

SE~~NU~~AL
Misconduct
Institute

ASCA Sexual Misconduct Institute



Learning Foundation

Force. Incapacitation. & Consent.



Force

- Physical force
- Mental/emotional force
 - Coercion
 - Revenge porn

Impaired vs. Intoxicated vs. Incapacitated

Impaired

- Usually by alcohol or drugs
- Impairment starts upon consumption/use
- Continuum up to and including incapacitation
- Early stages of impairment are often undetectable to others
- Person can be impaired but still have capacity

Intoxicated

- Has legal meaning in most states
- Intoxicated individuals still have capacity
- Intoxication can lead to incapacitation

Impaired vs. Intoxicated vs. Incapacitated

Incapacitated

- In the college setting, usually by drugs or alcohol
- Incapacitation can also result from disability (mental, developmental, or physical) or state of unconsciousness
- An incapacitated person is one who is “physically helpless” or substantially incapable of appraising their conduct, understanding potential consequences of sexual activity, or deciding to engage in sexual activity.

Impairment

Intoxication

Incapacitation

Two Important Questions to Evaluate

1. Was the complainant incapacitated?
2. Did the respondent know, or should the respondent reasonably have known, that the complainant was incapacitated?

Examples of Questions – for Complainant

- How much did you drink?
 - Out of what container/vessel?
 - Over what period of time?
- Did you pour your own drinks? If not, who did? How did you obtain them?
- Did you ingest any other drugs? Pills?
- On a scale of 1-10, with 1 being completely sober and 10 being unconscious, what number would you say you were at?
 - Pros/cons of this scale

Examples of Questions – for Complainant

- If there's memory loss...
 - What do you attribute your memory loss to?
- If the complainant walked from one location to another...
 - What can you recall about the walk from X to X?
 - Do you remember how you got up and down the stairs?
 - Do you recall how you got back into your residence hall?

Examples of Questions – for Witnesses/Respondent

- Had you ever seen this person drink before?
 - How was that different or the same than the night of the incident?
- When did you see him/her during the evening?
- What specific behavior did you observe?
 - Focus on observable, outwardly facing behavior

Other Evidence to Consider

- Surveillance
- Key swipe records
- Text messages

Consent

- Policy Definitions
 - No single definition - Defined by state law and vary across states
- The legal role of consent - There is no single legal definition of consent. Each state may have its own definition, by statute or established through case law.
- In general, there are three main ways that states analyze consent in relation to sexual acts
 - Freely Given Consent
 - Affirmative Consent
 - Capacity to Consent

Consent, cont.

- Freely Given Consent - The consent offered of the person's own free will, without being induced by fraud, coercion, violence, or threat of violence
- Affirmative Consent - Did the person express overt actions or words indicating agreement for sexual acts?
- Capacity to Consent
 - Did the individual have the capacity, or legal ability, to consent?
 - A person's capacity, or ability, to legally consent to sexual activity can be based on a number of factors, which often vary from state to state.
 - In a criminal investigation, a state may use these factors to determine if a person who engaged in sexual activity had the capacity to consent. If not, the state may be able to charge the perpetrator with a crime.

Consent, cont.

Sample factors that may contribute to an individual's consent

- **Age:** Is the person at or above the age of consent for that state? Does the age difference between the perpetrator and victim affect the age of consent in that state?
- **Vulnerable adults:** Is the person considered a vulnerable adult, such as an elderly or ill person? Is this adult dependent on others for care?
- **Developmental disability:** Does the person have a developmental disability or other form of mental incapacitation, such as a traumatic brain injury?
- **Physical disability:** Does the person have a physical disability, incapacity, or other form of helplessness?
- **Unconsciousness:** Was the person sleeping, sedated, strangled, or suffering from physical trauma?
- **Intoxication:** Was the person intoxicated? Different states have different definitions of intoxication, and in some states it matters whether you voluntarily or involuntarily became intoxicated.
- **Relationship of victim/perpetrator:** Was the alleged perpetrator in a position of authority, such as a teacher or correctional officer?

Consent, cont.

- Remember: **Each state's law is different**
- If you are unsure how a state law applies to specific circumstances, consult with your general counsel
- Helpful Resources
 - [State Law Generator](#)
 - [Myths & Facts](#)

What Does Consent Look Like?

- Mutual agreement to engage in sexual activity
- Explicit enthusiastic agreement
- It's about communication
 - Verbal
 - Non-verbal
 - Physical Cues

What Consent is NOT

- Refusing to acknowledge when consent is withdrawn
- Not acknowledging “no”
- Assuming what a person is wearing is an invitation
- Someone under the legal age of consent (varies by state)
- Pressuring someone by using fear and intimidation
- Assuming you have permission because you have done it before
- Someone is incapacitated by drugs or alcohol

Examples of Questions for Respondent

- What words or actions did you observe/hear from the complainant that indicated to you, that there was consent?
 - Walk through every step of the sexual interaction
- What was complainant doing/saying during the sexual activity?
- Hand positioning

References

1. National Highway Transportation Safety Administration. (n.d.) *The ABCs of BAC - A Guide to Understanding Blood Alcohol Concentration and Alcohol Impairment*. Retrieved August 15, 2015, from <http://www.nhtsa.gov/links/sid/ABCsBACWeb/page2.htm>.
2. University of North Carolina at Chapel Hill. (2015). *Incapacitation or Incapacitated*. Retrieved August 15, 2015, from <http://sexualassaultanddiscriminationpolicy.unc.edu/prohibited-conduct/incapacitation-incapacitated>.
3. Legal Role of Consent. Retrieved October 9, 2016 from <https://rainn.org>

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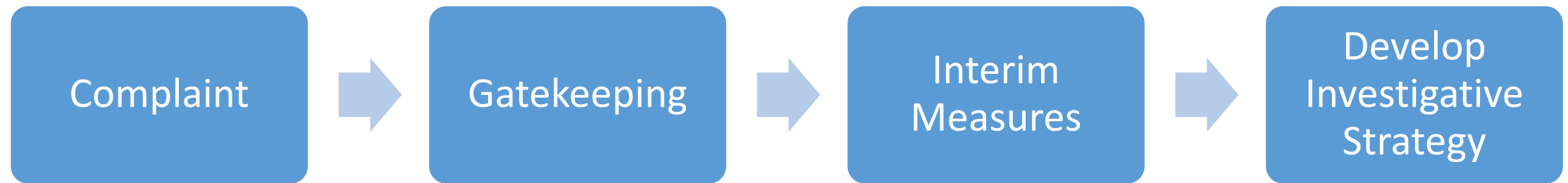


Learning Foundation

Investigations

Pre-Investigation

Pre-Investigation



Complainant Intake

- Initial intake meeting may or may not be with the person who ultimately will investigate
- Establish an understanding of the complainants intentions
 - Are they requesting an opportunity to be heard?
 - Are they requesting an investigation?
 - Are they requesting a full adjudication?
 - Are they reluctant and/or requesting confidentiality?
- Review rights, options, and resources
 - Counseling and/or advocacy
 - Law enforcement
- Address confidentiality
 - Who needs to know the information? Why do they need to know?
 - How will the institution evaluate a request for confidentiality?

Pre-Investigation Planning

- General Issues to address before you begin
 - **Investigators:** One or two?
 - **Interviews:** Audio record, video record, neither?
 - **Criminal Investigations:** How will you coordinate with local/campus police?
 - **Witnesses:** Are or should they be compelled to appear for an interview?
 - **Timeline:** What is considered prompt for this matter?
 - **Requests for Delay:** Will those be considered?
 - **Advisors:** What role do they play?
 - **Environment:** Is it safe, calming, free of perceived bias?
 - **Expectations:** Do students know what to expect and when?
 - **Conflict of Interest:** How do you address real & perceived conflict or bias?

Interview Basics

Interview Environment

- Ideal interview space is
 - Safe (physically and emotionally)
 - Private
 - Neutral (in location and décor)
 - Comfortable (both in furnishings and in size)
 - Set up to promote dialog
 - Designed to reduce distractions
- Interview space should reflect a environment free of
 - Elements of bias
 - Conflicts of interest

Interview Environment

- Things to have on hand
 - Business cards/contact information for investigator(s)
 - Written copies of campus and community resources
 - Written copies of relevant campus policy and protocols
 - Paper & pen for student to take own notes if desired
- Consider having on hand
 - Tissues
 - Water (or other beverage to offer)
 - Stress ball, slinky, etc.

Interviewing Tips

- Dress/appearance
- Attend to your non-verbal behaviors
 - Focus on the student, rather than the advisor, support person, etc.
 - Present an open posture
 - Balanced eye contact
- Practice active listening
- Demonstrate empathy, but maintain proper boundaries
 - Do not “own” the emotions yourself
- Be mindful of your own reaction to triggering information
 - Consult with colleagues to learn more about your own non-verbals

Interviewing Tips

- Managing the difficult conversation
 - Acknowledge once at the beginning that this could be a difficult conversation
 - Do not preface questions with “I know this is hard” or “This must be difficult”
 - Use anatomical language
 - Seek clarity with slang language or terms unfamiliar to you

Framing the Initial Interview

- Welcome & introductions
- Use the initial interview as an opportunity to begin the process of building rapport
- Overview of the process
 - Explanation of investigatory process, resolution process, appeal rights
- Review rights and options specific to that person's role
 - Complainant/respondent rights differ from witnesses
 - Discussion of available resources

Framing the Initial Interview

- Discussion of roles
 - Investigator(s), advisor/support person, etc.
- Establish a goal for the interview
 - Gather information about the incident
 - Who, What, Where, When, How
 - *Why*
 - Gather information related to the elements of the policy

Framing the Initial Interview

- Establish an understanding of the party's intentions
 - Do they intend to cooperate fully with an investigation?
- Explain when/how case updates will be provided
- Emphasize the university's position on acts of retaliation
- Discuss questions and/or concerns of the party
- Setting expectations for the interview

Activity #1

Develop an investigative strategy based on what you observe in this video.

Please be aware this activity may trigger some personal trauma. If you need assistance, please feel free to step out.

The Reluctant Complainant

- At times, a complainant will request confidentiality
 - with a continued investigation
 - with no further investigation
 - or, refuse participation all together
- The rescinded 2014 Q&A remains instructive
 - the investigator should explain
 - ability to fully respond may be limited
 - the university's protections and response to acts of retaliation
 - need to analyze the request against a university's ability to maintain a safe and non-discriminatory environment
- Investigator should document clearly the complainant's request and rationale for why it may be honored (or not)

The Reluctant Complainant

- If necessary to proceed without the complainant's participation,
 - Seek detailed relevant information from those who received primary accounts
 - First witness(es)
 - RA and/or law enforcement officer who spoke with the complainant
 - Seek to piece together the narrative from physical information, i.e. social media documentation, photographs, etc.
 - Refrain from addressing gaps in information with speculation or theories
- Be mindful of the rights and impact on the respondent should the complainant not participate

The Reluctant Respondent

- At times, a respondent will refuse to participate and/or offer limited information
 - Fearful of the impact on a criminal investigation
 - Unwilling to speak on the matter without first knowing what information has been reported or gathered
 - May claim to exercise a right to avoid incrimination of themselves
- If necessary to proceed without the respondent's participation,
 - Be mindful not to receive the complainant's narrative alone
 - Seek additional information to either support or refute claims
 - Avoid finding culpability in the respondent for failing to provide a narrative

The Complainant

Impact of the Event

- For some, the event will initiate a neurobiological, physiological, and psychological response to trauma
 - But not necessarily for all....
- Memories *may*
 - Be difficult to articulate in a linear fashion
 - Be recalled in a disjointed or spotty fashion
 - Not ever be available, especially if the complainant was incapacitated
- Be mindful of the time passed between the event and the interview
 - Multiple sleep cycles often allow the complainant to formulate their narrative through better recollection

Impact of the Event

- Complainant may demonstrate a wide array of emotions
 - Anger
 - Embarrassment
 - Depression
 - Indifference
 - Resistance
 - Reluctance
 - Vengeance
 - Shame
 - Guilt
- Complainant may have experienced tonic immobility, disassociation, illness, or other uncontrollable responses

Trauma-Informed Interview Techniques

- Trauma-informed approach has moved from “buzz-word” to “skill requirement” for conduct officers
 - Information on interviewing victims of trauma has been available through mental health practitioners and medical professionals from some time
 - See also resources from Dr. David Lisak, Dr. Jim Hopper, and Dr. Rebecca Campbell for more on the trauma-informed approach
- Forensic Experiential Trauma Interview (FETI) Technique
 - Developed by Russel Strand
 - Technique often used in law enforcement and [military investigations](#)
 - Purpose is to unlock the memories of the complainant through use of sensory-based questions
 - Free training on FETI available through the End Violence Against Women International (EVAWI) Online Training Institute

Resources available at <http://www.evawintl.org>

Trauma-Informed Interview Techniques

- Minimize the number of interviews and interviewers
 - A chilling effect is created by having to recall their narrative too often and to a wider audience
- Practice the art of patience - details may be slow to develop
- Account for needed breaks and/or pauses to maintain a level of comfort
 - Postpone questions if necessary
- Do not reframe the incident
 - Capture the story of the complainant through their words
 - Use the language of the complainant

Trauma-Informed Interview Techniques

- Ask open-ended questions in a calm and neutral tone
- Questions that speak to sensory elements of the incident may unlock details
 - Sight, smell, taste, texture, sound, etc.
- Questions that speak to the emotional elements of the incident may also unlock details
 - Allow the complainant to unpack their feelings
 - May generate recall of incident specific information
- Emphasize that, though perhaps difficult, detailed information will need to be captured

Trauma-Informed Interview Techniques

- Allow the complainant to deliver their narrative free from interruption
- Possible interview questions – *sensory or emotional information*
 - “What is the memory that sticks out most for you?”
 - “Tell me more about information that you have to recall, but have not...”
 - “What sounds do you recall?”
 - “Please tell me more about what you recall feeling (physically) at that time?”
 - “Please tell me more about how this has impacted you.”
 - Seek more information about the physical and emotional response
 - Seek more information about the academic, social, personal, and behavior impact

Trauma-Informed Interview Techniques

- Possible interview questions – *detailed and factual information*
 - “Tell me more about what you had to eat/drink that night.”
 - “Tell me more about your interaction with the respondent.”
 - “Do you recall...?”
 - Seek information about specific questions about the encounter, i.e. type/frequency of physical/sexual interaction during the event
 - Seek information about specific forms in which the complainant refused consent, or attempted to
 - “Do you have any pieces of information you would like me to review? Texts, social media, medical reports, etc?”
 - “Are there others you would like me to speak with? What will they share with me?”

Common Responses from the Complainant

- Guilt, shame and self-blame
 - “I never should have drank so much.”
 - “I didn’t even want to go out that night.”
 - “I knew better than to walk home with him.”
 - “I just don’t want him to get into any trouble.”
 - “Maybe I led him on.”
 - “All I did was lay there.”
 - “I can never let anyone find out about this.”
 - “Where I’m from, you don’t get raped unless you let your guard down.”

Common Responses from the Complainant

- Fear of retaliation or harm
 - “I don’t want anyone to know about this.”
 - “If this gets out, I will never...”
 - “I couldn’t live with myself if...”
 - “I want you to do something about this, but if you do....”
- Oversharing of irrelevant or protected information
 - “My boyfriend and I have plenty of consensual sex. What his friend did to me was not consensual.”
 - “I’ve been taking depression medication for a few years now.”
 - “I was raped in high school.”

The Respondent

Impact of the Event

- Undergoing a university investigation may cause the respondent to feel
 - An increased level of stress
 - Shame and/or embarrassment
 - Anger
 - Hopelessness
 - A sense of retaliation
- Make available to the respondent appropriate resources and/or support
- A respondent who believes they are supported may be more likely to engage at a greater level with the process

Techniques for Interviewing the Respondent

- Prior to requesting an interview with the respondent
 - Arrange to receive all relevant and available material necessary to conduct a thorough interview
 - Internal or external reports
 - Complainant's statement
 - If necessary, witnesses for the complainant
 - Have a file started, that if necessary, might be reviewed

Techniques for Interviewing the Respondent

- Ask open-ended questions in a calm and neutral tone
- Expect that the respondent will have a narrative prepared, verbally or in writing
 - May be a narrative believed to be honest; may be knowingly false in nature
 - Use a well-placed interruption to prevent recitation of a crafted narrative
- Seek clarification about critical details
 - Specific information about how consent was obtained and/or understood
 - Circle back on critical details as needed
 - “This piece isn’t adding up to me...”
- Do not reframe the incident
 - Capture the story of the respondent through their words

Techniques for Interviewing the Respondent

- Begin the interview with broad inquiry
 - “Let’s discuss the night of the alleged incident.”
 - “Tell me more about what you were up to that night, starting at wherever the ‘beginning’ is for you.”
 - “There is a concern that your behavior that night violated our Code. Tell me why that may be.”
 - “Please tell me about your relationship/interaction(s) with the complainant.”
- Allow the respondent to fully respond to broad questions
 - Indicates the theme of how they intend for the investigator to come to understand their actions

Techniques for Interviewing the Respondent

- Possible interview questions – *consent*
 - “What were your actions to demonstrate you were a consenting party?”
 - “Tell me more about what you observed from the complainant in response to your actions.”
 - “Please tell more when/how you came to understand you had consent.”
 - “What was your response if/when she indicated she wasn’t interested?”
 - “Could you explain in greater detail her behaviors that informed you consent was present throughout the activity?”
 - “How did you come to know that he/she was enjoying the interaction?”
 - “Was there a time you wondered if he/she was into it?”

Techniques for Interviewing the Respondent

- Possible interview questions – *grooming techniques*
 - “Tell me more about the party that night. What was all in the punch?”
 - “What was it about him/her that interested you?”
 - “Why were you drinking beer, but he/she was drinking the punch?”
 - “How did you come to know that he/she wanted another drink each time you brought him/her one?”
 - “What was the purpose of returning to your room (or other location)?”
 - “Were there other locations you could have gone?”

Techniques for Interviewing the Respondent

- Possible interview questions – *detailed and factual information*
 - “Tell me more about what you had to eat/drink that night.”
 - “Tell me more about your interaction with the complainant.”
 - “Do you recall...?”
 - Seek information about specific questions about the encounter, i.e. type/frequency of physical/sexual interaction during the event
 - “Do you have any pieces of information you would like me to review? Texts, social media, etc?”
 - Seek clarification on the content and purpose of interactions pre- and post-event
 - “Are there others you would like me to speak with; what will they share with me?”

Common Responses from the Respondent

- Deny the allegation based on their character
 - “I would never do this because I am a spiritual person.”
 - “My parents raised me to be better than that.”
 - “I know someone who has been raped and there is no way I would ever do that to someone.”
 - “I knew he/she was drunk, so I all wanted to do was take him/her somewhere safe away from everyone else.”
- Deny the allegation based on their physical condition
 - “I had so much to drink I couldn’t maintain an arousal.”
 - “I’m the one that was blacked out – just ask my friends how much I drank.”
 - “When I am drunk, I do all kinds of things that I would never do when I am sober.”
- Refuse to address the allegation
 - “I will talk with you about anything, just not that night.”
 - “Under the advice of counsel...”
 - “I want to see the file before I say anything.”

Common Responses from the Respondent

- Deny the allegation based on their experience with sexual behavior
 - “No one has ever talked with me about consent, I’m not sure what to even look for.”
 - “I was a virgin before that night.”
 - “My friends tell me he/she is much more experienced than I am, he/she should have told me ‘no.’”
 - “I’m the one who was violated.”
 - “I am not trying to brag, but I really don’t need to take advantage of anyone to get laid.”
- Reframe the incident or direct attention to irrelevant material
 - “This really isn’t about consent. Isn’t this more about a vengeful ex?”
 - “Consent is much more complicated than this. Isn’t there something to be said for ‘drunk sex?’”
 - “We really should be talking about how he/she took advantage of me.”
 - “If I wasn’t a *[special population]*, you wouldn’t even be talking to me about this.”
 - “I’ve seen the news and I know all you need to do is nail me to the wall on this one.”

Witnesses

Interviewing Witnesses

- Much of the behavior that is being investigated happens between two people in private locations.
- While it is rare to have a witness to the actual violation, witnesses can provide important context information
 - Fill in gaps in timeline
 - Provide information about alcohol or drug use of parties involved
 - Provide observations potentially speaking to incapacitation
 - Often have information related to first impressions/reactions of parties after the incident.

Interviewing Witnesses

- Addressing Confidentiality
 - Be transparent about what, if any, confidentiality you can provide.
 - If the witness's name will be used, explain the context of that use and who will have access to that information.
- Addressing Retaliation
 - Define retaliation under your institution's policies
 - Explain measures to protect the witness from retaliation and how you will address retaliation should it occur
- Connect to Resources
 - If the witness is showing signs of distress/discomfort, help connect them to assistance
 - If appropriate, consider offering interim measures such as a no contact order to the witness

Techniques for Interviewing Witnesses

- Strategies related to witnesses
 - Be strategic regarding the order in which you interview witnesses
 - In matters regarding student organizations, schedule interviews in such a way to minimize opportunities for witnesses to compare stories, notes, questions asked, etc.
 - Listen for stories or accounts that sound too similar
 - Using the exact same wording or phrasing
 - Telling their story in exactly the same sequence
 - Witnesses may give short or vague answers to questions – unpack those
 - “Can you say more about that?”
 - “What exactly do you mean by...?”

Techniques for Interviewing Witnesses

- Ask questions to establish information about
 - Timeline
 - “What time did you get to the party?”
 - “What time did he/she get home?”
 - Substance use
 - “What were you all drinking while you were pre-gaming? Do you recall how much he/she drank?”
 - “Where did the alcohol come from? Who was getting the drinks?”
 - Incapacitation
 - “What was your impression of how drunk he/she was? What did you observe that made you think that?”
 - Initial reactions
 - “When he/she came home the next morning, what did he tell you about the night before?”

Closing and Other Considerations

Closing the Interview

- Connection to additional witnesses/information
 - “Do you have any texts, pictures, etc. that may be related to this incident?”
 - “Is there anyone else you can think of that I should talk to? What information do you think they may be able to provide?”
- Wrap up questions
 - “Is there anything else you think I need to know?”
 - “Is there anything you were expecting me to ask that I did not?”
- Allow time for parties to ask questions
- Additional information
 - How to contact you if they remember anything else after the interview or have additional questions
- Next steps
 - Will this person hear from you again? When should they expect that contact? What might that contact look like?

Reconciling the Narrative

- Seek to determine if the event is likely to have occurred based on available factual information
- Investigator must be prepared to reconcile a party's narrative with supporting or competing information
 - Independent, factual witnesses – including respondent's narrative
 - Physical evidence

Notetaking Tips

- Two investigator model is helpful
 - One takes lead on questions, the other focuses on notetaking
 - Person questioning should still take notes on items to follow up on in order to avoid interrupting
- Be mindful of distractions
- Notes should be thorough, clear, and neutrally written
- Develop system to denote important items and indicate where follow up questions are necessary
- Clean up and finalize notes as soon after the interview as possible
- Consider using dictation software to save time

Gathering Documentary Information

- Potential information for consideration
 - Text messages call logs
 - Photographs
 - Social media
 - Snapchat, Twitter, Instagram, Facebook, Tinder, Grindr, Fade, etc.
 - Video
 - Personal recordings and security/surveillance footage
 - Building access and/or swipe card records
 - Medical records
 - Guest lists (i.e. parties, student organization events)

Verifying Documentary Information

- Seek to independently verify the information provided
 - Text Messages
 - Messages in a thread can be selectively deleted
 - Ask student for phone bill to verify time stamps
 - Ask others involved in the text conversation if they still have the messages
 - Social Media Posts
 - Templates online to fake posts/messages
 - Ask student to sit at your computer/desk to print or screen capture
 - Photographs
 - Look at date and time of creation for digital images

Relevancy of Information

- Examples of potentially irrelevant information
 - Does not speak to the issue
 - Speaks to a fact not in dispute
 - Sexual history that does not address pattern of consent understood between the parties
 - Character references/letters
- Sometimes, information can be prejudicial
 - Inflammatory social medial posts not related to the issue
 - Opinion/evaluative statements not backed by fact
- If you choose not to use/include something, document decision & rationale

Common Mistakes

- Unnecessary interruptions
- Rapid fire questioning
- Refraining from seeking clarification
- Placing judgement upon the actions and/or response of the parties
- Rationalizing the narrative
- Less than thorough documentation of the interview
- Failing to provide timely updates to the parties

Common Mistakes

- Mislabeling neurological and psychological impact as acts of deception
 - Especially in light of memory recall challenges
- Failure to recognize the impact of trauma on memory recall
 - Not to be equated with intentional acts deception
- Providing greater weight to the narrative associated with heaviest emotional response
- Confusing the need to provide interim/remedial measures with resolution through adjudication only

False, Unfounded, and Unsubstantiated Reports

- Most rigorous research on false reports comes from the criminal justice system
- Reliable data estimates 2-8% of reports would be considered false
 - Intentional attempt to report knowingly inaccurate information
- A true, malicious false report may be addressed by the university
 - May ultimately be considered an act of discrimination itself
- Be wise to weigh the potential for creating a chilling effect when pursuing a false report

Lonsway, K.A. et. al. (2009). *False reports: Moving beyond the issue to successfully investigate and prosecute non-stranger sexual assault*. The Voice, 3(1).

False, Unsubstantiated, and Unfounded Reports

- A fair and neutral investigation may result in the determination that the report is unsubstantiated
 - Available information will not ultimately demonstrate that the event occurred at the level required by the standard of proof
 - Not equitable to a finding that the report is false or unfounded
- Under VAWA, law enforcement have the only authority to designate a report as unfounded

(U.S. Department of Education, 2016)

Activity #2

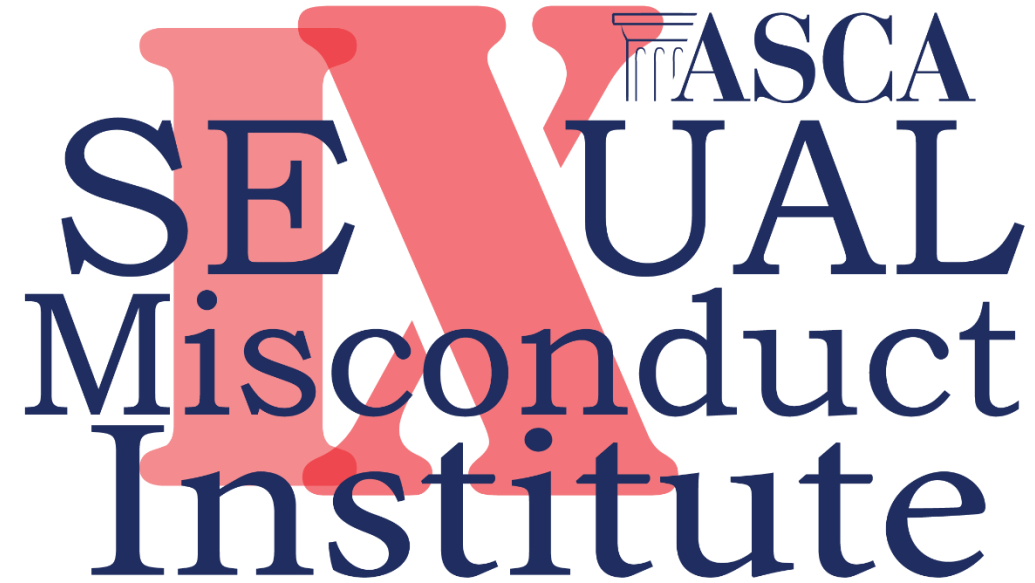
Please be aware this activity may trigger some personal trauma. If you need assistance, please feel free to step out. We have folks available with expertise in counseling and working as victim support.

References

Online training institute. End Violence Against Women International. <http://www.evawintl.org>

Lonsway, K.A. et. al. (2009). *False reports: Moving beyond the issue to successfully investigate and prosecute non-stranger sexual assault*. The Voice, 3(1).

U. S. Department of Education. Office for Postsecondary Education. (2016). *The Handbook for Campus Safety and Security Reporting*. Accessed July 5, 2017.
<https://www2.ed.gov/admins/lead/safety/handbook.pdf>

The logo features the word "SEXUAL" in large, dark blue, serif capital letters. The letter "X" is significantly larger and filled with a semi-transparent red color. Below "SEXUAL" are the words "Misconduct" and "Institute" in a smaller, dark blue, serif font. In the upper right corner of the logo, there is a small icon of a classical building facade followed by the acronym "ASCA" in a dark blue, serif font.

SEXUAL
Misconduct
Institute

ASCA

ASCA Sexual Misconduct Institute

A thick, solid blue horizontal arrow pointing to the right, spanning the width of the slide.

Learning Foundation

Report Writing and Record Keeping

Written Documents

- Letters
- Investigative Reports
- Writing Rationales
 - Finding
 - Sanction
- Record Keeping
- Releasing Records
 - To Students Involved
 - Open Records
 - Subpoenas

Letters

- Charge Letters/Notice of Charges/Notice of Investigation
 - Remember Due Process
 - Written statement of charges
 - Right to be heard by impartial body
 - No Contact Directive
 - Retaliation
- Finding Letter
 - Rationale for Finding
 - Rationale for Sanction

Example of Written Statement of Charges

The Office of Compliance has received information alleging that during a fraternity party that occurred on or around March 12, 2016, you sexually assaulted another UW-Madison student, attempted to physically force the student to perform a sex act and slapped the student when she refused to do so. The information indicates that you were under the influence of alcohol at the time.

Example of Written Statement of Charges

- 1. 17.09(2) Sexual Assault: Conduct defined in s. 940.225, Stats.
- 2. 17.09(6) Illegal Use, Possession, Manufacture, or Distribution of Alcohol or Controlled Substances: Use, possession, manufacture, or distribution of alcoholic beverages or of marijuana, narcotics, or other controlled substances, except as expressly permitted by law or university policy.
- 3. 17.09(15) Violation of University Rules: Conduct that violates any published university rules, regulations, or policies, including provisions contained in university contracts with students; specifically university rules prohibiting sexual harassment.
- 4. 17.09(14) Violation of Ch. UWS 18: Conduct that violates ch. UWS 18, including, but not limited to, provisions regulating fire safety, theft, and dangerous weapons. Specifically: 18.10(1)(a) Assaultive Behavior: No person may intentionally strike, shove, hit, punch, kick or otherwise subject another person to physical contact or cause bodily harm without the consent of the person.

Example of No Contact Directive

NO CONTACT DIRECTIVE: In the meantime, be advised that you are to have no contact with XXX of any kind, direct or indirect, until further notice. This includes, but is not limited to: face-to-face/in-person, telephone, e-mail, text message, social networking sites, written communication, video and other electronic communication, and contact through third parties. Any attempt to contact this person may be construed as harassment and result in more serious disciplinary and/or legal action. University Housing (if applicable) and the University of Wisconsin Police Department have been notified of this directive.

Example of Retaliation Statement

Please be advised that University of Wisconsin-Madison policies prohibit acts of retaliation taken against a person because they reported any form of sex discrimination, including sexual assault or sexual harassment, filed a complaint, participated in the investigation of a complaint, or assisted others who raised a complaint. Retaliation is a serious offense which can result in disciplinary action. Any adverse action taken by you or others on your behalf against XXX for reporting this information to the University will be investigated by the Office of Compliance as an act of retaliation.

Investigative Reports

- Alleged Violations
- Jurisdiction
- Standard of Proof
- Involved Parties
- Investigative Timeline
- Background
- Complainant Statement
- Respondent Statement
- Witness(es) Statement(s)
- Findings
- *Response(s)*
- Violations and Analysis
- Conclusion
- Appendix

Example of Alleged Violations Section

On (DATE) a letter was sent to the Respondent informing them that (OFFICE) was beginning an investigation pursuant to the Student Code of Conduct. The allegations were as follows:

The respondent allegedly penetrated the complainant's vagina with his penis after she reminded him that she did not want to have sexual intercourse.

The conduct described may have violated the following codes of conduct: 17.09(1) Dangerous Conduct, 17.09(2) Sexual Assault, 17.09(19) Sexual Harassment.

Involved Parties

- Complainant is an undergraduate student at the UW-Madison.
- Respondent is a graduate student at the UW-Madison.
- Six witnesses were interviewed in the process and are referred to as W1-W6 in the investigative report.
 - Investigators have discretion to list witness names or use W1, W2, W3
- A UW-Madison academic staff member from the University Apartments also provided information for the investigative report.

Timeline and Background

- Timeline of specific events occurring during the investigation
 - Dates of notice, interviews, review of file, etc.
- Background information
 - Circumstances under which the Complainant reported the conduct
 - When/how the notice of investigation/charge letter was sent to Respondent
 - When/how the Respondent and Complainant interviewed with office
 - Other documentation reviewed (text messages, screenshots, photos)

Complainant, Respondent, & Witness Statements

- Factual, neutral summary of interviews
 - Complainant's interview
 - Respondent's interview
 - Witness interview(s)

Findings and Responses

- Summarize separately the information that is undisputed and disputed
- For undisputed elements
 - “It is undisputed that the Complainant and Respondent engaged in mutual kissing.”
- For disputed elements
 - “It is disputed that the Respondent moved the Complainant’s underwear aside while on top of her and penetrated her vagina with his penis.”
- If applicable to your process, separately provide summaries of the responses to findings from the complainant(s) and respondent(s)

Violations and Analysis

- Outline each code violation and analyze it with the information gathered in the investigation
- 17.09(1) Dangerous Conduct
 - The Student Code defines dangerous conduct as conduct that endangers or threatens the health or safety of oneself or another person.
- 17.09(2) Sexual Assault
 - The Student Code defines sexual assault as . . .
- 17.09(19) Sexual Harassment
 - The Student Code defines sexual harassment as . . .

Result (per Clery Handbook)

- Result: “Any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution”
- Be prepared to articulate, in writing, how information was weighted and credibility was assessed
- It is not sufficient to say
 - “the evidence presented met the institution’s standard of evidence,” or
 - “the evidence presented did NOT meet the institution’s standard of evidence”

(U.S. Department of Education, 2016)

Conclusion

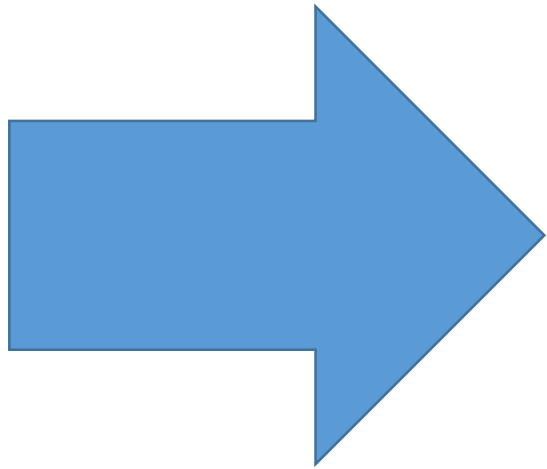
- Based on the preponderance of the evidence, including statements from the Complainant, the Respondent, and witnesses, it is determined that the Respondent is **charged/responsible** for violating the codes of student conduct as outlined previously in this report. A finding letter outlining this decision will be emailed to the Complainant and Respondent simultaneously.

Appendix/Exhibits

- Full Meeting Notes
- Police Reports
- University Incident Reports and/or Complaints
- Phone Logs
- Text Messages
- Emails
- Photos
- Medical Records
- Social Media screenshots


Parties Review Draft Investigative Report

- Comments incorporated as footnotes
- Signed sheet to acknowledge review



Untitled ▾

Search


THE UNIVERSITY
WISCONSIN
MADISON

Investigation Report Draft Review:
Confirmation Page for Case No. _____

Reviewed by:

Complainant _____
Printed Name Signature Date

Respondent _____
Printed Name Signature Date

Declined by:

Complainant _____ Date Respondent _____ Date

For Office Use Only

Comments Collected From Complainant: No/Yes	Comments Collected From Respondent: No/Yes
List Documents Collected From Complainant: <input type="checkbox"/> None	List Documents Collected From Respondent: <input type="checkbox"/> None

ASSOCIATION FOR STUDENT CONDUCT ADMINISTRATION

Writing Rationale Statements (per Clery Handbook)

- Rationale for result and sanctions must include:
 - Information presented during the proceeding
 - Explanation for how the evidence was weighed
 - How the evidence and information support the result and sanctions
 - Description of how the institution's standard of evidence was applied

(U.S. Department of Education, 2016)

Rationale Writing

Two approaches:

1. Minimalist approach
 - a. Not too much detail
 - b. Keep it simple
 - c. Bare minimum amount of information
2. Extensive detail

Rationale Writing

- “I determined based on the preponderance of the evidence...”
- Avoid terms like “I believe” or “I think”
- Should include:
 - Elements of policy student is alleged to have violated
 - Facts from investigation/hearing
 - Nature of conversation with student

Rationale Example

- “Based on the information that was available to me, as the Hearing Officer in this case, I determined, by the preponderance of the evidence, that Joe Smith violated the sexual misconduct policy. The information I evaluated in this determination included: a report from University PD which documented a trip to the hospital for a forensic nurse exam, and the information provided at the hearing including medical records from the local hospital.”

Rationales for Findings - Responsible

This Administrative Hearing Officer found that there was preponderance for a finding of responsible based on the information provided in the hearing including the testimonies, investigative report, and supplementary documents. Evidence supporting this finding includes, but is not limited to, the following: During the hearing, the investigative report and information provided by or about the Respondent displayed the Respondent's interest in the Complainant as more than just "that RA friend to you." Respondent admitted in the hearing that after leaving a note with that message for Complainant (but before Complainant had seen the note), he touched the Complainant's knee for a period of time without obtaining any verbal or non-verbal consent allowing him to do so. After communicating in a variety of ways that she was not interested in a relationship with Respondent, including Complainant's specific direction that Respondent leave her alone and stop texting her, Respondent texted Complainant numerous times. Based on these surrounding factors and the definitions provided by the Code of Student Conduct, the Respondent was found to be in violation of the aforementioned charge.

Rationales for Findings – Not Responsible

The Administrative Hearing Officer did not believe there was enough information to establish, by a preponderance of the evidence, the violation of Non-Consensual Sexual Contact and Sexual Harassment based on the definition of consent in the Code of Student Conduct. The investigation report and testimonies during the hearing provided contradictory information on the level of Complainant's intoxication, including but not limited to the extent to which Complainant's speaking and walking were impaired at the time of the events in question, the perception of the Complainant's witnesses as to her level of intoxication and whether Complainant was able to fully understand and consent to her interactions with Respondent during and after their time at the Restaurant.

Rationales for Findings – Not Responsible *(continued)*

The Complainant described herself as blacked out during some of the conversations with other witnesses while at the Restaurant; however, several witnesses who saw her at the Restaurant and/or at Respondent's apartment after they left the Restaurant described her as talking coherently and walking without any trouble. Testimony provided by one of the Complainant's witnesses stated that she watched the Respondent order, pick-up, and provide the Complainant with one cup of wine and that she did not see Respondent put anything in the Complainant's drink. The Administrative Hearing Officer acknowledges that some of these contradictions could be read in a way that is consistent (e.g., the Complainant could have been blacked out and still appeared to other witnesses to be coherent). Viewing the information presented in its entirety, however, the Administrative Hearing Officer concluded that there was not sufficient evidence presented to establish a violation of 4.15a or 4.15b. The Administrative Hearing Officer did believe, however, that there was preponderance of evidence to find the Respondent in violation of 4.03a Acts of Harm: Bodily Harm. This determination is based on information provided during the hearing and in the investigative packet, including but not limited to pictures of Complainant and Respondent's acknowledgement that he saw no marks on Complainant's neck before they started kissing.

Rationales for Sanctions

In considering the most appropriate educational sanctions regarding this case for the Complainant and Respondent, this Administrative Hearing Officer reviewed the information provided in the investigative report, the information provided by the Respondent, and the sanctioning guidelines provided by the Code of Student Conduct. In doing so, this Administrative Hearing Officer has determined that the most appropriate resolution regarding this case is disciplinary probation along with the additional sanctions specified. The sanctioning in this matter also reflected “compelling factors” (Code Section *Identify section as needed*) offered by the Respondent to support a sanction different from the standard guidance including, but not limited to, information about the Respondent’s character and information provided by the Respondent regarding his insight to the behavior. The additional components are provided to help educate about community standards at the University and to facilitate the continued development of thoughtful, responsible, engaged members of the University community.

Rationales for Sanctions

The rationale provided for these sanctions is as follows: In considering the most appropriate educational sanctions regarding this case for the Complainant and Respondent, this Administrative Hearing Officer reviewed the impact statement provided by the Complainant, the information provided by the Respondent, the sanctioning guidance provided by the Code of Student Conduct, and the totality of the information presented about the case. In doing so, this Administrative Hearing Officer has determined that, in the Hearing Officer's professional judgment, suspension for a two-year period is the most appropriate resolution regarding this case. Factors that weighed into this decision included, but were not limited to, the nature and severity of the incident, the impact on the Complainant, Complainant's anticipated time to degree completion, and the educational mission set forth by the Code of Student Conduct. The sanctioning in this matter also reflected "compelling factors" (Code Section *Identify section as needed*)

Record Keeping

- Database (case for each party, Respondent and Complainant)
 - Contents should include:
 - Charge Letter
 - Finding Letter
 - Investigative Report
 - Information supporting Invest. Report
 - Hearing materials
 - Request for hearing
- Hearing packet
- Hearing recording
- Hearing decision
- Hearing appeal
- Appeal decision
- Emails
- Confirmations of meetings, what was discussed during meetings
- Interim measures, e.g. no contact directive

Records Retention Policy

- What is it?
- Does it match up with Housing/Residence Life Policies?
- Talk with your Registrar's Office

Record Release To Students Involved

- Consider creating an incident report form that students fill out to request to view their student record:
 - [University of Wisconsin - Madison: Form Example](#)

Background Checks

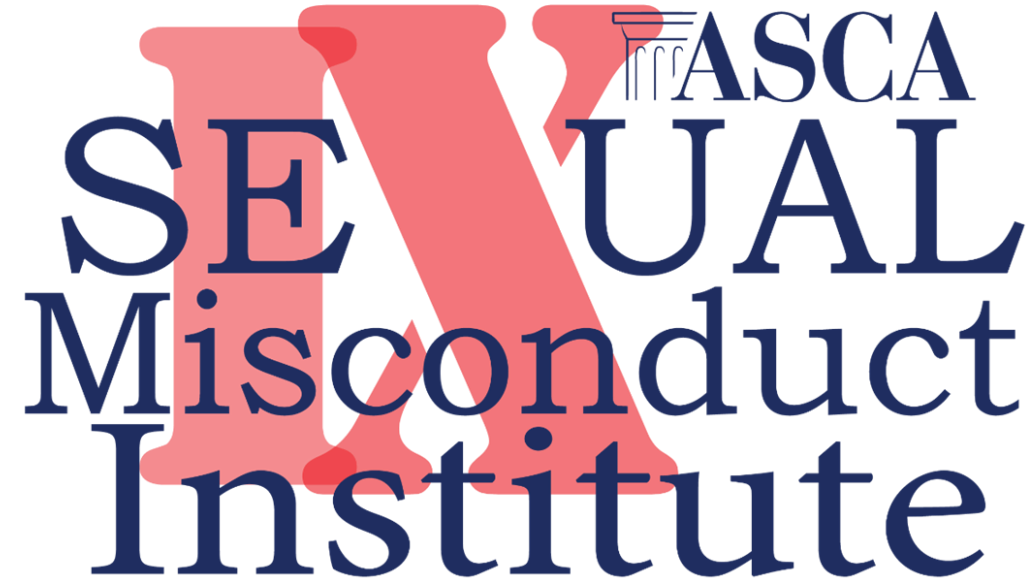
- Who is doing these?
- What is needed in order to release records?

Open Records

- Work with Legal or Open Records Steward
- If you charge for Open Records requests, be ready to share your hourly rate of pay
- Be ready to justify your training
- Advocate, if necessary, for both parties
 - e.g. student newspaper requesting names of students found responsible for a sexual assault violation in the past 10 years (FERPA)

Subpoenas

- Work with Legal
- Be ready to release documents
- Notify students that you are releasing their information
- Watch for “No Disclosure”
 - The FERPA notice provisions don’t apply with the subpoena directing us to not disclose its existence. So, we can’t notify any student who may appear in those records and we can’t share the existence of the subpoena

The logo features the word "SEXUAL" in a large, red, serif font, with the "X" being particularly prominent. To the right of "SEXUAL" is the word "ASCA" in a smaller, blue, serif font, positioned above the word "Misconduct". Below "Misconduct" is the word "Institute" in a large, blue, serif font. The entire logo is centered at the top of the slide.

SEXUAL
ASCA
Misconduct
Institute

ASCA Sexual Misconduct Institute

A thick, blue horizontal arrow pointing to the right, spanning the width of the slide.

Learning Foundation

Adjudication Models and Appeals Processes

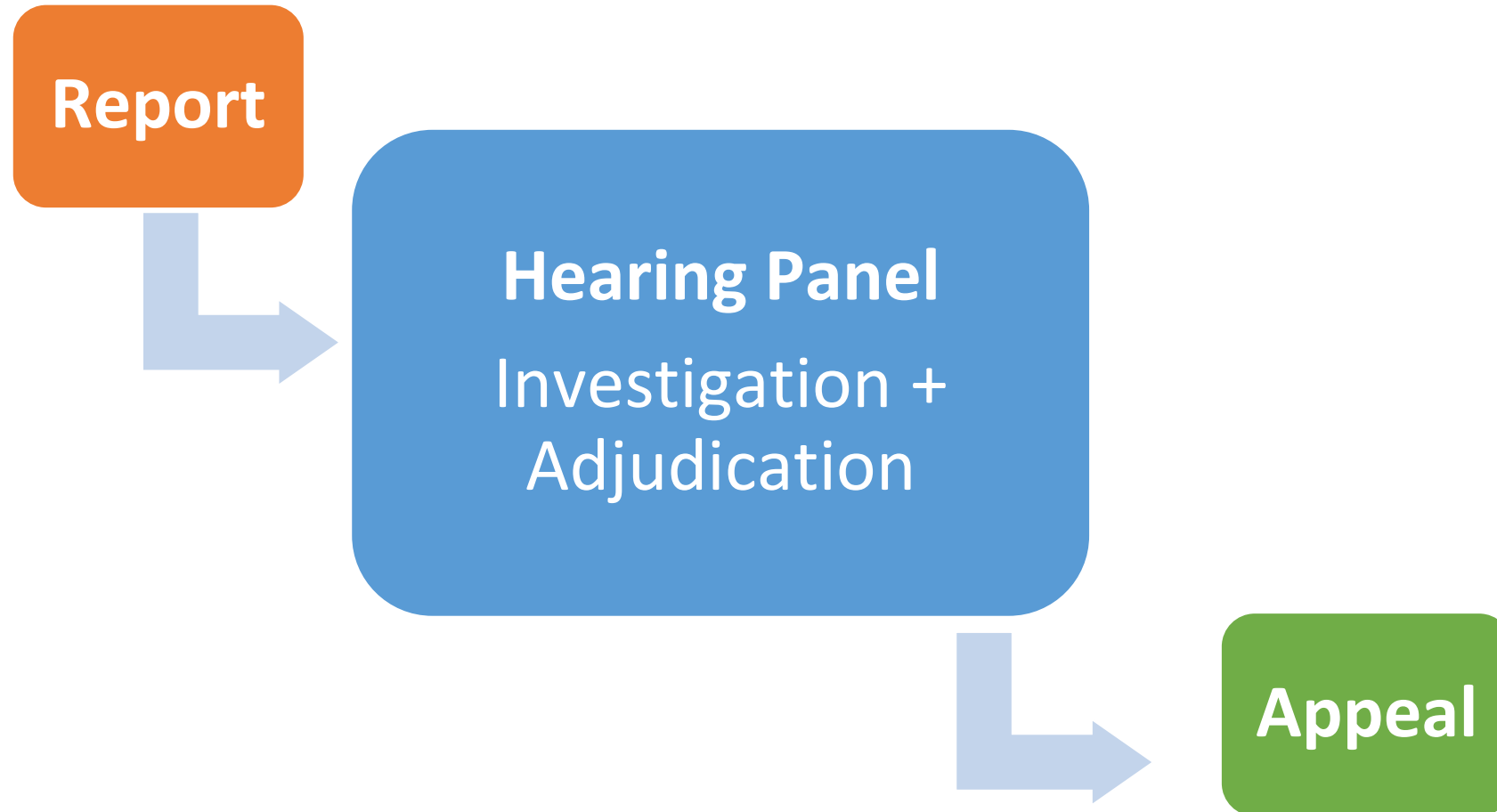
The Adjudication Phase

- Hallmarks of the adjudication phase
 - Fair, neutral evaluation of the relevant facts
 - Finding and/or outcome is reached
 - Responsible, not responsible, no finding
 - Sanctions, if necessary, are assigned
 - Rationale is articulated

Adjudication Models

- Traditional Hearing Panel
- Investigator Model
- Hybrid Model
- Adaptable/Alternative Dispute Resolution Model

Traditional Hearing Panel



Traditional Hearing Panel

- Traditional practice included
 - Inquiry or “bare bones” investigation, pre-hearing
 - Referral to a hearing panel
 - Panel is tasked with (possible) discovery of fact and deliberation
 - Panel adjudicates by reaching an outcome
- Generally no longer considered a best practice unless modified to hybrid model

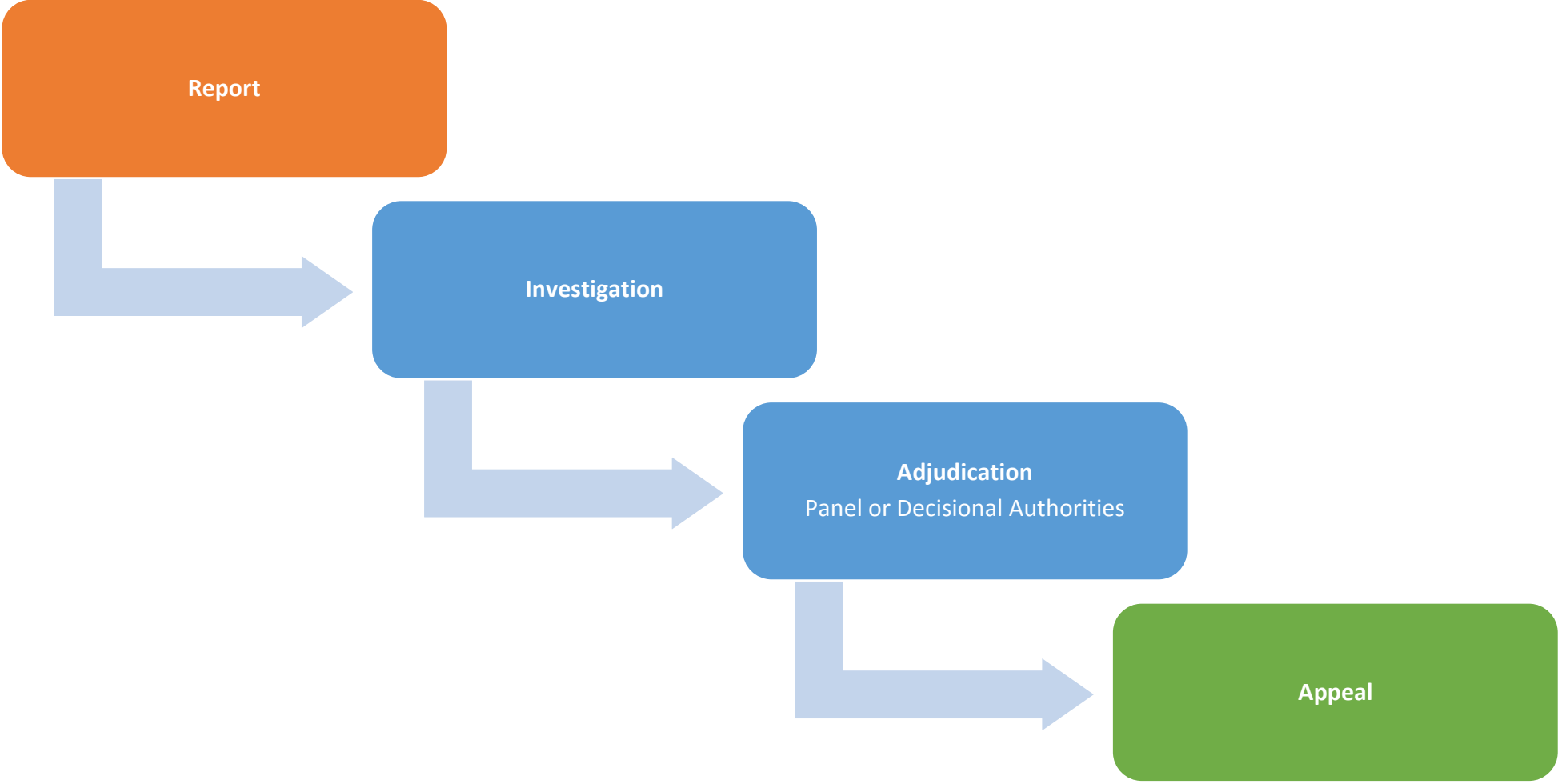
Investigator Model



Investigator Model

- Investigator(s) serve as the point of contact for all parties
- Serves several main functions
 - Neutral fact-finder
 - Deliberative authority charged to render an outcome
 - May also be asked to facilitate interim measures process
- Investigation may be documented in a formal report
- Must have autonomy and authority

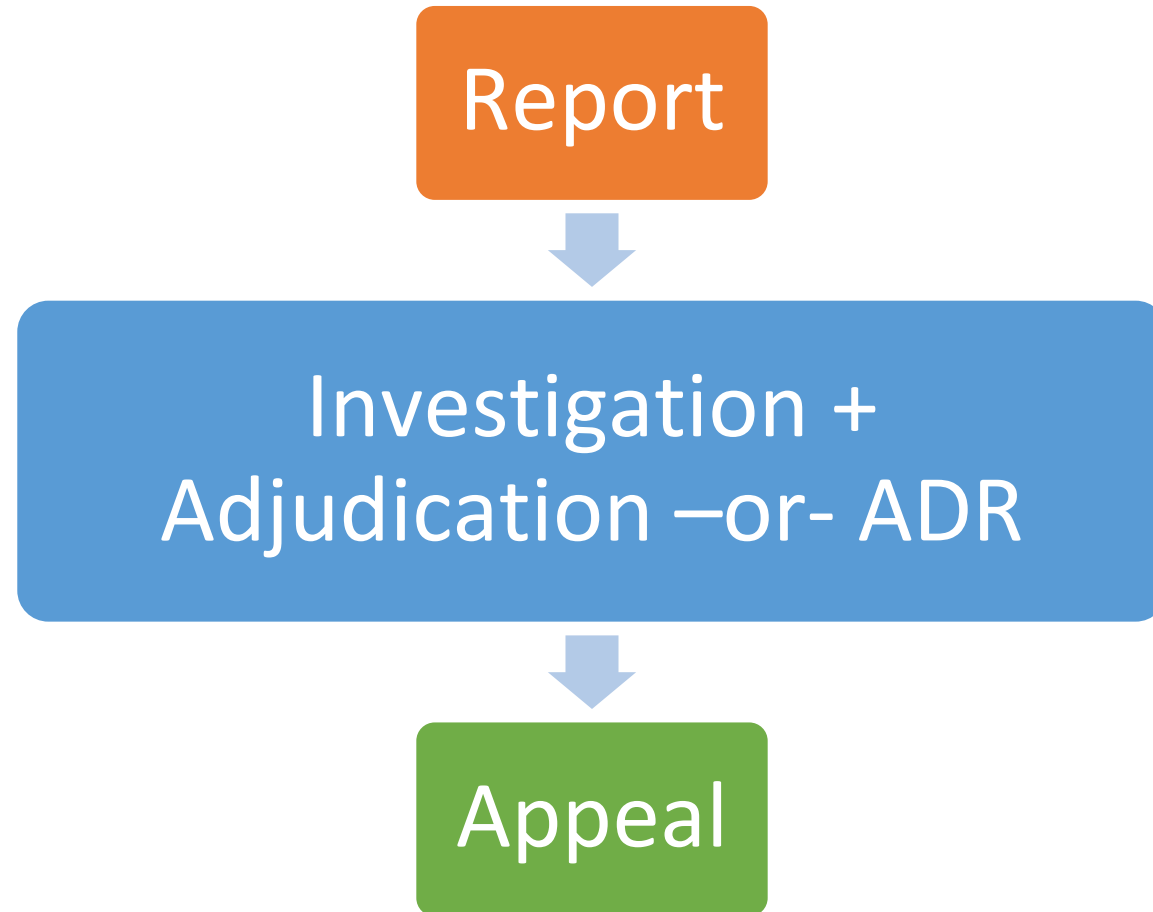
Hybrid Model



Hybrid Model

- Combines aspects of the hearing model and the investigation model
- Clearly defined, separate roles: Investigator(s) and Adjudicator(s)
- Highly trained individuals tasked with specific tasks

Alternative Dispute Resolution



Alternative Dispute Resolution Model

- Informal Resolution
 - May be used at any stage of process, pre-investigation, during or post investigation
- Mediation
 - 2001 Guidance indicates that mediation in sexual assault cases is not appropriate
 - 2017 Interim Guidance contradicts this
- Restorative Justice (Practices)
 - Promoting Restorative Initiatives for Sexual Misconduct (PRISM) Report

Informal/Agreed Resolution Model

- Resolution agreement between institution and respondent
 - Respondent is in general agreement about the facts of the case
 - Agrees to a set of proposed sanctions
 - Respondent typically waives right to appeal
- Complainant needs/rights should be considered with any agreement
- Appropriate when the respondent is not disputing responsibility
- If to be used, be sure that this option exists in your policy

Selection of an Adjudication Model

- Considerations for the adjudicator(s)
 - Identity of the adjudicator(s)
 - Faculty, staff, student? Outside party?
 - Selection process?
- Role of the adjudicator(s)
 - Continued fact-finding or review?
 - Reach a finding and/or determine sanctions?

Selection of an Adjudication Model

- Considerations for the parties
 - Level of participation of the parties
 - Review of the report/file?
 - To what degree can the parties contribute, question, and/or comment
 - Direct or indirect format?
 - Involvement of the advisor/support person of choice
 - Pre and post-adjudication opportunities to engage
 - Early file/report review option, with or without feedback?
 - Notifications – hearing notice, outcome, opportunity for appeal?

Selection of an Adjudication Model

- Logistical considerations and other involved parties
 - Management of the adjudication process
 - Identifying and resolving possible conflicts of interest
 - Assistance and/or advisor to the adjudicator(s)
 - Training of the adjudicator(s)
 - How often, by whom, and to what depth?
 - Record of the adjudication
 - Written, audio, or visual documentation? Who manages the record?

Completing the Adjudication

Applying the Burden of Proof

- Options
 - Preponderance of the information/evidence standard
 - Clear and Convincing
- Reduce Risk
 - Utilize same burden across board
- Minimize, as much as possible, the burden on the harassed student

Resolving the Allegations

- Policy must clearly articulate
 - Who and how and by whom resolution will be reached
 - How information/evidence will be obtained and evaluated
 - How an outcome(s) will be articulated to the parties

Weighing the Information

- To *weigh* the information is to
 - Evaluate the *strength* of the information against the broader body
 - Evaluate the *accuracy* of the information against the broader body
 - Assess the *certainty* and/or *probability* of truthfulness
 - Make a *determination* of its *relevancy* and/or *usefulness*
 - Place *value* upon the information

Weighing the Information

- Greatest weight is to be assigned to that
 - Which can be supported by physical evidence and verbal account(s),
 - Which is either not in dispute entirely or
 - Which is determined to be more likely accurate than not
- One need not weigh the information against any greater standard that articulated by policy

2001 Revised Guidance

- Evidence about the **relative credibility** of the allegedly harassed student and the alleged harasser. (pg. 9)
 - Detail and consistency of the account
 - Existence of corroborative evidence in relation to whether it should logically exist
 - “Evidence that the alleged harasser has been found to have harassed others may support the credibility of the student claiming the harassment;”
 - “Conversely, the student’s claim will be weakened if he or she has been found to have made false allegations against other individuals.”
 - “Evidence of the allegedly harassed student’s reaction or behavior after the alleged harassment.”
 - “Evidence about whether the student claiming harassment filed a complaint or took other action to protest the conduct soon after the alleged incident occurred.”

Evaluating Credibility

- Policy and/or practice ought to establish who carries the responsibility to evaluate the credibility of parties
 - Investigator, beyond gathering of facts, may provide a credibility analysis
 - Adjudicator(s), beyond evaluating the facts, may be asked to evaluate credibility to resolve allegations
- Be mindful of whom the policy dictates makes this determination
- Credibility assessments are reserved for those whom are assigned

Credibility Assessment

- Credibility is granted to those whom
 - Engage the process honestly, without deceit
 - Cooperate and are complete
 - Lack motive to be anything other than credible
- Credibility is not granted to those whom
 - Deceive, fabricate, and/or facilitate dishonesty or interference
 - Act upon a motive to manipulate the process

Cautions for Common Pitfalls

- Be wary of common pitfalls of sexual misconduct adjudications
 - *Everyone* believes they must perform for the investigator(s) and adjudicator(s)
 - Everyone wishes to be believed
 - Be watchful of the over-exaggeration of accounts consistent with myths surrounding sexual misconduct
 - The physiobiological impact of trauma *may* be confused as dishonesty
 - Not every inaccuracy is an untruth
 - Use of an advisor/support person to be confused as a lack of cooperation or deception

The Appeals Process

- Purpose of the Appeal Process
 - Opportunity for the parties to have the matter further evaluated
 - Based on a narrow set of established criteria
 - Clearly articulated possible outcomes on appeal
 - Not intended to be a re-investigation or re-hearing
- Not a fundamental requirement of due process
 - If provided, must be fair and equitable for all parties

The Appeals Officers

- Selecting Appeals Officers
 - Criteria ought to be outlined in your policy
 - Must be highly trained and clearly aware of their role(s)
 - Capable of refraining from involving themselves in the case
- Development of Appeals Officers
 - Fully trained on all aspects of the policy and related practices
 - Investigative methods, trauma-informed, credibility assessment, etc.
 - Can articulate the goals of each phase of the process
 - Can identify and clearly articulate an understanding of the key facts they are called to consider

The Appeals Process: Common Grounds for Appeal

- Finding rendered was not supported by all available and relevant information
- Discovery of new information
 - Had been previously unavailable
 - Upon its availability, would have reasonably affected the outcome
- Significant procedural error
 - The error reasonably would have impacted the outcome in a substantial way
- Grossly disproportionate sanction
 - Sanction issues is far out of range of what is typical for the offense in light of all relevant aggravating and mitigating circumstances
 - Too light *or* too heavy

The Appeals Process: Common Outcomes of Appeals

- Dismissal of the appeal – grounds or deadlines not met, procedures not followed
- Original outcome is upheld
- Case remanded back for a rehearing
- Original outcome is modified by the appeals officer

The Appeals Process

- Selection of models of appeals process
 - Model should best reflect the purpose of the appeals process
 - Paper processes reflect a “review” based on the criteria
 - Boards and other in-person processes could reflect a “re-investigation” or “re-hearing” format
- Increasing the number of appeals officers
 - Increases those that require training
 - May increase variety of outcome

References

U. S. Department of Education. Office for Postsecondary Education. (2016). *The Handbook for Campus Safety and Security Reporting*. Accessed July 5, 2017.
<https://www2.ed.gov/admins/lead/safety/handbook.pdf>

See also

Baker, T.R. (2005) *Judicial Complaint Resolution Models for Higher Education: An Administrator's Reference Guide*. Horsham, PA: LRP Publications.

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Compliance, Rights, and Due Process

Title IX

Title IX of the Education Amendments of 1972 (Title IX), 20 W.S.C. §§ 1681 et seq., and its implementing regulations, 34 C.F.R. Part 106

Enacted by Congress, Title IX seeks to reduce or eliminate barriers to educational opportunity caused by sex discrimination in institutions that receive federal funding

TITLE IX

NO PERSON IN THE UNITED STATES SHALL, ON THE BASIS OF SEX, BE EXCLUDED FROM PARTICIPATION IN, BE DENIED THE BENEFITS OF, OR BE SUBJECTED TO DISCRIMINATION UNDER ANY EDUCATION PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE.

Existing Guidance

2001 Revised Sexual Harassment Guidance

2001 Revised Guidance

- Title IX guidance promulgated by the DOE/OCR
- Replaced the 1997 Guidance
 - Revisions were made following the resolution of multiple SCOTUS cases addressing private litigation under Title IX (i.e. *Gebser* and *Davis*)
 - Guidance distinguishes from compliance vs private litigation matters
- “Notice” and “Request for Comments” were published in the Federal Register in November 2000
- Final guidance released in January 2001

2001 Revised Guidance

- Principles of the 1997 and 2001 Guidance
 - Sexual harassment... “interfere with a student’s academic performance and emotional and physical well-being.” (pg. ii)
 - “the good judgement and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX.” (pg. ii)
 - “prompt and effective action calculated to **end** the harassment, **prevent** its recurrence, and, as appropriate, **remedy** its effects.” (pg. iii)
 - “do not overreact to behavior that does not rise to the level of sexual harassment.” (pg. iii)
 - “well-publicized and effective grievance procedures.” (pg. iii)

2001 Revised Guidance

- Sexual Harassment
 - “Unwanted conduct of a sexual nature” (pg. 2)
 - Unwelcome: “not [requested] or [invited] and ‘[regarded] as undesirable or offensive.’” (pg. 8)
- DOE Requirements
 - “Issue a policy against sex discrimination,
 - Adoption and publication of grievance procedures (prompt and equitable resolution)...
 - Designate at least one employee to coordinate compliance” (pg. 4)

2001 Revised Guidance

- Assessing alleged acts of sexual harassment
 - Does the conduct alleged deny or limit a “student’s ability to participate in or benefit from the program based on sex?” If so then,
 - The school’s responsibility depends upon the “identity of the harasser and the context in which the harassment occurs.” (pg. 5)

2001 Revised Guidance

- Two types of harassment
 - *Quid pro quo*
 - Hostile environment harassment
 - “sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s program...” (pg. 5)
 - Consideration of subjective and objective perspectives (pg. 5)
 - “Constellation of surrounding circumstances, expectations, and relationships” (pg. vi, pg. 5)

2001 Revised Guidance

- “Recipient agrees that...will not, on the basis of sex...
 - Subject students to separate or different rules of behavior, sanctions, or other treatment.” (pg. 4)
- “Title IX does not require a school to adopt a policy specifically prohibiting sexual harassment or to provide separate grievance procedures for sexual harassment complaints. However, its nondiscrimination policy and grievance procedures for handling discrimination complaints must **provide effective means for preventing and responding** to sexual harassment.” (pg. 19)

2001 Revised Guidance

- “Gender-based harassment, including that predicated on sex-stereotyping, is covered by Title IX if it is sufficiently serious to deny or limit a student’s ability to participate in or benefit...” (pg. v)
- “Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students that is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s program constitutes sexual harassment...” (pg. 3)

2001 Revised Guidance

- Evidence about the **relative credibility** of the allegedly harassed student and the alleged harasser. (pg. 9)
 - Detail and consistency of the account
 - Existence of corroborative evidence in relation to whether it should logically exist
 - “Evidence that the alleged harasser has been found to have harassed others may support the credibility of the student claiming the harassment;”
 - “Conversely, the student’s claim will be weakened if he or she has been found to have made false allegations against other individuals.”
 - “Evidence of the allegedly harassed student’s reaction or behavior after the alleged harassment.”
 - “Evidence about whether the student claiming harassment filed a complaint or took other action to protest the conduct soon after the alleged incident occurred.”

2001 Revised Guidance

- On notice when a responsible employee
 - “knew, or in the exercise of reasonable care should have known, about the harassment.” (pg. 13)
 - Should have known: “would have learned of the harassment if it had exercised reasonable care or made a ‘reasonably diligent inquiry.’” (pg. 13)
- Responsible employee is any employee who
 - “has the authority to take action to redress the harassment,
 - who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or
 - an individual who a student could reasonably believe has this authority or responsibility.” (pg. 13)
- Must be trained

2001 Revised Guidance

- Investigative steps will vary depending upon
 - “the nature of the allegations, the source of the complaint, the age of the student or students involved,
 - the size and administrative structure of the school, and other factors.”
(pg. 15)

2001 Revised Guidance

- May be appropriate to take interim measures
 - “In all cases, schools should make every effort to prevent disclosure of the names of all parties involved – the complainant, the witnesses, and the accused -- except to the extent necessary to carry out an investigation.” (pg. 16)
 - Measures may include housing reassignment, class schedule adjustments, etc.
 - “Potential criminal conduct, school personnel should determine whether appropriate law enforcement authorities should be notified.” (pg. 16)

2001 Revised Guidance

- “...may be required to provide other services to the student who was harassed if necessary to address the effects of the harassment” (pg. 16)
- “should take steps to prevent any further harassment and to prevent any retaliation against the student who made the complaint (or was the subject of the harassment), against the person who filed a complaint on behalf of a student, or against those who provided information as witnesses.” (pg. 17)

2001 Revised Guidance

- Responding to requests for confidentiality of the complainant
 - “discuss confidentiality standards and concerns with the complainant initially;”
 - make clear that “Title IX prohibits retaliation will take steps to prevent retaliation and will take strong responsive actions if retaliation occurs.”
 - “take all reasonable steps to investigate and respond to the complaint consistent with the student’s request as long as doing so does not prevent the school from responding effectively to the harassment and preventing harassment of other students.” (pg. 17)
- “Evaluate the confidentiality request in the context of its responsibility to provide a safe and nondiscriminatory environment for all students” (pg. 17)
- Other means may be available to address the harassment outside of the use of the grievance procedures

2001 Revised Guidance

- Prompt and equitable grievance procedures
 - “Notice...of the procedure, including where complaints may be filed;
 - Application of the procedure to complaints alleging harassment...;
 - Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence;
 - Designated and reasonably prompt timeframes for the major stages of the complaint process;
 - Notice to the parties of the outcome of the complaint; and
 - An assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.” (pg. 16)

2001 Revised Guidance

- When the investigation results in a determination that harassment has occurred, the school should
 - Take “reasonable, timely, age-appropriate, and effective corrective action”
 - Tailored to the specific situation
 - End the harassment
 - Series of escalating consequences may be necessary if initial steps are ineffective at stopping the harassment” (pg. 16)
 - “Minimize, as much as possible, the burden on the student who was harassed.” (pg. 16)

2001 Revised Guidance

- OCR emphasizes that grievance procedures must
 - Be available, clear, and easily understood
- OCR recognizes that
 - Procedures will “vary considerably in detail, specificity, and components...” (pg. 20)
 - Timelines “will vary depending on the complexity of the investigation and the severity and extent of the harassment” (pg.20)
 - It is not advisable to have the complainant “work out the problem directly with the individual alleged to have been harassing” (pg. 20)
 - Mediation in sexual assault cases is not appropriate

2001 Revised Guidance

- Regarding due process rights of the parties
 - “Procedures that ensure the Title IX rights of the complainant, while at the same time **according due process to both parties involved**, will lead to sound and supportable decisions. Of course, schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.”

2001 Revised Guidance

- OCR case resolution processes – The DOE/OCR will consider whether
 - “the school has a disseminated policy prohibiting sex discrimination under Title IX and effective grievance procedures;
 - the school appropriately investigated or otherwise responded to allegations of sexual harassment; and
 - the school has taken immediate and effective corrective action responsive to the harassment, including effective actions to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects.” (pg. 14)
- OCR will take no further action if the above steps if
 - the above steps have been taken, or
 - will be taken
- OCR must seek voluntary compliance/resolution

FERPA and Title IX

- FERPA provides
 - Right to review, inspect, and request modification/additions
- Information gathered through a campus based process is protected as an education record under FERPA
 - Including any law enforcement or medical information obtained
- Neither FERPA or Title IX override a federally protected due process right
 - OCR has been clear on this since 1997

(U.S. Department of Education, 2001)

FERPA and Title IX

- OCR does not recognize a conflict between FERPA and Title IX with notice of outcome
- OCR does recognize a potential for conflict related to notice of sanction
 - Generally may only disclose to the complainant sanctions directly related to the complainant

(U.S. Department of Education, 2001)

Dear Colleague Letter 2013

- Speaks directly to retaliation
 - By either institution or student
 - Includes intimidating, threatening, coercing, or in anyway discriminating against the individual who has filed a report

(U.S. Department of Education, 2013)

Dear Colleague Letter 2015

“I write to remind you that all school districts, colleges, and universities receiving federal financial assistance must designate at least one employee to coordinate their efforts to comply with and carry out their responsibilities under Title IX.” - Asst. Sec. for OCR

- Provided additional clarification on the importance of the Title IX coordinator
 - Independent
 - Full time
 - Multiple coordinators
 - Support for Title IX coordinators

(U.S. Department of Education, 2015)

Interim Guidance

2017 DCL and Q&A

2017 Interim Guidance

- September 22, 2017 DCL
 - Rescinded the 2011 DCL and 2014 Q&A
 - Reemphasized the authority of the 2001 Revised Guidance
- Accompanying Q&A
 - Provided interim guidance on key areas
 - Interim guidance is enforceable until a notice and comment process results in new permanent guidance

2017 Interim Guidance

- Interim measures
 - “individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending.”
 - “school may not rely on fixed rules or operating assumptions that favor one party over another, nor may a school make such measures available only to one party.”

2017 Interim Guidance

- Prompt investigation
 - 2011 DCL 60 day rule no longer applies
 - “no fixed time frame under which a school must complete a Title IX investigation..¹³ OCR will evaluate a school’s good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.”
- Equitable investigation
 - “burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed.”

2017 Interim Guidance

- Equitable investigation
 - “requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.”
 - “Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms.”

2017 Interim Guidance

- Sufficient notice
 - “written notice to the responding party of the allegations constituting a potential violation of the school’s sexual misconduct policy, including
 - sufficient details and with sufficient time to prepare a response before any initial interview...
 - the specific section of the code of conduct allegedly violated,
 - the precise conduct allegedly constituting the potential violation,
 - the date and location of the alleged incident...
 - sufficient time to prepare for meaningful participation.”

2017 Interim Guidance

- Requirements for adjudication
 - “The investigator(s), or separate decision-maker(s), with or without a hearing, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the school’s sexual misconduct policy.”
 - “should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.”
 - “Any process made available to one party in the adjudication procedure should be made equally available to the other party.”
 - “Decision-making techniques or approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the adjudication proceeds objectively and impartially.”

2017 Interim Guidance

- Sanctions
 - “Disciplinary sanction decisions must be made for the purpose of deciding how best to enforce the school’s code of student conduct while considering the impact of separating a student from her or his education.”

2017 Interim Guidance

- Outcomes and appeals
 - “written notice of the outcome of disciplinary proceedings to the reporting and responding parties concurrently.”
 - “If a school chooses to allow appeals from its decisions regarding responsibility and/or disciplinary sanctions, the school may choose to allow appeal
 - solely by the responding party; or
 - by both parties, in which case any appeal procedures must be equally available to both parties.”

Additional Guidance

Jeanne Clery Act and VAWA

Violence Against Women Reauthorization (VAWA) 2013

- Amended the Jeanne Clery Act
 - Report domestic violence, dating violence, and stalking, beyond crime categories the Clery Act already mandates;
 - Adopt certain student discipline procedures, such as for notifying complainants of their rights, options and resources; and
 - Adopt certain institutional policies to address and prevent campus sexual violence.

2016 Revised Clery Handbook

- Requires simultaneous notification, in writing, to both the complainant and respondent
 - The result of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault or stalking;
 - The institution's procedures for the accused and the victim to appeal the result of the institutional disciplinary proceeding, if such procedures are available;
 - Any change to the result; and
 - When such results become final

(U.S. Department of Education, 2016)

2016 Revised Clery Handbook

- “Result” is defined as any initial, interim and final decision by any official or entity authorized to resolve disciplinary matters within the institution
- Must include:
 - Sanctions imposed by the institution
 - Rationale for the result and sanctions

(U.S. Department of Education, 2016)

2016 Revised Clery Handbook

- Rationale for result and sanctions must include:
 - Information presented during the proceeding
 - Explanation for how the evidence was weighed
 - How the evidence and information support the result and sanctions
 - Description of how the institution's standard of evidence was applied
- It is not sufficient to say:
 - “the evidence presented met the institution's standard of evidence” **OR**
 - “the evidence presented did NOT meet the institution's standard of evidence”

(U.S. Department of Education, 2016)

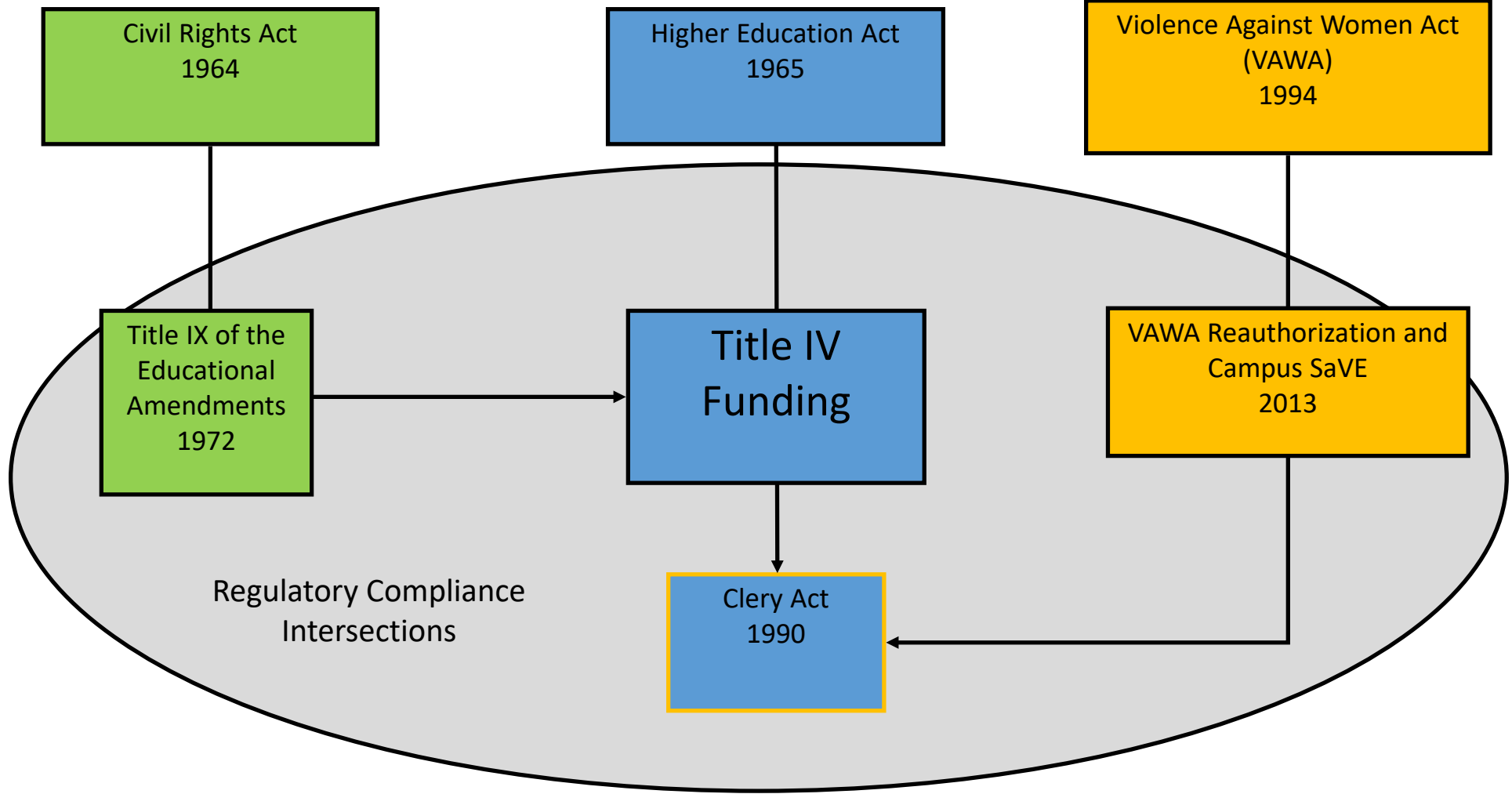
Where Clery and Title IX Intersect

The Clery Act

- Campus Security Authorities (CSAs)
- Non-personally identifiable information
- All Clery crimes
- Accommodations
- Disciplinary Procedures

Title IX

- Responsible employees
- All relevant details
- Sex discrimination, including sexual harassment which includes sexual violence
- Interim measures
- Grievance procedures



Title IX, ADA, and Section 504

- A documented disability is not generally viewed as a justifiable cause for prohibited behavior
- Interim and/or remedial measures may include access to resources typically available for those with documented disabilities
- Rely on your documented ADA/504 compliance processes to provide appropriate accommodations
- May provide a better opportunity for individuals to participate more fully

(McKendall, M.J, 2009)

Guidance on Sexual Misconduct

- Revised Sexual Harassment Guidance, 2001
- Dear Colleague Letter, 2011 – since recalled
- Dear Colleague Letter, 2013
- Not Alone Report – White House Task Force Report, 2014
- DOE Q and A Document, 2014 – since recalled
- Dear Colleague Letter, 2015
- The Handbook for Campus Safety and Security Reporting, 2016
- Dear Colleague Letter, 2016 – since recalled
- Dear Colleague Letter and Q and A, 2017 (Interim guidance)

Rights of the Involved Parties

OCR Guidance

Rights of the Respondent and Complainant

- OCR expect equity in the process
 - Rights afforded the respondent are afforded the complainant
- Clearly articulate, verbally and in writing, when and how parties may
 - Access, review and seek to make additions to the file
 - Amnesty options available – generally understood as complainant oriented
 - Access to confidential and/or privileged campus and community resources
- Both parties should be provided the options to submit information verbally, in writing, or not at all

(U.S. Department of Education, 2001)

Witness(es) or Other Involved Parties

- Witnesses do not have the same fundamental rights as complainant/respondent
 - To access the file
 - Receive notice of outcome or sanctions
- May prove necessary to make a limited release of information
 - In order to ensure implementation of sanctions (i.e. no contact with witness)
 - Order of trespass from campus

Witness(es) or Other Involved Parties

- Consider the opportunity for witness to have an advisor/support person
 - Support of the witness may increase their participation level
- Articulate any amnesty options available to the witness(es)
- Right to be protected from retaliation

Fundamental Due Process

Due Process

- United States Constitution, Fifth Amendment
 - No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Retrieved June 22, 2017 https://www.law.cornell.edu/constitution/fifth_amendment

Due Process

- United States Constitution, Fourteenth Amendment
 - Section 1: “All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without **due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.”

Retrieved June 22, 2017 <https://www.law.cornell.edu/constitution/amendmentxiv>

Fundamental Principles – Public Institutions

- University nearly always considered a state actor
 - Students receive 14th Amendment protections
- Specific fundamental elements of due process must be provided
 - Substantive
 - Charges are not arbitrary or capricious
 - Complaint concerns prohibited conduct
 - Sanctions are appropriate to the offense
 - Procedural
 - Process is fundamentally fair
 - Minimum requirements set by law or policy are met – follow your process
 - Notice includes written statement of charges
 - Meaningful opportunity to be heard by an impartial body
 - Decision based on substantial evidence

Fundamental Principles – Private Institutions

- University representative is not typically considered an agent of the state or state actor
- Students do not necessarily possess the same constitutional rights afforded at a public institution
- Student and university generally considered to be in a contractual relationship (policy/procedures)
 - Follow our processes – “Do what we say we will do”
- Processes must not be arbitrary or capricious
 - Courts will take note of practices that are not fundamentally fair and/or actions conducted in bad faith

Arbitrary and Capricious

- Will be examined based on the action(s) taken
 - Abuse of power
 - Acting outside of procedural requirements
 - Acting without rational or without reasonable basis
 - Action without consideration of relevant factors
 - Clear evidence of error of judgement

Retrieved on June 22, 2017 <https://definitions.uslegal.com/a/arbitrary-and-capricious/>

Phases of the Disciplinary Process

- Disciplinary procedures typically consist of three distinct phases
 - Pre-adjudication/investigation – notice and collection of information
 - Adjudication – evaluation and decision-making process
 - Appeal – request that the decision be reviewed

Phases of the Disciplinary Process

Investigation

- Inquiry
- Fact gathering
- Assessment
- Notice of charge (if necessary)

Adjudication

- Response
- Review
- Evaluation
- Decision outcome, finding

Appeal

- Targeted review based on a narrow criteria

Process Form and Function

University processes need not be overly burdensome

- *Dixon v Alabama Bd of Ed* 294 F.2d 150 (5th Cir, 1961)
 - Provides that minimal constitutional due process must be provided to a respondent
- *Goss v Lopez* 419 U.S. 565 (1975)
 - Must provide some kind of notice...some kind of opportunity to be heard
 - Over complicating the process “may not only make it too costly as a regular disciplinary tool, but also destroy its effectiveness as a part of the teaching process”

Process Form and Function

The General Order 45 F.R.D 133, 145 (W.D.Mo 1968)

- School policies and procedures regulate only the relationship of the student and the university
 - Rights as a student are not to be confused to be akin to rights afforded under state/federal criminal processes
- Attendance at the university is generally considered a voluntary agreement
 - The *most punitive* action is that respondent is separated from the university – determination the student is no longer fit to attend
- Discipline and related consequences are a part of the educational process

The *Esteban* Nine

Esteban v Central Missouri State College 415 F.2d 1077, 1088-89 (8th Cir, 1969)

- School procedures are not the same for which criminal procedures must be established

Esteban Checklist – Rights of the Respondent

- Written statement of charge with at least ten days notice
- Hearing before a “power” to suspend or expel
- Advance inspection of materials
- Right to counsel (advisor only)
- Right to present facts of their own
- Right to hear evidence presented against them and opportunity to question
- Decision determined based on evidence presented
- Findings include written statement of facts
- Right to make a recording

Activity – Review of Your Campus Process

Questions to ask yourself about your process

- Are basic fundamental processes provided?
- Beyond fundamental process, what else is offered and why?
- Does it tend to favor one party over the other?
- Does your institution balance the needs of the parties?
- Are the right people in place to make sure the process is fair?
- Are both parties treated with dignity and respect?

Activity – Review of Your Campus Process

Questions to ask yourself about your process

- Does your institution provide more information to only one party, or do they meet with each party separately to provide information to both?
- How do you manage the involvement of witnesses in your process? Do you identify witnesses to the parties?
- Does your institution have a process for addressing reluctant complainants?
- Does your institution have a process for the management of interim measures requests?

References

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SE~~N~~UAL
Misconduct
Institute

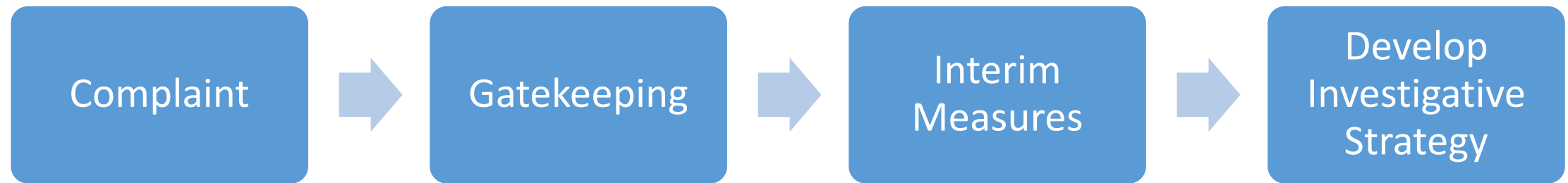


Learning Foundation

Investigations

Pre-Investigation

Pre-Investigation



Complainant Intake

- Initial intake meeting may or may not be with the person who ultimately will investigate
- Establish an understanding of the complainants intentions
 - Are they requesting an opportunity to be heard,
 - Are they requesting an investigation?
 - Are they requesting a full adjudication?
 - Are they reluctant and/or requesting confidentiality?
- Review rights, options, and resources
 - Counseling and/or advocacy
 - Law enforcement
- Address confidentiality
 - Who needs to know the information? Why do they need to know?
 - How will the institution evaluate a request for confidentiality?

Pre-Investigation Planning

- General Issues to address before you begin:
 - **Investigators:** One or two?
 - **Interviews:** Audio record, video record, neither?
 - **Criminal Investigations:** How will you coordinate with local/campus police?
 - **Witnesses:** Are or should they be compelled to appear for an interview?
 - **Timeline:** What is considered prompt for this matter?
 - **Requests for Delay:** Will those be considered?
 - **Advisors:** What role do they play?
 - **Environment:** Is it safe, calming, free of perceived bias?
 - **Expectations:** Do students know what to expect and when?
 - **Conflict of Interest:** How do you address real & perceived conflict or bias?

Interview Basics

Interview Environment

- Ideal interview space is
 - Safe (physically and emotionally)
 - Private
 - Neutral (in location and décor)
 - Comfortable (both in furnishings and in size)
 - Set up to promote dialog
 - Designed to reduce distractions
- Interview space should reflect a environment free of
 - Elements of bias
 - Conflicts of interest

Interview Environment

- Things to have on hand
 - Business cards/contact information for investigator(s)
 - Written copies of campus and community resources
 - Written copies of relevant campus policy and protocols
 - Paper & pen for student to take own notes if desired
- Consider having on hand
 - Tissues
 - Water (or other beverage to offer)
 - Stress ball, slinky, etc.

Interviewing Tips

- Dress/appearance
- Attend to your non-verbal behaviors
 - Focus on the student, rather than the advisor, support person, etc.
 - Present an open posture
 - Balanced eye contact
- Practice active listening
- Demonstrate empathy, but maintain proper boundaries
 - Do not “own” the emotions yourself
- Be mindful of your own reaction to triggering information
 - Consult with colleagues to learn more about your own non-verbals

Interviewing Tips

- Managing the difficult conversation
 - Acknowledge once at the beginning that this could be a difficult conversation
 - Do not preface questions with “I know this is hard” or “This must be difficult”
 - Use anatomical language
 - Seek clarity with slang language or terms unfamiliar to you

Framing the Initial Interview

- Welcome & introductions
- Use the initial interview as an opportunity to begin the process of building rapport
- Overview of the process
 - Explanation of investigatory process, resolution process, appeal rights
- Review rights and options specific to that person's role
 - Complainant/respondent rights differ from witnesses
 - Discussion of available resources

Framing the Initial Interview

- Discussion of roles
 - Investigator(s), advisor/support person, etc.
- Establish a goal for the interview
 - Gather information about the incident
 - Who, What, Where, When, How
 - *Why*
 - Gather information related to the elements of the policy

Framing the Initial Interview

- Establish an understanding of the party's intentions
 - Do they intend to cooperate fully with an investigation?
- Explain when/how case updates will be provided
- Emphasize the university's position on acts of retaliation
- Discuss questions and/or concerns of the party
- Setting expectations for the interview

Activity #1

Develop an investigative strategy based on what you observe in this video.

Please be aware this activity may trigger some personal trauma. If you need assistance, please feel free to step out. We have folks available with expertise in counseling and working as victim support.

The Reluctant Complainant

- At times, a complainant will request confidentiality
 - with a continued investigation
 - with no further investigation
 - or, refuse participation all together
- The rescinded 2014 Q&A remains instructive
 - the investigator should explain
 - ability to fully respond may be limited
 - the university's protections and response to acts of retaliation
 - need to analyze the request against a university's ability to maintain a safe and non-discriminatory environment
- Investigator should document clearly the complainant's request and rationale for why it may be honored (or not)

The Reluctant Complainant

- If necessary to proceed without the complainant's participation,
 - Seek detailed relevant information from those who received primary accounts
 - First witness(es)
 - RA and/or law enforcement officer who spoke with the complainant
 - Seek to piece together the narrative from physical information, i.e. social media documentation, photographs, etc.
 - Refrain from addressing gaps in information with speculation or theories
- Be mindful of the rights and impact on the respondent should the complainant not participate

The Reluctant Respondent

- At times, a respondent will refuse to participate and/or offer limited information
 - Fearful of the impact on a criminal investigation
 - Unwilling to speak on the matter without first knowing what information has been reported or gathered
 - May claim to exercise a right to avoid incrimination of themselves
- If necessary to proceed without the respondent's participation,
 - Be mindful not to receive the complainant's narrative alone
 - Seek additional information to either support or refute claims
 - Avoid finding culpability in the respondent for failing to provide a narrative

The Complainant

Impact of the Event

- For some, the event will initiate a neurobiological, physiological, and psychological response to trauma
 - But not necessarily for all....
- Memories *may*
 - Be difficult to articulate in a linear fashion
 - Be recalled in a disjointed or spotty fashion
 - Not ever be available, especially if the complainant was incapacitated
- Be mindful of the time passed between the event and the interview
 - Multiple sleep cycles often allow the complainant to formulate their narrative through better recollection

Impact of the Event

- Complainant may demonstrate a wide array of emotions
 - Anger
 - Embarrassment
 - Depression
 - Indifference
 - Resistance
 - Reluctance
 - Vengeance
 - Shame
 - Guilt
- Complainant may have experienced tonic immobility, disassociation, illness, or other uncontrollable responses

Trauma-Informed Interview Techniques

- Trauma-informed approach has moved from “buzz-word” to “skill requirement” for conduct officers
 - Information on interviewing victims of trauma has been available through mental health practitioners and medical professionals from some time
 - See also resources from Dr. David Lisak, Dr. Jim Hopper, and Dr. Rebecca Campbell for more on the trauma-informed approach
- Forensic Experiential Trauma Interview (FETI) Technique
 - Developed by Russel Strand
 - Technique often used in law enforcement and [military investigations](#)
 - Purpose is to unlock the memories of the complainant through use of sensory-based questions
 - Free training on FETI available through the End Violence Against Women International (EVAWI) Online Training Institute

Resources available at <http://www.evawintl.org>

Trauma-Informed Interview Techniques

- Minimize the number of interviews and interviewers
 - A chilling effect is created by having to recall their narrative too often and to a wider audience
- Practice the art of patience - details may be slow to develop
- Account for needed breaks and/or pauses to maintain a level of comfort
 - Postpone questions if necessary
- Do not reframe the incident
 - Capture the story of the complainant through their words
 - Use the language of the complainant

Trauma-Informed Interview Techniques

- Ask open-ended questions in a calm and neutral tone
- Questions that speak to sensory elements of the incident may unlock details
 - Sight, smell, taste, texture, sound, etc.
- Questions that speak to the emotional elements of the incident may also unlock details
 - Allow the complainant to unpack their feelings
 - May generate recall of incident specific information
- Emphasize that, though perhaps difficult, detailed information will need to be captured

Trauma-Informed Interview Techniques

- Allow the complainant to deliver their narrative free from interruption
- Possible interview questions – *sensory or emotional information*
 - “What is the memory that sticks out most for you?”
 - “Tell me more about information that you have to recall, but have not...”
 - “What sounds do you recall?”
 - “Please tell me more about what you recall feeling (physically) at that time?”
 - “Please tell me more about how this has impacted you.”
 - Seek more information about the physical and emotional response
 - Seek more information about the academic, social, personal, and behavior impact

Trauma-Informed Interview Techniques

- Possible interview questions – *detailed and factual information*
 - “Tell me more about what you had to eat/drink that night.”
 - “Tell me more about your interaction with the respondent.”
 - “Do you recall...?”
 - Seek information about specific questions about the encounter, i.e. type/frequency of physical/sexual interaction during the event
 - Seek information about specific forms in which the complainant refused consent, or attempted to
 - “Do you have any pieces of information you would like me to review? Texts, social media, medical reports, etc?”
 - “Are there others you would like me to speak with; what will they share with me?”

Common Responses from the Complainant

- Guilt, shame and self-blame
 - “I never should have drank so much.”
 - “I didn’t even want to go out that night.”
 - “I knew better than to walk home with him.”
 - “I just don’t want him to get into any trouble.”
 - “Maybe I led him on.”
 - “All I did was lay there.”
 - “I can never let anyone find out about this.”
 - “Where I’m from, you don’t get raped unless you let your guard down.”

Common Responses from the Complainant

- Fear of retaliation or harm
 - “I don’t want anyone to know about this.”
 - “If this gets out, I will never...”
 - “I couldn’t live with myself if...”
 - “I want you to do something about this, but if you do....”
- Oversharing of irrelevant or protected information
 - “My boyfriend and I have plenty of consensual sex. What is friend did to me was not consensual.”
 - “I’ve been taking depression medication for a few years now.”
 - “I was raped in high school.”

The Respondent

Impact of the Event

- Undergoing a university investigation may cause the respondent to feel
 - An increased level of stress
 - Shame and/or embarrassment
 - Anger
 - Hopelessness
 - A sense of retaliation
- Make available to the respondent appropriate resources and/or support
- A respondent who believes they are supported may be more likely to engage at a greater level with the process

Techniques for Interviewing the Respondent

- Prior to requesting an interview with the respondent
 - Arrange to receive all relevant and available material necessary to conduct a thorough interview
 - Internal or external reports
 - Complainant's statement
 - If necessary, witnesses for the complainant
 - Have a file started, that if necessary, might be reviewed

Techniques for Interviewing the Respondent

- Ask open-ended questions in a calm and neutral tone
- Expect that the respondent will have a narrative prepared, verbally or in writing
 - May be a narrative believed to be honest; may be knowingly false in nature
 - Use a well-placed interruption to prevent recitation of a crafted narrative
- Seek clarification about critical details
 - Specific information about how consent was obtained and/or understood
 - Circle back on critical details as needed
 - “This piece isn’t adding up to me...”
- Do not reframe the incident
 - Capture the story of the respondent through their words

Techniques for Interviewing the Respondent

- Begin the interview with broad questions
 - “Can we discuss the night of the report?”
 - “Tell me more about what you were up to that night, starting at wherever the ‘beginning’ is for you.”
 - “There is a concern that your behavior that night violated our Code. Tell me why that may be.”
 - “Please tell me about your relationship/interaction(s) with the complainant.”
- Allow the respondent to fully respond to broad questions
 - Indicates the theme of how they intend for the investigator to come to understand their actions

Techniques for Interviewing the Respondent

- Possible interview questions – *consent*
 - “What were your actions to demonstrate you were a consenting party?”
 - “Tell me more about what you observed from the complainant in response to your actions.”
 - “Please tell more when/how you came to understand you had consent.”
 - “What was your response if/when she indicated she wasn’t interested?”
 - “Could you explain in greater detail her behaviors that informed you consent was present throughout the activity?”
 - “How did you come to know that he/she was enjoying the interaction?”
 - “Was there a time you wondered if he/she was into it?”

Techniques for Interviewing the Respondent

- Possible interview questions – *grooming techniques*
 - “Tell me more about the party that night. What was all in the punch?”
 - “What was it about him/her that interested you?”
 - “Why were you drinking beer, but he/she was drinking the punch?”
 - “How did you come to know that he/she wanted another drink each time you brought him/her one?”
 - “What was the purpose of returning to your room (or other location)?”
 - “Were there other locations you could have gone?”

Techniques for Interviewing the Respondent

- Possible interview questions – *detailed and factual information*
 - “Tell me more about what you had to eat/drink that night.”
 - “Tell me more about your interaction with the complainant.”
 - “Do you recall...?”
 - Seek information about specific questions about the encounter, i.e. type/frequency of physical/sexual interaction during the event
 - “Do you have any pieces of information you would like me to review? Texts, social media, etc?”
 - Seek clarification on the content and purpose of interactions pre- and post-event
 - “Are there others you would like me to speak with; what will they share with me?”

Common Responses from the Respondent

- Deny the allegation based on their character
 - “I would never do this because I am a spiritual person.”
 - “My parents raised me to be better than that.”
 - “I know someone who has been raped and there is no way I would ever do that to someone.”
 - “I knew he/she was drunk, so I all wanted to do was take him/her somewhere safe away from everyone else.”
- Deny the allegation based on their physical condition
 - “I had so much to drink I couldn’t maintain an arousal.”
 - “I’m the one that was blacked out – just ask my friends how much I drank.”
 - “When I am drunk, I do all kinds of things that I would never do when I am sober.”
- Refuse to address the allegation
 - “I will talk with you about anything, just not that night.”
 - “Under the advice of counsel...”
 - “I want to see the file before I say anything.”

Common Responses from the Respondent

- Deny the allegation based on their experience with sexual behavior
 - “No one has ever talked with me about consent, I’m not sure what to even look for.”
 - “I was a virgin before that night.”
 - “My friends tell me he/she is much more experienced than I do, he/she should have told me ‘no.’”
 - “I’m the one who was violated.”
 - “I am not trying to brag, but I really don’t need to take advantage of anyone to get laid.”
- Reframe the incident or direct attention to irrelevant material
 - “This really isn’t about consent. Isn’t this more about a vengeful ex?”
 - “Consent is much more complicated than this. Isn’t there something to be said for ‘drunk sex?’”
 - “We really should be talking about how he/she took advantage of me.”
 - “If I wasn’t a *[special population]*, you wouldn’t even be talking to me about this.”
 - “I’ve seen the news and I know all you need to do is nail me to the wall on this one.”

Witnesses

Interviewing Witnesses

- Much of the behavior that is being investigated happens between two people in private locations.
- While it is rare to have a witness to the actual violation, witnesses can provide important context information
 - Fill in gaps in timeline
 - Provide information about alcohol or drug use of parties involved
 - Provide observations potentially speaking to incapacitation
 - Often have information related to first impressions/reactions of parties after the incident.

Interviewing Witnesses

- Addressing Confidentiality
 - Be transparent about what, if any, confidentiality you can provide.
 - If the witness's name will be used, explain the context of that use and who will have access to that information.
- Addressing Retaliation
 - Define retaliation under your institution's policies
 - Explain measures to protect the witness from retaliation and how you will address retaliation should it occur
- Connect to Resources
 - If the witness is showing signs of distress/discomfort, help connect them to assistance
 - If appropriate, consider offering interim measures such as a no contact order to the witness

Techniques for Interviewing Witnesses

- Strategies related to witnesses
 - Be strategic regarding the order in which you interview witnesses
 - In matters regarding student organizations, schedule interviews in such a way to minimize opportunities for witnesses to compare stories, notes, questions asked, etc.
 - Listen for stories or accounts that sound too similar
 - Using the exact same wording or phrasing
 - Telling their story in exactly the same sequence
 - Witnesses may give short or vague answers to questions – unpack those
 - “Can you say more about that?”
 - “What exactly do you mean by...?”

Techniques for Interviewing Witnesses

- Ask questions to establish information about
 - Timeline
 - “What time did you get to the party?”
 - “What time did he/she get home?”
 - Substance use
 - “What were you all drinking while you were pre-gaming? Do you recall how much he/she drank?”
 - “Where did the alcohol come from? Who was getting the drinks?”
 - Incapacitation
 - “What was your impression of how drunk he/she was? What did you observe that made you think that?”
 - Initial reactions
 - “When he/she came home the next morning, what did he tell you about the night before?”

Closing and Other Considerations

Closing the Interview

- Connection to additional witnesses/information
 - “Do you have any texts, pictures, etc. that may be related to this incident?”
 - “Is there anyone else you can think of that I should talk to? What information do you think they may be able to provide?”
- Wrap up questions
 - “Is there anything else you think I need to know?”
 - “Is there anything you were expecting me to ask that I did not?”
- Allow time for parties to ask questions
- Additional information
 - How to contact you if they remember anything else after the interview or have additional questions
- Next steps
 - Will this person hear from you again? When should they expect that contact? What might that contact look like?

Reconciling the Narrative

- Seek to determine if the event is likely to have occurred based on available factual information
- Investigator must be prepared to reconcile a party's narrative with supporting or competing information
 - Independent, factual witnesses – including respondent's narrative
 - Physical evidence

Notetaking Tips

- Two investigator model is helpful
 - One takes lead on questions, the other focuses on notetaking
 - Person questioning should still take notes on items to follow up on in order to avoid interrupting
- Be mindful of distractions
- Notes should be thorough, clear, and neutrally written
- Develop system to denote important items and indicate where follow up questions are necessary
- Clean up and finalize notes as soon after the interview as possible
- Consider using dictation software to save time

Gathering Documentary Information

- Potential information for consideration
 - Text messages call logs
 - Photographs
 - Social media
 - Snapchat, Twitter, Instagram, Facebook, Tinder, Grindr, Fade, etc.
 - Video
 - Personal recordings and security/surveillance footage
 - Building access and/or swipe card records
 - Medical records
 - Guest lists (i.e. parties, student organization events)

Verifying Documentary Information

- Seek to independently verify the information provided
 - Text Messages
 - Messages in a thread can be selectively deleted
 - Ask student for phone bill to verify time stamps
 - Ask others involved in the text conversation if they still have the messages
 - Social Media Posts
 - Templates online to fake posts/messages
 - Ask student to sit at your computer/desk to print or screen capture
 - Photographs
 - Look at date and time of creation for digital images

Relevancy of Information

- Examples of potentially irrelevant information
 - Does not speak to the issue
 - Speaks to a fact not in dispute
 - Sexual history that does not address pattern of consent understood between the parties
 - Character references/letters
- Sometimes, information can be prejudicial
 - Inflammatory social medial posts not related to the issue
 - Opinion/evaluative statements not backed by fact
- If you choose not to use/include something, document decision & rationale

Common Mistakes

- Unnecessary interruptions
- Rapid fire questioning
- Refraining from seeking clarification
- Placing judgement upon the actions and/or response of the parties
- Rationalizing the narrative
- Less than thorough documentation of the interview
- Failing to provide timely updates to the parties

Common Mistakes

- Mislabeling neurological and psychological impact as acts of deception
 - Especially in light of memory recall challenges
- Failure to recognize the impact of trauma on memory recall
 - Not to be equated with intentional acts deception
- Providing greater weight to the narrative associated with heaviest emotional response
- Confusing the need to provide interim/remedial measures with resolution through adjudication only

False, Unfounded, and Unsubstantiated Reports

- Most rigorous research on false reports comes from the criminal justice system
- Reliable data estimates 2-8% of reports would be considered false
 - Intentional attempt to report knowingly inaccurate information
- A true, malicious false report may be addressed by the university
 - May ultimately be considered an act of discrimination itself
- Be wise to weigh the potential for creating a chilling effect when pursuing a false report

Lonsway, K.A. et. al. (2009). *False reports: Moving beyond the issue to successfully investigate and prosecute non-stranger sexual assault*. The Voice, 3(1).

False, Unsubstantiated, and Unfounded Reports

- A fair and neutral investigation may result in the determination that the report is unsubstantiated
 - Available information will not ultimately demonstrate that the event occurred at the level required by the standard of proof
 - Not equitable to a finding that the report is false or unfounded
- Under VAWA, law enforcement have the only authority to designate a report as unfounded

(U.S. Department of Education, 2016)

Activity #2

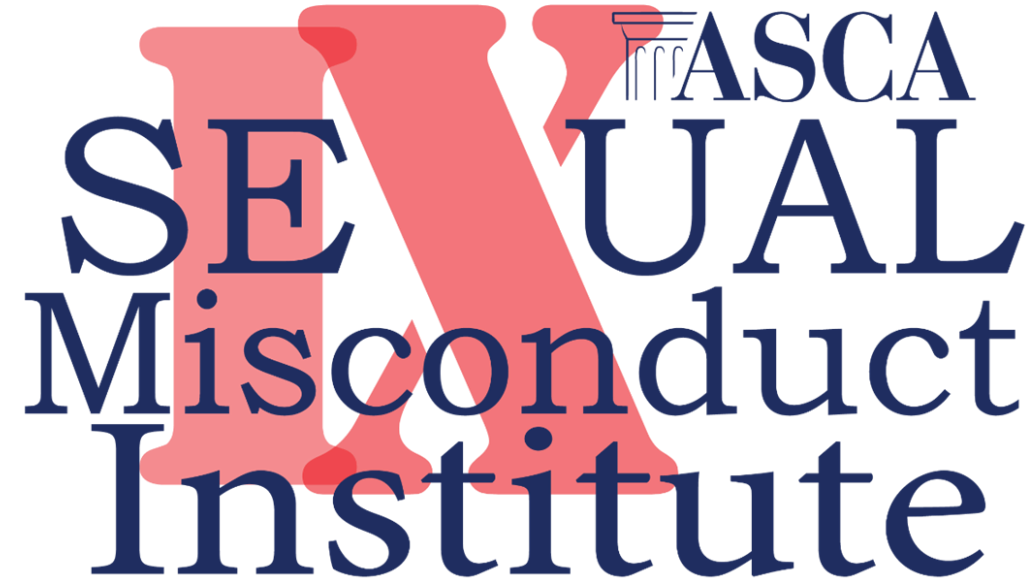
Please be aware this activity may trigger some personal trauma. If you need assistance, please feel free to step out. We have folks available with expertise in counseling and working as victim support.

References

Online training institute. End Violence Against Women International. <http://www.evawintl.org>

Lonsway, K.A. et. al. (2009). *False reports: Moving beyond the issue to successfully investigate and prosecute non-stranger sexual assault*. The Voice, 3(1).

U. S. Department of Education. Office for Postsecondary Education. (2016). *The Handbook for Campus Safety and Security Reporting*. Accessed July 5, 2017.
<https://www2.ed.gov/admins/lead/safety/handbook.pdf>

The logo features the word "SEXUAL" in large, dark blue, serif capital letters. The letter "X" is significantly larger and filled with a semi-transparent red color. Below "SEXUAL" are the words "Misconduct" and "Institute" in a smaller, dark blue, serif font. In the upper right corner of the logo, there is a small icon of a classical building facade followed by the acronym "ASCA" in a dark blue, serif font.

SEXUAL
Misconduct
Institute
ASCA

ASCA Sexual Misconduct Institute

A thick, solid blue horizontal arrow pointing to the right, spanning the width of the slide.

Learning Foundation

Sanctioning and Reintegration

OCR Guidance

- Sanctions and remedies should: eliminate harassment, prevent reoccurrence, and remedy effects
- Sanctions alone are not an adequate institutional response
 - May need other remedies

Table Conversation

- What is the philosophy of your conduct office?
- Did your conduct office have a role in the writing of your policy?
- What does your Title IX Coordinator believe about appropriate sanctions?
- What does your campus believe would constitute “appropriate” sanctioning?

Types of Sanction Processes

- Sanctioning board
- Sanction agreements
- Appointed person/office renders sanctions
- Pre-mandated sanctions

- For consideration: If you have a hearing panel are they recommending sanctions?

Sanctioning Board

- Advantages
 - Multiple identities represented
 - Cross section of expertise
- Disadvantages
 - Scheduling
 - Varying philosophies and understandings of Title IX work
 - Training
 - Consistency

Sanctioning Agreements

- Advantages
 - Decreases liability
 - Complainant/respondent exhibit choice
 - May increase commitment to learning/growth
- Disadvantages
 - May not find a combinations of sanctions that meets the needs of all parties and Title IX obligations

Sanctioning Appointed Person/Office

- Advantages
 - More personal relationship with complainant/respondent
 - Easier to build rapport/understand the case
- Disadvantages
 - Vetting by the Title IX Coordinator could increase time
 - If disagreement occurs, there needs to be a means to arrive at a sanctioning decision

Mandated Sanctions

- Advantages
 - Consistency
 - Consequences for behaviors that violate policies are publicly known and accessible to the campus community
- Disadvantages
 - Unable to sanction to where the respondent is at or what the complainant may wish to see as an outcome
 - Complainants may not come forward to report knowing what the sanctions are in advance

Assessment of the Situation

- What interim measures have already been taken before sanctioning occurs?
 - Examples:
 - Respondent was removed from housing
 - Respondent was told they had to leave their campus employment
- What interim measures are carrying over? Are any changing?
- How is the respondent/complainant being advised?
 - Which department is advising?
 - Which is overseeing?
 - Are they the same?

Assessment of the Respondent

- What is the housing situation? Where is the survivor's housing?
- Is the respondent or complainant a member of ROTC?
- Is the respondent studying on a student Visa?
- If suspended, does the respondent have the means to return home or have housing?
- Which school/college is the respondent enrolled in? Do they have an honor code?
- What is the add/drop date for financial aid? Does your school have a reimbursement program?
- Does the respondent have an on-campus job?
- Does the respondent have a fellowship or scholarship that requires them to be in good standing? Will they lose funding if separated?

Assessing the Complainant's Situation

- What is something that can be done that may begin to repair harm?
- What clubs/activities/on campus jobs does the complainant have?
- Does the complainant want to be notified if the respondent returns?

Assess: What is the Policy Violation?

- How many complainants?
- What is the level of impact?
- Is there a criminal case to be aware of?
- How has the community been impacted?
- AOD involved?
- Was there consensual sex with something non-consensual like videotaping, sending a picture, etc.? If so, was there mass distribution?
- Was there more than one violation?

Assess: What is the Policy Violation?

- Did the respondent provide alcohol to the complainant?
- Where did the violation occur? During a class? In a lab?
 - What role was the respondent assuming at the time?
 - Graduate students teaching courses/instructors? (GSI, Teaching assistant etc.)
- Is there a power dynamic between the respondent and complainant in their roles? Example:
 - Respondent is an RA in a residence hall, and the complainant is a resident that reports to the respondent
- What are the additional, mitigating, and/or aggravating factors?

Assess Sanction/Educational Measure Options

- No contact
- Separation - transcript notation
- Disciplinary probation
- Workshop
- Reading and reflective essay
- Workbooks
- Alcohol assessment or reduction program
- Interviewing a member of the community

Assess Sanction Options

- Creating a mixed media project
- Employment restriction
- Trespassing from areas of campus or all of campus
- Restrictions on attendance to events
- Reparations
- Assessments
- Counseling (can you mandate or recommend/advise?)

Sanctioning Activity

At each table suggest sanctions for the following situation:

A Respondent was found responsible for non-consensual digital penetration of a complainant after having consensual sex. The Respondent is also found responsible for non-consensual recording of the consensual sex.

Issuing Sanctions

- Provide very clear instructions for the complainant and respondent
- Set the duration and deadline of each sanction
- Be sure what you sanction is actually possible administratively and enforceable. If not, it can create liability
- Have a conversation about desired learning outcomes

Issuing Sanctions/Educational Measures

- Find out if the respondent's institutional email will still be available after separated; seek out alternative email addresses/phone numbers
- Ensure the respondent understands implications
 - Transcript notations
 - Disciplinary records policies
- Provide a copy to the complainant; ensure that letters go out at the same time.

Sanction Monitoring

- Who will monitor sanctions?
- Will your conduct software send out late notices?
- What additional actions can you take if sanctions are not completed in time?

What is the Process of Re-Entry?

- Have the student reapply to the school
- Petition to return
- Automatic re-entry back upon sanction completion
- A multi-tiered process of re-entry
- Review and evaluation process before reintegration

Review and Evaluation Considerations

- Which stakeholders should be present? Who holds the decision making power for reentry based on your policy?
- What are the objectives and possible outcomes?
- Do another case management assessment
 - Academic advising support may be needed
 - Housing, etc.

Review and Evaluation Considerations, cont.

- Is there outlined criteria in the sanctioning to determine if the respondent is able to be back on campus or not?
 - Sanctions completed on time and at a standard that demonstrates growth?
 - Does the respondent take accountability?
 - If not, do they acknowledge the harm/impact to the survivor?
- What is the level of social support when returning on campus?
- Provide the respondent with a decision regarding reintegration

Additional Considerations

- Do you need to lift holds on an account for a respondent to register for classes nearing the end of the suspension?
- If expelling, is there a no trespass order?
- What is the process of no trespassing at your institution?

Reintegration

- Remove holds
- Connect respondent with campus resources
- What sanctions may still be in place as the respondent returns?
 - No contact
 - Disciplinary probation
 - Employment restrictions
 - Building restrictions
 - Check-in meetings
- Considerations: on-campus job

Notification of the Complainant

- Check class schedules to ensure there is no conflict of interest
 - If classes are in the same hall or building, create a walking path for both parties
- Assess for clubs/activities and that there is no conflict of interest
- Review no contact
- Review no retaliation

Other Forms of Support

- Circles of Support and Accountability
 - PRISM Report
- Counseling services
- Health/wellness services
- Academic advising
- Social support

Reintegration Case Scenarios

1. A respondent who was suspended has returned to campus and wishes to participate in a professional student organization. One of the women he has a no contact directive with is the president of the student organization.
2. A respondent who recently came back to campus plans to return to his campus job as an ID scanner at the residence hall dining facility. The complainant still lives in the residence halls and eats meals at the residence hall dining facility.