of the live hearing in order to expedite relevancy determinations, but it is not mandatory to do so

Cross-Examination by Advisor

- ▶ Must be conducted by the advisor directly, orally, and in real time at the live hearing, which can be held virtually on a case-by-case basis.
- ▶ Relevancy of question is determined by the decision-maker(s)
 - ▶ Party or witness should be instructed not to answer until decision is made
- ▶ If relevant, party or witness may respond
 - ▶ If party or witness refuses to respond, explain repercussions
- ▶ Process:
 - ▶ Advisor states question
 - ▶ Advisor and decision-maker(s) listen, look at decision-maker(s) for nod or other signal and listen for other party's advisor to object
- ▶ Signal to proceed
 - ▶ "Go ahead," or "you may answer"
 - ▶ Visual cue Ok if it is clear on recording

How to Object to Questions

- ▶ [Objector] “that is not relevant”
- ▶ [Decision-maker] “how does that relate to this incident?”
 - ▶ Decision-maker or the other advisor may offer a short statement about relevance
- ▶ If more than one decision-maker, confer with the entire panel to make the relevancy decision
- ▶ Decision-maker states the ruling:
 - ▶ If question is determined to be irrelevant, a brief explanation must be provided to the parties at the hearing.
 - ▶ E.g., “That is not relevant because the complainant’s previous sexual experiences do not relate to this incident.”
- ▶ Parties and advisors can challenge the relevance determination by the decision-maker, but only one time after receiving the explanation



We are serving real, live human beings. This is not a TV court drama.

- ▶ Not cross-examination in the sense that criminal defense lawyers, prosecutors and civil litigators practice it
- ▶ Subject to Rules of Decorum
 - ▶ Parties/witnesses may be college students
 - ▶ Treat everyone with respect ~~even~~ especially if you disagree with them
- ▶ Sarcasm, invective, intimidation:
 - ▶ First offense: correction by presiding officer
 - ▶ Second offense: may be excluded from hearing



Suggestions for asking difficult questions

- ▶ Details regarding consent or sexual encounters often are important to the conduct charge
- ▶ Let the witness get all the way through their account before
- ▶ Listen carefully, try not to get distracted by questions you plan to ask
- ▶ Who, what, where, when, & how
- ▶ Rarely 'why?'
- ▶ "Help me to understand . . ."
- ▶ "I'm sorry to have to pry into intimate details, but it is important for us to know . . ."
- ▶ "It seems that you are having difficulty recalling some details, but please tell me, if you can what happened"



Reluctant Parties and Witnesses

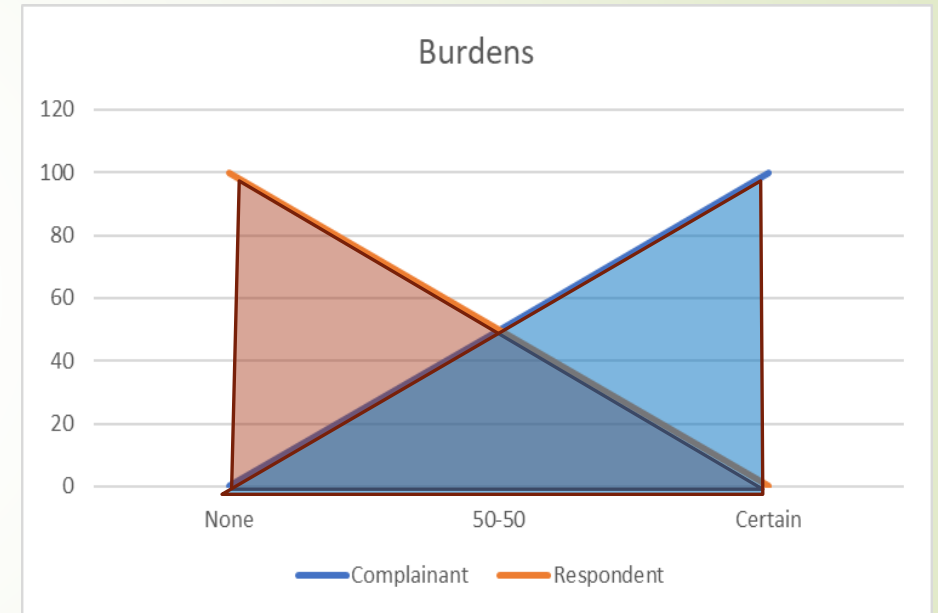
- ▶ Institution cannot compel the parties or any witnesses
 - ▶ Courts can – and do compel parties and witnesses
- ▶ Often a case cannot go to hearing without the complainant
- ▶ Respondent has Fifth Amendment and conduct process right to silence
- ▶ Decision-makers have to disregard any information that is not subject to cross-examination at the live hearing



Burden of Proof

Burden of proof

- ▶ Respondent presumed not to be responsible for the violation until it is proven
- ▶ Institution has to prove the matter “by a preponderance” of the evidence
 - ▶ More likely than not
 - ▶ “50% and a feather”
- ▶ Not required to prove to certainty



Burden of Proof

- ▶ To make a finding of responsibility, decide which evidence was more convincing
 - ▶ If University presented more persuasive evidence on the elements of the charge(s), then the respondent should be found responsible
 - ▶ If not, or if the evidence is equally balanced, the respondent should be found NOT responsible
 - ▶ Consider each “element” of each violation
- ▶ Simply means “more likely than not” – you may have doubts, but believe that it is more likely than not that the incident occurred
- ▶ Greater weight of the evidence
 - ▶ Quality and persuasiveness
 - ▶ Not number of witnesses or documents

[Adapted from Federal Civil Jury Instructions]

Written Determination Regarding Responsibility

- The decision-maker(s) must issue a written determination regarding responsibility by applying the preponderance of the evidence standard of proof
- The written decision must contain all of the following:
 - Identification of the allegations potentially constituting sexual harassment
 - A description of the procedural steps taken from the receipt of the Formal Complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
 - Findings of fact supporting the determination
 - Conclusions regarding the application of the policy to the facts
 - A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the institution imposes on the respondent (if applicable), and whether remedies designed to restore or preserve equal access to the education program or activity will be provided to the complainant
 - The institution's procedures and permissible bases for the complainant and respondent to appeal

Appeal

- An appeal can be based on one or more of the following purposes:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonable available at the time of determination that would affect the outcome of the matter;
 - The sanction was not appropriate for the violation (may not be applicable for standard sanctions); or
 - The investigator or hearing decision-maker had a conflict of interest for or against either party that affected the outcome of the matter
- Appeals must be submitted within the timeframe determined in the EOHN policy; the specific appeal window should be noted in the original outcome letter
- Appeal outcomes are determined by a decision maker that has had not other involvement in the case



Thank you!

- ▶ Advisors play a central role in Plymouth State University's response to reports of incidents of sexual violence and related misconduct
- ▶ We appreciate your participation in this process