

# Hypo Two - Answer

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Complainant tells the Title IX Coordinator that his boyfriend hit him in the face after they returned from drinking downtown, and wants to file a complaint against him. Complainant states that this occurred two years ago in the beginning of their relationship, but they just broke up and he felt he should report it.

Zoom Poll:

Yes, this is Sexual Harassment;

No, there is not Sexual Harassment;

I'm not sure

# Hypothetical Three

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An anonymous letter to the Title IX Coordinator states that a video is circulating among students of Respondent, a student, having sex with Complainant, another student, who appears to be unresponsive.

# Hypo Three - Answer

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An anonymous letter to the Title IX Coordinator states that a video is circulating among students of Respondent, a student, having sex with Complainant, another student, who appears to be unresponsive.

Zoom Poll:

Yes, this is Sexual Harassment;

No, there is not Sexual Harassment;

I'm not sure

# Hypothetical Four

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Complainant, a student, alleges that her partner, another student, secretly took a video of them engaged in sexual intercourse. Complainant stated that she just found out about the video when a friend informed her about it.

# Hypo Four - Answer

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Complainant, a student, alleges that her partner, another student, secretly took a video of them engaged in sexual intercourse. Complainant stated that she just found out about the video when a friend informed her about it.

Zoom Poll:

Yes, this is Sexual Harassment;

No, there is not Sexual Harassment;

I'm not sure

# Hypothetical Five

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Complainant, an employee, tells the Title IX Coordinator that Respondent, an unknown person on campus who may be a student, has been following Complainant around campus. Whoever it is has key card access to buildings. Complainant states that she often catches Respondent staring at her. Complainant states she is scared because she is often alone at night on campus.

# Hypo Five - Answer

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Complainant, an employee, tells the Title IX Coordinator that Respondent, an unknown person on campus who may be a student, has been following Complainant around campus. Whoever it is has key card access to buildings. Complainant states that she often catches Respondent staring at her. Complainant states she is scared because she is often alone at night on campus.

Zoom Poll:

Yes, this is Sexual Harassment;

No, there is not Sexual Harassment;

I'm not sure

# **Combining Mandatory Regulation Language**

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**With discretionary  
policy language**

# Discretionary: Consent, Coercion, Incapacitation, Exploitation

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- Discretion is left to the institution on consent, coercion, and incapacitation, which, as we will discuss, allows institutional discretion on the extent of these violations, especially under “sexual assault”
- Exploitation/revenge porn: may be pervasive unwelcome conduct depending on widespread dissemination (30166)

# Consent: Left to the Institutions to Define

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USED left “consent” and terms that often negate consent to the discretion of the recipients to “reflect the unique values of a recipient’s educational community.” (30159, see also 30174)

- No required definition in law, regs, or guidance
- Policy language is going to be critical to your analysis
- We will use standard language for discussion purposes

# Who Can *NEVER* Give Consent?



- Those who are unable to consent by law (ex. minors, incarcerated persons)
- Severely cognitively disabled persons
- Those who are incapacitated

# Consent 1 of 2

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- Some policies usually also require:
  - Clear – (Non verbal v. verbal) communication
  - Knowing - Mutually understood as willingness to participate in a sexual activity and the conditions of that sexual activity
  - Voluntary - Freely and actively given
  - Consent for activity with one person does not transfer to another person

# Consent 2 of 2

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- Some policies include:
  - May be withdrawn with clear communication
  - Consent for one activity is not consent for everything
  - Silence or failure to resist does not constitute consent
  - Previous consent does not constitute consent for future activities

# When Does Consent *NOT* Exist?

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- Use of physical force or threats of physical force,
  - Many policies also include physically intimidating behavior or coercion

# Evidence of Consent? 1 of 2

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- What words or actions did complainant use to convey consent/non-consent?
  - Must examine sexual contacts, acts in detail
- Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

# Evidence of Consent? 2 of 2

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- Who took off what clothes?
- Who provided the condom?
- Who initiated physical contact?
- Who touched who where?
- Who was in position of physical advantage?
- “They gave consent” = What did you say to them, and what did they say to you?

# Coercion: Left to Institution to Define

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- Is this in your policy?
  - Does your TIX team, your preventive education team, and your local rape crisis center agree on a definition when working with your community?
- Often defined as unreasonable pressure for sexual activity
- Compare: “I will break up with you” versus “I will kill myself”

# Incapacitation: Left to Institution to Define

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- State of being unconscious, asleep, or under the influence of drugs and/or alcohol to such an extent that the person cannot appreciate the nature or consequences of their actions
- Intoxicated people **can** consent.  
Incapacitated people **cannot** consent.

# Incapacitation: Amnesty?

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Nothing in the Regulations precludes the postsecondary institution from providing amnesty to students for personal alcohol and/or drug use when participating in a Title IX investigation

# Incapacitation 1 of 2



- Determined by how the alcohol (or drugs) consumed impacts a person's decision-making capacity, awareness of consequences, and ability to make informed judgments
- Beyond mere intoxication
- No requirement for incapacitation to be voluntary or involuntary on the part of the complainant

# Incapacitation 2 of 2

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- To be responsible where a complainant is incapacitated, policies typically require that the **respondent knew or reasonably should have known about the incapacitation**
- Incapacitation of the respondent is not a defense

# Productive Questioning on Gauging Intoxication

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Difficult to gauge:

- How trashed were you?
- On a scale of 1-10, how drunk were you?
- Why did you get that drunk?

Preferable approach:

- Explain why you need the information
- Don't place blame

# Any Drugs?

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- Did they take any medications that might have interacted with alcohol or otherwise affected their level of intoxication?
- Did they take any drugs that may have altered their ability to stay awake, understand what was happening, etc.?
- What, how much, and when?
- Remember: can have amnesty in your policy for personal drug and alcohol use (also a good way to avoid institutional retaliation!) at 30536

# Physical Effects

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Some policies list physical effects that are not solely indicative of, but may indicate incapacitation:

- Conscious or unconscious?
- Vomiting?
- Slurred speech
- Difficulty walking
- Difficulty holding a coherent conversation

# Blackout ≠ Incapacitation

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- Alcohol can interfere with the ability to form memories
- May be a complete lack of memory or fragmentary blackouts
- Listen carefully to the way they describe what they remember. Does it fit with what you know about intoxication and recall?



# Myths and Stereotypes



# The Things People Say

- “Why wasn’t she hysterical?”
- “It can’t have been rape. She went back to him the next day!”
- “Of course he did it.”
- “If she hadn’t been drunk...”

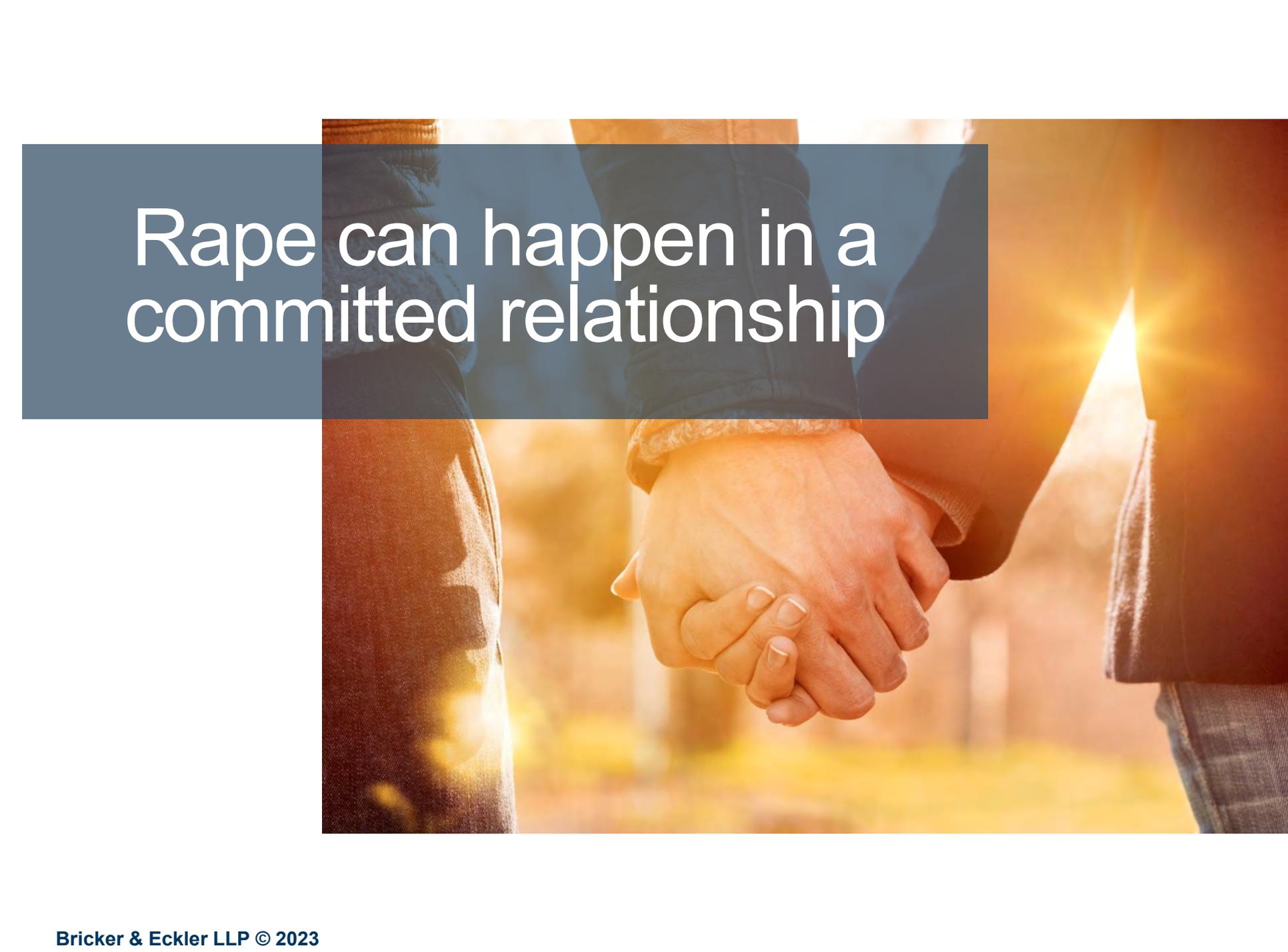
## Know Better

# KNOW THE FACTS

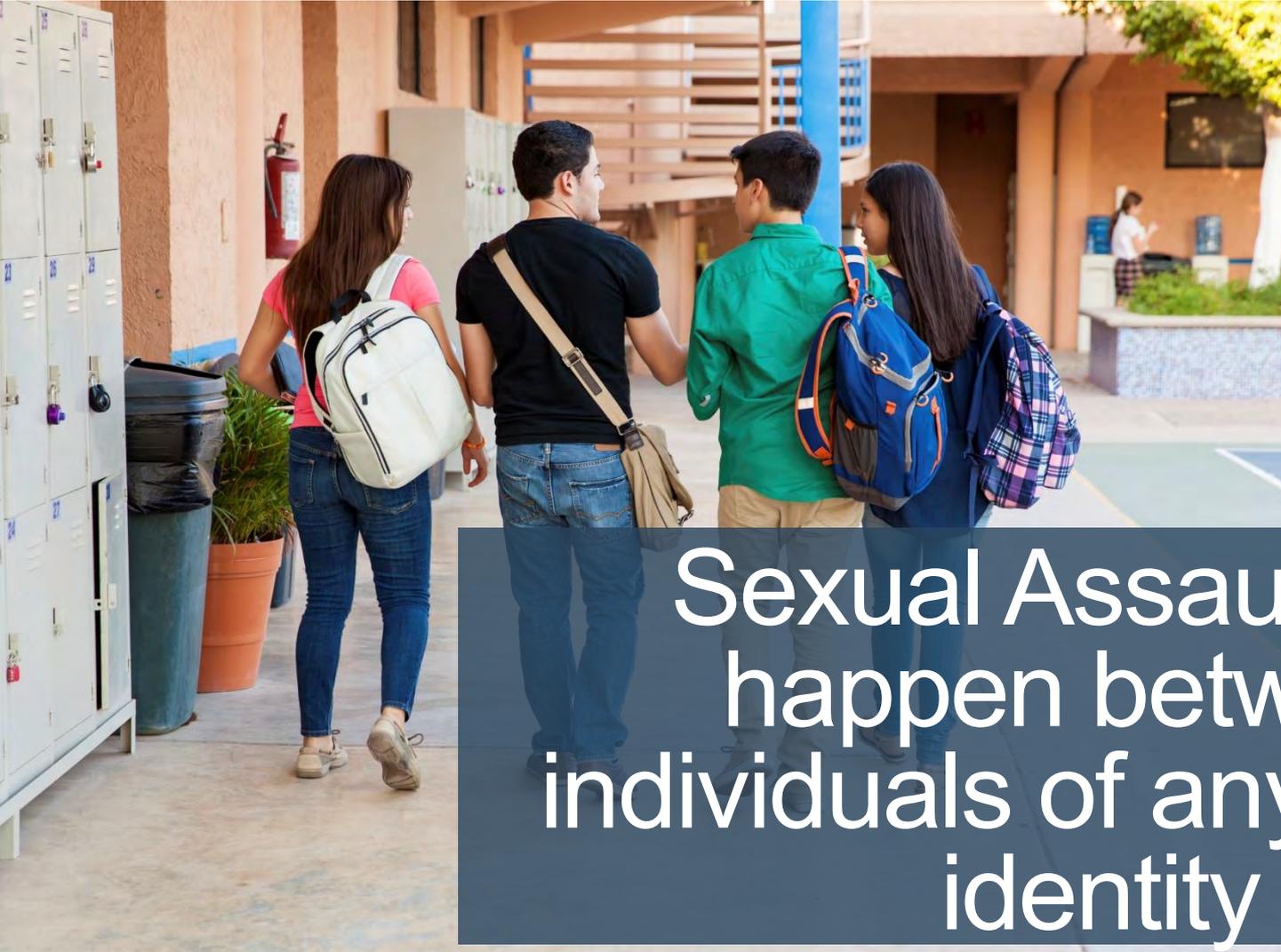
- “Why wasn’t she hysterical?”
- “It can’t have been rape. She went back to him the next day!”
- “Of course he did it.”



Most rapes are committed  
by perpetrators that know  
their victims



Rape can happen in a  
committed relationship



Sexual Assault can  
happen between  
individuals of any gender  
identity

Victims of intimate partner violence may return to their perpetrator for reasons that may not seem rational to others



A photograph of a bar counter with several glasses of amber-colored liquid. A metal tap is pouring liquid into the central glass. The background is blurred with warm, bokeh lights. A dark blue semi-transparent box is overlaid on the top right of the image, containing white text.

Drug-facilitated sexual assault is common, and the most common drug used is alcohol



Being drunk doesn't excuse  
a perpetrator's own behavior



A wide variety of responses are normal for victims: people are different and react differently—don't make assumptions about how they “should act”



How people mentally process what happened to them affects the way the brain encodes and decodes memories of what occurred

**Why it is  
Important to  
NOT make  
assumptions?**



# Why Don't People Tell Right Away

- The Preamble to the Title IX Regulations tell us:
  - Fear of retaliation
  - Fear of not being believed



# Why Don't People Always Remember

- A party should not be “unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory” ( Preamble, p. 30323)



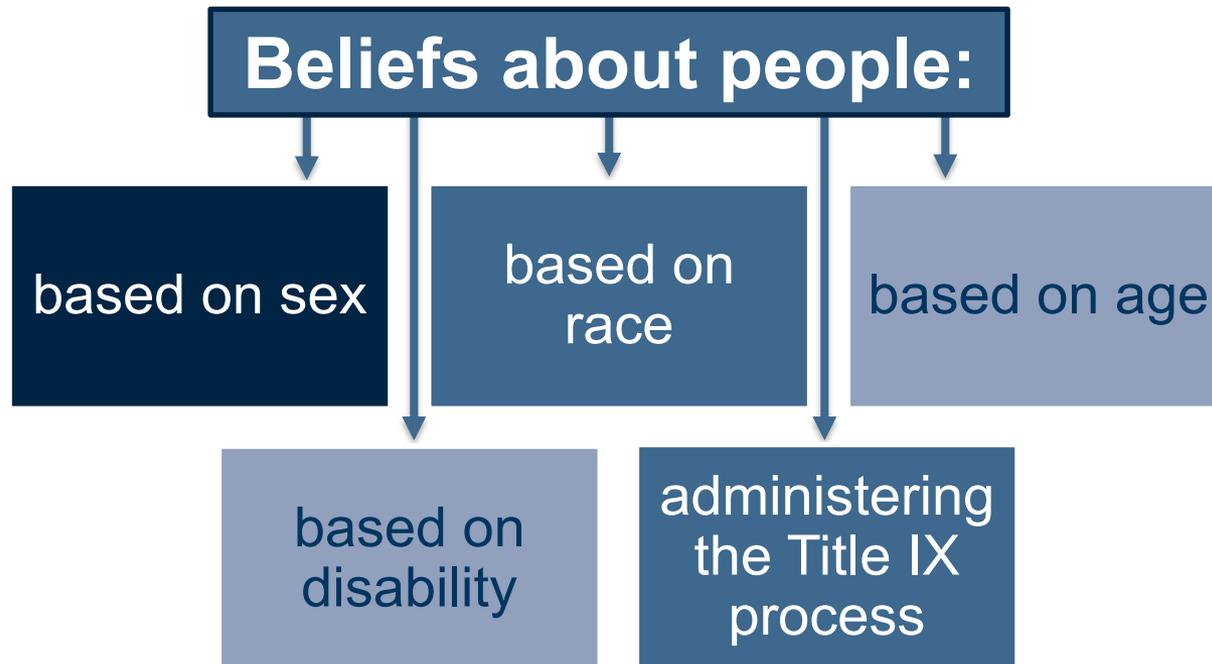
# A Note About Trauma

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- Assume all parties and witnesses may be dealing with trauma – from this or other incidents
- Meet them where they are
- Help them tell their story as part of the process
- Signs of trauma ≠ policy violation
- No signs of trauma ≠ no policy violation

# Stereotypes Affect Response



# Avoiding Sex Stereotypes



- “Must” not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Examples of sex stereotypes in comments (Preamble, p. 30253):
  - Women have regret sex and lie about sexual assaults
  - Men are sexually aggressive or likely to perpetrate sexual assault

# Analyzing Sex Stereotypes

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- Age of consent
- Dating vs. arranged marriages
- Attitudes towards homosexuality
- Attitudes towards intimate partner violence
- Cooperating with investigations
- Sharing personal information
- Reactions toward authority figures
- Reactions toward male vs. female

# Culture Affects Response

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- I won't report it if it doesn't feel wrong.
- I'll admit it because I don't understand it's prohibited.
- I won't report it if I would be a snitch.
- It's impolite to look you in the eye, so I'll look down the whole time.
- I deserved it. It's normal.
- Reporting this would result in serious consequences at home.

# Process YOUR Response

(1 of 2)



- Is your assessment based on your culture, or theirs, or both? (It shouldn't be.)
- Is your assessment based on stereotypes you hold based on sex? Race? Culture? Yours or theirs? (It shouldn't be.)
- Is your assessment based on their role (Complainant or Respondent)? (It shouldn't be.)

# Process YOUR Response

(2 of 2)



- Is your assessment based on a person you like or someone you identify with? (It shouldn't be.)
- Is your assessment based on a person “acting guiltily” by not making eye contact or fidgeting? (It shouldn't be.)
- Would you have done things differently?
- If so, SO WHAT?

# Counterintuitive Response



- If they didn't act the way you might have, that doesn't mean it isn't true.
- Stop and consider carefully before you decide someone is lying because they responded in a way different from how you would have responded.
- Counterintuitive response has to be measured to another's perspective. Be careful to use a valid measurement.

# **Be Human and Be a Blank Slate**

# Questions?