



TITLE IX/VAWA INVESTIGATOR TRAINING

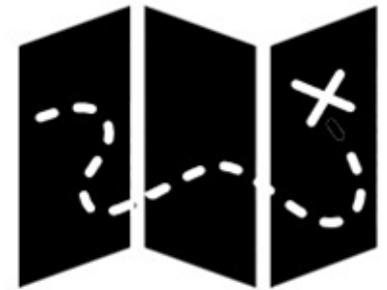
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AGENDA



- Introduction and Legal Landscape
- Overview of the Process
- Working with the Parties
- Stages of Investigation
- Drafting an Investigation Report
- The Decision-Making Process
- Weighing Evidence and Assessing Credibility



TERMINOLOGY



- DOE = Department of Education
- Recipient = Institutions covered by Title IX
- OCR = Department of Education's Office for Civil Rights
- VAWA = Violence Against Women Reauthorization Act
- FERPA = Family Educational Rights and Privacy Act
- CSA = Campus Security Authority
- Investigation/Grievance Procedures/Complaint Procedures
- Adjudicator/Decision-Maker
- Complainant/Reporting Party/accuser/victim/survivor
- Respondent/Responding Party/accused/alleged perpetrator



SEXUAL VIOLENCE STATISTICS



SEXUAL VIOLENCE STATISTICS



■ United Educators' Study

- 28% of reports resulted in lawsuits, demand letters, or federal Title IX complaints
- 78% involved one or both parties consuming alcohol
- 40% of complainants delayed reporting, waiting, on average, nearly a year after the incident
- 80% of complainants were freshmen or sophomores
- 90% of complainants knew the respondent



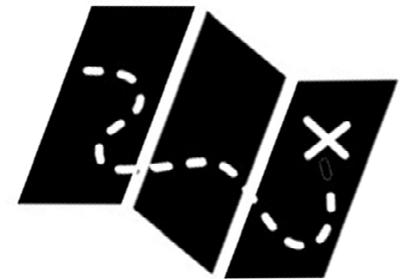
THE LEGAL LANDSCAPE



SESSION OVERVIEW



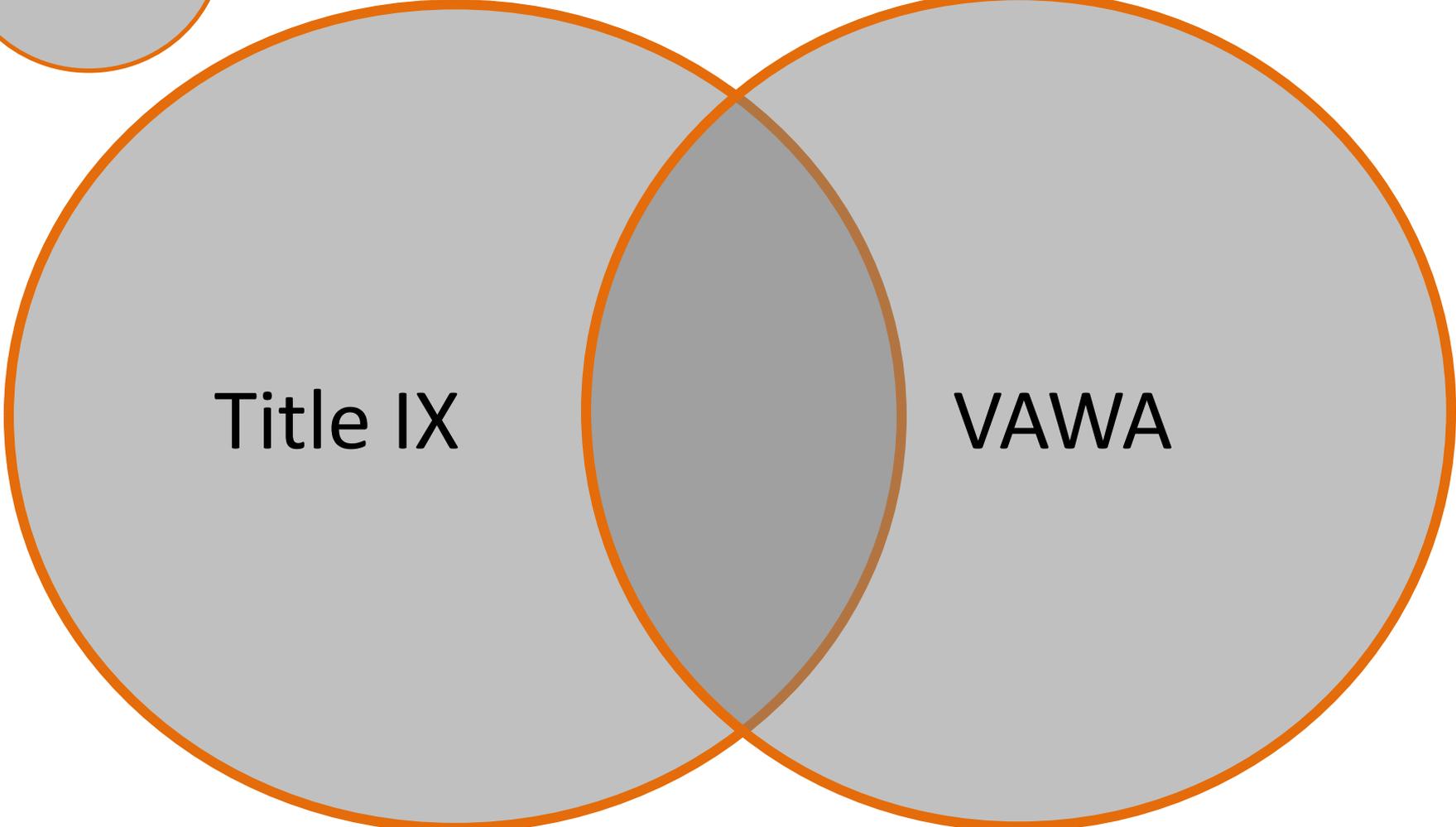
- Title IX
- Clery Act
- Violence Against Women Reauthorization Act
- Defining Sexual Misconduct
- Interaction with Other Laws
- Risks of Non-Compliance
- Training Requirements
- Recordkeeping Requirements



LEGAL OBLIGATIONS



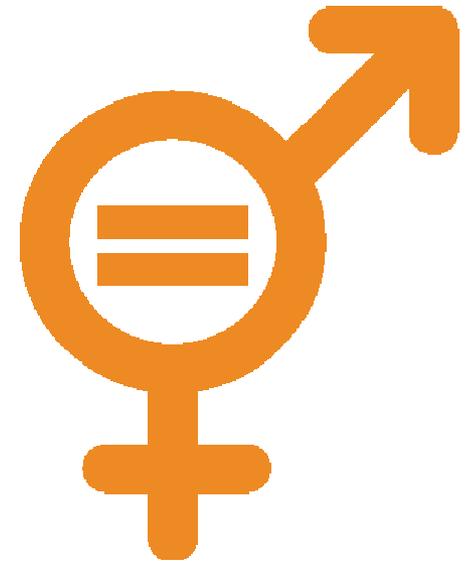
Other
Conduct



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 educational program or activity receiving Federal financial assistance”

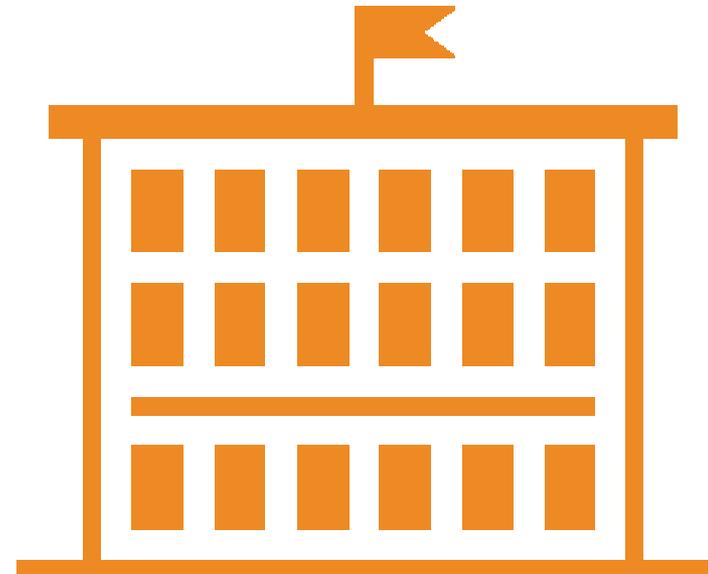


20 U.S.C. § 1681

WHO MUST COMPLY WITH TITLE IX?



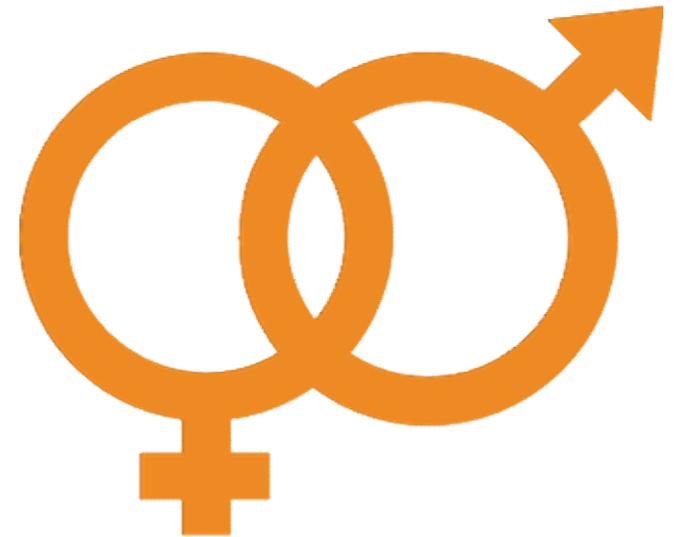
- Institutions that receive federal funds
 - Students
 - Employees
 - Third Parties
 - Visitors
 - Vendors



DISCRIMINATION “ON THE BASIS OF SEX”



- Includes:
 - Sexual harassment
 - Differential treatment



WHEN INSTITUTIONS MUST RESPOND UNDER TITLE IX*



- Institution has actual knowledge of
- Sexual harassment
- In an education program or activity of the institution
- Against a person in the United States



*for conduct occurring on August 14, 2020 or later

*WHEN INSTITUTIONS MUST RESPOND UNDER TITLE IX**



- Actual knowledge
 - Notice of sexual harassment or allegations of sexual harassment to the Title IX Coordinator or an official who has authority to institute corrective measures on behalf of the institution
 - Notice includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator
 - Vicarious liability and constructive notice are insufficient
 - Standard not met if the only official with actual knowledge is the respondent

WHEN INSTITUTIONS MUST RESPOND UNDER TITLE IX*



- Actual knowledge (cont.)
 - The following does not qualify an individual as having the authority to institute corrective measures
 - Mere ability or obligation to report sexual harassment
 - Ability or obligation to inform a student about how to report
 - Being trained in how to report

WHEN INSTITUTIONS MUST RESPOND UNDER TITLE IX*



- Education program or activity
 - Locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs
 - Includes all incidents of sexual harassment occurring on an institution's campus
 - Also includes off-campus conduct if
 - Occurs as part of the institution's "operations"
 - Institution exercised substantial control over the respondent and the context of alleged sexual harassment
 - Occurs at an off-campus building owned or controlled by a student organization officially recognized by the postsecondary institution (e.g., fraternities and sororities)

How INSTITUTIONS MUST RESPOND UNDER TITLE IX*



- Must respond promptly in a manner that is not deliberately indifferent
- Deliberately indifferent = response is clearly unreasonable in light of the known circumstances
- Follow grievance process outlined in the regulations



THE LEGAL LANDSCAPE

- All schools receiving federal funds must:
 - Publish Notice of Nondiscrimination
 - Designate a Title IX Coordinator
 - Disseminate policy prohibiting sex discrimination
 - Adopt and publish fair and equitable grievance procedures
 - Offer supportive measures to a complainant
 - Follow a legally compliant grievance process
 - Train individuals with heightened responsibilities
 - Train students and employees



OCR's ENFORCEMENT AND GUIDANCE



- OCR's Role:
 - Issue guidance
 - Compliance reviews
 - Resolution agreements



CLERY ACT



- Provide accurate, timely, and complete information
- Regarding certain types of crimes/incidents
- Occurring on or adjacent to campus
- To promote campus safety and consumer protection

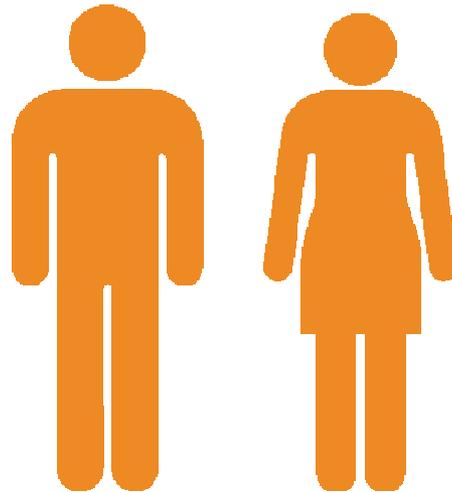


VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT (VAWA)



- Extends Clery crimes to include VAWA crimes: domestic violence, dating violence, and stalking
- Requires discipline procedures for addressing sexual misconduct
- Requires education programs to promote awareness
- Codified parts of 2011 Dear Colleague Letter on Title IX

DEFINING SEXUAL MISCONDUCT



TITLE IX—SEXUAL HARASSMENT



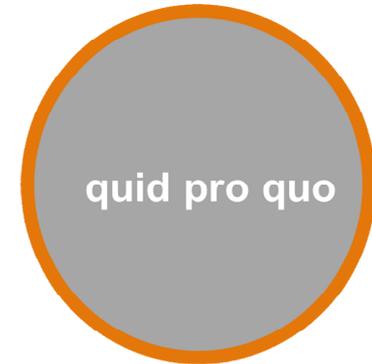
- Conduct *on the basis of sex* that satisfies one or more of the following:
 - Quid pro quo
 - Hostile environment
 - Sexual assault and VAWA crimes



TITLE IX—SEXUAL HARASSMENT



- Quid pro quo:
 - Employee conditions aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct
 - Examples
 - Supervisor conditioning promotion on participation in sexual advance
 - Professor conditioning grade on participation in sexual advance



TITLE IX—SEXUAL HARASSMENT



- Hostile Environment:
 - Unwelcome conduct (on the basis of sex) determined by a reasonable person to be *so severe, pervasive, and objectively offensive* that it effectively denies a person equal access to the institution’s education program or activity



TITLE IX—SEXUAL HARASSMENT



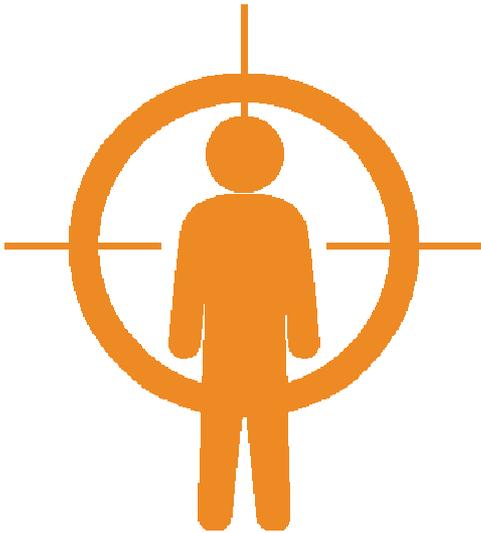
- Examples: Multiple incidents of the following conduct may constitute hostile environment sexual harassment
 - Unwelcome sexual flirtations, advances, or propositions
 - Requests for sexual favors
 - Verbal abuse of a sexual nature, obscene language, off-color jokes, sexual innuendo, and gossip about sexual relations
 - The display of derogatory or sexually suggestive posters, cartoons, drawings, objects, notes, letters, photos, emails, or text messages
 - Visual conduct such as leering or making gestures
 - Sexually suggestive comments about an individual's body or body parts, or sexually degrading words to describe an individual



TITLE IX—SEXUAL HARASSMENT



- Examples: Multiple incidents of the following conduct may constitute hostile environment sexual harassment
 - Unwelcome touching of a sexual nature such as patting, caressing, pinching, or brushing against another's body
 - Unwelcome verbal or physical conduct against an individual related to the individual's gender identity or the individual's conformity or failure to conform to gender stereotypes
 - Cyber harassment, including but not limited to disseminating information, photos, or videos of a sexual nature without consent
 - Videotaping or taking photographs of a sexual nature without consent



TITLE IX—SEXUAL HARASSMENT



- Sexual Assault
- VAWA Crimes
 - Dating violence
 - Domestic violence
 - Stalking
- As defined in Clery
- Consent: No particular definition of consent with respect to sexual assault is required



TITLE IX—SEXUAL HARASSMENT



■ VAWA Crimes—Sexual Assault:

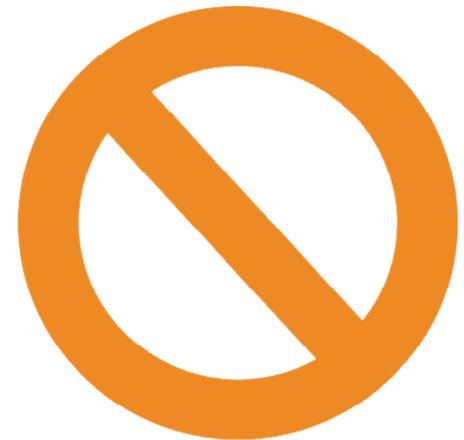
- **Rape:** The penetration, no matter how slight, of the vagina or anus with any body part or object or oral penetration by a sex organ of another person without the consent of the victim
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity

TITLE IX—SEXUAL HARASSMENT



■ VAWA Crimes—Sexual Assault:

- ***Incest***: Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law
- ***Statutory Rape***: Sexual intercourse with a person who is under the statutory age of consent



TITLE IX—SEXUAL HARASSMENT



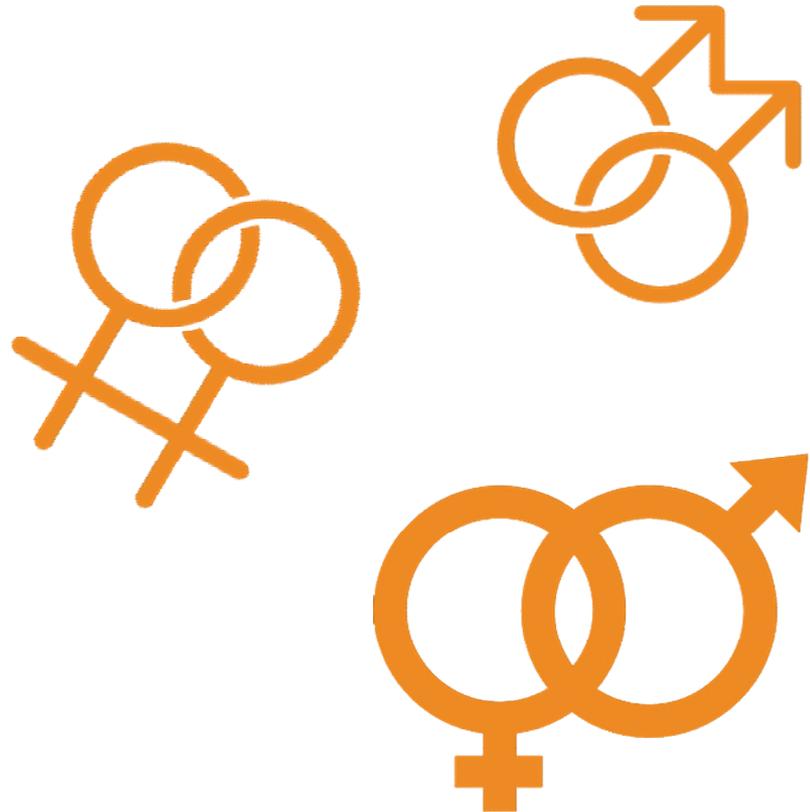
- **VAWA Crimes:**
 - **Domestic Violence:** committed by current/former spouse, intimate partner, co-parent, cohabitant, or others protected under domestic or family violence law
 - **Dating Violence:** person with whom victim has/had a social relationship of a romantic or intimate nature (determined by reporting party's perspective and length, type, and frequency of interaction)
 - **Stalking:** course of conduct directed at a specific person that would cause fear for safety or substantial emotional distress

TITLE IX—SEXUAL HARASSMENT



- Male/Female
- Female/Male
- Female/Female
- Male/Male

- Gender Identity



Legal Obligations*



Other
conduct

Title IX

Quid pro quo harassment that occurs in an education program or activity against a person in the United States

Hostile environment (as defined by Title IX) in an education program or activity against a person in the United States

Title IX & VAWA

Sexual assault or VAWA crime that occurs in an education program or activity against a person in the United States

VAWA

Sexual assault or VAWA crime that occurs outside an education program or activity

Sexual assault or VAWA crime that occurs against a person outside of the United States

INTERACTION WITH OTHER LAWS



- FERPA: Family Educational Rights and Privacy Act
 - Limits disclosure of student education records
 - Several exceptions permit disclosure
 - In Title IX cases, exception permits school to disclose to both parties all directly related evidence, all information in the investigation report and attachments that goes to the decision-maker, and statement of, and rationale for, the final results of any disciplinary proceedings or appeals, including sanctions and whether remedies will be provided
 - Required by Title IX
 - Does not include what the remedies are
 - Everything is given to parties and their advisors
 - In cases involving sexual assault/VAWA crime, exception permits school to disclose to the parties any information provided to the decision-makers and the final results of the disciplinary proceedings, including *all* sanctions



INTERACTION WITH OTHER LAWS



- Mandatory reporting laws: state-specific laws requiring school employees to report child abuse
 - Mandatory reporters may include teachers, coaches, administrators, or others who interact with minors or who supervise those who interact with minors
 - Must report if know or reasonably suspect abuse or neglect of a child
 - Report to police or county department

RISKS OF NON-COMPLIANCE

- OCR enforcement
- Clery Act enforcement
- Lawsuits
 - Private right of action under Title IX, breach of contract, interference with contract, negligence, negligence *per se*, negligent supervision, intentional infliction of emotional distress, defamation, violation of right to due process at public schools, invasion of privacy/violation of confidentiality
- Public relations



TRAINING REQUIREMENTS



- Train Title IX Coordinator, investigator, decision-maker, or facilitator of informal resolution process on
 - Definition of sexual harassment
 - Scope of the institution's education program or activity
 - How to conduct investigation and grievance process, including hearings, appeals, and informal resolution processes, and how to serve impartially, including by avoiding prejudgment of the facts at interest, conflicts of interest, and bias
 - Issues related to sexual assault, domestic violence, dating violence, and stalking (annually)
 - How to conduct an investigation and hearing that protects the safety of complainants and promotes accountability (effects of trauma) (annually)

TRAINING REQUIREMENTS



- Train Title IX Coordinator, investigator, decision-maker, or facilitator of informal resolution process on (cont.)
 - Relevant evidence and how it should be used during a proceeding (annual)
 - Proper techniques for questioning witnesses (annual)
 - Basic procedural rules for conducting a proceeding (annual)
 - Avoiding actual and perceived conflicts of interest (annual)
 - Institution's policies and procedures

TRAINING REQUIREMENTS



- Investigators must also receive training on
 - Issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Training materials must not rely on sex stereotypes and must promote impartial investigations and adjudications
- Training materials must be publicly available on institution's website

RECORDKEEPING REQUIREMENTS



- Title IX – for 7 years, must maintain:
 - Investigation and adjudication records
 - Training materials for investigators, decision-makers, coordinators, and persons designated to facilitate informal resolution process
 - Any actions taken (including supportive measures) in response to a report of sexual harassment

RECORDKEEPING REQUIREMENTS

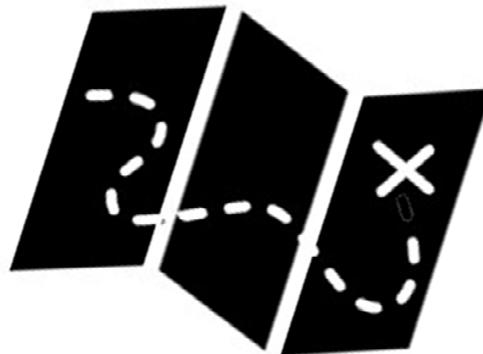


- Examples of investigator's records:
 - Communications with parties and other correspondence relating to investigation (including documentation of verbal in-person/phone conversations)
 - Investigator's notes
 - Party and witness statements, if applicable
 - Recordings of interviews or interview notes
 - Other evidence received (text messages, pictures, emails, etc.)
 - Investigation report or summary
 - Start and stop dates of investigation suspension
 - Training records – relating to investigators, adjudicators, appeal officers, and other involved officials, as well as training received by parties

Q & A



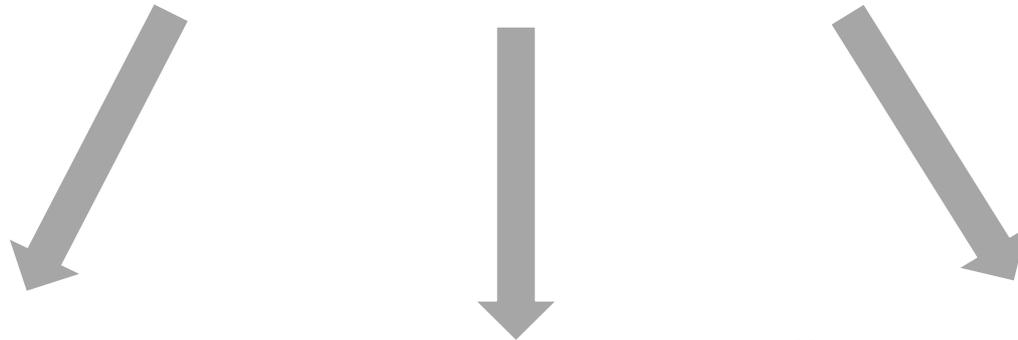
OVERVIEW OF PROCESS



RESPONDING TO A REPORT



Report



Confidential
Resource – Legally
Privileged

Other Employees

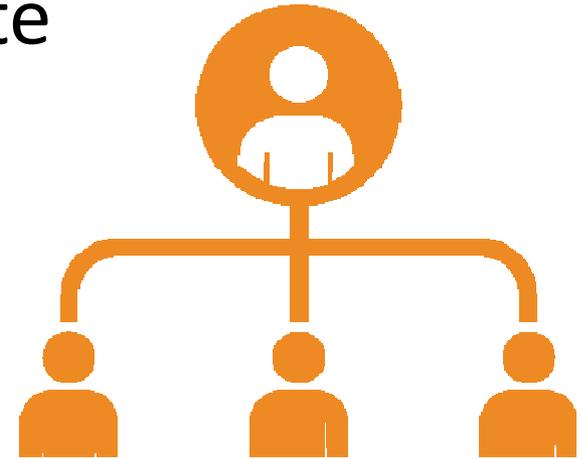


Title IX Coordinator &
Officials with Authority

RESPONDING TO A REPORT



- Title IX Coordinator can delegate intake duties to others, but:
 - Avoid conflicts
 - Oversee training
 - Determine appropriate process
 - Ensure process is user-friendly
 - Make roles and responsibilities clear
 - Oversee process to ensure compliance and effectiveness



RESPONDING TO A REPORT



- Title IX:
 - Institution has actual knowledge of
 - Sexual harassment (as defined by regulations)
 - In an education program or activity of the institution
 - Against a person in the United States
- VAWA:
 - Allegations of sexual assault, domestic violence, dating violence, or stalking
 - Applies regardless of location of alleged conduct (on or off campus; in or out of the education program of activity; in or out of the U.S.)



RESPONDING TO A REPORT



- Response must treat complainant and respondent equitably by
 - Providing written explanation of rights and options to complainants of sexual assault or VAWA crime
 - Offering supportive measures to a complainant (with or without formal complaint)
 - Following a grievance process that complies with the applicable regulations before imposing any disciplinary sanctions or other actions that are not supportive measures against a respondent

RESPONDING TO A REPORT



- Report vs. Formal Complaint
 - Report
 - Initiates obligation to respond, including offering supportive measures (see next slide for more details)
 - Complainant's identity may be kept confidential from respondent
 - Formal complaint
 - Initiates grievance process
 - Cannot be filed anonymously
 - Requires complainant's physical or digital signature or otherwise indicates that the complainant is the person filing the complaint
 - Title IX Coordinator can sign a complaint
 - Grievance process requires that complainant's identity be disclosed to respondent, if known

RESPONDING TO A REPORT



- Title IX Coordinator must promptly contact complainant (with or without formal complaint)
 - Inform complainant of the availability of supportive/interim measures with or without the filing of a formal complaint
 - Consider complainant's wishes with respect to supportive/interim measures
 - Explain the process for filing a formal complaint
 - Notify complainant of right to report to law enforcement and offer help with report (VAWA)
 - Provide complainant with written notice of rights (VAWA)



RESPONDING TO A REPORT – SUPPORTIVE/INTERIM MEASURES



- Offered to complainant and respondent
- Must be non-disciplinary, non-punitive
- Must be without fee or charge to the complainant or respondent
- Available before or after the filing of a formal complaint or where no formal complaint is filed
- Designed to restore or preserve equal access to recipient's education program or activity without unreasonably burdening the other party
- Including measures designed to protect safety of all parties or the educational environment, or deter sexual harassment
- Must maintain as confidential as long as confidentiality does not impair ability of the institution to provide measures



RESPONDING TO A REPORT – SUPPORTIVE/INTERIM MEASURES



- Examples
 - Mutual restrictions on contact between the parties
 - Change academic or extracurricular activities, living, transportation, dining, and working situations
 - Access to resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, legal assistance, visa and immigration assistance, campus escort services, increased security, and student financial aid
- If school does not offer these services, enter into MOU with local victim services provider, if possible



RESPONDING TO A REPORT



- Other obligations:
 - Notify campus security, if necessary
 - Clergy report, if necessary



RESPONDING TO A FORMAL COMPLAINT



■ Formal complaint

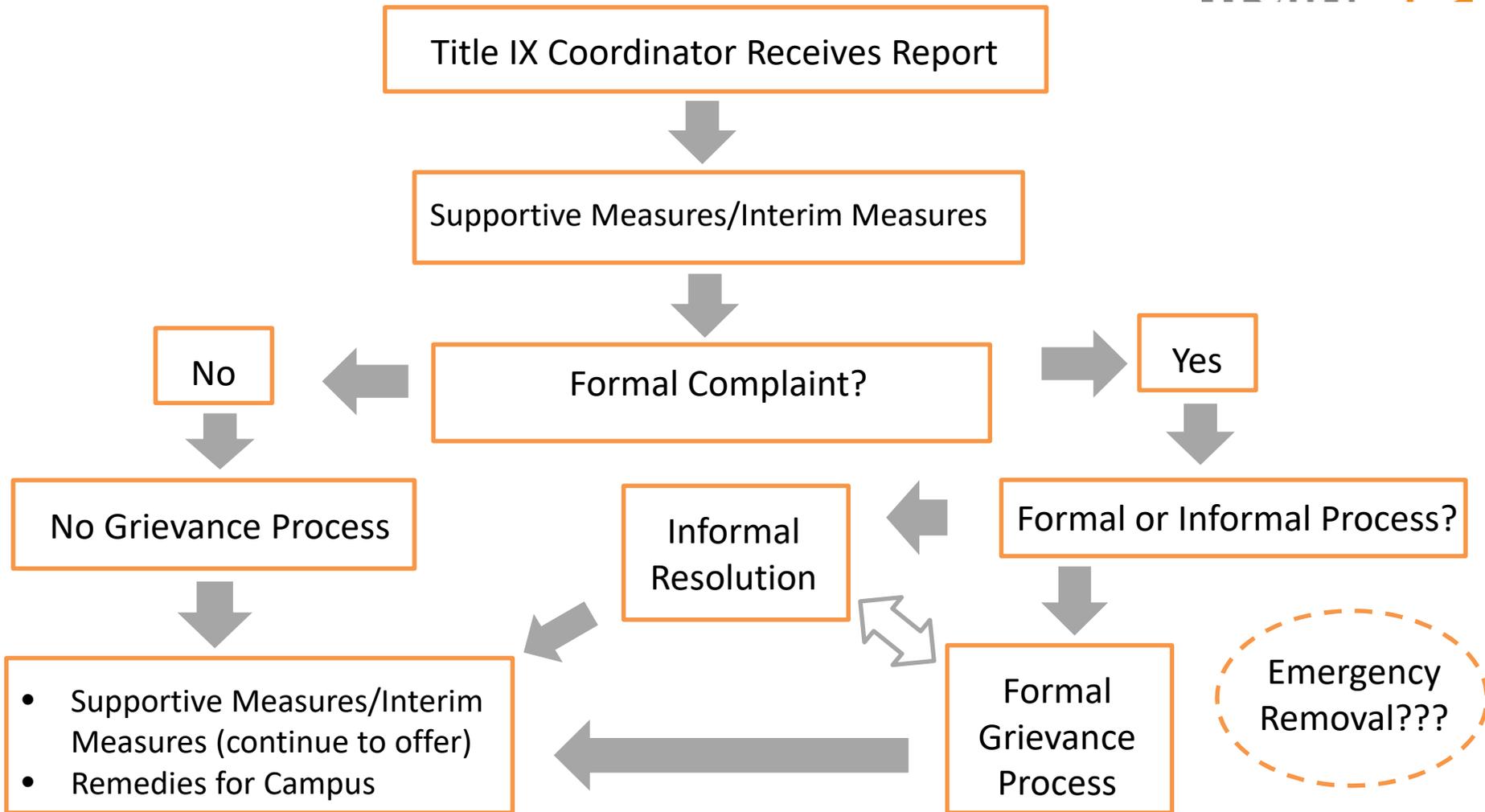
- VAWA: No specific requirements
- Title IX:
 - Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment
 - At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed
 - Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party, and must comply with the requirements to be free from conflicts and bias

INFORMAL RESOLUTION



- VAWA: No specific requirements
- Title IX:
 - Any time prior to determination, may facilitate informal resolution process, such as mediation, if
 - Provide parties with detailed written notice
 - Obtain parties' voluntary written consent to informal process
 - May not offer informal resolution unless a formal complaint is filed
 - May not offer or facilitate informal resolution to resolve allegations that an employee sexually harassed a student

RESPONDING TO A REPORT



RESPONDING TO A FORMAL COMPLAINT – SUPPORTIVE/INTERIM MEASURES



- Review support/interim measures available during an investigation
 - Periodically update both parties on status of investigation
 - No contact orders
 - Available to both parties
 - Designed to restore or preserve equal access to education program or activity without unreasonably burdening the other party
 - All others mentioned earlier



FORMAL GRIEVANCE PROCESS



- The process the school uses to resolve sexual harassment complaints. This includes the fact-gathering investigation and any hearing or decision-making process the school uses to determine:
 - Whether or not the conduct occurred using
 - Preponderance of the evidence standard (“more likely than not”) or
 - Clear and convincing evidence standard (“highly probable”); and
 - If the conduct occurred, what actions the school will take to eliminate the hostile environment, prevent its recurrence, and remedy its effects, which may include:
 - Imposing sanctions on the respondent;
 - Providing remedies for the complainant; and
 - Addressing the campus community



FORMAL GRIEVANCE PROCESS



- Must treat complainants and respondents equitably by
 - Providing remedies to a complainant where a determination of responsibility for sexual harassment has been made
 - Remedies must be designed to restore or preserve equal access to the institution’s education program or activity
 - May include the same individualized services as “supportive measures”
 - Do not need to be “non-disciplinary” or “non-punitive” and do not need to avoid burdening the respondent
 - Following grievance process that complies with applicable regulations before imposing disciplinary sanctions or other actions that are not supportive measures

FORMAL GRIEVANCE PROCESS



- Objective evaluation of all relevant evidence
 - Inculpatory and exculpatory evidence
 - Credibility determinations may not be based on status as complainant, respondent, or witness
- No conflicts of interest or bias as Title IX Coordinator, investigator, decision-maker, or facilitator of informal resolution process
 - For or against complainants or respondents generally
 - For or against an individual complainant or respondent
- Presumption of non-responsibility

FORMAL GRIEVANCE PROCESS: DUAL ROLES UNDER TITLE IX

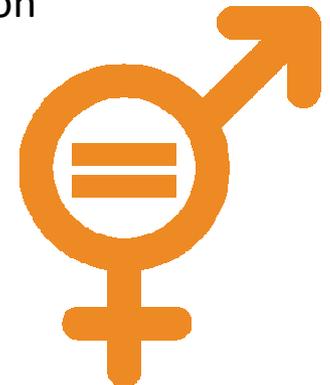


- Title IX requires independent decision-maker
 - Title IX Coordinator and decision-maker must be different individuals
 - Investigator and decision-maker must be different individuals
 - Title IX Coordinator and investigator may offer recommendations regarding findings and/or conclusions on responsibility, but decision-maker has independent obligation to objectively evaluate relevant evidence and cannot simply defer to recommendations
- Title IX Coordinator may act as investigator

FORMAL GRIEVANCE PROCESS— EQUAL RIGHTS FOR THE PARTIES



- Interview/hear from both parties
- Equal opportunity for parties
 - Identify/present fact witnesses and evidence, including inculpatory and exculpatory evidence
 - Access to evidence (if any) (Title IX and VAWA)
 - Must allow *access* for sexual assault/VAWA
 - Must provide *copy* for Title IX
 - Right to an advisor (may be attorney) (Title IX and VAWA)
 - May limit extent of participation (must apply equally)
 - If party has no advisor, school will provide for cross-examination
 - Participate in pre-hearing meeting (if any)
 - Identify/present character or expert witnesses (if any)
 - Written notice of
 - Meetings
 - Allegations
 - Informal Complaint Process
 - Written simultaneous notices of outcome



FORMAL GRIEVANCE PROCESS— OTHER REQUIREMENTS



- Burden of proof and gathering evidence is on the institution, not on the parties
- May not restrict ability of either party to discuss the allegations or to gather and present relevant evidence

FORMAL GRIEVANCE PROCESS —

ADVISORS



- Parties have a right to an advisor of their choice
- May be, but not required to be, an attorney
- Advisors have right to receive copies all directly related evidence (Title IX only)
- Advisors may cross-examine parties and witnesses at live hearing (Title IX only)
- Institution must provide if none (Title IX only)
 - Limited role
- May otherwise limit extent of advisor's participation in the process (must apply equally)

FORMAL GRIEVANCE PROCESS — TIMEFRAMES



- Reasonably prompt timeframes
 - Including timeframes for filing and resolving appeals and informal resolution processes
 - Temporary delay or extension of timeframes for good cause, which may include
 - Absence of parties, a party's advisor, or witnesses
 - Concurrent law enforcement activity
 - Need for language assistance or accommodations of disability
 - Must provide written notice to parties of the delay or extension and the reason for it
 - Some timeframes are set by the regulations (Title IX)



FORMAL GRIEVANCE PROCESS — CRIMINAL PROCESS



- Separate from criminal investigation
- May not dissuade complainant from going to police in cases involving allegations of criminal conduct—should encourage reporting to police
- May temporarily delay for initial police investigation
 - Prior guidance said police evidence-gathering stage typically takes 7-10 days
 - Must resume when notified that police are done gathering evidence
- May not delay for criminal prosecution

FORMAL GRIEVANCE PROCESS



- Policy must:
 - Describe range of possible sanctions and remedies or list the possible sanctions and remedies
 - Describe range of supportive measures available to both parties
 - Describe appeal bases and procedures

FORMAL GRIEVANCE PROCESS



- Privileged information
 - Do not require, allow, rely upon, otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally recognized privilege, unless person holding such privilege has waived the privilege
- Treatment records
 - Institution cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the school obtains that party's voluntary, written consent to do so

FORMAL GRIEVANCE PROCESS



- Any provisions, rules, or practices other than those required by the regulations that an institution adopts as part of its grievance process must apply equally to both parties



FORMAL GRIEVANCE PROCESS — DISMISSAL OF FORMAL COMPLAINT



- **Mandatory dismissal under Title IX**
 - Must dismiss formal complaint if alleged conduct
 - even if proved, would not constitute sexual harassment
 - did not occur in the institution's education program or activity or
 - did not occur against a person in the United States
 - Such dismissal does not preclude action under another provision of institution's code of conduct
- **Discretionary dismissal under Title IX**
 - May dismiss formal complaint if at any time during the investigation or hearing
 - complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations, therein
 - respondent is no longer enrolled or employed by the recipient or
 - specific circumstances prevent the recipient from gathering sufficient evidence to reach a determination as to the formal complaint or allegations therein

FORMAL GRIEVANCE PROCESS — CONSOLIDATION OF FORMAL COMPLAINTS



- Title IX: An institution may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the *allegations of sexual harassment arise out of the same facts or circumstances*
- VAWA: No specific guidance

Q & A



WORKING WITH THE PARTIES



CASE STUDY



When assessing the credibility of the complainant, which of the following might cause you to find the complainant less credible:

1. Complainant spent the night in respondent's room after the alleged assault
2. Complainant engaged in consensual sexual activity with respondent during the same incident
3. Complainant filed a formal complaint after complainant's roommate told complainant that from complainant's description of the incident, it sounded like complainant was sexually assaulted
4. The police investigated the incident but did not press charges

CASE STUDY



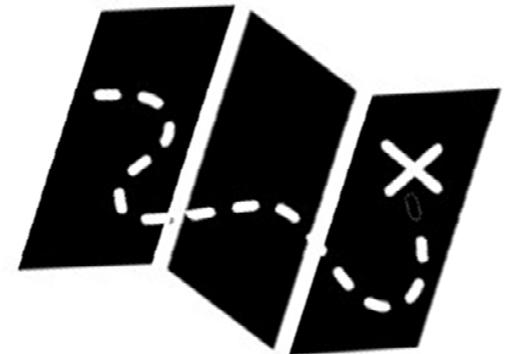
When assessing the credibility of the respondent, which of the following might cause you to find the respondent less credible:

1. Respondent criticized complainant's credibility
2. After the investigation began, respondent filed a formal complaint alleging complainant engaged in sexual assault
3. Respondent's account of the order of events is jumbled
4. Respondent has an attorney advisor

SESSION OVERVIEW



- Rape Myths
- Secondary Victimization
- Common Victim Responses
- Neurobiology of Sexual Assault
- How to serve impartially
 - Working with Complainant
 - Working with Respondent



RAPE MYTHS



| Myth | Reality |
|--|--|
| Rape is primarily sexually motivated | Rape combines elements of power, anger and sexuality |
| Rapists are usually strangers | Most perpetrators are known to the victim |
| The victim did something to cause the rape | No behavior warrants being raped; under no circumstances can the victim be blamed |
| Acquaintance rape is not as traumatic | There are no differences in victim psychological symptoms between acquaintance and stranger rape |

SECONDARY VICTIMIZATION



- Secondary victimization:
 - The attitudes, beliefs, and behaviors that victims experience as victim blaming and insensitive
 - It exacerbates their trauma, and it makes them feel like what they're experiencing is a second rape — hence the term “secondary victimization”



SECONDARY VICTIMIZATION



- Examples of behaviors:
 - Discouraging the victim from making the report
 - Telling victim it's not serious enough to pursue
 - Asking about dress, behavior, or what they might have done to provoke the assault
- Psychological impact on victims:
 - Blamed
 - Depressed
 - Anxious
 - Violated
 - Reluctant to seek help



COMMON VICTIM RESPONSES



- Initial denial of incident
- No reporting/delayed reporting
- Maintaining contact with perpetrator
- Fight, flight, or freeze



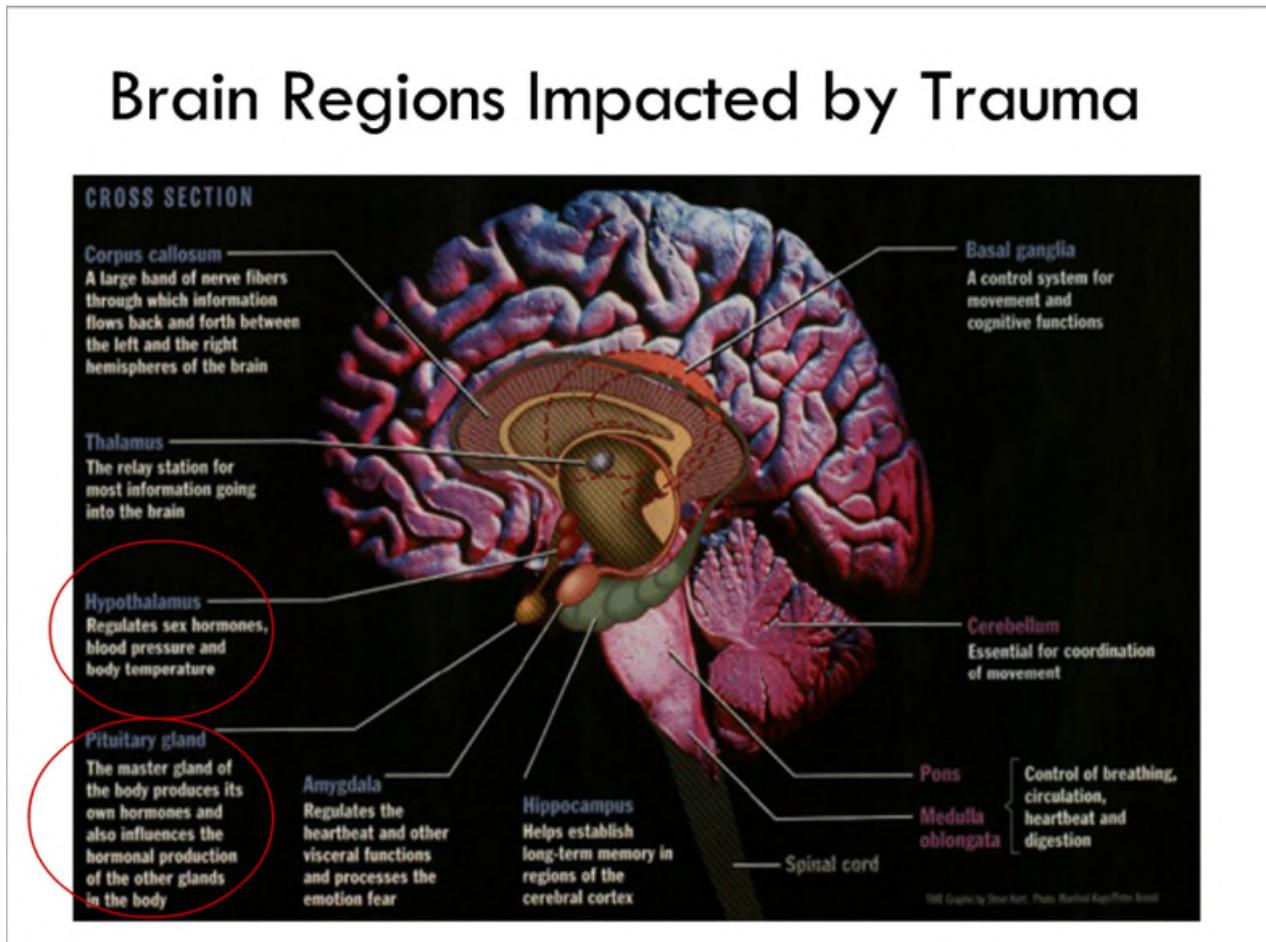
NEUROBIOLOGY OF SEXUAL ASSAULT



The Neurobiology of Sexual Assault

NEUROBIOLOGY OF SEXUAL ASSAULT

Brain Regions Impacted by Trauma

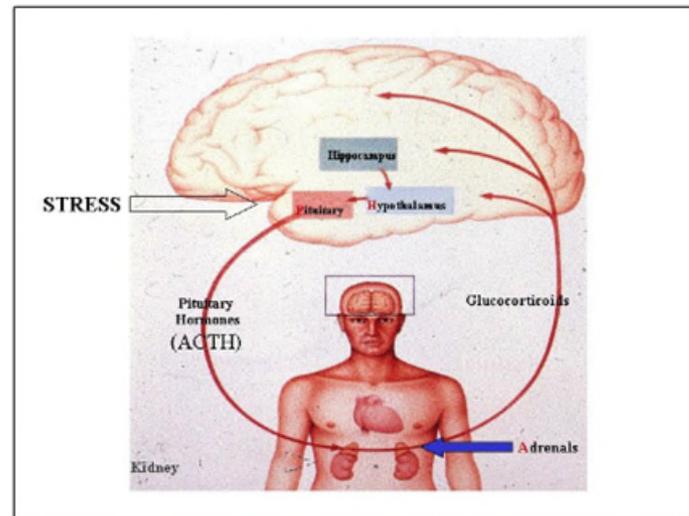


NEUROBIOLOGY OF SEXUAL ASSAULT

Brain-Body Regions Impacted by Trauma

HPA Axis

Balances body following stress by releasing of various hormones/chemicals



SOURCE: Southwick et al., 2005

NEUROBIOLOGY OF SEXUAL ASSAULT

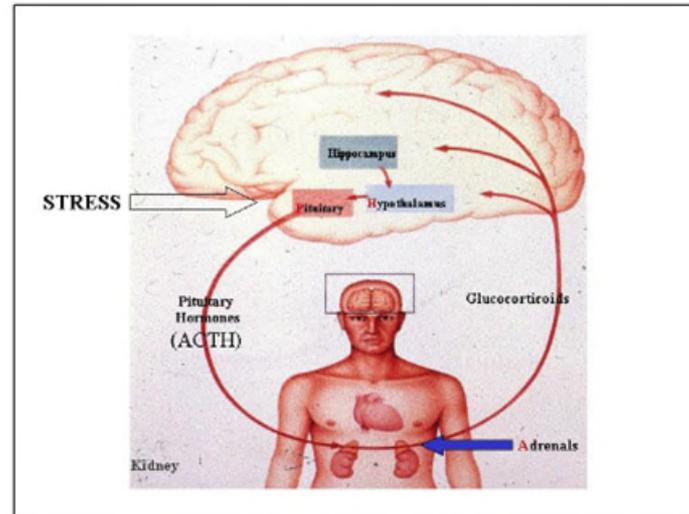
Brain-Body Regions Impacted by Trauma

Catecholamines: Fight or flight response

Cortisol: Energy available

Opioids: Prevent pain

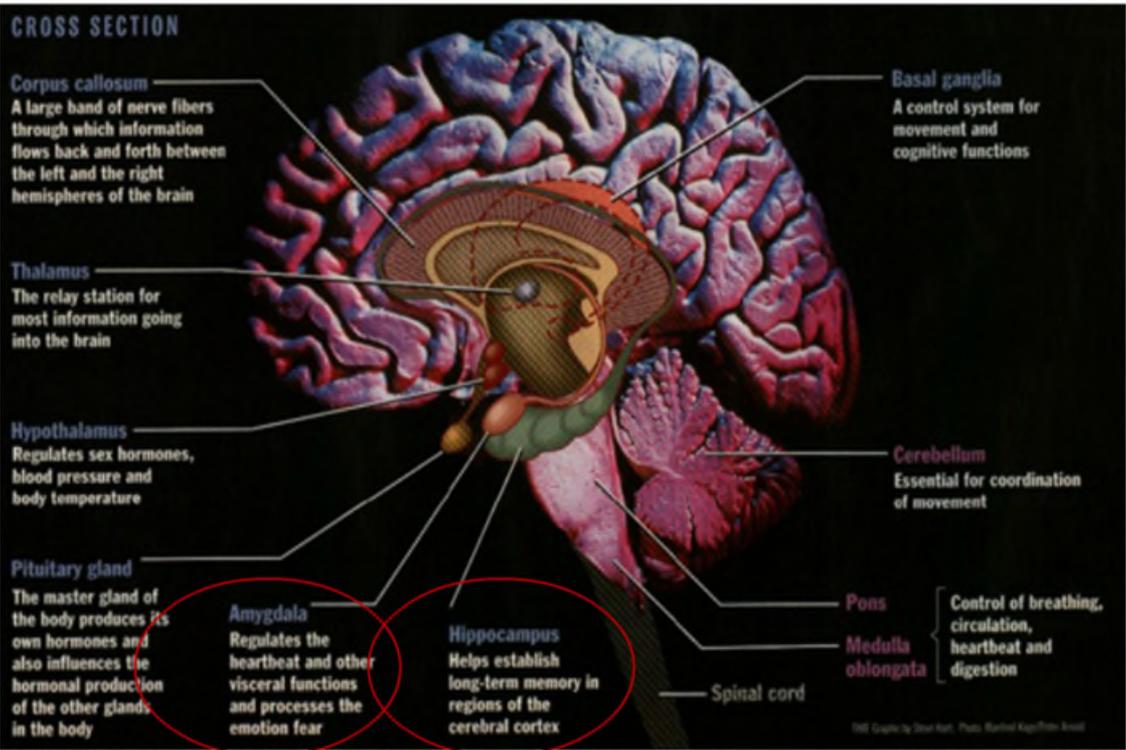
Oxytocin: Promotes good feelings



SOURCE: Southwick et al., 2005

NEUROBIOLOGY OF SEXUAL ASSAULT

Brain Regions Impacted by Trauma



Memory Processes Impacted by Trauma

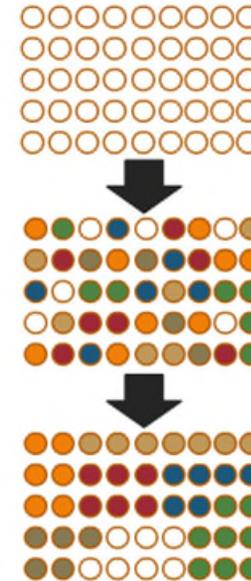
Hippocampus processes information into memories

Encoding = Organizing sensory information

Consolidation = Grouping information into memories and storing them

Amygdala specializes in the processing of emotional memories (works with the hippocampus)

Both structures are VERY sensitive to hormonal fluctuations



SOURCE: Southwick et al., 2005

NEUROBIOLOGY OF SEXUAL ASSAULT

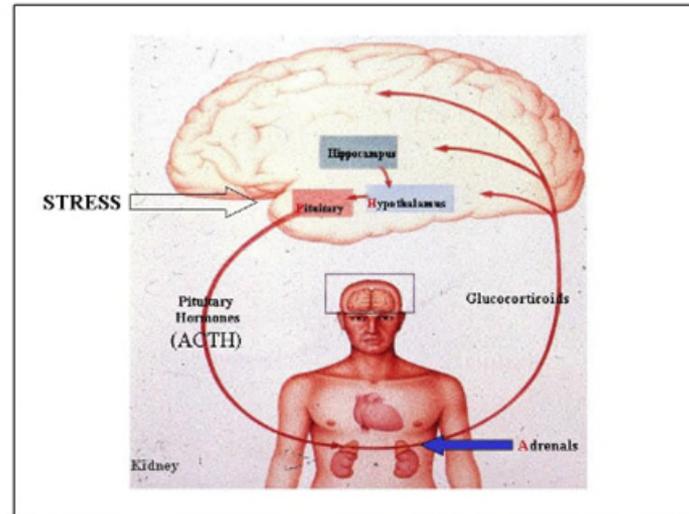
Like These . . .

Catecholamines: Fight or flight response

Cortisol: Energy available

Opioids: Prevent pain

Oxytocin: Promotes good feelings



THESE HORMONES IMPAIR MEMORY CONSOLIDATION

SOURCE: Southwick et al., 2005

NEUROBIOLOGY OF SEXUAL ASSAULT



What Happens During A Sexual Assault

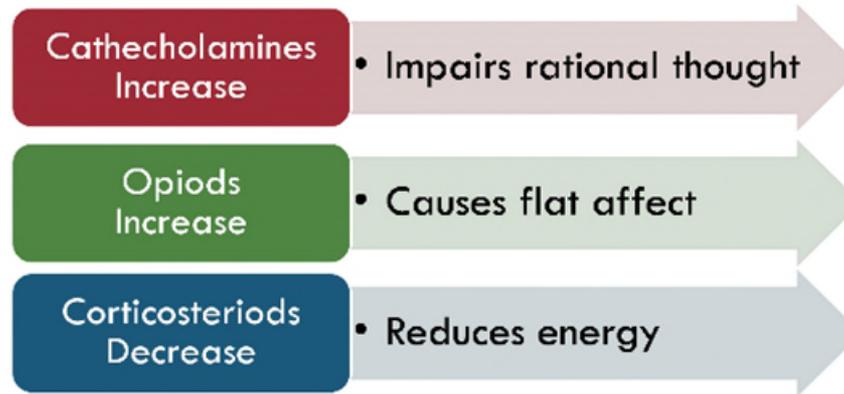


SOURCE: Banks, 2002; Southwick et al., 2005

NEUROBIOLOGY OF SEXUAL ASSAULT



What Happens During A Sexual Assault

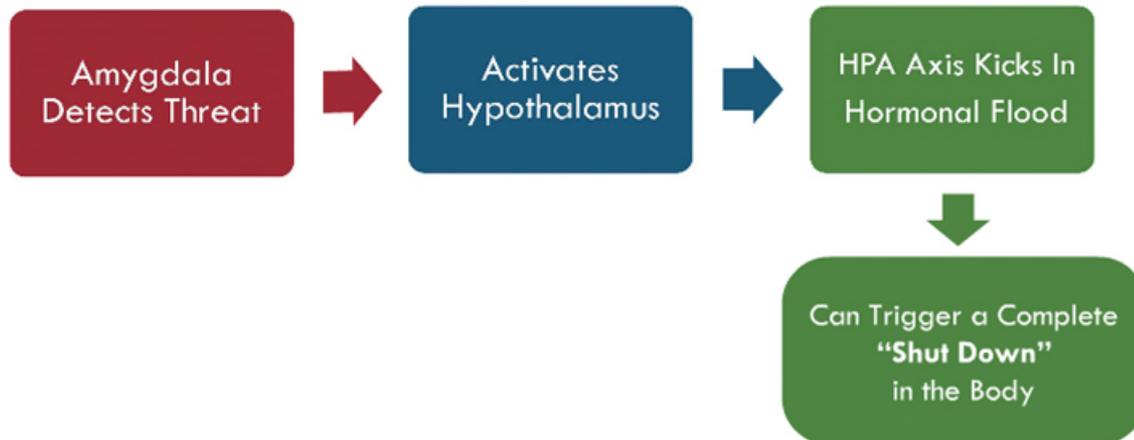


SOURCE: Banks, 2002; Southwick et al., 2005

NEUROBIOLOGY OF SEXUAL ASSAULT



What Happens During A Sexual Assault



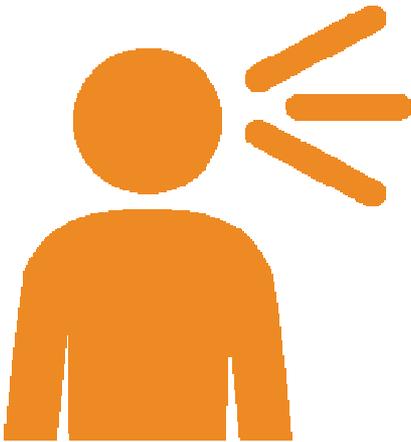
SOURCE: Banks, 2002; Southwick et al., 2005

Tonic Immobility (TI)

- AKA: “Rape-induced paralysis”
- Autonomic (uncontrollable) mammalian response in extremely fearful situations
- Increased breathing, eye closure, paralysis
- 12-50% rape victims experience TI during assault
- TI is ~more common in victims who have been assaulted before (childhood, adolescence, or adult)

SOURCE: Fuse et al., 2007; Galiano et al., 1993; Heidt et al., 2005

COMMON BEHAVIORS DURING ASSAULT



- Impaired rational thought
- Flat affect
- Reduced energy
- Flight
- Fight
- Freeze

MEMORY

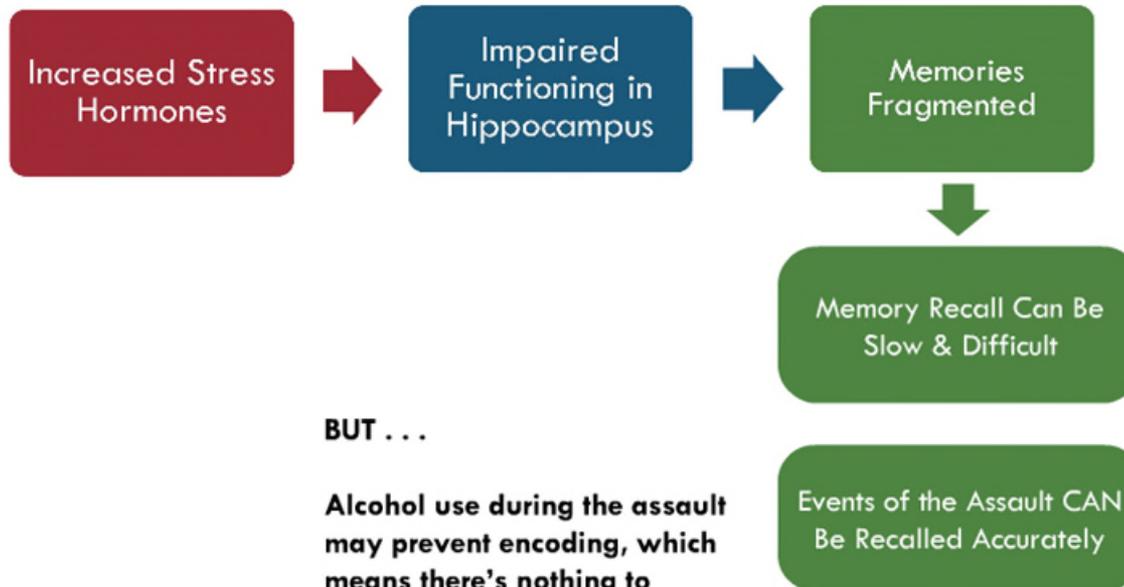


What Happens During A Sexual Assault



MEMORY

What Happens During A Sexual Assault



BUT . . .

Alcohol use during the assault may prevent encoding, which means there's nothing to retrieve

SOURCE: Koss et al., 1995, 1996; Roozendaal et al., 2009; Rubin et al., 2008

MEMORY

Case Study: Memory Fragmentation

- 25 year-old woman
- Raped by a friend's brother at 4th July party
- Filed police report
- Detective interview was when it all went to hell

"He wouldn't let up, pounding me with question after question after question. Trying to trick me, trying to get me to mess up. I wanted to say, 'hold on, give me a minute to think'. No, he kept coming at me."

MEMORY

Case Study: Memory Fragmentation

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- Raped by a friend's brother at 4th July party
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MEMORY



Case Study: Memory Fragmentation

“We talked it through. And I didn’t feel rattled and freaked out. I’m sure I was incoherent and he just let it roll. He was patient.

I felt like I was piecing it together, like a puzzle, we were putting together a puzzle together.

And drinking coffee.”

MEMORY



Case Study: Memory Fragmentation

I: So, why did you do that? (give her the coffee)

R: It helps. Not the coffee so much, just the moment to let it all come together in their heads.

I: What do you mean?

R: I don't know why it's like that, I've just noticed that over the years. If you give them a few minutes to breathe it starts to make more sense. I don't know why, it just does.



**MEMORY
CONSOLIDATION**
A DOCUMENTED
NEUROBIOLOGICAL CONDITION

MEMORY



Case Study: Memory Fragmentation

- I: Were you worried that if you gave her some time, she'd just make something up?
- R: Nah, not really. I mean, some victims lie, but most don't. Besides, if they're lying, we'll catch 'em at it eventually. I think it's just hard for victims to talk about and we just need to have a little patience.



**MEMORY
CONSOLIDATION**
A DOCUMENTED
NEUROBIOLOGICAL CONDITION

IMPACT OF TRAUMA ON MEMORY



- Memories accurately stored
- Memory recall slow
- Fragmented account
- Concentration difficult
- Alcohol exception—may impact storage and accuracy of memories

SENSORY DETAILS



- Victims of trauma may be able to recount vivid sensory details, including certain things the victim saw, heard, or smelled during the assault
- These details could provide more information about the incident and may help clarify the victim's memory
- Use open-ended questions
 - What can you recall about what happened?
- May also use sensory-based questions
 - What did you see?
 - What did you hear?
 - What did you smell?
 - What did you taste?
 - What did you touch?

IMPACT OF CULTURE



- Cultural background is one of many factors that may impact the way that complainant, respondent, and witnesses react to the incident and present during the investigation interviews
- Different cultural backgrounds will influence individuals in different ways
- Be aware of and sensitive to possible cultural influences
- Incorporate training as appropriate



TRAUMA-INFORMED APPROACH GONE WRONG



- University of Mississippi lawsuit based in part on its training materials
 - Victims sometimes withhold facts and lie about details
 - Victims lie about anything that casts doubt on their account of the event
 - When complainants withhold exculpatory details or lie to an investigator or the hearing panel, the lies should be considered a side effect of an assault
- A trauma-informed approach should not unfairly favor the complainant or prejudice the decision-maker against the respondent



TAKE AWAY



- Do not automatically draw negative inference based on a behavior that may be a response to trauma
- If an individual exhibits behaviors associated with trauma, it does not automatically mean that individual experienced trauma
- A response consistent or inconsistent with a typical trauma response should not in and of itself be outcome determinative

SERVING IMPARTIALLY



- Avoid prejudgment of the facts at issue
- Avoid conflicts of interest
- Avoid bias
- Avoid appearing to agree with either party's account

SERVING IMPARTIALLY



- Set boundaries
 - Make objective role clear up front
 - Not counseling
 - Differentiate from your other roles within institution
 - Know how to respond when coming close to line
 - Point to resources on campus



SERVING IMPARTIALLY



- Separate support/advocacy services from investigation/adjudication process
- Conflation of roles can:
 - Impact thorough assessment of the facts
 - Create distrust/confusion by complainant
 - Give appearance of bias/lack of impartiality



SERVING IMPARTIALLY — WORKING WITH COMPLAINANT



- Slow down
- Make him/her feel comfortable
- Consider timing and locations
- Allow sufficient time for thorough exploration of the issues
- Develop rapport and allow for closure
- Explain process
- Remind the complainant of the ability to ask questions and present information during the entire process



SERVING IMPARTIALLY — WORKING WITH COMPLAINANT

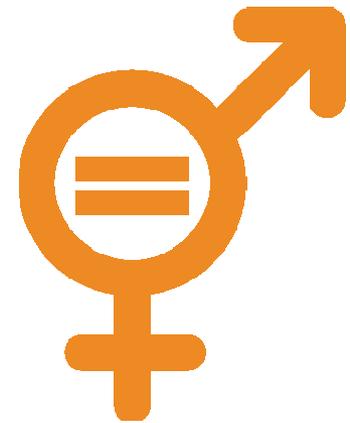


- Recognize the impact of trauma on memory
 - Allow the complainant to give a narrative
 - Use open-ended free recall questions
 - Build in an opportunity for follow-up
 - Allow a written narrative if that is more comfortable
- Memory may be impaired by alcohol
- Use “account” or “experience” rather than “story”
- Allow advisor to be present
- Avoid secondary victimization
- Be transparent about how information will be used

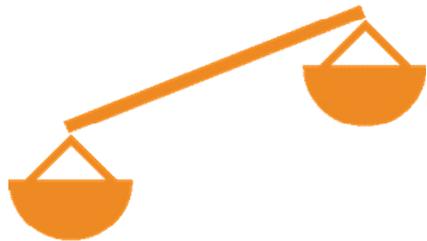
SERVING IMPARTIALLY — WORKING WITH RESPONDENT



- Recognize stress involved with being accused of sexual misconduct
 - He/she may be defensive
 - He/she may be nervous or uncomfortable
- Explain fair and equitable process
- Do not appear to take sides
- Use impartial language
- Afford same opportunity to provide narrative of experience, to provide physical or other evidence, etc.
- Memory may be impaired by alcohol

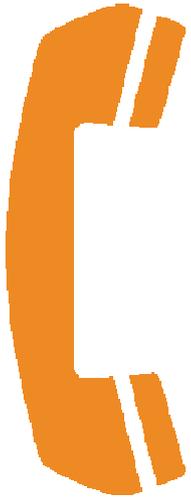


SERVING IMPARTIALLY — WORKING WITH RESPONDENT



- Remind the respondent of the ability to ask questions and present information during the entire process
- Ensure the respondent is fully aware of the process and prohibition against retaliation
- Be transparent about how information will be used
- Allow advisor to be present

COMMUNICATION



- Identify contact person who will coordinate with multiple departments/people on complainant's/respondent's behalf
- Ensure regular and timely communications to both parties regarding: next steps, expectations, timing, and delays
- Ensure that parties have notice of all meetings
- Document all communications, including phone calls
- Use sensitive and informed tone and content, both to the parties and among team members

SOURCES OF INFORMATION



- NIJ Presentation by Rebecca Campbell
- trainED gratefully acknowledges the U.S. Department of Justice, Office of Justice Programs, and National Institute of Justice for allowing us to reproduce, in part or in whole, the recording of The Neurobiology of Sexual Assault. The opinions, findings, and conclusions or recommendations expressed in this recording are those of the speaker(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Q & A



STAGES OF INVESTIGATION



OBLIGATIONS OF THE INSTITUTION UPON RECEIVING REPORT



- Assess immediate safety and well-being for individual and campus
 - Consider whether emergency removal is necessary
- Notify complainant of right to contact law enforcement (or not to) and seek medical treatment; offer institution's assistance
- Enter into crime log, assess for timely warning
- Offer/provide supportive/interim measures
- Provide written notice of rights to complainant (VAWA)
- Notify complainant of importance of preserving evidence (VAWA)

PRE-INVESTIGATION



OBLIGATIONS OF THE INSTITUTION

- Upon formal complaint, provide written notice to known parties, including:
 - Notice of grievance process, including any informal resolution process
 - Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare response before initial interview
 - Identities of the parties involved, if known
 - Conduct allegedly constituting sexual harassment
 - Date and location of the alleged incident, if known



PRE-INVESTIGATION

OBLIGATIONS OF THE INSTITUTION



- Upon formal complaint, provide written notice to both parties, including:
 - Statements that:
 - Respondent is presumed not responsible
 - Determination of responsibility is made at conclusion of grievance process
 - Right to advisor of choice who may be but is not required to be an attorney
 - Parties may inspect and review evidence *as permitted in sexual misconduct policy*
 - Inform parties of any policy provision that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
- Provide notice of *additional* allegations about the complainant or respondent that arise during process

PRE-INVESTIGATION OBLIGATIONS OF THE INSTITUTION



- Determine whether parties have advisors
- Require advisors to sign advisor agreement (optional)
- Consider whether informal resolution is appropriate



ROLE OF INVESTIGATOR



- Identify factual issues
- Give parties opportunity for input
- Compile investigation materials for decision-makers and parties
- Credibility and/or make recommendations?
 - Can offer recommendations regarding responsibility but ultimate determination must be made by separate adjudicator (Title IX)
- Role does not include:
 - Adjudication of complaint
 - Providing support or advocacy to either party
 - Serving as a confidential resource



DIFFERENCES BETWEEN CRIMINAL AND INSTITUTIONAL INVESTIGATIONS



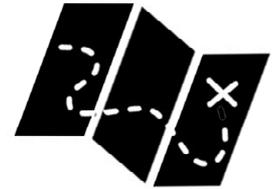
- Different standards of proof
 - Probable cause vs. beyond reasonable doubt vs. preponderance of evidence vs. clear and convincing
- Different investigation “powers”
 - Subpoena powers vs. disciplinary actions
- Timing of processes
- Cooperating with law enforcement
 - Memorandum of Understanding
 - Use of police report



STAGES OF INVESTIGATION



- **Stage One:** Review complaint and outline investigation
- **Stage Two:** Gather evidence
- **Stage Three:** Review / Draft / Conduct additional interviews
- **Stage Four:** Make evidence available to parties (Title IX only)
- **Stage Five:** Package investigation for decision-maker(s)



STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION



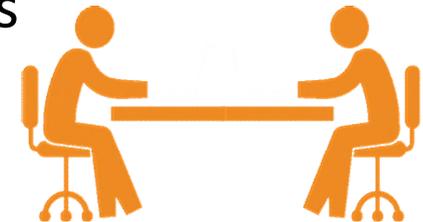
- Review formal complaint
- Review notice provided to parties
 - Alert Title IX Coordinator if there are additional allegations
- Review institution's policy and how it defines relevant terms
- Identify all known witnesses and gather information about them
- Begin to create chronology of events
- Strategize about the timing and location of interviews



STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION



- Prepare script of opening remarks
 - Explain your role in the grievance/complaint process
 - Provide general explanation of reason for interview—gathering facts
 - Explain possible uses of party's/witness's statements
 - If applicable, explain cross-examination
 - If applicable, inform party/witness of recording and its use
 - Advise party and advisor on advisor's limited role
 - Explain the need to ask difficult, detailed questions
 - Ask party/witness not to read into questions
 - Tell party/witness he or she can ask for a break during the interview



STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION



- Prepare script of opening remarks (cont.)
 - Explain that timelines and order of events may not be clear
 - Tell the party/witness to feel free to ask why a question is asked (Investigators: be prepared to answer)
 - Instruct *witness* regarding confidentiality (gag orders on parties is not permissible)
 - Assure/warn party/witness regarding policy prohibiting retaliation
 - If applicable, advise party/witness on alcohol or other policy waiver
 - Obtain commitment to tell the truth

STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION



- Prepare script of closing remarks
 - Ask if there is anything else the party/witness wants you to know
 - Ask if there is anything the party/witness thought you would ask about that you have not yet discussed
 - Give parties opportunity to suggest witnesses, evidence, and questions to ask the other party
 - Find out what information those witnesses/evidence/questions will provide
 - Give witnesses opportunity to suggest other witnesses and evidence
 - Find out what information those witnesses/evidence will provide
 - Remind party/witness regarding need to preserve evidence

STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION



- Prepare script of closing remarks (cont.)
 - If applicable, explain that an additional interview may be necessary at a later date
 - Advise that party/witness may reach out to you with additional information
 - Reminder regarding policy prohibiting retaliation
 - Remind *witness* of instructions regarding confidentiality
 - Must not restrict the ability of either party to discuss the allegations under investigation
 - Explain to party that questions related to process or resources should be directed to the Title IX Coordinator or Deputy Coordinator

STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION



- Identify ultimate questions that will need to be decided
- Develop checklist for key questions—examples:
 - Elements of each potential violation
 - Consent to each act
 - Impact of alcohol
 - Ask for written communications—texts, emails, etc.
- Create list of topics for witness interviews (not questions)
- Avoid investigative techniques and approaches that apply sex stereotypes or generalizations

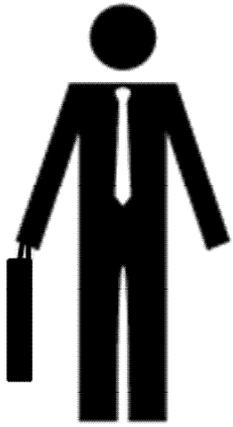
STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION



- Gather and review available evidence
- Know the setting(s) of the events
- Determine whether witness interviews will be recorded
- Stay flexible



STAGE ONE: REVIEW COMPLAINT AND OUTLINE INVESTIGATION



- Prepare for parties with advisors
 - Consider having advisors review and sign document outlining purpose and role of advisor
- Also be prepared for how to handle “private” investigations by the parties



CASE STUDY

CASE STUDY



- On September 15, 2020, Ashley Anderson made a complaint of sexual misconduct against Nick Newman.

CASE STUDY



Sexual Misconduct Complaint Form

COMPLAINANT NAME: Ashley Anderson

ADDRESS: 1234 Oak Ridge Drive

DATE OF REPORT OF ALLEGED POLICY VIOLATION: September 15, 2020

RESPONDENT NAME: Nick Newman

ADDRESS: 999 Off-Campus Lane

ALLEGATIONS:

On July 24, 2020, Nick Newman sexually harassed and sexually assaulted me. At the time, Nick and I were in a dating relationship. On the night of July 24, I walked into Nick's apartment and saw him showing several of his friends topless pictures of me without my consent. Later in the night, after getting really drunk, Nick and I went back to my apartment. At my apartment, Nick touched my breasts and had sex with me without my consent. Even though I said "no" several times, Nick continued to touch me and eventually had sex with me. I was too drunk to consent to anything that happened.

CASE STUDY



Excerpt of Notice of Allegations

On September 15, 2020, a formal complaint of alleged sexual misconduct was submitted by Ashley Anderson to Title IX Coordinator, Beth Baker. In her formal complaint Ashley alleged that on or around July 24, 2020, Nick Newman sexually harassed and sexually assaulted her. Ashley alleged that while they were at Nick's off-campus apartment, Nick engaged in sexual harassment including showing partially nude pictures of Ashley to his friends and making harassing comments. Ashley alleged that later in the night, while they were at her apartment in the University's Oak Ridge apartment complex, Nick engaged in non-consensual sexual contact and non-consensual sexual penetration of Ashley.

CASE STUDY – DEFINITION OF TITLE IX SEXUAL HARASSMENT



Title IX Hostile Environment Harassment is unwelcome conduct on the basis of sex determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity.

For the purposes of the definition of Title IX Hostile Environment Harassment, reasonable person means a reasonable person in the shoes of the complainant, considering the ages, abilities, and relative positions of authority of the individuals involved in an incident.

CASE STUDY – DEFINITION OF NON-TITLE IX SEXUAL HARASSMENT



- As used in this Policy, Non-Title IX Sexual Harassment is unwelcome conduct of a sexual nature or based on sex, including sexual advances, requests for sexual favors, offensive comments or other conduct based on sex, sexually motivated physical contact, or other verbal, nonverbal, or physical conduct or communication of a sexual nature, when:
 -
 - such conduct has the purpose or effect of substantially and unreasonably interfering with an individual's employment or education, or of creating an intimidating, hostile, or offensive employment or educational environment ("hostile environment" harassment).

CASE STUDY—DEFINITION OF SEXUAL ASSAULT



Sexual assault is any actual or attempted sexual contact, including penetration, with another person without that person's consent. Sexual contact includes intentional contact by the accused with the victim's genital area, groin, inner thigh, buttocks, or breasts, whether clothed or unclothed; touching another with any of these body parts, whether clothed or unclothed; coerced touching by the victim of another's genital area, groin, inner thigh, buttocks, or breasts, whether clothed or unclothed; or forcing another to touch him/herself with or on any of these body parts.

CASE STUDY—DEFINITION OF CONSENT



Consent means words or overt actions by a person clearly and affirmatively communicating a freely-given present agreement to perform a particular sexual act. Words or overt actions clearly communicate consent when a reasonable person in the circumstances would believe those words or actions indicate a willingness to participate in a mutually agreed-upon sexual activity. Although consent does not need to be verbal, verbal communication is the most reliable form of asking for and obtaining consent. It is the responsibility of the person initiating the specific sexual activity to obtain consent for that activity.

CASE STUDY—DEFINITION OF CONSENT



The definition of consent is subject to the following:

- Consent can only be given if one is of legal age. The legal age of consent in this state is 16.
- Consent is a mutually understood and freely given “yes,” not the absence of “no.”
- Consent to one form of sexual activity cannot imply consent to other forms of sexual activity.
- Consent can be withdrawn at any time. When consent is withdrawn, the sexual activity for which consent was initially provided must stop.
- Silence or failing to resist does not imply consent.
- Previous relationships or previous consent does not imply consent to future sexual acts.
- An existing sexual, romantic, or marital relationship does not imply consent.
- Prior sexual activity with other individuals does not imply consent.
- Consent cannot be procured, expressly or implicitly, by use of force, intimidation, threats, or **coercion**, as that term is defined below.
- An individual known to be – or who should be known to be – **incapacitated**, as defined by the Policy, cannot consent to sexual activity initiated by another individual.
- Use of alcohol or other drugs will never function to excuse behavior that violates this Policy.

CASE STUDY—DEFINITION OF INCAPACITATION



A person who is incapacitated cannot give valid consent to sexual contact. Incapacitation means the inability to understand the fact, nature, or extent of the sexual situation. Incapacitation may result from mental or physical disability, sleep, unconsciousness, involuntary physical restraint, or from the influence of drugs or alcohol. With respect to incapacitation due to the influence of drugs or alcohol, incapacitation requires more than being under the influence of drugs or alcohol; a person is not incapacitated just because they have been drinking or using drugs.

CASE STUDY—DEFINITION OF INCAPACITATION



Where drugs and/or alcohol are involved, incapacitation is determined based on the facts and circumstances of the particular situation looking at whether the individual was able to understand the fact, nature, or extent of the sexual situation, whether the individual was able to communicate decisions regarding consent, nonconsent, or the withdrawal of consent, and whether such condition was known or reasonably known to the respondent or a reasonable person in respondent's position. Use of drugs or alcohol by the respondent is not a defense against allegations of sexual misconduct.

STAGE TWO: GATHER EVIDENCE



- Types of evidence:
 - Witness interviews
 - Physical evidence
 - Text messages/emails/photos
 - Social media
 - Police report
 - Medical examination – *Caution!*
 - Student/personnel records
 - Surveillance video



STATE TWO: GATHER EVIDENCE – NOTICE OF MEETINGS



- Title IX: Written notice to the party whose participation is invited or expected of the

- Date
- Time
- Location
- Participants
- Purpose



of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate

- VAWA: Timely notice to the other party of meetings that are part of the disciplinary process

STAGE TWO: GATHER EVIDENCE – INTERVIEW PARTIES & WITNESSES



- Go through script of opening remarks
 - Explain your role in the grievance/complaint process
 - Provide general explanation of reason for interview—gathering facts
 - Explain possible uses of party's/witness's statements
 - If applicable, explain cross-examination
 - If applicable, inform party/witness of recording and its use
 - Advise party and advisor on advisor's limited role
 - Explain the need to ask difficult, detailed questions
 - Ask party/witness not to read into questions
 - Tell party/witness he or she can ask for a break during the interview



STAGE TWO: GATHER EVIDENCE – INTERVIEW PARTIES & WITNESSES



- Go through script of opening remarks (cont.)
 - Explain that timelines and order of events may not be clear
 - Tell the party/witness to feel free to ask why a question is asked (Investigators: be prepared to answer)
 - Instruct *witness* regarding confidentiality (gag orders on parties is not permissible)
 - Assure/warn party/witness regarding policy prohibiting retaliation
 - If applicable, advise party/witness on alcohol or other policy waiver
 - Obtain commitment to tell the truth

STAGE TWO: GATHER EVIDENCE – INITIAL PARTY INTERVIEWS



- Purpose is to provide each party with an opportunity to share their account
- Do not ask party to respond to or rebut other party's or witness's accounts
- Ask limited follow-up questions to clarify party's own account
- When in doubt, don't ask

STAGE TWO: GATHER EVIDENCE – WITNESS INTERVIEWS



- “Do you know why you were asked to come speak with me today?”
 - “Highway” or “Scenic Route” interview?
- If Scenic Route, use “funnel” approach
- If Highway interview, download everything they “know” about relevant events

STAGE TWO: GATHER EVIDENCE – WITNESS INTERVIEWS



■ Scenic Route: Funnel Approach

- Start broadly; avoid leading questions
 - “I understand you were at a party off-campus last Saturday; did anything unusual happen while you were there?”
 - “You take Professor Johnson’s architectural drafting course on Wednesday afternoons; did you observe anything out of the ordinary last week?”
- Decide whether to ask more detailed questions
- More reliable responses and less rumor mill



STAGE TWO: GATHER EVIDENCE – INTERVIEW PARTIES & WITNESSES



- Create chronology of events
- Identify the who, what, where, when, and how
 - If don't know names, figure out other identifiable information
 - If helpful, consider drawing a map/diagram
 - If exact times aren't known, what events were going on to help fix a time
 - Avoid "why" questions
- Close "chapters" by recapping events
- Distinguish between personal knowledge and hearsay

STAGE TWO: GATHER EVIDENCE – INTERVIEW PARTIES & WITNESSES



- Ask about evidence (text messages, photos, emails)
 - Expect that the parties and witnesses may be talking to each other during the complaint process—ask for these communications later in the process
 - Ask witnesses to forward information immediately
- Don't share information unless necessary
- Don't focus on writing exhaustive notes
- Let witness do most talking (“What happened next?”)



STAGE TWO: GATHER EVIDENCE – INTERVIEW PARTIES & WITNESSES



- Don't avoid questions because answers seem too obvious or too personal
- Don't inquire into complainant's prior sexual history with anyone other than respondent
 - Unless respondent alleges someone else committed the conduct
- Do not ask or initiate discussion about privileged information, unless individual holding the privilege has waived it (e.g., doctor-patient privilege, attorney-client privilege)
- Do not ask for or otherwise access treatment records without the party's written consent
- Prepare a summary/draft report immediately following interview



STAGE TWO: GATHER EVIDENCE – INTERVIEW PARTIES & WITNESSES



- Go through script of closing remarks
 - Ask if there is anything else the party/witness wants you to know
 - Ask if there is anything the party/witness thought you would ask about that you have not yet discussed
 - Give parties opportunity to suggest witnesses, evidence, and questions to ask the other party
 - Find out what information those witnesses/evidence/questions will provide
 - Give witnesses opportunity to suggest other witnesses and evidence
 - Find out what information those witnesses/evidence will provide
 - Remind party/witness regarding need to preserve evidence

STAGE TWO: GATHER EVIDENCE – INTERVIEW PARTIES & WITNESSES



- Go through script of closing remarks (cont.)
 - If applicable, explain that an additional interview may be necessary at a later date
 - Advise that party/witness may reach out to you with additional information
 - Reminder regarding policy prohibiting retaliation
 - Remind *witness* of instructions regarding confidentiality
 - Must not restrict the ability of either party to discuss the allegations under investigation
 - Explain to party that questions related to process or resources should be directed to the Title IX Coordinator or Deputy Coordinator



CASE STUDY

Ask questions of Ashley

CASE STUDY



- Ashley's initial interview takes place over Zoom. Ashley has stated that she does not have an advisor present. However, during the interview you often see someone walking around in the background.
- What should you do?

CASE STUDY



- During her initial interview, Ashley alleges that she felt that Nick pressured her into having sex. Ashley told the investigator that she said no several times to Nick touching her breasts but “he wouldn’t take no for an answer.” Ashley also stated that at one point in the night Nick threatened to break up with her when she was feeling insecure about her body. Ashley stated that she felt like she had to have sex with him or he would dump her.
- What should you do?



CASE STUDY

Ask questions of Nick

CASE STUDY



- During his initial interview, Nick states that during the night in question Ashley performed oral sex on him. When you asked if either of them said anything before Ashley started performing oral sex on him, Nick stated, “No, neither of us said anything; she just started doing it. I don’t know, I didn’t really consent to that, did I”?
- How do you respond?

CASE STUDY



- Nick decides to file a formal complaint against Ashley for non-consensual sexual penetration.
- The Title IX Coordinator issues the following amended notice of allegations.

CASE STUDY



Excerpt of Amended Notice of Allegations

A formal complaint of alleged sexual misconduct was submitted by Nick Newman to Title IX Coordinator, Beth Baker. In his formal complaint, Nick alleges that on or around July 24, 2020, at Ashley's apartment in the University's Oak Ridge apartment complex, Ashley sexually assaulted him by engaging in non-consensual sexual penetration.

CASE STUDY



- During his initial interview Nick suggested you interview his current girlfriend because she will be able to “vouch that he would never sexually assault someone.”
- How do you respond?

CASE STUDY



- After talking with the Coordinator, you decide to interview Nick's current girlfriend.

CASE STUDY



- According to both parties' accounts, Tyler, Jason, and Drew looked at the topless pictures of Ashley. Both parties agree that the students were laughing and whistling/woo-hoo-ing. According to Ashley, one of them also made derogatory comments about her while looking at the pictures.
- What should you do with this information?

CASE STUDY

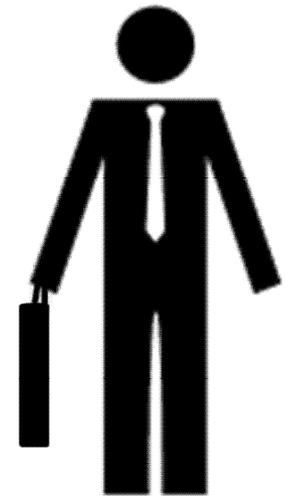


- You receive an email from Ashley. She tells you that she has a new advisor who is an attorney. Since her attorney was not present during her initial interview, she would like you to provide the recording of the interview to her attorney.
- How do you respond?

STAGE TWO: GATHER EVIDENCE – INTERVIEW PARTIES – ADVISORS



- VAWA requires:
 - Proceeding must “provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the **opportunity to be accompanied to any related meeting** or proceeding by the advisor of their choice”
- Title IX requires:
 - Allow advisor of choice, who may be but is not required to be an attorney
 - May establish equal restrictions on advisors’ participation



STAGE TWO: GATHER EVIDENCE – INTERVIEW PARTIES – ADVISORS



- Advisors, particularly attorney advisors, have become increasingly common participants
- Tips for addressing disruptive advisors:
 - Signed advisor agreements
 - Be prepared to enforce the agreement parameters
 - Set the ground rules at the outset (e.g., “potted plant”)
 - Don’t engage with the advisor; only address the party (even in response to the advisor’s statements)
 - Hold the party responsible for the advisor’s actions
 - Don’t be afraid to consider pausing the process if the advisor continues to be disruptive
 - Be consistent

CASE STUDY



- During your interview with Ashley’s friend Lauren, she starts to give you all the “dirt” on Nick. She says that she heard that he sleeps around a lot and even cheated on Ashley. She relays another rumor she heard that Nick intentionally got another girl “completely wasted” at a party last year and then took her home. Lauren says she heard that Nick was “bragging about” it the next day.
- What do you do with this information?

STAGE THREE: REVIEW/DRAFT/ CONDUCT ADDITIONAL INTERVIEWS



- Draft report
- Assess what more needs to be done
- Determine whether additional witnesses are necessary or merely duplicative
- Determine whether new facts/allegations require additional interviews
- Inform Title IX Coordinator of any new allegations (related or unrelated)
- Determine whether notice to the parties needs to be amended
- Be sure that each party has adequate notice of the other party's allegations
- Inform parties in advance of close of evidence date



STAGE THREE: REVIEW/DRAFT/ CONDUCT ADDITIONAL INTERVIEWS

- Purpose of follow-up interviews with the parties
 - Gather any missing information from each party's account
 - Provide each party an opportunity to respond to the other party's factual account, including any specific allegations and defenses to those allegations
- Preparing for follow-up interviews with the parties
 - Complete draft report prior to conducting follow-up interviews
 - Identify gaps in each party's account
 - Ensure that the accounts have addressed each allegation of a policy violation (including all elements of alleged policy violations)
 - Identify differences between the parties' accounts and between each party's account and witness accounts
 - Outline questions for follow-up interviews

CASE STUDY



- During your initial interview with Ashley she said that she was going to send you screen shots of a text message conversation that she had with a friend from high school on July 25, 2020—the day she and Nick broke up. Ashley said that she told her friend in the text messages that she felt like Nick sexually assaulted her. You have contacted Ashley several times about the messages but have not received them.
- How do you respond?

CASE STUDY



- During her follow-up interview Ashley tells you that she has struggled with anxiety for many years and that this investigation has made everything much worse.
- How should you respond?

CASE STUDY



- During his initial interview, Nick alleged that Ashley engaged in non-consensual oral sex. During Ashley's initial interview she did not even mention that oral sex occurred.
- How should you approach this issue with Ashley in her follow-up interview?

CASE STUDY



- Nick's follow-up interview takes place over Zoom. His advisor is with him in the room. Nick continually mutes his sound and talks with his advisor during the interview.
- How do you respond?

CASE STUDY



- You have completed your interviews and have prepared a draft of the investigation report. Now what do you do?

STAGE THREE: REVIEW/DRAFT/ CONDUCT ADDITIONAL INTERVIEWS



- Finalize draft of investigation report
- Meet with coordinator
 - Ensure parties have received notice of all allegations
 - Confirm process and timing for sharing evidence (if any)
 - Title IX: Copy of directly related evidence
 - VAWA: Access to evidence that will be shared with the decision-maker
 - When in doubt, err on side of following Title IX process

STAGE FOUR: PROVIDE EVIDENCE TO PARTIES TO REVIEW AND RESPOND*

- *Prior to completion of investigation report, must provide equal opportunity to inspect and review any evidence obtained that is directly related to the allegations*
 - Includes evidence upon which the institution does not intend to rely in reaching a determination and inculpatory or exculpatory evidence whether obtained from a party or other source
 - Must send to party and party's advisor in hard copy or electronic format
 - Party must be given at least 10 days to submit a written response
- Investigator must consider that written response before completing investigation report
- Must make all that evidence available at any hearing

STAGE FOUR: PROVIDE EVIDENCE TO PARTIES TO REVIEW AND RESPOND*



- Types of evidence that must be provided to parties:
 - Documents collected from the parties
 - Text messages
 - Emails
 - Social media posts and messages
 - Photos and videos
 - Other evidence
 - Police reports
 - Security footage
 - Wifi access point records
 - Party and witness interviews

STAGE FOUR: PROVIDE EVIDENCE TO PARTIES TO REVIEW AND RESPOND*



- Sexual history = include if directly related
 - Protections related to complainant's prior sexual history do not apply at this stage
 - Still analyze whether such evidence is “directly related to the allegations”
- Privileged information = only with waiver of privilege
- Treatment records = only with written consent

STAGE FOUR: PROVIDE EVIDENCE TO PARTIES TO REVIEW AND RESPOND*



- May permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under the final regulations)
 - Redactions are limited to information not directly related or that is otherwise specifically barred
 - May not redact other information, such as confidential, sensitive, or prejudicial information, if it is directly related to the allegations

STAGE FOUR: PROVIDE EVIDENCE TO PARTIES TO REVIEW AND RESPOND*



- Maintain records of any information withheld and the rationale for doing so
- Investigator and Title IX Coordinator should both be involved in determination of what is directly related

STAGE FOUR: PROVIDE EVIDENCE TO PARTIES TO REVIEW AND RESPOND*



- Ensuring privacy
 - May require parties and advisors to:
 - Use the evidence (and investigation report) only for purposes of the grievance process and
 - Require them not to further disseminate or disclose these materials
 - May use a non-disclosure agreement
 - May use digital encryption or other practices to address privacy concerns (e.g., watermarks)

CASE STUDY



- Do you include the following in “directly related” evidence?
 - Nick’s roommate Jason stated that the same group of people that were hanging out with Nick and Ashley on the night in question had gotten together the weekend before to “hang out and drink.” Jason told you about some of the “stupid” things that their other roommate Tyler did that night.

CASE STUDY



- Do you include the following in “directly related” evidence (cont.):
 - Nick told you that he heard that Ashley has been struggling academically this semester and is at risk of falling under the 3.0 GPA requirement to be in the Student Government Association. Nick stated that that was the real reason that she is so upset and that she brought up this complaint just so she would have an excuse for her poor grades and get a “free pass.”
 - Ashley’s friend Lauren stated that Nick was known on campus for sleeping around a lot and she even heard that he cheated on Ashley during their relationship.

CASE STUDY



- You provide the parties and advisors with copies of the directly related evidence and give them 10 days to submit a written response.

CASE STUDY



- During the response period, Ashley calls you to tell you that she heard a rumor that Nick was reading some of the interview transcripts to his roommates.
- What should the institution have done when you provided the evidence to the parties?
- Assuming the institution put protective measures and rules in place, what do you do now?

CASE STUDY



- Both Nick and Ashley submit responses to the directly related evidence.

STAGE FOUR: PROVIDE EVIDENCE TO PARTIES TO REVIEW AND RESPOND*



- Steps following parties' review
 - Review parties' responses
 - Consult with Title IX Coordinator to decide whether any additional action is needed
 - Investigator should consider parties' viewpoints about whether the evidence directly related to the allegations is relevant and therefore whether to include it in the investigation report
 - May provide a copy of each party's written response to the other party, but that is not required

CASE STUDY



- In Nick's response to the directly related evidence, he objects to your failure to include any information from his current girlfriend, whom you interviewed.
- What should you do?

CASE STUDY



- You talk with the Coordinator about your interview with Nick's current girlfriend. You tell the Coordinator that the interview was very short. You found out that Nick has only known his current girlfriend for a few weeks and she was not acquainted with either of the parties at the time of the alleged conduct. Nick's girlfriend said he is "a really great guy" and that she "can't imagine him doing something like this."
- Is the information "directly related?"

STAGE FIVE: PACKAGE INVESTIGATION FOR DECISION-MAKERS



- Complete investigation report
- Provide access (VAWA) or copy (Title IX) to parties, and parties' advisors
 - At least 10 days prior to hearing (Title IX)
 - Allow parties to supplement with written responses (Title IX)
- Review parties' responses
- Consult with Title IX Coordinator to decide whether any additional action is needed
- Provide report, attachments/evidence, and if applicable, parties' written responses to adjudicator(s)



Q & A



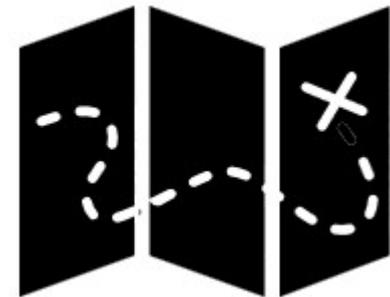
DRAFTING AN INVESTIGATION REPORT



SESSION OVERVIEW



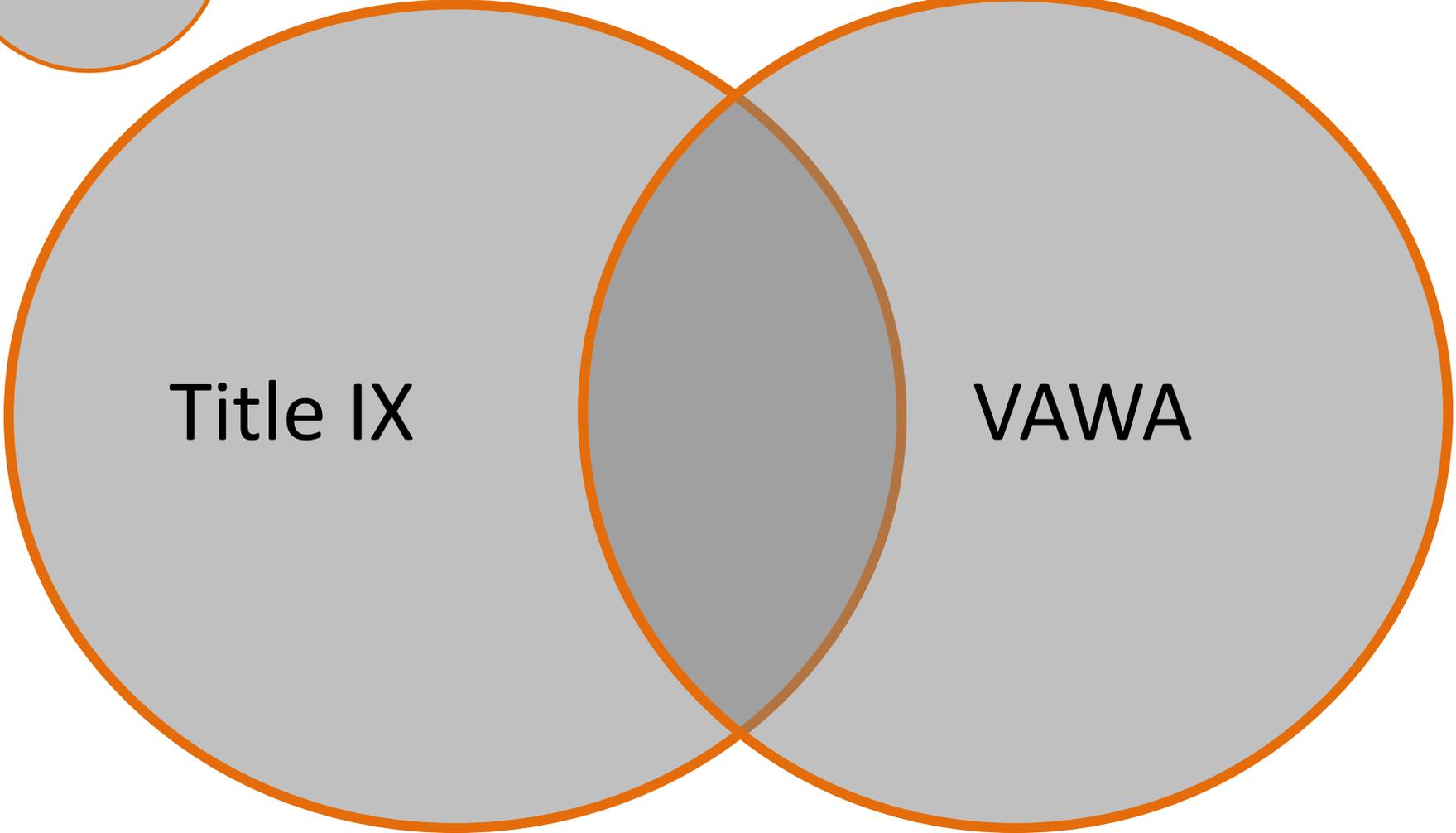
- Legal Requirements
- Relevancy Issues
- Purpose
- Preparation
- Elements of the Report
- Role of the Title IX Coordinator
- Case Study



LEGAL REQUIREMENTS



Other
Conduct



LEGAL REQUIREMENTS



- Must create investigative report that fairly summarizes **relevant** evidence (Title IX)
- Investigator cannot adjudicate (Title IX)
- Parties must be provided:
 - VAWA: information used in the decision-making process – access required
 - Title IX:
 - any evidence obtained that is **directly related** to the allegations – copy for parties and advisors required
 - Investigation report – copy to parties and advisors required
 - Opportunity to submit written response to each



CASE STUDY



- As you finalize your investigation report, you review the parties' responses to the directly related evidence.
- In her response to the directly related evidence, Ashley says that information in her account and Nick's account regarding whether they had engaged in oral sex prior to the incident cannot be included in the investigation report because those statements are about her prior sexual history.
- Do you include those statements in the investigation report?

TITLE IX RELEVANCY ISSUES



- Complainant's sexual behavior or predisposition are not relevant *unless*:
 - Such questions and evidence are offered to prove someone other than respondent committed the alleged conduct or
 - The questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent
- The investigation report should not include any information about the complainant's sexual history that is not relevant

RELEVANCY ISSUES



- Always consider relevance:
 - Expert reports?
 - Character evidence?
 - Lie detector test results?
 - Prior violation by respondent?
 - Allegations of similar misconduct?



PURPOSE



- Know the purpose of your investigation and report under your institution's policies
 - Provide a summary of your investigation
 - Allow parties to submit a response (Title IX)
 - Allow adjudicators to prepare for hearing and/or make a decision
 - Determine whether you are weighing in on credibility
 - Determine whether the adjudicator(s) want you to provide a recommendation



PREPARATION



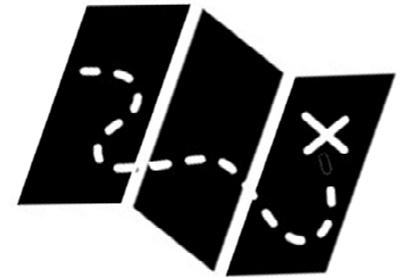
- Prepare for report drafting during your investigation by—
 - Staying organized
 - Taking good notes and/or recording interviews
 - Review recordings, notes, and evidence to assess whether you need more information
 - Think about how you will summarize the facts in your report to help assess whether you've gathered all of the evidence you need
 - Drafting the report as you conduct your investigation
 - Identify information that is not directly related
 - Identify information that is directly related but not relevant



ELEMENTS OF THE REPORT



- Introduction
- Summary of allegations/complaint(s)
- Documents/evidence reviewed
- Witnesses interviewed
- Interview methodology
- Summary of facts by allegation OR witness summaries



ELEMENTS OF THE REPORT



■ Introduction

- State the reason for your investigation
- Date of complaint(s)
- Date of notice(s) of allegations
- Your appointment as investigator
 - Refer to policy/procedures
- Purpose of report
- Scope of your role (e.g., credibility, recommendation)
- Date of close of evidence
- Date parties were provided with copies of directly related evidence (Title IX)
- Date parties submitted responses (if any) to directly related evidence (Title IX)



ELEMENTS OF THE REPORT



- Summary of allegations/complaint(s)
 - Include allegations from original complaint and those gathered during interviews; consider whether to differentiate between the two
 - Check notice(s) of allegations for consistency



ELEMENTS OF THE REPORT



- Include a list of documents and evidence reviewed
 - Policies
 - Written complaints
 - Text messages
 - Social media screen shots
 - Letters from institution to parties
 - Emails from witnesses to investigator
 - Other written documentation
 - Physical evidence
 - Parties' responses to "directly related evidence" (Title IX)

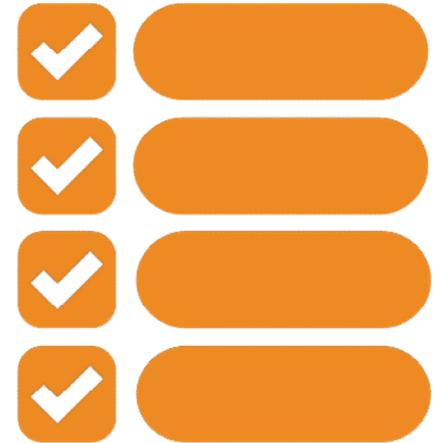


ELEMENTS OF THE REPORT



■ Interview methodology

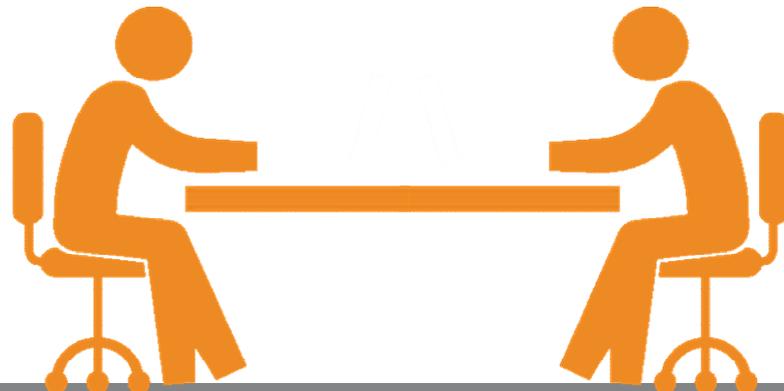
- List of witnesses
- Dates of interviews
- Location
- Individuals present—e.g., advisors
- Recorded or not recorded
- Reasoning for choice of whom to interview (and not interview)



ELEMENTS OF THE REPORT



- Interview methodology (cont.)
 - General questions asked by investigator
 - General approach used in interviews
 - Statements made by investigator
 - Information shared with or withheld from witnesses



ELEMENTS OF THE REPORT



- Summary of the facts—two approaches:
 - Summary of facts by allegation
 - Separate out each allegation
 - Give account from each party/witness
 - Describe other evidence supporting or refuting allegation
 - Witness summaries
 - Recap account from each party/witness
 - Describe other evidence offered by or gathered from witness



ELEMENTS OF THE REPORT



- Summary of the facts
 - Include facts that may impact a credibility finding
 - Weigh in on credibility if that's part of your role
 - Adjudicator must make the ultimate determination (Title IX)
 - Exclude facts that are not relevant
 - No longer a prejudicial vs. probative evaluation (Title IX)



ROLE OF TITLE IX COORDINATOR DURING INVESTIGATION PHASE



- Determine who will provide ongoing communication with the parties throughout the complaint process
 - Notify parties of delays and reason for delays
 - Notify parties of their own and other party's meetings
- Ensure that parties receive adequate notice of any new allegations
- Oversee process to ensure compliance with policy and designated timeframes
- Determine which process applies (if multiple)
- Review investigation report, party responses, and rebuttals
 - Redact impermissible content
 - Evaluate whether further investigation is necessary
- Intake and investigate?
 - Beware of conflicts when filling multiple roles
- Cannot adjudicate or decide appeal (Title IX)



CASE STUDY

Investigation Report:
Summary of Facts Gathered

CASE STUDY—INVESTIGATION REPORT



Investigation Report Excerpt

The parties are both in their junior year at the University. The parties agree that they met at the beginning of spring semester of their sophomore year when they had a class together. The parties agree that they dated for almost three months during the late spring and summer of 2020. Ashley and Nick both stated that they had had sexual intercourse many times throughout their dating relationship. The parties agree that they broke up on July 25, 2020.

CASE STUDY—INVESTIGATION REPORT



July 24, 2020—Nick’s Apartment

Ashley’s Account

Ashley stated that on July 24, 2020, she and two friends—Lauren and Amanda—went to Nick’s apartment to hang out with him and some other guys. Ashley stated that she had not been drinking before going to Nick’s apartment.

CASE STUDY—INVESTIGATION REPORT



Ashley stated that when they arrived at Nick’s apartment, the door was partially open and they could hear him and a few others laughing and whistling. Ashley stated that she heard someone say, “She’s hot, but man, I think Jason has bigger boobs than her.” Ashley stated that she then heard Nick say, “Hey man she more than makes up for it in other ways.” Ashley stated that she then heard the other person respond, “Like how? Like, is she really flexible?””

CASE STUDY—INVESTIGATION REPORT



Ashley stated that they then pushed the door open and entered the apartment.¹ She stated that she saw Nick’s roommates, Tyler and Jason, and another guy named Drew huddled around Nick’s phone looking at something. Ashley stated that she couldn’t remember who was holding the phone. Ashley stated that Nick was a few feet away from the other three guys, sitting on a chair. Ashley stated that when they walked in the room, one of the guys said, “uh-oh” and whoever was holding the phone quickly handed it to Nick.

¹Nick stated that he, Tyler, Jason, and David Donaldson live in a two-bedroom off-campus apartment. Nick stated that he and Tyler share a room and Jason and David share a room. Nick stated that the main entrance to the apartment opens directly to the living room. The parties and witnesses agree that David was not present during any of the alleged conduct.

CASE STUDY—INVESTIGATION REPORT



Ashley stated that earlier in the week she had sent Nick several selfies in which she was topless. Ashley stated that Nick had been asking her to send nude pictures for a long time but she had repeatedly said “no” because she “just wasn’t comfortable doing that type of thing.” Ashley stated that she is “just not that secure in [her] body.” Ashley stated that she eventually “gave in a little” and sent a few topless selfies.

CASE STUDY—INVESTIGATION REPORT



Ashley stated that after walking in the room she looked at Nick, turned around, and “stormed out” of the apartment. Ashley stated that Nick followed her out to the hallway. Ashley stated that she asked Nick if he’d shown his friends the topless pictures of her. Ashley stated that Nick claimed he had told his friends about the pictures but hadn’t shown them. Ashley stated that Nick said Tyler just grabbed his phone and looked at the pictures. Ashley stated that Nick “claimed” he tried to get the phone back and said the guys only had it for “like 30 seconds” before she walked in. Ashley stated that Nick apologized and convinced her to come back to the apartment and hang out with everyone. Ashley stated that they went back to the apartment together, but she didn’t talk to him and “made it clear” that she was still mad at him.

CASE STUDY—INVESTIGATION REPORT



Ashley stated that they stayed in Nick’s living room drinking, talking, and watching YouTube videos for two or three hours. Ashley stated that she had “several” beers and “a few” shots. Ashley stated that she has trouble remembering everything that happened at Nick’s apartment. Ashley stated that she thought that Nick was the one who suggested they should leave. Ashley stated that she got up to leave but stumbled over a chair. Ashley stated that she remembered someone telling Nick that he had to walk her home or she “wouldn’t make it.” Ashley stated that she lives about a half-mile from Nick’s apartment. Ashley stated that Nick walked her home and supported her with his arm around her waist the whole time.

CASE STUDY—INVESTIGATION REPORT



Ashley stated that she doesn't really remember the walk and doesn't remember if they talked at all. When asked how she would rate her level of intoxication on a scale of 1 (sober) to 10 (passed out) when she left Nick's apartment, Ashley stated she would be about an 8 because she needed him to help her walk and she didn't remember much from the walk.²

²The intoxication scale is asked by the investigator to assist in understanding how an individual views their own intoxication level and how that compares to reports from others about an individual's level of intoxication and its impact on them. How an individual ranks him or herself on the intoxication scale is not determinative of whether that individual or someone else was incapacitated.

CASE STUDY—INVESTIGATION REPORT



Nick's Account

Nick stated that he, his roommates, Tyler and Jason, and Drew, a guy from Tyler's soccer team, were hanging out in the living room of his apartment on July 24, 2020. Nick stated that he was looking at pictures of Ashley on his phone and told his friends that she had sent him some "topless selfies". Nick stated that Tyler suddenly grabbed his phone and looked at the pictures, showing them to the other two guys. Nick stated that he tried to grab the phone but the guys stopped him. Nick stated that they only looked at the pictures for a few seconds before Ashley and her friends walked into the apartment. Nick stated that they had invited Ashley and some other girls over to hang out. When asked if anyone made comments about the pictures, Nick stated that the guys were laughing and "like woo-hoo-ing." When told of Ashley's account regarding the specific comments she heard between Nick and one of the other guys, Nick stated, "I don't recall specifically what was said; there was some joking around." When asked where he was in comparison to the other guys when Ashley and her friends walked into the room, Nick stated that he was standing right by them because he had been trying to get the phone.

CASE STUDY—INVESTIGATION REPORT



Nick stated that Ashley got mad right away and stormed out into the hallway. Nick stated that he ran after her, apologized, and explained what had happened. Nick stated that Ashley agreed to come back to the apartment, but she still seemed mad at him the whole time they were there.

CASE STUDY—INVESTIGATION REPORT



Nick stated that they were all drinking in their apartment that night. Nick stated that he had a few shots and a few beers. He stated that he was “buzzed” but was still in control and can remember everything. When asked to rate his intoxication level on a scale of 1 to 10 at the time he left his apartment, Nick stated that he was about a 5. Nick stated that Ashley was drinking, but not more than she usually does. Nick stated that Ashley was loud and “spouting off a bit.” He stated that Ashley was drinking enough that he wouldn’t have left her alone, but she “didn’t need help walking or anything.” When asked why he wouldn’t have left her alone, he responded that he was concerned that if he left her alone, “she might not have made the best decisions.” When asked to rate Ashley’s intoxication level, Nick stated that he thought she was a 6 or 7. Nick stated that he eventually asked Ashley if she wanted to go home because she was “getting pretty loud” and “acting kind of obnoxious.” Nick stated that Ashley “often would often feel embarrassed the next day after she’d been acting that way.”

CASE STUDY—INVESTIGATION REPORT



When told of Ashley’s account that Nick had to help her walk home because she had been drinking a lot, Nick stated “I always used to walk her home if it was late at night. I wouldn’t have wanted Ashley to be walking alone in the dark after she’d been drinking or anytime really.” Nick stated that he also often used to spend the night at Ashley’s apartment because he shared a bedroom with Tyler, but she had her own room. When asked if she needed help walking to her apartment, Nick stated, “No, she didn’t need help. I don’t even think we held hands cause she was still pissed at me. She didn’t stumble or anything like that.” Nick stated that they didn’t talk much on the walk because he could tell Ashley was still pissed about the pictures.

CASE STUDY—INVESTIGATION REPORT



Lauren's Account

Ashley's friend, Lauren, stated that when they arrived outside Nick's apartment door they could hear the guys "laughing about Ashley's body." When asked what she heard them say, Lauren stated that she could not remember what it was specifically, just that it was "some kind of insult about the pictures." Lauren stated that all four guys were all huddled around the phone when they walked in the door. Lauren stated that Nick and Ashley got into a fight in the hall, but then came back to the room together. Lauren stated that she "didn't think much of it" because "they were always fighting." Lauren stated that she didn't know how much Ashley had to drink. Lauren stated that she left before Ashley so she may have drank more after she left.

CASE STUDY—INVESTIGATION REPORT



Amanda's Account

Ashley's friend, Amanda, stated that when they entered Nick's apartment, Tyler, Jason, and Drew were looking at a phone. When asked where Nick was in comparison to the other three, Amanda stated that he was sitting in a chair a little ways away. Amanda stated that Ashley and Nick were clearly fighting the whole night, which was "nothing new for them." Amanda stated that she knew Ashley was upset about the pictures, and she can tend to drink a lot when she is upset. Amanda stated that Ashley "had way too much to drink." When asked why she thought Ashley had too much to drink, Amanda stated that she was talking loudly, saying things she wouldn't usually say, and lost her balance once or twice. Amanda stated that she thought someone should cut her off. Amanda stated that she would have been more concerned, but she knew that Nick would take care of her. Amanda stated that Nick had to help Ashley home.

CASE STUDY—INVESTIGATION REPORT



Tyler's Account

Nick's roommate, Tyler, stated that he took Nick's cell phone after he was "bragging about" the pictures of Ashley. When asked who was looking at the pictures, Tyler stated that he, Nick, Jason, and Drew all looked at the pictures. Tyler stated that he looked at the pictures for "maybe a few seconds" before Ashley came in. Tyler stated that Ashley was drinking in their apartment but "didn't seem that drunk." Tyler stated that Ashley is "just mad that Nick broke up with her" and that is why she filed the complaint.

CASE STUDY—INVESTIGATION REPORT



Jason's Account

Nick's roommate, Jason, stated that he remembers Tyler taking Nick's phone, but he doesn't remember how long they looked at the pictures. Jason stated that it was "no big deal; it's not like he sent them to anyone." Jason stated that "everyone was drinking in the apartment that night." He stated that he doesn't remember anyone "getting like really wasted."

CASE STUDY—INVESTIGATION REPORT



Drew's Account

Drew stated that he and Nick are “not really friends;” they are “more like acquaintances.” Drew stated that he happened to be hanging out in Nick, Tyler, and Jason’s apartment on July 24, 2020, but he didn’t usually spend much time with them. Drew stated that Tyler is one of his soccer teammates. Drew stated that while he was at their apartment, Nick started telling them about pictures of Ashley that were on his phone. Drew stated that Tyler took Nick’s phone and started looking at the pictures and showing them to Jason and Drew. When asked, Drew stated that he didn’t remember Nick doing anything to stop them or trying to take back his phone. When asked how long they looked at the pictures, Drew stated that he remembers that they swiped through a few pictures, and the three of them and Nick were “making several comments back and forth,” so he “would guess that [they] looked at the pictures for like a couple of minutes.” Drew stated that Tyler was making comments about Ashley’s breasts.

CASE STUDY—INVESTIGATION REPORT



Drew stated that Ashley drank a lot while they were at Nick’s apartment. Drew stated that she was acting “really loud and obnoxious” and then fell over when she tried to get up to leave. Drew stated that he thought someone should make sure Ashley got home OK.

CASE STUDY—INVESTIGATION REPORT



July 24, 2020/Early morning hours July 25, 2020—Ashley’s Apartment

Ashley’s Account:

Ashley stated that when they got to her apartment, she felt “really out of it” and had trouble unlocking her door. Ashley stated that she eventually opened the door and she and Nick went to her room. Ashley stated that she thought Nick was going to spend the night “because he usually did if he walked [her] home.” Ashley stated that she did not think they were going to “do anything” and did not want to “do anything,” because she was still “really mad” at Nick about the pictures. When asked what she meant by “do anything” Ashley stated that she meant “like sex and stuff.” When asked whether she and Nick usually had sex when he spent the night, Ashley stated, “sometimes we did; sometimes we didn’t and we just went to sleep.”

CASE STUDY—INVESTIGATION REPORT



Ashley stated that once in her room she and Nick both changed for bed and started fighting again. When asked to explain what they both wore to bed, Ashley stated that she was wearing a long t-shirt and underwear, but was not wearing a bra. Ashley stated that Nick “just wore his boxers.” Ashley stated that Nick “must have realized that [she] was still mad at him” and said something like, “when are you going to let this go?” Ashley stated that they started “getting into a recurring fight [they] used to have.” Ashley stated that Nick always wanted her to “be more showy, like wanted [her] to dress sexier or send him naked pictures of [her]self.” Ashley stated that Nick would get upset when she refused to do those things and would tell her that she needed to be more comfortable with her body and with him. Ashley stated that she didn’t feel comfortable showing her body off, even in her relationships, but she had “given in” after Nick “kept asking for nude pictures.” Ashley stated that she was so mad at him because “if he knew [she] was so uncomfortable showing off [her] body, how could he let his friends see those pictures?” Ashley stated that during the fight Nick eventually said that he “couldn’t take her insecurity anymore.” Ashley stated that he “gave her an ultimatum.” When asked what she meant by that, Ashley stated, “like he implied that he would break up with me if I couldn’t let the whole picture thing go.” Ashley stated that she didn’t want to break up, so she told him she forgave him, but “was actually still really upset about it.”

CASE STUDY—INVESTIGATION REPORT



Ashley stated that she then got into her bed and wanted to go to sleep because she “felt really tired and woozy.” Ashley stated that Nick laid down next to her and started “stroking her arm and back.” Ashley stated that she told him, “I’m really not in the mood.” Ashley stated that Nick then told her she was beautiful and that he didn’t understand how she could be so insecure when he continually tells her how much he loves her body. Ashley stated that Nick then started kissing her, but she “kinda turned away” and told him to stop. Ashley stated that she then said, “I just don’t feel very sexy after hearing the comments those guys made about me.” Ashley stated that Nick then said, “C’mon baby, it doesn’t matter what they think, I think your hot” and then touched her breast over her shirt. Ashley stated that she said, “Please just stop it.” Ashley stated that Nick then put his hand under her shirt and touched her bare breast, saying “You stop it. I love every part of you and you need to stop being so insecure.”

CASE STUDY—INVESTIGATION REPORT



Ashley stated that Nick then started kissing her again. Ashley stated that she “didn’t stop him but didn’t really actively participate.” Ashley stated that “after [she] said ‘no’ so many times and [Nick] kept going, [she] sort of gave up resisting him.” When asked if she explicitly said, “no,” Ashley stated that she may not have used the word “no” but she said “like ‘stop it’ or ‘I’m not in the mood,’ things like that.” Ashley stated that Nick then removed his boxers and her underwear and then they had sex. Ashley stated that she felt really tired while they were having sex and “just wanted it to be over.” When asked who initiated intercourse, Ashley stated that Nick initiated it. When asked if either of them said anything during sex or right before, Ashley stated that neither of them said anything. Ashley stated that if she hadn’t drunk so much she could have thought more clearly and wouldn’t have given in to Nick’s pressuring.

CASE STUDY—INVESTIGATION REPORT



Nick's Account

Nick stated that when they got to Ashley's apartment they entered together. When asked if Ashley had trouble unlocking the door, Nick stated that she did have trouble but that she had often "struggled with her door." Nick explained that Ashley's apartment has a lock with a card reader and Ashley "can never get it on the first try." When asked whether he had planned to spend the night at Ashley's apartment that night, Nick stated that he "figured that's what would happen." Nick stated that he and Ashley went into Ashley's bedroom and changed out of their clothes and "got ready for bed." When asked what they were wearing, Nick stated, "I wore my boxers and [Ashley] just had on a t-shirt I think." When asked whether they were talking during that time, Nick stated, "We kinda picked up our fight from earlier." When asked to explain, Nick stated that Ashley was "accusing [him] of being insensitive to her feelings about her body." Nick stated that "it felt like [they] had had the same fight a hundred times." Nick stated that he was "really sick of [Ashley's] insecurities and obsession about what people think about her—especially about her body." Nick stated that he told Ashley that he "couldn't take that kind of drama anymore" and that if she couldn't "just let these kind of things go, [they] weren't going to work out anymore." Nick stated that Ashley "calmed down," apologized, and told him she could "let it go." Nick stated that he asked Ashley, "'So we're good?'" and she replied, "'yeah, we're good.'"

CASE STUDY—INVESTIGATION REPORT



Nick stated that they then both laid down on Ashley’s bed. Nick stated that he put his arm around Ashley, but she “rejected [him].” When asked how she rejected him, Nick stated that she said something or turned away. He stated that he didn’t “exactly remember.” When told of Ashley’s account that she told him “I’m really not in the mood,” Nick stated, “Yeah, that sounds about right.” Nick stated that he thought she was still upset and feeling insecure about her body, so he tried to make her feel better by telling her he loved her body, kissing her, and touching her breasts. Nick stated that Ashley, “still wasn’t having it,” and she told him she was “feeling bad about what the guys had said about her pictures.” Nick stated that he then told Ashley that he loved her body and she shouldn’t be insecure about it. Nick stated that after that point, Ashley “seemed to feel better” and “got more into it.”

CASE STUDY—INVESTIGATION REPORT



When asked how he could tell that Ashley “wasn’t having it,” Nick stated that she said “don’t” or “stop it” when he touched her breasts. When asked if Ashley said “don’t” or “stop it” more than once, Nick stated, “Yeah, I think she may have said it a couple of times.” When asked if Nick touched Ashley’s breasts after she said, “don’t” or “stop it,” Nick stated, “Yeah, I did, but it wasn’t like she was saying ‘no’ in that way.” When asked to explain, Nick stated that he “knew she was feeling bad about herself” and he “tried to reassure her” that he found her attractive. When asked what words or overt actions he could point to to indicate that Ashley consented to him touching her breasts, Nick stated, “Well, we were dating and she let me touch her breasts all the time. She wasn’t saying no because she wasn’t comfortable with it; I knew she was mad and needed me to reassure her about her body.” When asked what he meant when he said Ashley “got more into it” after he told her he loved her body and she shouldn’t be insecure about it, Nick stated, “like she turned toward me and was kissing me back and stuff.”³

³When told of Nick’s account that she turned toward him and was kissing him back and stuff, Ashley stated, “Yeah, I guess I maybe turned toward him a little and was moving my lips, but it’s not like I was aggressively kissing him or super into it. I mean, I didn’t want it to be awkward.”

CASE STUDY—INVESTIGATION REPORT



Nick stated that after kissing more, Ashley took off his boxers and started performing oral sex on him. When asked if either of them said anything before Ashley started performing oral sex on him, Nick stated, “No, neither of us said anything; she just started doing it. I don’t know, I didn’t really consent to that, did I?” Nick stated that after a minute or two he stopped Ashley from performing oral sex because he wanted to “make sure she enjoyed herself, too.” Nick stated that they started kissing again and eventually had sex.

CASE STUDY—INVESTIGATION REPORT



When asked who removed Ashley’s underwear, Nick stated that Ashley took off her own underwear.⁴

⁴When asked if she performed oral sex on Nick, Ashley stated that her memory was “fuzzy,” but she thought that she did perform oral sex. Ashley stated that she remembered feeling like she had to “do something” because Nick was “so insistent.” Ashley stated, “I remember thinking that if I just gave him head he would be satisfied and we could go to sleep. But then the next thing I remember is him taking off my underwear and having sex with me.” When asked what words or overt actions indicated that Nick consented to her performing oral sex on him, Ashley stated, “well, I don’t remember how it started, but Nick was always asking me to give him head; there wasn’t an issue with consent.” When told of Nick’s account that she removed her own underwear, Ashley stated that she was “sure that Nick was the one to take them off.” When told of Nick’s account that she removed his boxers before engaging in oral sex, Ashley stated, “that may be; I don’t remember that clearly. It’s all a bit spotty, but I have a distinct memory of Nick removing my underwear.” Ashley stated that she felt like she “gave into having oral sex, but [she] never wanted to have intercourse that night.”

CASE STUDY—INVESTIGATION REPORT



When asked what position they were in while having sex, Nick stated that he was on top, which was “pretty typical.” When asked what words or overt actions indicated that Ashley consented to intercourse, Nick stated “well, I would say, her kissing me, going down on me and taking off her underwear.” Nick stated that sex often happened like that; they “didn’t have a conversation about it every time; things just progressed, and [they] both participated.” He stated that they talked early on in their relationship about how they would say something if there was ever anything they didn’t want to do or didn’t feel comfortable with. When asked if oral sex was always a part of how things progressed to intercourse, Nick stated, “no, sometimes there was no oral sex; sometimes we just did oral sex and didn’t have intercourse.”⁵

⁵When asked if she and Nick engaged in oral sex at other times during their relationship, Ashley stated that they “often did, but not every time they had sex.” Ashley stated, “oral sex is sometimes how things end, and that’s what I was hoping for that night. I was just so tired and out of it and was feeling so bad about my body. I just, you know, wanted the night to be over.”

CASE STUDY—INVESTIGATION REPORT



When told of Ashley’s account that Nick removed her underwear, Nick stated, “No, I’m pretty sure she took them off herself.” When told of Ashley’s account that she didn’t really actively participate, Nick stated, “Well, it’s not like she took charge or anything, but she wasn’t just laying there like a board or anything. I mean, she had her arms around me and stuff.”

CASE STUDY—INVESTIGATION REPORT



July 25, 2020—Ashley’s Apartment (the next morning)

Ashley’s Account

Ashley stated that Nick spent the night and the next morning while he was in the bathroom, she took his phone and started deleting the pictures she had sent him. Ashley stated that when Nick walked in the room and saw what she was doing, he got upset and they started fighting again. When asked what they each said, Ashley stated, “I don’t remember everything. He said something like he couldn’t handle my insecurity and I was always paranoid.” Ashley stated that they had had a fight another time after she was looking through messages on his phone “to make sure he wasn’t cheating on [her],” so Nick was “especially mad that [she] had taken his phone again.” Ashley stated that she apologized and started crying, but that Nick told her he wanted to break up. Ashley stated that she tried to “talk him out of it, but he wouldn’t listen.” Ashley stated that Nick then left and they have only spoken briefly one time when they met to exchange some of their things that they left at each other’s apartments.

CASE STUDY—INVESTIGATION REPORT



Ashley stated that after they broke up, she ran into her friend, Lauren later in the day. Ashley stated that Lauren “must have been able to tell that something was wrong” because she asked Ashley if she was ok. Ashley stated that she told Lauren that she was hung over and that she and Nick had broken up that morning. Ashley stated that she told Lauren she didn’t want to talk about it.

CASE STUDY—INVESTIGATION REPORT



Ashley stated that she went home to her parents' house soon after the breakup because her summer classes had ended. Ashley stated that she “thought [she] could just forget about the whole thing.” Ashley stated that she “definitely wasn’t able to forget it,” but she did think about it a lot and “got some perspective about it all.” Ashley stated that after she came back to school for the fall semester and saw Nick, she “knew [she] had to do something” and decided to report what had happened.

CASE STUDY—INVESTIGATION REPORT



Nick's Account

Nick stated that he stayed the night with Ashley, but in the morning he caught her deleting the pictures from his phone while he was out of the room. Nick stated that Ashley was “super paranoid” about him and other girls and would often look at his phone to “check up on him.” Nick stated that they had fought about it so many times and he “just couldn’t take it anymore.” Nick stated that they fought about the pictures and her looking at his phone and her body issues. Nick stated that he “finally told her that [he] couldn’t handle all of her issues and [he] wanted to break up.” Nick stated that she started crying and apologizing, but he “told her it was over.” Nick stated that he has seen Ashley a handful of times around campus and once when they met to return each other’s belongings.

CASE STUDY—INVESTIGATION REPORT



Lauren's Account

Lauren stated that she saw Ashley the day after they had been at Nick's apartment. Lauren stated that she could tell that Ashley had been crying, so she asked what was wrong. Lauren stated that Ashley told her that she and Nick had broken up, but she "didn't go into the details." When asked if they talked about anything else during that encounter, Lauren stated, "We didn't talk long. Ashley said she wasn't feeling well, she was still recovering from the night before, so she was going to go take a nap."

CASE STUDY



- You submit your completed investigation report to the Title IX Coordinator.
- The parties each review the investigation report and submit a response.

CASE STUDY



- In his response to the investigation report Nick again objects to the investigator's failure to include any information from his current girlfriend.
- How do you respond?

CASE STUDY



Nick's response also states the following:

- I feel so bad that those guys saw the pictures of Ashley that she sent me. If I could go back, I wouldn't have said anything to the guys about them. But I never showed the guys the pictures. Tyler took my phone from me. It wasn't something that I wanted to happen.

CASE STUDY



Nick's response also states the following:

- Ashley did not even mention during her first interview that she performed oral sex on me. That shows that she has no credibility. How can she claim that she “wasn't in the mood” to have sex when she initiated oral sex right before intercourse? Maybe she was worried that if she admitted to the oral sex it would show that she *was* an active participant in our sexual encounter that night and that she *did* consent to having sex. Or maybe she didn't want to mention it because she knew that she never got consent from me for the oral sex. Whatever her reason, it is clear that she has not been forthcoming during this investigation. Her account should not be believed.

CASE STUDY



Nick's response also states the following:

- Ashley is alleging that she felt like she had to have sex with me, but I never pressured her into anything. All I was trying to do was to make her feel better and not be so self-conscious. The only reason I even wanted to have sex that night was because she was feeling so bad about herself. I wanted to reassure her.

CASE STUDY



Ashley's response states the following:

- Nick's claim that he was trying to stop the other guys from looking at the pictures of me is not at all believable. He was sitting in a chair a few feet away from the other guys. It is obvious from everyone's testimony that the only reason the guys stopped looking at the pictures was because I walked in the room.

CASE STUDY



Ashley's response also states the following:

- I was sexually assaulted that night. I didn't even have capacity to consent to any of it because I was too intoxicated. Plus, I gave no words or actions that indicated that I wanted to have sex with Nick that night. In fact, I said I wasn't in the mood and told him to stop when he tried to touch me. And I only ended up going along with it in the end because Nick wouldn't take no for an answer.

PROVIDING THE PARTIES ACCESS TO REPORT



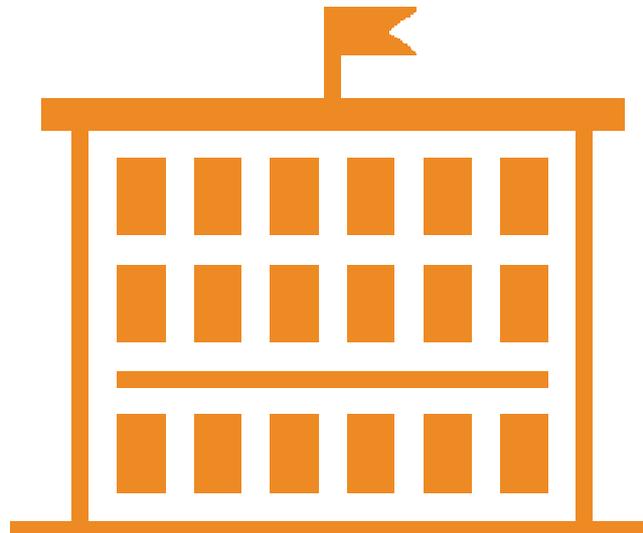
- Title IX:
 - Prior to finalizing the report, parties and advisors must have received copies of all directly related evidence
 - At this stage, parties and advisors must receive electronic or hard copy of investigative report (and attachments) at least 10 days prior to hearing
 - Parties must have opportunity to submit a written response to the report
 - Allow for rebuttal?
 - Use confidentiality protections listed in Stage Four, including:
 - Use of watermark
 - Prohibition of dissemination
 - Non-disclosure agreement

PROVIDING THE PARTIES ACCESS TO REPORT



- VAWA cases that are not Title IX:
 - Access to whatever information is provided to the decision-maker(s)
 - Access to review information; not copies
 - Use of watermarks
 - Prohibit photographs, copying, downloading (check smart phones at the door)
 - Supervise access
 - Out of town access
 - secure site with ability to prohibit downloading AND
 - skype session during review
 - access by advisor – must be with party
 - Require confidentiality/prohibit dissemination?
 - Allow parties to submit written response?
 - Allow parties to submit rebuttal?

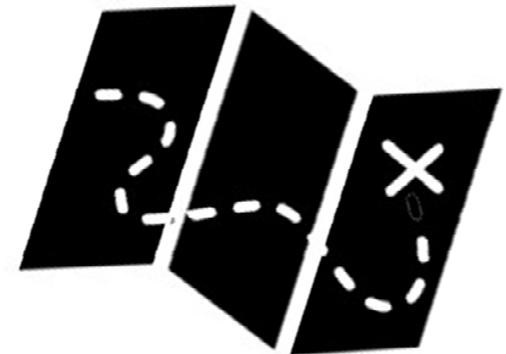
THE DECISION-MAKING PROCESS



SESSION OVERVIEW



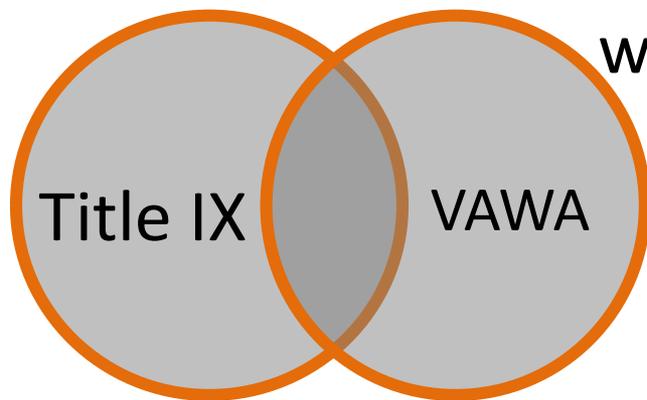
- Decision-Making Process
- Weighing Evidence and Assessing Credibility
- Determination
- Case Study
- Sanctions and Remedies
- Notice of Determination
- Appeals



DECISION-MAKING PROCESS



- Must be prompt, fair and impartial
 - Timely completion
 - Timely notice of meetings
 - Consistent with policies
 - Conducted by officials with training and without conflict/bias



DECISION-MAKING PROCESS



- Objective evaluation of all relevant evidence
 - Inculpatory and exculpatory evidence
 - Credibility determinations may not be based on status as complainant, respondent, or witness
- Presumption of non-responsibility

DECISION-MAKING PROCESS



- What evidence will the decision-maker(s) consider?
 - Investigation report
 - Parties' response statements
 - Recordings
 - Live hearing (required under Title IX)
- NOTE: Whatever information is provided to the decision-maker(s) for adjudications or hearings must be shared with the parties
 - Title IX or VAWA

LIVE HEARING



- General requirements under Title IX
 - Must provide live hearing
 - Permit each party's advisor to ask the other party and witnesses "all relevant questions and follow-up questions"
 - If party does not have advisor, institution must provide one for cross-examination

HEARING—RELEVANCY DETERMINATIONS



- Decision-maker may hear arguments regarding relevancy of a question on the spot or may tell parties to reserve arguments for appeal (incorrect relevancy determination could be an alleged procedural error on appeal)
- Must allow question if relevant, even if misleading or assumes facts not in evidence
- Can establish rule that duplicative questions are not relevant
- Exclude questions with caution

HEARING—CROSS-EXAMINATION



- Party or witness who does not appear at the hearing
 - Cannot rely on any statements from a party or witness who does not submit to cross-examination
 - Failure to answer one question constitutes a failure to submit to cross-examination (unless question came from decision-maker)
 - Still applies even if disability or death is the reason the person did not submit to cross-examination
 - Statements that cannot be considered include statements in investigation report or any other source (police report, medical exam, text messages, witness accounts, etc.)

HEARING—CROSS-EXAMINATION



- School also cannot coerce unwilling participant
 - Be careful with any requirement that a student or employee cooperate with grievance process
 - Discipline for not attending hearing may constitute retaliation

HEARING—OTHER PROCEDURAL RULES



- May establish additional rules that apply equally to both parties
 - Cross-examination must be respectful, non-abusive, not intimidating
 - Limit evidence at hearing to evidence that was gathered or presented as part of the investigation (or otherwise prior to the hearing)
 - Whether investigator may be called as a witness
 - Process for making objections to the relevance of questions and evidence
 - Other procedures at the hearing
 - Opening statements by parties or advisors
 - Closing statements by parties or advisors
 - Reasonable time limitations on hearings

HEARING—OTHER PROCEDURAL RULES

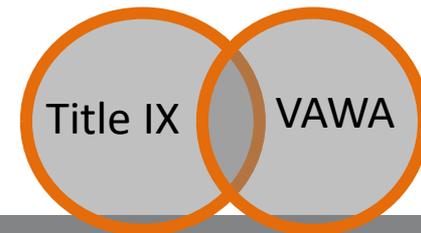


- Some procedural rules are prohibited
 - Cannot prohibit a party from conferring with his or her advisor during the hearing
 - Cannot prohibit character evidence, lie detector test results, evidence that is unduly prejudicial, or evidence of prior bad acts
 - Decision-maker may determine how much weight to give such evidence

INVESTIGATOR ROLE IN DECISION-MAKING PROCESS



- If role is investigator (and not adjudicator), role in adjudication should be limited
 - May be asked to review parties' responses to investigation report
 - Avoid communication with adjudicators, if at all possible (outside of the hearing process)
 - If communication with adjudicators outside the hearing process is necessary, work with Title IX Coordinator to provide the parties with access to additional information
 - May be called as witness at hearing?



WEIGHING EVIDENCE AND ASSESSING CREDIBILITY



EVIDENTIARY ISSUES



- Always consider relevance and weight of evidence
- Types of evidence
 - Statements from parties and witnesses contained in investigation report
 - Live testimony and cross-examination
 - Character evidence
 - Physical evidence (texts, video, security access information, etc.)
 - Medical information (including mental health records)
 - Only with waiver/consent
 - Consider need for expert guidance in understanding and interpreting information
 - Polygraph/lie detector test results



EVIDENTIARY ISSUES



- Complainant's sexual behavior or predisposition are not relevant *unless*:
 - Such questions and evidence are offered to prove someone other than respondent committed the alleged conduct or
 - The questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent
 - The mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence



EVIDENTIARY ISSUES



- Prior bad acts/pattern evidence:
 - Allegation v. policy violation
 - Determine relevance and weight of evidence
 - May be relevant in fact-finding *and/or* sanction determination
 - Consider timing and process for requesting and providing access to the adjudicators and the parties (Title IX vs. VAWA)

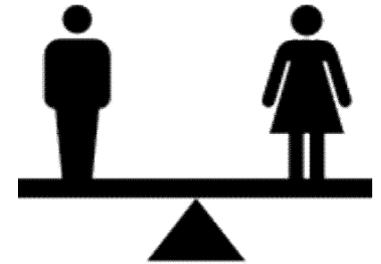


EVIDENTIARY ISSUES



Weighing Evidence / Assessing Credibility:

- Is information the witness provided accurate based on other evidence?
- How did the witness learn the facts?
- How well did he or she recall facts?
- How forthcoming was the witness?
- Did the witness seem honest and sincere? (*caution*)
- What are the possible motives for being less than truthful?
- What is the witness's relationship to the complainant and respondent?
- Are there other factors that bear on the believability of the witness?



DEALING WITH INCULPATORY & EXCULPATORY EVIDENCE



- Consider all relevant evidence provided
 - Do not cherry-pick evidence that supports your conclusion
 - Do not ignore contrary evidence
- If evidence supporting both conclusions exists:
 - Is some evidence stronger than other evidence? If so, why?
 - Do you find one party more credible than the other party? If so, why?
 - If a witness's statement is contrary to your conclusion, why do you not believe the witness?

DETERMINATION



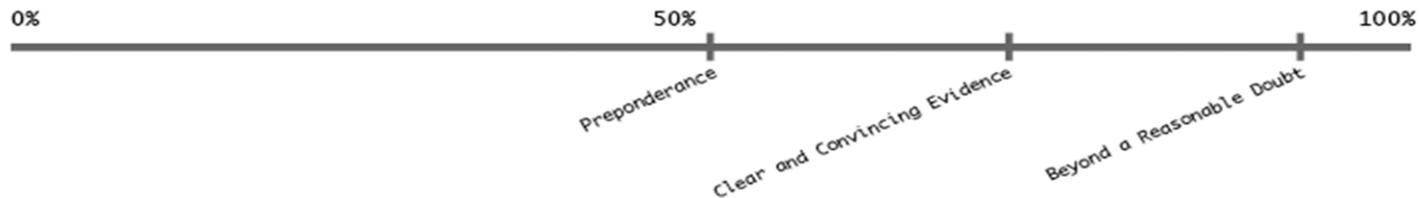
- Finding re: policy violation
 - Sexual contact/harassment
 - Consent/unwelcomed
- Sanctions
- Remedies
- Written Notice

DETERMINATION—FINDING



■ Standard of proof

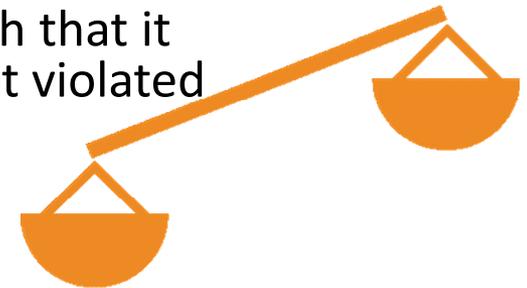
- “Preponderance of the evidence” or “clear and convincing” (not “beyond a reasonable doubt”)
- Use same standard of proof for all formal complaints of sexual harassment
- Burden is on the school to gather sufficient evidence to reach a fair, impartial determination
- Presumption of non-responsibility that would need to be overcome
- Decision-maker(s) must ultimately decide whether it was more likely than not that a policy violation has occurred (preponderance) or whether it is highly probable that a policy violation has occurred



DETERMINATION—FINDING



- Preponderance:
 - Must decide either that:
 - It was “more likely than not” that the Respondent violated the institution’s sexual misconduct policy OR
 - That there was insufficient evidence to establish that it was “more likely than not” that the Respondent violated the institution’s sexual misconduct policy
- Clear and convincing:
 - Must decide either that:
 - It was “highly probable” that the Respondent violated the institution’s misconduct policy OR
 - That there was insufficient evidence to establish that it was “highly probable” that the Respondent violated the institution’s sexual misconduct policy





CASE STUDY

Relevant Definitions

CASE STUDY – DEFINITION OF TITLE IX SEXUAL HARASSMENT



Title IX Hostile Environment Harassment is unwelcome conduct on the basis of sex determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity.

For the purposes of the definition of Title IX Hostile Environment Harassment, reasonable person means a reasonable person in the shoes of the complainant, considering the ages, abilities, and relative positions of authority of the individuals involved in an incident.

CASE STUDY – DEFINITION OF NON-TITLE IX SEXUAL HARASSMENT



- As used in this Policy, Non-Title IX Sexual Harassment is unwelcome conduct of a sexual nature or based on sex, including sexual advances, requests for sexual favors, offensive comments or other conduct based on sex, sexually motivated physical contact, or other verbal, nonverbal, or physical conduct or communication of a sexual nature, when:
 -
 - such conduct has the purpose or effect of substantially and unreasonably interfering with an individual's employment or education, or of creating an intimidating, hostile, or offensive employment or educational environment ("hostile environment" harassment).

CASE STUDY—DEFINITION OF SEXUAL ASSAULT



Sexual assault is any actual or attempted sexual contact, including penetration, with another person without that person's consent. Sexual contact includes intentional contact by the accused with the victim's genital area, groin, inner thigh, buttocks, or breasts, whether clothed or unclothed; touching another with any of these body parts, whether clothed or unclothed; coerced touching by the victim of another's genital area, groin, inner thigh, buttocks, or breasts, whether clothed or unclothed; or forcing another to touch him/herself with or on any of these body parts.

CASE STUDY—DEFINITION OF CONSENT



Consent means words or overt actions by a person clearly and affirmatively communicating a freely-given present agreement to perform a particular sexual act. Words or overt actions clearly communicate consent when a reasonable person in the circumstances would believe those words or actions indicate a willingness to participate in a mutually agreed-upon sexual activity. Although consent does not need to be verbal, verbal communication is the most reliable form of asking for and obtaining consent. It is the responsibility of the person initiating the specific sexual activity to obtain consent for that activity.

CASE STUDY—DEFINITION OF CONSENT



The definition of consent is subject to the following:

- Consent can only be given if one is of legal age. The legal age of consent in this state is 16.
- Consent is a mutually understood and freely given “yes,” not the absence of “no.”
- Consent to one form of sexual activity cannot imply consent to other forms of sexual activity.
- Consent can be withdrawn at any time. When consent is withdrawn, the sexual activity for which consent was initially provided must stop.
- Silence or failing to resist does not imply consent.
- Previous relationships or previous consent does not imply consent to future sexual acts.
- An existing sexual, romantic, or marital relationship does not imply consent.
- Prior sexual activity with other individuals does not imply consent.
- Consent cannot be procured, expressly or implicitly, by use of force, intimidation, threats, or **coercion**, as that term is defined below.
- An individual known to be – or who should be known to be – **incapacitated**, as defined by the Policy, cannot consent to sexual activity initiated by another individual.
- Use of alcohol or other drugs will never function to excuse behavior that violates this Policy.

CASE STUDY—

DEFINITION OF COERCION



Coercion is conduct or intimidation that would compel an individual to do something against their will by (1) the use of physical force, (2) threats of severely damaging consequences, or (3) pressure that would cause a reasonable person to fear severely damaging consequences. Coercion is more than an effort to persuade or attract another person to engage in sexual activity. Coercive behavior differs from seductive behavior based on the degree and type of pressure someone uses to obtain consent from another.

CASE STUDY—DEFINITION OF INCAPACITATION



A person who is incapacitated cannot give valid consent to sexual contact. Incapacitation means the inability to understand the fact, nature, or extent of the sexual situation. Incapacitation may result from mental or physical disability, sleep, unconsciousness, involuntary physical restraint, or from the influence of drugs or alcohol. With respect to incapacitation due to the influence of drugs or alcohol, incapacitation requires more than being under the influence of drugs or alcohol; a person is not incapacitated just because they have been drinking or using drugs.

CASE STUDY—DEFINITION OF INCAPACITATION



Where drugs and/or alcohol are involved, incapacitation is determined based on the facts and circumstances of the particular situation looking at whether the individual was able to understand the fact, nature, or extent of the sexual situation, whether the individual was able to communicate decisions regarding consent, nonconsent, or the withdrawal of consent, and whether such condition was known or reasonably known to the respondent or a reasonable person in respondent's position. Use of drugs or alcohol by the respondent is not a defense against allegations of sexual misconduct.



CASE STUDY

Determine Whether
a Policy Violation Occurred
and Rationale for your Decision

DETERMINATION— SANCTIONS AND REMEDIES



- Consider who will decide the sanctions and how
 - Consider limited role of Title IX Coordinator
- Any information provided to individual(s) who determine sanctions must also be provided to the parties
- Policy must list *all* possible sanctions and describe the range of remedies
- The list of sanctions must be specific, including the type and length of suspensions and any requirements that must be met for reinstatement



DETERMINATION— SANCTIONS AND REMEDIES



- Must treat complainants and respondents equitably by
 - Providing remedies to a complainant where a determination of responsibility for sexual harassment has been made
 - Remedies must be designed to restore or preserve equal access to the institution’s education program or activity
 - May include the same individualized services as “supportive measures”
 - Do not need to be “non-disciplinary” or “non-punitive” and do not need to avoid burdening the respondent
 - Following grievance process that complies with regulations before imposing disciplinary sanctions or other actions that are not supportive measures
- Consider remedies for broader student population

NOTICE OF DETERMINATION



- Identification of the allegations potentially constituting sexual harassment
- Procedural steps since complaint
 - Notices to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, hearings held
- Findings of fact
- Conclusion regarding application of code of conduct to the facts
- Statement of and rationale for the result as to each allegation
 - Determination of responsibility
 - Any disciplinary sanctions imposed on respondent
 - *Whether* remedies will be provided to complainant
- Appeal information
- Simultaneous delivery to the parties
- Becomes final either the date the parties receive the written determination of the appeal or the date on which an appeal would no longer be timely

APPEALS UNDER TITLE IX



- Must be offered to both parties
 - From a determination regarding responsibility
 - From a recipient's dismissal of a formal complaint or any allegations therein
- Required bases:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
 - The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter;
 - May offer an appeal equally to both parties on additional bases

APPEALS UNDER TITLE IX



- Requirements
 - Notify other party in writing when an appeal is filed
 - Appeal officer is different than Title IX Coordinator, investigator and decision-maker at hearing
 - No conflict of interest or bias
 - Give both parties reasonable, equal opportunity to submit written statement in support of, or challenging, the outcome
 - Written decision describing result of appeal and rationale
 - Simultaneous delivery of result to parties

APPEALS UNDER VAWA



- Not required, but if offered, must do so equally
- Transparency, equality, notice requirements from main process will apply to appeals
- Examples include:
 - Right to advisor
 - Notice of meetings
 - Access to information used by appeals panel/individual
 - Simultaneous notice of outcome

Q & A



2020 Title IX/VAWA Investigator Training

Handout 1

Complaint

On September 15, 2020, Ashley Anderson made a complaint of sexual misconduct against Nick Newman.

Sexual Misconduct Complaint Form

COMPLAINANT NAME: Ashley Anderson

ADDRESS: 1234 Oak Ridge Drive

DATE OF REPORT OF ALLEGED POLICY VIOLATION: September 15, 2020

RESPONDENT NAME: Nick Newman

ADDRESS: 999 Off-Campus Lane

ALLEGATIONS:

On July 24, 2020, Nick Newman sexually harassed and sexually assaulted me. At the time, Nick and I were in a dating relationship. On the night of July 24, I walked into Nick's apartment and saw him showing several of his friends topless pictures of me without my consent. Later in the night, after getting really drunk, Nick and I went back to my apartment. At my apartment, Nick touched my breasts and had sex with me without my consent. Even though I said "no" several times, Nick continued to touch me and eventually had sex with me. I was too drunk to consent to anything that happened.

2020 Title IX/VAWA Investigator Training

Handout 2

Excerpt of Notice of Allegations

On September 15, 2020 a formal complaint of alleged sexual misconduct was submitted by Ashley Anderson to Title IX Coordinator, Beth Baker. In her formal complaint Ashley alleged that on or around July 24, 2020, Nick Newman sexually harassed and sexually assaulted her. Ashley alleged that while they were at Nick's off-campus apartment, Nick engaged in sexual harassment including showing partially nude pictures of Ashley to his friends and making harassing comments. Ashley alleged that later in the night, while they were at her apartment in the University's Oak Ridge apartment complex, Nick engaged in non-consensual sexual contact and non-consensual sexual penetration of Ashley.

2020 Title IX/VAWA Investigator Training

Handout 3

Excerpt of Amended Notice of Allegations

A formal complaint of alleged sexual misconduct was submitted by Nick Newman to Title IX Coordinator, Beth Baker. In his formal complaint, Nick alleges that on or around July 24, 2020, at Ashley's apartment in the University's Oak Ridge apartment complex, Ashley sexually assaulted him by engaging in non-consensual sexual penetration.

2020 Title IX/VAWA Investigator Training

Handout 4

Definition of Title IX Hostile Environment Sexual Harassment

Title IX Hostile Environment Harassment is unwelcome conduct on the basis of sex determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the University's education program or activity.

For the purposes of the definition of Title IX Hostile Environment Harassment, reasonable person means a reasonable person in the shoes of the complainant, considering the ages, abilities, and relative positions of authority of the individuals involved in an incident.

Definition of Non-Title IX Sexual Harassment

As used in this Policy, Non-Title IX Sexual Harassment is unwelcome conduct of a sexual nature or based on sex, including sexual advances, requests for sexual favors, offensive comments or other conduct based on sex, sexually motivated physical contact, or other verbal, nonverbal, or physical conduct or communication of a sexual nature, when:

- such conduct has the purpose or effect of substantially and unreasonably interfering with an individual's employment or education, or of creating an intimidating, hostile, or offensive employment or educational environment ("hostile environment" harassment).

Definition of Sexual Assault

Sexual assault is any actual or attempted sexual contact, including penetration, with another person without that person's consent. Sexual contact includes intentional contact by the accused with the victim's genital area, groin, inner thigh, buttocks, or breasts, whether clothed or unclothed; touching another with any of these body parts, whether clothed or unclothed; coerced touching by the victim of another's genital area, groin, inner thigh, buttocks, or breasts, whether clothed or unclothed; or forcing another to touch him/herself with or on any of these body parts.

Definition of Consent

Consent means words or overt actions by a person clearly and affirmatively communicating a freely-given present agreement to perform a particular sexual act. Words or overt actions clearly

communicate consent when a reasonable person in the circumstances would believe those words or actions indicate a willingness to participate in a mutually agreed-upon sexual activity. Although consent does not need to be verbal, verbal communication is the most reliable form of asking for and obtaining consent. It is the responsibility of the person initiating the specific sexual activity to obtain consent for that activity.

The definition of consent is subject to the following:

- Consent can only be given if one is of legal age. The legal age of consent in this state is 16.
- Consent is a mutually understood and freely given “yes,” not the absence of “no.”
- Consent to one form of sexual activity cannot imply consent to other forms of sexual activity
- Consent can be withdrawn at any time. When consent is withdrawn, the sexual activity for which consent was initially provided must stop.
- Silence or failing to resist does not imply consent.
- Previous relationships or previous consent does not imply consent to future sexual acts.
- An existing sexual, romantic, or marital relationship does not imply consent.
- Prior sexual activity with other individuals does not imply consent.
- Consent cannot be procured, expressly or implicitly, by use of force, intimidation, threats, or **coercion**, as that term is defined below.
- An individual known to be – or who should be known to be – **incapacitated**, as defined by the Policy, cannot consent to sexual activity initiated by another individual.
- Use of alcohol or other drugs will never function to excuse behavior that violates this Policy.

Definition of Incapacitation

A person who is **incapacitated** cannot give valid consent to sexual contact. Incapacitation means the inability to understand the fact, nature, or extent of the sexual situation.

Incapacitation may result from mental or physical disability, sleep, unconsciousness, involuntary physical restraint, or from the influence of drugs or alcohol. With respect to incapacitation due to the influence of drugs or alcohol, incapacitation requires more than being under the influence of drugs or alcohol; a person is not incapacitated just because they have been drinking or using drugs.

Where drugs and/or alcohol are involved, incapacitation is determined based on the facts and circumstances of the particular situation looking at whether the individual was able to understand the fact, nature, or extent of the sexual situation, whether the individual was able to communicate decisions regarding consent, nonconsent, or the withdrawal of consent, and whether such condition was known or reasonably known to the respondent or a reasonable person in

respondent's position. Use of drugs or alcohol by the respondent is not a defense against allegations of sexual misconduct.

Definition of Coercion

Coercion is conduct or intimidation that would compel an individual to do something against their will by (1) the use of physical force, (2) threats of severely damaging consequences, or (3) pressure that would cause a reasonable person to fear severely damaging consequences. Coercion is more than an effort to persuade or attract another person to engage in sexual activity. Coercive behavior differs from seductive behavior based on the degree and type of pressure someone uses to obtain consent from another.

2020 Title IX/VAWA Investigator Training

Handout 5

Investigation Report Excerpt:

Background

The parties are both in their junior year at the University. The parties agree that they met at the beginning of spring semester of their sophomore year when they had a class together. The parties agree that they dated for almost three months during the late spring and summer of 2020. Ashley and Nick both stated that they had had sexual intercourse many times throughout their dating relationship. The parties agree that they broke up on July 25, 2020.

July 24, 2020—Nick’s Apartment

Ashley’s Account

Ashley stated that on July 24, 2020, she and two friends—Lauren and Amanda—went to Nick’s apartment to hang out with him and some other guys. Ashley stated that she had not been drinking before going to Nick’s apartment.

Ashley stated that when they arrived at Nick’s apartment, the door was partially open and they could hear him and a few others laughing and whistling. Ashley stated that she heard someone say, “She’s hot, but man, I think Jason has bigger boobs than her.” Ashley stated that she then heard Nick say, “Hey man she more than makes up for it in other ways.” Ashley stated that she then heard the other person respond, “Like how? Like, is she really flexible?”

Ashley stated that they then pushed the door open and entered the apartment.¹ She stated that she saw Nick’s roommates, Tyler and Jason, and another guy named Drew huddled around Nick’s phone looking at something. Ashley stated that she couldn’t remember who was holding the phone. Ashley stated that Nick was a few feet away from the other three guys, sitting on a chair. Ashley stated that when they walked in the room, one of the guys said, “uh-oh” and whoever was holding the phone quickly handed it to Nick.

Ashley stated that earlier in the week she had sent Nick several selfies in which she was topless. Ashley stated that Nick had been asking her to send nude pictures for a long time but she had repeatedly said “no” because she “just wasn’t comfortable doing that type of thing.” Ashley

¹ Nick stated that he, Tyler, Jason, and David Donaldson live in a two-bedroom off-campus apartment. Nick stated that he and Tyler share a room and Jason and David share a room. Nick stated that the main entrance to the apartment opens directly to the living room. The parties and witnesses agree that David was not present during any of the alleged conduct.

stated that she is “just not that secure in [her] body.” Ashley stated that she eventually “gave in a little” and sent a few topless selfies.

Ashley stated that after walking in the room she looked at Nick, turned around, and “stormed out” of the apartment. Ashley stated that Nick followed her out to the hallway. Ashley stated that she asked Nick if he’d shown his friends the topless pictures of her. Ashley stated that Nick claimed he had told his friends about the pictures but hadn’t shown them. Ashley stated that Nick said Tyler just grabbed his phone and looked at the pictures. Ashley stated that Nick “claimed” he tried to get the phone back and said the guys only had it for “like 30 seconds” before she walked in. Ashley stated that Nick apologized and convinced her to come back to the apartment and hang out with everyone. Ashley stated that they went back to the apartment together, but she didn’t talk to him and “made it clear” that she was still mad at him.

Ashley stated that they stayed in Nick’s living room drinking, talking, and watching YouTube videos for two or three hours. Ashley stated that she had “several” beers and “a few” shots. Ashley stated that she has trouble remembering everything that happened at Nick’s apartment. Ashley stated that she thought that Nick was the one who suggested they should leave. Ashley stated that she got up to leave but stumbled over a chair. Ashley stated that she remembered someone telling Nick that he had to walk her home or she “wouldn’t make it.” Ashley stated that she lives about a half-mile from Nick’s apartment. Ashley stated that Nick walked her home and supported her with his arm around her waist the whole time. Ashley stated that she doesn’t really remember the walk and doesn’t remember if they talked at all. When asked how she would rate her level of intoxication on a scale of 1 (sober) to 10 (passed out) when she left Nick’s apartment, Ashley stated she would be about an 8 because she needed him to help her walk and she didn’t remember much from the walk.²

Nick’s Account

Nick stated that he, his roommates, Tyler and Jason, and Drew, a guy from Tyler’s soccer team, were hanging out in the living room of his apartment on July 24, 2020. Nick stated that he was looking at pictures of Ashley on his phone and told his friends that she had sent him some “topless selfies”. Nick stated that Tyler suddenly grabbed his phone and looked at the pictures, showing them to the other two guys. Nick stated that he tried to grab the phone but the guys stopped him. Nick stated that they only looked at the pictures for a few seconds before Ashley and her friends walked into the apartment. Nick stated that they had invited Ashley and some other girls over to hang out. When asked if anyone made comments about the pictures, Nick stated that the guys were laughing and “like woo-hoo-ing.” When told of Ashley’s account

² The intoxication scale is asked by the investigator to assist in understanding how an individual views their own intoxication level and how that compares to reports from others about an individual’s level of intoxication and its impact on them. How an individual ranks him or herself on the intoxication scale is not determinative of whether that individual or someone else was incapacitated.

regarding the specific comments she heard between Nick and one of the other guys, Nick stated, "I don't recall specifically what was said; there was some joking around." When asked where he was in comparison to the other guys when Ashley and her friends walked into the room, Nick stated that he was standing right by them because he had been trying to get the phone.

Nick stated that Ashley got mad right away and stormed out into the hallway. Nick stated that he ran after her, apologized, and explained what had happened. Nick stated that Ashley agreed to come back to the apartment, but she still seemed mad at him the whole time they were there.

Nick stated that they were all drinking in their apartment that night. Nick stated that he had a few shots and a few beers. He stated that he was "buzzed" but was still in control and can remember everything. When asked to rate his intoxication level on a scale of 1 to 10 at the time he left his apartment, Nick stated that he was about a 5. Nick stated that Ashley was drinking, but not more than she usually does. Nick stated that Ashley was loud and "spouting off a bit." He stated that Ashley was drinking enough that he wouldn't have left her alone, but she "didn't need help walking or anything." When asked why he wouldn't have left her alone, he responded that he was concerned that if he left her alone, "she might not have made the best decisions." When asked to rate Ashley's intoxication level, Nick stated that he thought she was a 6 or 7. Nick stated that he eventually asked Ashley if she wanted to go home because she was "getting pretty loud" and "acting kind of obnoxious." Nick stated that Ashley "often would often feel embarrassed the next day after she'd been acting that way."

When told of Ashley's account that Nick had to help her walk home because she had been drinking a lot, Nick stated "I always used to walk her home if it was late at night. I wouldn't have wanted Ashley to be walking alone in the dark after she'd been drinking or anytime really." Nick stated that he also often used to spend the night at Ashley's apartment because he shared a bedroom with Tyler, but she had her own room. When asked if she needed help walking to her apartment, Nick stated, "No, she didn't need help. I don't even think we held hands cause she was still pissed at me. She didn't stumble or anything like that." Nick stated that they didn't talk much on the walk because he could tell Ashley was still pissed about the pictures.

Lauren's Account

Ashley's friend, Lauren, stated that when they arrived outside Nick's apartment door they could hear the guys "laughing about Ashley's body." When asked what she heard them say, Lauren stated that she could not remember what it was specifically, just that it was "some kind of insult about the pictures." Lauren stated that all four guys were all huddled around the phone when they walked in the door. Lauren stated that Nick and Ashley got into a fight in the hall, but then came back to the room together. Lauren stated that she "didn't think much of it" because "they were always fighting." Lauren stated that she didn't know how much Ashley had to drink. Lauren stated that she left before Ashley so she may have drank more after she left.

Amanda's Account

Ashley's friend, Amanda, stated that when they entered Nick's apartment, Tyler, Jason, and Drew were looking at a phone. When asked where Nick was in comparison to the other three, Amanda stated that he was sitting in a chair a little ways away. Amanda stated that Ashley and Nick were clearly fighting the whole night, which was "nothing new for them." Amanda stated that she knew Ashley was upset about the pictures, and she can tend to drink a lot when she is upset. Amanda stated that Ashley "had way too much to drink." When asked why she thought Ashley had too much to drink, Amanda stated that she was talking loudly, saying things she wouldn't usually say, and lost her balance once or twice. Amanda stated that she thought someone should cut her off. Amanda stated that she would have been more concerned, but she knew that Nick would take care of her. Amanda stated that Nick had to help Ashley home.

Tyler's Account

Nick's roommate, Tyler, stated that he took Nick's cell phone after he was "bragging about" the pictures of Ashley. When asked who was looking at the pictures, Tyler stated that he, Nick, Jason, and Drew all looked at the pictures. Tyler stated that he looked at the pictures for "maybe a few seconds" before Ashley came in. Tyler stated that Ashley was drinking in their apartment but "didn't seem that drunk." Tyler stated that Ashley is "just mad that Nick broke up with her" and that is why she filed the complaint.

Jason's Account

Nick's roommate, Jason, stated that he remembers Tyler taking Nick's phone, but he doesn't remember how long they looked at the pictures. Jason stated that it was "no big deal; it's not like he sent them to anyone." Jason stated that "everyone was drinking in the apartment that night." He stated that he doesn't remember anyone "getting like really wasted."

Drew's Account

Drew stated that he and Nick are "not really friends;" they are "more like acquaintances." Drew stated that he happened to be hanging out in Nick, Tyler, and Jason's apartment on July 24, 2020, but he didn't usually spend much time with them. Drew stated that Tyler is one of his soccer teammates. Drew stated that while he was at their apartment, Nick started telling them about pictures of Ashley that were on his phone. Drew stated that Tyler took Nick's phone and started looking at the pictures and showing them to Jason and Drew. When asked, Drew stated that he didn't remember Nick doing anything to stop them or trying to take back his phone. When asked how long they looked at the pictures, Drew stated that he remembers that they swiped through a few pictures, and the three of them and Nick were "making several comments back and forth," so he "would guess that [they] looked at the pictures for like a couple of minutes." Drew stated that Tyler was making comments about Ashley's breasts.

Drew stated that Ashley drank a lot while they were at Nick's apartment. Drew stated that she was acting "really loud and obnoxious" and then fell over when she tried to get up to leave. Drew stated that he thought someone should make sure Ashley got home OK.

July 24, 2020/Early morning hours July 25, 2020—Ashley's Apartment

Ashley's Account:

Ashley stated that when they got to her apartment, she felt "really out of it" and had trouble unlocking her door. When asked to rate her level of intoxication at that point, Ashley stated that she was "still around a 7 or 8." Ashley stated that she eventually opened the door and she and Nick went to her room. Ashley stated that she thought Nick was going to spend the night "because he usually did if he walked [her] home." Ashley stated that she did not think they were going to "do anything" and did not want to "do anything," because she was still "really mad" at Nick about the pictures. When asked what she meant by "do anything" Ashley stated that she meant "like sex and stuff." When asked whether she and Nick usually had sex when he spent the night, Ashley stated, "sometimes we did; sometimes we didn't and we just went to sleep."

Ashley stated that once in her room she and Nick both changed for bed and started fighting again. When asked to explain what they both wore to bed, Ashley stated that she was wearing a long t-shirt and underwear, but was not wearing a bra. Ashley stated that Nick "just wore his boxers." Ashley stated that Nick "must have realized that [she] was still mad at him" and said something like, "when are you going to let this go?" Ashley stated that they started "getting into a recurring fight [they] used to have." Ashley stated that Nick always wanted her to "be more showy, like wanted [her] to dress sexier or send him naked pictures of [her]self." Ashley stated that Nick would get upset when she refused to do those things and would tell her that she needed to be more comfortable with her body and with him. Ashley stated that she didn't feel comfortable showing her body off, even in her relationships, but she had "given in" after Nick "kept asking for nude pictures." Ashley stated that she was so mad at him because "if he knew [she] was so uncomfortable showing off [her] body, how could he let his friends see those pictures?" Ashley stated that during the fight Nick eventually said that he "couldn't take her insecurity anymore." Ashley stated that he "gave her an ultimatum." When asked what she meant by that, Ashley stated, "like he implied that he would break up with me if I couldn't let the whole picture thing go." Ashley stated that she didn't want to break up, so she told him she forgave him, but "was actually still really upset about it."

Ashley stated that she then got into her bed and wanted to go to sleep because she "felt really tired and woozy." Ashley stated that Nick laid down next to her and started "stroking her arm and back." Ashley stated that she told him, "I'm really not in the mood." Ashley stated that Nick then told her she was beautiful and that he didn't understand how she could be so insecure when he continually tells her how much he loves her body. Ashley stated that Nick then started kissing her, but she "kinda turned away" and told him to stop. Ashley stated that she then said, "I just don't feel very sexy after hearing the comments those guys made about me." Ashley

stated that Nick then said, “C’mon baby, it doesn’t matter what they think, I think your hot” and then touched her breast over her shirt. Ashley stated that she said, “Please just stop it.” Ashley stated that Nick then put his hand under her shirt and touched her bare breast, saying “You stop it. I love every part of you and you need to stop being so insecure.”

Ashley stated that Nick then started kissing her again. Ashley stated that she “didn’t stop him but didn’t really actively participate.” Ashley stated that “after [she] made it clear that she wasn’t interested, but [Nick] kept persisting, [she] sort of gave up resisting him.” Ashley stated that after kissing for a while, Nick removed his boxers and her underwear and then they had sex. Ashley stated that she felt really tired while they were having sex and “just wanted it to be over.” When asked who initiated intercourse, Ashley stated that Nick initiated it. When asked if either of them said anything during sex or right before, Ashley stated that neither of them said anything. When asked what position they were in during intercourse, Ashley stated that “Nick was on top.” Ashley stated that if she hadn’t drank so much she could have thought more clearly and wouldn’t have given in to Nick’s pressuring.

Nick’s Account

Nick stated that when they got to Ashley’s apartment they entered together. When asked if Ashley had trouble unlocking the door, Nick stated that she did have trouble but that she had often “struggled with her door.” Nick explained that Ashley’s apartment has a lock with a card reader and Ashley “can never get it on the first try.” When asked to rate Ashley’s level of intoxication when they got to Ashley’s apartment, Nick stated that she was a “six.” When asked why he thought she was around a six, Nick stated, “she was still being pretty loud and, you know, pretty emotional, I mean, more emotional than usual.” When asked whether he had planned to spend the night at Ashley’s apartment that night, Nick stated that he “figured that’s what would happen.” Nick stated that he and Ashley went into Ashley’s bedroom and changed out of their clothes and “got ready for bed.” When asked what they were wearing, Nick stated, “I wore my boxers and [Ashley] just had on a t-shirt I think.” When asked whether they were talking during that time, Nick stated, “We kinda picked up our fight from earlier.” When asked to explain, Nick stated that Ashley was “accusing [him] of being insensitive to her feelings about her body.” Nick stated that “it felt like [they] had had the same fight a hundred times.” Nick stated that he was “really sick of [Ashley’s] insecurities and obsession about what people think about her—especially about her body.” Nick stated that he told Ashley that he “couldn’t take that kind of drama anymore” and that if she couldn’t “just let these kind of things go, [they] weren’t going to work out anymore.” Nick stated that Ashley “calmed down,” apologized, and told him she could “let it go.” Nick stated that he asked Ashley, ““So we’re good?”” and she replied, ““yeah, we’re good.””

Nick stated that they then both laid down on Ashley’s bed. Nick stated that he put his arm around Ashley, but she “rejected [him].” When asked how she rejected him, Nick stated that she said something or turned away. He stated that he didn’t “exactly remember.” When told of

Ashley's account that she told him "I'm really not in the mood," Nick stated, "Yeah, that sounds about right." Nick stated that he thought she was still upset and feeling insecure about her body, so he tried to make her feel better by telling her he loved her body, kissing her, and touching her breasts. Nick stated that Ashley, "still wasn't having it," and she told him she was "feeling bad about what the guys had said about her pictures." Nick stated that he then told Ashley that he loved her body and she shouldn't be insecure about it. Nick stated that after that point, Ashley "seemed to feel better" and "got more into it." When asked how he could tell that Ashley "wasn't having it," Nick stated that she said "don't" or "stop it" when he touched her breasts. When asked if Ashley said "don't" or "stop it" more than once, Nick stated, "Yeah, I think she may have said it a couple of times." When asked if Nick touched Ashley's breasts after she said, "don't" or "stop it," Nick stated, "Yeah, I did, but it wasn't like she was saying 'no' in that way." When asked to explain, Nick stated that he "knew she was feeling bad about herself" and he "tried to reassure her" that he found her attractive. When asked what words or overt actions he could point to to indicate that Ashley consented to him touching her breasts, Nick stated, "Well, we were dating and she let me touch her breasts all the time. She wasn't saying no because she wasn't comfortable with it; I knew she was mad and needed me to reassure her about her body." When asked what he meant when he said Ashley "got more into it" after he told her he loved her body and she shouldn't be insecure about it, Nick stated, "like she turned toward me and was kissing me back and stuff."³

Nick stated that after kissing more, Ashley took off his boxers and started performing oral sex on him. When asked if either of them said anything before Ashley started performing oral sex on him, Nick stated, "No, neither of us said anything; she just started doing it. I don't know, I didn't really consent to that, did I?" Nick stated that after a minute or two he stopped Ashley from performing oral sex because he wanted to "make sure she enjoyed herself, too." Nick stated that they started kissing again and eventually had sex. When asked who removed Ashley's underwear, Nick stated that Ashley took off her own underwear.⁴ When asked what

³ When told of Nick's account that she turned toward him and was kissing him back and stuff, Ashley stated, "Yeah, I guess I maybe turned toward him a little and was moving my lips, but it's not like I was aggressively kissing him or super into it. I mean, I didn't want it to be awkward."

⁴ When asked if she performed oral sex on Nick, Ashley stated that her memory was "fuzzy," but she thought that she did perform oral sex. Ashley stated that she remembered feeling like she had to "do something" because Nick was "so insistent." Ashley stated, "I remember thinking that if I just gave him head he would be satisfied and we could go to sleep. But then the next thing I remember is him taking off my underwear and having sex with me." When asked what words or overt actions indicated that Nick consented to her performing oral sex on him, Ashley stated, "well, I don't remember how it started, but Nick was always asking me to give him head; there wasn't an issue with consent." When told of Nick's account that she removed her own underwear, Ashley stated that she was "sure that Nick was the one to take them off." When told of Nick's account that she removed his boxers before engaging in oral sex, Ashley stated, "that may be; I don't remember that clearly. It's all a bit spotty, but I have a distinct memory of Nick

position they were in while having sex, Nick stated that he was on top, which was “pretty typical.” When asked what words or overt actions indicated that Ashley consented to intercourse, Nick stated, “well, I would say, her kissing me, going down on me and taking off her underwear.” Nick stated that sex often happened like that; they “didn’t have a conversation about it every time; things just progressed, and [they] both participated.” He stated that they talked early on in their relationship about how they would say something if there was ever anything they didn’t want to do or didn’t feel comfortable with. When asked if oral sex was always a part of how things progressed to intercourse, Nick stated, “no, sometimes there was no oral sex; sometimes we just did oral sex and didn’t have intercourse.”⁵ When told of Ashley’s account that Nick removed her underwear, Nick stated, “No, I’m pretty sure she took them off herself.” When told of Ashley’s account that she didn’t really actively participate, Nick stated, “Well, it’s not like she took charge or anything, but she, like, had her arms around me, she was kissing me, and she was, you know, thrusting her hips.”

July 25, 2020—Ashley’s Apartment (the next morning)

Ashley’s Account

Ashley stated that Nick spent the night and the next morning while he was in the bathroom, she took his phone and started deleting the pictures she had sent him. Ashley stated that when Nick walked in the room and saw what she was doing, he got upset and they started fighting again. When asked what they each said, Ashley stated, “I don’t remember everything. He said something like he couldn’t handle my insecurity and I was always paranoid.” Ashley stated that they had had a fight another time after she was looking through messages on his phone “to make sure he wasn’t cheating on [her],” so Nick was “especially mad that [she] had taken his phone again.” Ashley stated that she apologized and started crying, but that Nick told her he wanted to break up. Ashley stated that she tried to “talk him out of it, but he wouldn’t listen.” Ashley stated that Nick then left and they have only spoken briefly one time when they met to exchange some of their things that they left at each other’s apartments.

Ashley stated that after they broke up, she ran into her friend, Lauren later in the day. Ashley stated that Lauren “must have been able to tell that something was wrong” because she asked Ashley if she was ok. Ashley stated that she told Lauren that she was hung over and that she and Nick had broken up that morning. Ashley stated that she told Lauren she didn’t want to talk about it.

removing my underwear.” Ashley stated that she felt like she “gave into having oral sex, but [she] never wanted to have intercourse that night.”

⁵ When asked if she and Nick engaged in oral sex at other times during their relationship, Ashley stated that they “often did, but not every time they had sex.” Ashley stated, “oral sex is sometimes how things end, and that’s what I was hoping for that night. I was just so tired and out of it and was feeling so bad about my body. I just, you know, wanted the night to be over.”

Ashley stated that she went home to her parents' house soon after the breakup because her summer classes had ended. Ashley stated that she "thought [she] could just forget about the whole thing." Ashley stated that she "definitely wasn't able to forget it," but she did think about it a lot and "got some perspective about it all." Ashley stated that after she came back to school for the fall semester and saw Nick, she "knew [she] had to do something" and decided to report what had happened.

Nick's Account

Nick stated that he stayed the night with Ashley, but in the morning he caught her deleting the pictures from his phone while he was out of the room. Nick stated that Ashley was "super paranoid" about him and other girls and would often look at his phone to "check up on him." Nick stated that they had fought about it so many times and he "just couldn't take it anymore." Nick stated that they fought about the pictures and her looking at his phone and her body issues. Nick stated that he "finally told her that [he] couldn't handle all of her issues and [he] wanted to break up." Nick stated that she started crying and apologizing, but he "told her it was over." Nick stated that he has seen Ashley a handful of times around campus and once when they met to return each other's belongings.

Lauren's Account

Lauren stated that she saw Ashley the day after they had been at Nick's apartment. Lauren stated that she could tell that Ashley had been crying, so she asked what was wrong. Lauren stated that Ashley told her that she and Nick had broken up, but she "didn't go into the details." When asked if they talked about anything else during that encounter, Lauren stated, "We didn't talk long. Ashley said she wasn't feeling well, she was still recovering from the night before, so she was going to go take a nap."

2020 Title IX/VAWA Investigator Training

Handout 6

Excerpts from Party Response Statements

Excerpt from Ashley's Response to the Investigation Report

Nick's claim that he was trying to stop the other guys from looking at the pictures of me is not at all believable. He was sitting in a chair a few feet away from the other guys. It is obvious from everyone's testimony that the only reason the guys stopped looking at the pictures was because I walked in the room.

I was sexually assaulted that night. I didn't even have capacity to consent to any of it because I was too intoxicated. Plus, I gave no words or actions that indicated that I wanted to have sex with Nick that night. In fact, I said I wasn't in the mood and told him to stop when he tried to touch me. And I only ended up going along with it in the end because Nick wouldn't take no for an answer.

Excerpt from Nick's Response to the Investigation Report

The investigator interviewed my current girlfriend, but didn't mention a word from her interview in the report. Her testimony should have been included.

I feel so bad that those guys saw the pictures of Ashley that she sent me. If I could go back, I wouldn't have said anything to the guys about them. But I never showed the guys the pictures. Tyler took my phone from me. It wasn't something that I wanted to happen.

Ashley did not even mention during her first interview that she performed oral sex on me. That shows that she has no credibility. How can she claim that she "wasn't in the mood" to have sex when she initiated oral sex right before intercourse? Maybe she was worried that if she admitted to the oral sex it would show that she *was* an active participant in our sexual encounter that night and that she *did* consent to having sex. Or maybe she didn't want to mention it because she knew that she never got consent from me for the oral sex. Whatever her reason, it is clear that she has not been forthcoming during this investigation. Her account should not be believed.

Ashley is alleging that she felt like she had to have sex with me, but I never pressured her into anything. All I was trying to do was to make her feel better and not be so self-conscious. The only reason I even wanted to have sex that night was because she was feeling so bad about herself. I wanted to reassure her.



Training for Title IX/VAWA Investigators

WEB RESOURCES

Title IX Final Regulation:

- **Department of Education Fact Sheet:**
<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-fact-sheet.pdf>
- **Department of Education Final Rule Overview:**
<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf>
- **Department of Education Summary of Major Provisions:**
<https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>
- **Final Regulation:** <https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf>

January 2001, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties:

<https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>

January 25, 2006 Dear Colleague Letter on Sexual Harassment:

<https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>

April 24, 2015 Department of Education Guidance on Title IX Coordinators:

- **Dear Colleague Letter on Title IX Coordinators:**
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>
- **Letter to Title IX Coordinators:** <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-letter-201504.pdf>
- **Title IX Resource Guide:** <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>

Final Regulations for the Violence Against Women Act amendments to the Clery Act (October 20, 2014):

<http://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf>

Handbook for Campus Safety and Security Reporting:

<http://www2.ed.gov/admins/lead/safety/handbook.pdf>

September 22, 2017 Department of Education Guidance:

- **Dear Colleague Letter:** https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf?utm_name
- **Q & A on Campus Sexual Misconduct:**
https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf?utm_name

April 4, 2011 Dear Colleague Letter on Sexual Violence (withdrawn):

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

Questions and Answers on Title IX & Sexual Violence (2014) (withdrawn):

<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

**Building Partnerships among Law Enforcement Agencies, Colleges and Universities:
Developing a Memorandum of Understanding to Prevent and Respond Effectively to Sexual
Assaults at Colleges and Universities:**

https://obamawhitehouse.archives.gov/sites/default/files/docs/white_house_task_force_law_enforcement_mou.pdf

Not Alone: <https://obamawhitehouse.archives.gov/1is2many/notalone>

It's On Us Campaign:

<http://www.itsonus.org/>