



TITLE IX/VAWA HEARING PANEL TRAINING

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TELL US ABOUT YOURSELF

How many hearings of Title IX matters have you participated in?

1. Not applicable (I have a different role in the process)
2. None
3. Less than 10
4. 10 or more

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AGENDA

- Introduction and Legal Landscape
- Overview of Process
- Working with the Parties
- Intake and Investigation Process
- Hearing/Decision-Making Process
 - Legal requirements
 - Stages of adjudication process
 1. Prepare for hearing
 2. Conduct hearing
 3. Deliberate and make determination
 4. Determine sanctions and remedies
 5. Draft notice of determination
 - Case study
- Appeals



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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/Hearing Panel
- Complainant/Reporting Party/accuser/victim/survivor
- Respondent/Responding Party/accused/alleged perpetrator



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TERMINOLOGY 

- Complainant
 - An individual who is alleged to be the victim of conduct that could constitute sexual harassment
- Respondent
 - An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

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SEXUAL VIOLENCE STATISTICS 



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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



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THE LEGAL LANDSCAPE 



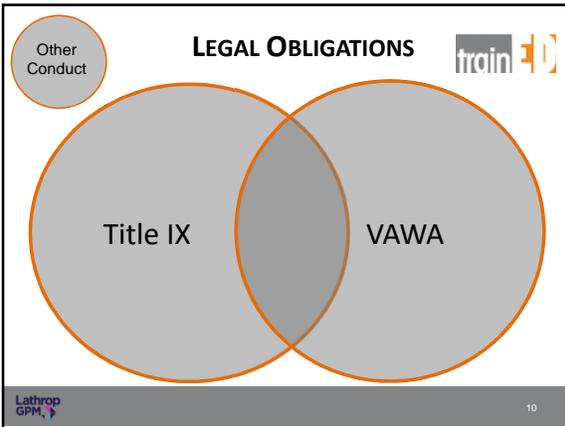
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SESSION OVERVIEW 

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



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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

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WHO MUST COMPLY WITH TITLE IX?

Institutions that receive federal funds

- Students
- Employees
- Third Parties
 - Visitors
 - Vendors

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**DISCRIMINATION
"ON THE BASIS OF SEX"**



- Includes:
 - Sexual harassment
 - Differential treatment



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**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



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**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

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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

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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)

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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 

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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



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OCR'S ENFORCEMENT AND GUIDANCE

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



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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



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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

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DEFINING SEXUAL MISCONDUCT 



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TITLE IX—SEXUAL HARASSMENT 

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



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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



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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



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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



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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

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TITLE IX—SEXUAL HARASSMENT 

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



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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

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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



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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

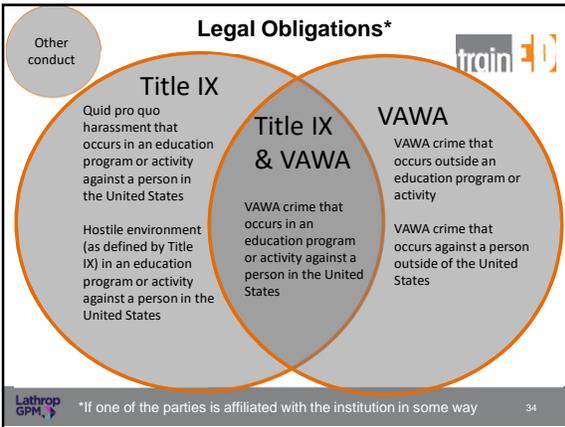
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TITLE IX—SEXUAL HARASSMENT 

- Male/Female
- Female/Male
- Female/Female
- Male/Male
- Gender Identity



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- INTERACTION WITH OTHER LAWS**
- FERPA: Family Educational Rights and Privacy Act
 - Disability accommodation laws
 - State mandatory reporting laws
 - Title VII/State anti-discrimination laws
 - State student safety laws
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- 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
 - 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
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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



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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)

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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

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TRAINING REQUIREMENTS 

- 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
- Decision-makers must also receive training on
 - Technology to be used at a live hearing
 - Issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant

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Q & A 

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OVERVIEW OF PROCESS 

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- ### 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
- 
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- ### 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.)
- 
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RESPONDING TO A REPORT 

- Response must treat complainant and respondent equitably by
 - Providing written explanation of rights and options to complainant 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

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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

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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)



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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

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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

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RESPONDING TO A REPORT




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

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RESPONDING TO A FORMAL COMPLAINT

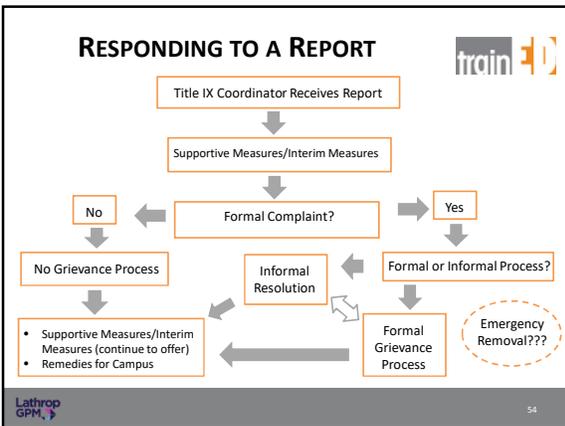
- Formal complaint
 - VAWA: No specific requirements
 - Title IX:
 - Document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment
 - At the time of filing a formal 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

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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

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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



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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



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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

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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

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**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

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**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



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**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
- Allow advisor of choice

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**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)

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**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)



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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

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FORMAL GRIEVANCE PROCESS 

- Policy must:
 - Describe range of possible sanctions and remedies or list the possible sanctions and remedies (VAWA requires a list of all possible sanctions)
 - Describe range of supportive measures available to both parties
 - Describe appeal bases and procedures

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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

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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



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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

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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

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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

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RECORDKEEPING

- Reports and complaints
- Notice to respondent of complaint
- Communications with parties and other correspondence relating to investigation (including documentation of verbal in-person/phone conversations)
- No-contact orders and other interim measures (offered and whether accepted or declined) for both parties
- 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
- Adjudicator or hearing panel notes
- Notice of determination
- Appeal records
- Names of all involved in process (parties, witnesses, investigators, adjudicators, appeal officers)
- Training records – relating to investigators, adjudicators, appeal officers, and other involved officials, as well as training received by parties
- Records relating to complaints of retaliation or violation of interim measures or sanctions
- Start and stop dates of investigation suspension
- Records relating to other complaints involving same parties

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Q & A



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WORKING WITH THE PARTIES



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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

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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

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SESSION OVERVIEW



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



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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

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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"



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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



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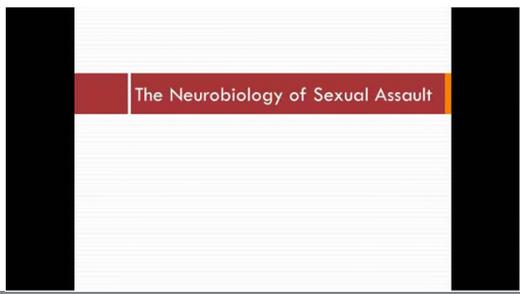
COMMON VICTIM RESPONSES

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



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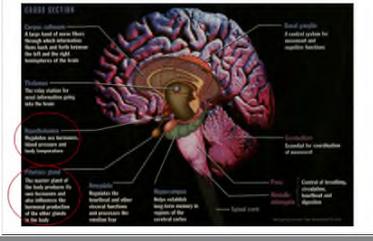
NEUROBIOLOGY OF SEXUAL ASSAULT



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NEUROBIOLOGY OF SEXUAL ASSAULT 

Brain Regions Impacted by Trauma



THIRD VENTRICLE
A large fluid-filled space that houses the pineal gland. It is located between the two halves of the brain.

Basal ganglia
A group of structures located deep within the brain that are involved in movement and learning.

Thalamus
A large, egg-shaped mass of gray matter situated above the brainstem and below the cerebral cortex.

Hypothalamus
A small region of the brain that is responsible for regulating the body's internal state, including hunger, thirst, and body temperature.

Brainstem
The part of the brain that is responsible for controlling basic life functions, such as breathing, heart rate, and blood pressure.

Midbrain
The middle part of the brainstem, which is responsible for processing sensory information and controlling movement.

Pons
The part of the brainstem that is responsible for controlling breathing and heart rate.

Medulla oblongata
The lower part of the brainstem, which is responsible for controlling basic life functions, such as breathing, heart rate, and blood pressure.

Spinal cord
A long, thin, tube-like structure that extends from the brainstem down the length of the spine. It is responsible for transmitting signals between the brain and the rest of the body.

Control of breathing, heart rate, and blood pressure

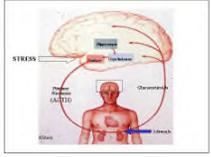
Lathrop GPM  82

NEUROBIOLOGY OF SEXUAL ASSAULT 

Brain-Body Regions Impacted by Trauma

HPA Axis

Balances body following stress by releasing of various hormones/chemicals



STRESS → Hypothalamus → Pituitary → Adrenal Glands → Cortisol → Bloodstream

STRESS → Hypothalamus → Pituitary → Adrenal Glands → Cortisol → Bloodstream

STRESS → Hypothalamus → Pituitary → Adrenal Glands → Cortisol → Bloodstream

SOURCE: Seethalakshmi et al., 2005

Lathrop GPM  83

NEUROBIOLOGY OF SEXUAL ASSAULT 

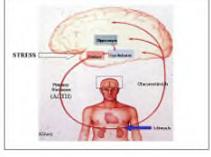
Brain-Body Regions Impacted by Trauma

Catecholamines: Fight or flight response

Cortisol: Energy available

Opioids: Prevent pain

Oxytocin: Promotes good feelings



STRESS → Hypothalamus → Pituitary → Adrenal Glands → Cortisol → Bloodstream

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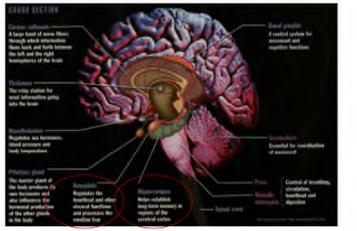
SOURCE: Seethalakshmi et al., 2005

Lathrop GPM  84

NEUROBIOLOGY OF SEXUAL ASSAULT



Brain Regions Impacted by Trauma



Hippocampus: A large bundle of nerve fibers that carries information between the brain and body between the left and right hemispheres of the brain.

Amygdala: The almond-shaped mass of gray matter that is part of the limbic system.

Hypothalamus: A small region of the brain that regulates body temperature, hunger, thirst, and other basic drives.

Pituitary: A pea-sized gland that sits just below the hypothalamus and secretes hormones that control the activity of other glands in the body.

Pineal: A small, pinecone-shaped gland that sits behind the hypothalamus and secretes melatonin, a hormone that regulates the sleep-wake cycle.

Hypothalamus: A small region of the brain that regulates body temperature, hunger, thirst, and other basic drives.

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Lathrop GPM,  85

NEUROBIOLOGY OF SEXUAL ASSAULT



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: Sutherland et al., 2005

Lathrop GPM,  86

NEUROBIOLOGY OF SEXUAL ASSAULT



Like These . . .

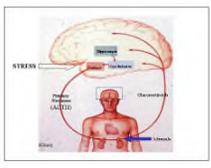
Catecholamines: Fight or flight response

Cortisol: Energy available

Opioids: Prevent pain

Oxytocin: Promotes good feelings

THESE HORMONES IMPAIR MEMORY CONSOLIDATION



SOURCE: Sutherland et al., 2005

Lathrop GPM,  87

NEUROBIOLOGY OF SEXUAL ASSAULT 

What Happens During A Sexual Assault



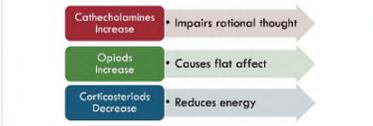
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graph LR; A[Amygdala Detects Threat] --> B[Activates Hypothalamus]; B --> C[HPA Axis Kicks In Hormonal Flood];
```

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

Lathrop GPM,  88

NEUROBIOLOGY OF SEXUAL ASSAULT 

What Happens During A Sexual Assault



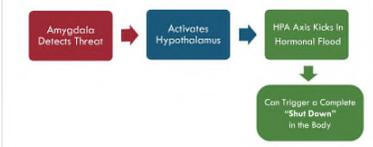
Cathecholamines Increase	• Impairs rational thought
Opioids Increase	• Causes flat affect
Corticosteroids Decrease	• Reduces energy

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

Lathrop GPM,  89

NEUROBIOLOGY OF SEXUAL ASSAULT 

What Happens During A Sexual Assault



```
graph TD; A[Amygdala Detects Threat] --> B[Activates Hypothalamus]; B --> C[HPA Axis Kicks In Hormonal Flood]; C --> D[Can Trigger a Complete "Shut Down" in the Body];
```

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

Lathrop GPM,  90

NEUROBIOLOGY OF SEXUAL ASSAULT



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: Foa et al., 2007; Gidycz et al., 1993; Hirsch et al., 2005

Lathrop GPM,  91

COMMON BEHAVIORS DURING ASSAULT



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

Lathrop GPM,  92

MEMORY



What Happens During A Sexual Assault



Lathrop GPM,  93

MEMORY



What Happens During A Sexual Assault



```
graph TD; A[Increased Stress Hormones] --> B[Impaired Functioning in Hippocampus]; B --> C[Memories Fragmented]; C --> D[Memory Recall Can Be Slow & Difficult]; D --> E[Events of the Assault CAN Be Recalled Accurately];
```

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

SOURCES: Koo et al., 1993, 1996; Reissdörfer et al., 2009; Rubin et al., 2008

Lathrop GPM94

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, posing 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.' He, he kept coming at me."

Lathrop GPM95

MEMORY



Case Study: Memory Fragmentation

"It was classic good-cop / bad-cop. He stormed off and another detective sat down next to me. He offered me a cup of coffee.

Coffee? OK fine. How do I take it? WHAT? Why does he care how I take my coffee?

Well, he did.

He made me coffee. He gave me time to just sit, collect my thoughts."

Lathrop GPM96

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."

Lathrop GPM,  97

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

Lathrop GPM,  98

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

Lathrop GPM,  99

IMPACT OF TRAUMA ON MEMORY 



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

Lathrop GPM,  100

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?

Lathrop GPM,  101

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



Lathrop GPM,  102

**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

Lathrop GPM,  103

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

Lathrop GPM,  104

SERVING IMPARTIALLY 

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

Lathrop GPM,  105

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



Lathrop GPM,  106

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



Lathrop GPM,  107

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



Lathrop GPM,  108

**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

Lathrop GPM, > 109

**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

Lathrop GPM, > 110

**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

Lathrop GPM, > 111

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

Lathrop GPM,  112

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.

Lathrop GPM,  113



Q & A



Lathrop GPM, 

train 

INTAKE AND INVESTIGATION PROCESS



Lathrop GPM,  115

train 

OBLIGATIONS OF THE INSTITUTION UPON RECEIVING REPORT

- Assess immediate safety and well-being for parties 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)

Lathrop GPM,  116

train 

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



Lathrop GPM,  117

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

Lathrop GPM,  118

PRE-INVESTIGATION OBLIGATIONS OF THE INSTITUTION 

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

Lathrop GPM,  119

ROLE OF INVESTIGATOR 

- Identify factual issues
- Give parties opportunity for input
- Compile investigation materials for hearing panel and parties 
- Credibility and/or make recommendations?
 - Can offer recommendations regarding responsibility but ultimate determination must be made by separate adjudicator (Title IX)

Lathrop GPM,  120

INVESTIGATION—PROVIDING INFORMATION TO THE PARTIES 

- 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 that fairly summarizes relevant evidence – copy to parties and advisors required
 - Opportunity to submit written response to each

Lathrop GPM,  121

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



Lathrop GPM,  122

**HEARING/
DECISION-MAKING PROCESS** 



Lathrop GPM,  123

SESSION OVERVIEW 

- Legal Requirements
- Stages of Adjudication Process
 - Stage 1: Prepare for hearing
 - Stage 2: Conduct hearing
 - Stage 3: Deliberate and make determination
 - Stage 4: Determine sanctions and remedies
 - Stage 5: Draft notice of determination
- Case Study



Lathrop GPM,  124

LEGAL REQUIREMENTS 



Lathrop GPM,  125

LEGAL REQUIREMENTS 

- 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," including those challenging credibility
 - If party does not have advisor, institution must provide one for cross-examination
 - If a party or witness does not submit to cross-examination at hearing, their statements cannot be considered by decision-maker(s)



Lathrop GPM,  126

LEGAL REQUIREMENTS—ADVISORS 

- Cross-examination must be conducted directly, orally, and in real time by the party’s advisor, never by the party personally
- Institution can otherwise place restrictions on advisors’ participation in the proceedings



Lathrop GPM,  127

**LEGAL REQUIREMENTS—
SCHOOL-APPOINTED ADVISORS** 

- Can request that the parties inform school in advance whether they have an advisor
 - If party does not have an advisor at the hearing, still required to provide an advisor even if party stated that they would have one
 - May want to have an advisor for each party on standby so that delaying the hearing is not necessary
- School-appointed advisor
 - Role is limited to relaying a party’s questions
 - No particular skills, qualifications, or training is required
 - Does not need to be neutral or avoid conflicts of interest
 - If a party refuses to work with an assigned advisor – the party forfeits his or her right to cross-examination

Lathrop GPM,  128

**LEGAL REQUIREMENTS—
ATTENDANCE AT HEARING** 

- Parties may be accompanied only by their advisors and other persons for reasons “required by law”
 - Institution must keep confidential the complainant, respondent, and any witness except as may be permitted by FERPA, as required by law, or to carry out the grievance process
 - Limits institution’s ability to authorize the parties to be accompanied to the hearing by individuals other than their advisors
 - A person assisting a party with a disability, or a language interpreter, may attend because presence is required by law and/or necessary to conduct the hearing

Lathrop GPM,  129

**LEGAL REQUIREMENTS—
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 hearing panel)
 - 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.)

Lathrop GPM,  130

**LEGAL REQUIREMENTS—
CROSS-EXAMINATION** 

- Party or witness who does not appear at the hearing
 - Advisor may conduct cross-examination on behalf of party even if party is not present
 - If one party does something to wrongfully procure absence of a party or witness, that is likely retaliation and the school must remedy
 - 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

Lathrop GPM,  131

**LEGAL REQUIREMENTS—
RELEVANCY DETERMINATIONS** 

- Hearing panel 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

Lathrop GPM,  132

**LEGAL REQUIREMENTS—
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

Lathrop GPM, > 133

**LEGAL REQUIREMENTS—
OTHER PROCEDURAL RULES**



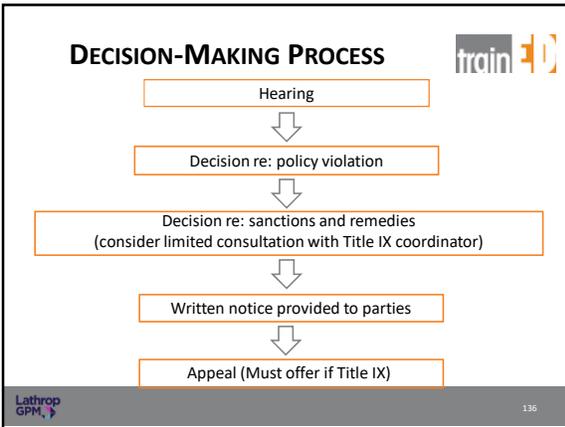
- Some procedural rules are prohibited
 - Cannot prohibit a party from conferring with his or her advisor during the hearing
 - Likely can prohibit conferring when a question is pending
 - Could also discourage from conferring when a question is pending by warning that such conduct will be considered when weighing the party's credibility
 - 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

Lathrop GPM, > 134

STAGES OF ADJUDICATION PROCESS



Lathrop GPM, > 135



- ### DECISION-MAKING PROCESS
- Process may be different depending on whether respondent is a student or an employee
 - Process may be different depending on whether Title IX applies and whether your institution uses separate processes for Title IX and non-Title IX
- The slide includes the 'train' logo and 'Lathrop GPM' branding.

- ### STAGES OF ADJUDICATION PROCESS
- Stage 1: Prepare for hearing
 - Stage 2: Conduct hearing
 - Stage 3: Deliberate and make determination
 - Stage 4: Determine sanctions and remedies
 - Stage 5: Draft notice of determination
-
- The slide includes the 'train' logo and 'Lathrop GPM' branding.



**STAGE ONE:
PREPARE FOR HEARING**





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**STAGE ONE: PREPARE FOR HEARING—
DECISION-MAKER(S)** 

- May have single decision-maker or a panel of decision-makers
- If a panel of decision-makers, may appoint one decision-maker to make relevancy determinations at the hearing
- May appoint Title IX Coordinator or another individual who is not a decision-maker to enforce procedural rules at the hearing
 - Decision-maker(s) must still determine relevancy issues

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STAGE ONE: PREPARE FOR HEARING 

- Communication with Others
 - Limit communication with Title IX Coordinator to procedural issues
 - Do not communicate with investigator outside of hearing
 - Do not communicate with parties, witnesses, or advisors outside of hearing

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STAGE ONE: PREPARE FOR HEARING 

- Determine hearing format and arrange technology
 - May conduct with all parties physically present in the same location
 - At the request of either party, institution must provide for live hearing to occur with the parties located in separate rooms with technology enabling the hearing panel and parties to simultaneously see and hear the party or witness answering questions
 - Witness cannot demand to be in a separate room, unless that witness alleges they are also a victim of respondent (institution can permit witness to be in a separate room upon request)
 - May conduct virtually (for all parties, witnesses, and other participants), with technology enabling participants simultaneously to see and hear each other
 - Video is required; phone is insufficient

Lathrop GPM,  142

STATE ONE: PREPARE FOR HEARING — 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

Lathrop GPM,  143

STAGE ONE: PREPARE FOR HEARING 

- Pre-hearing meeting with parties
 - Best for Title IX Coordinator to handle
 - Discuss procedure for hearing
 - Discuss parameters for evidence to be presented
 - Discuss role of advisors



Lathrop GPM,  144

STAGE ONE: PREPARE FOR HEARING 

- Hearing panel reviews adjudication file
 - Ensure that parties have access to same information as panel
- Analyze issues for hearing (work together if multiple decision-makers)
 - Identify ultimate questions that will need to be decided
 - Review institution's policy and how it defines relevant terms
 - Determine whether any additional information is needed to make the decision
 - Identify witnesses to ask if additional information is needed
 - Determine which witnesses hearing panel anticipates needing to rely on to make its determination
 - Consider questions or topics that may come up and any anticipated relevancy issues

Lathrop GPM,  145

STAGE ONE: PREPARE FOR HEARING 

- Determine logistics for hearing
 - Determine who will chair the hearing
 - Determine who provides list of witnesses requested by hearing panel to parties
 - Determine who will request that witnesses make themselves available for the hearing (including those identified by hearing panel and parties)
 - Determine whether investigator will be called as a witness
 - Determine order of witnesses
 - Ensure that all “directly related evidence” provided to parties during investigation is available for use at the hearing
 - Set up technology needed for hearing

Lathrop GPM,  146

STAGE ONE: PREPARE FOR HEARING 

- Prepare script of opening remarks
 - Provide general explanation of reason for hearing
 - Explain hearing panel's role in the complaint process
 - Confirm hearing panel has reviewed investigation report
 - Explain hearing process to parties:
 - Process for hearing panel and advisors to ask questions
 - Advise party and advisor on advisor's role
 - Parameters for permitted questions
 - Discuss what type of evidence may be considered (relevant)
 - Instruct parties they do not need to repeat information included in the investigation report
 - Process for presenting arguments
 - Time limitations



Lathrop GPM,  147

STAGE ONE: PREPARE FOR HEARING 

- Prepare script to use before each party/witness testifies
 - Inform parties and witness(es) of recording and its use
 - Explain possible uses of party's/witness's statements
 - Instruct parties/witnesses they do not need to repeat information included in the investigation report
 - Explain that the hearing panel may need to ask difficult, detailed questions
 - Ask parties not to read into questions
 - Tell parties/witness if question unclear, let hearing panel know
 - Tell parties/witness okay to ask for break and pre-determine breaks
 - Instruct witness(es) regarding confidentiality
 - Assure/warn parties/witness(es) regarding policy prohibiting retaliation
 - Advise parties/witness(es) on alcohol or other policy waiver
 - Obtain commitment to tell truth

Lathrop GPM,  148

STAGE ONE: PREPARE FOR HEARING 

- Prepare script to use prior to dismissing each party/witness who testifies
 - Ask parties if any more questions for this witness
 - Remind witness of instructions regarding confidentiality
 - Remind regarding policy prohibiting retaliation

Lathrop GPM,  149

STAGE ONE: PREPARE FOR HEARING 

- Prepare script of closing remarks
 - Remind regarding policy prohibiting retaliation
 - Explain that questions related to the process or resources should be directed to the Title IX Coordinator

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STAGE ONE: PREPARE FOR HEARING 

- Consider reviewing redacted excerpts of other hearings as part of training and preparation for hearing
- Consider holding a mock hearing to practice procedures and maintaining control during testimony and questioning

Lathrop GPM,  151

CASE STUDY 



Review complaint and notice(s) of allegations

Lathrop GPM,  152

CASE STUDY 

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

Lathrop GPM,  153

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.

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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 apartment in the University's Pine Tree apartment complex, 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.

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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.

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CASE STUDY

Review relevant policy definitions

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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, when such conduct occurs within an education program or activity and against a person in the United States.

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.

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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).

Non-Title IX Sexual Harassment does not include conduct covered under the definition of Title IX Sexual Harassment.

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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.

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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.

Lathrop GPM,  161

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.

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**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.

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**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.

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**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.

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trainED



CASE STUDY

Investigation Report:
Summary of Facts Gathered

Lathrop GPM, P.C.

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CASE STUDY—INVESTIGATION REPORT trainED

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.

Lathrop GPM, P.C.

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CASE STUDY—INVESTIGATION REPORT trainED

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.

Lathrop GPM, P.C.

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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?”

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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 apartment in the University’s Pine Tree apartment complex. 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.

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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.

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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.

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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.

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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.

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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.

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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.

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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."

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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.

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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.

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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.

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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.

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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."

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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.

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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.

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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.”

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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.”

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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."

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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] 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.

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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 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."

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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.”

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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.”

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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?” When asked if he engaged in any words or overt actions that may have indicated to Ashley that he consented to the oral sex, Nick stated “No, nothing; she just started doing it.” 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.

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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.”

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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 told of Ashley’s account that Nick initiated sexual intercourse, Nick stated “That might be right, I don’t really remember exactly how it started. It just progressed to that.” 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.”

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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, like, had her arms around me, she was kissing me, and she was, you know, thrusting her hips.”

Lathrop GPM,  195

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.

Lathrop GPM,  196

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.

Lathrop GPM,  197

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.

Lathrop GPM,  198

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.

Lathrop GPM,  199

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."

Lathrop GPM,  200





CASE STUDY

Party Response Statements

Lathrop GPM,  201

CASE STUDY: PARTY RESPONSE STATEMENTS 

Ashley's Response
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.

Lathrop GPM,  202

CASE STUDY: PARTY RESPONSE STATEMENTS 

Nick's Response
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.

Lathrop GPM,  203

CASE STUDY: PARTY RESPONSE STATEMENTS 

Nick's Response (cont.)
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.

Lathrop GPM,  204

CASE STUDY: PARTY RESPONSE STATEMENTS 

Nick's Response (cont.)

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.

Lathrop GPM,  205

CASE STUDY  

Review adjudication file and determine which witnesses should be available for the hearing

Lathrop GPM,  206

STAGE TWO: CONDUCT HEARING 



Lathrop GPM,  207

STAGE TWO: CONDUCT HEARING 

- Review script of opening remarks
 - Provide general explanation of reason for hearing
 - Explain hearing panel's role in the complaint process
 - Confirm hearing panel has reviewed investigation report
 - Explain hearing process to parties:
 - Process for hearing panel and advisors to ask questions
 - Advise party and advisor on advisor's role
 - Parameters for permitted questions
 - Discuss what type of evidence may be considered (relevant)
 - Instruct parties they do not need to repeat information included in the investigation report
 - Process for presenting arguments
 - Time limitations



Lathrop GPM  208

STAGE TWO: CONDUCT HEARING 

- Review script to use before each party/witness testifies
 - Inform parties and witness(es) of recording and its use
 - Explain possible uses of party's/witness's statements
 - Instruct parties/witnesses they do not need to repeat information included in the investigation report
 - Explain that the hearing panel may need to ask difficult, detailed questions
 - Ask parties not to read into questions
 - Tell parties/witness if question unclear, let hearing panel know
 - Tell parties/witness okay to ask for break and pre-determine breaks
 - Instruct witness(es) regarding confidentiality
 - Assure/warn parties/witness(es) regarding policy prohibiting retaliation
 - Advise parties/witness(es) on alcohol or other policy waiver
 - Obtain commitment to tell truth

Lathrop GPM  209

STAGE TWO: CONDUCT HEARING 

- Review script to use prior to dismissing each party/witness who testifies
 - Ask parties if any more questions for this witness
 - Remind witness of instructions regarding confidentiality
 - Remind regarding policy prohibiting retaliation

Lathrop GPM  210

STAGE TWO: CONDUCT HEARING 

- Allow parties and witnesses to present oral testimony, written statements, and/or relevant documents, records, or exhibits
- Provide opportunity for cross-examination
- Hearing panel asks questions of parties and witnesses as needed
- Follow your procedures
 - Opening and closing statements, if any

Lathrop GPM, > 211

STAGE TWO: CONDUCT HEARING 

- Hearing panel questioning of parties and witnesses
 - Ask clarifying questions as needed
 - Limit questions to those needed to make your decision (avoid questions out of curiosity)
 - Distinguish between personal knowledge and hearsay
 - Review checklist of issues – confirm addressed

Lathrop GPM, > 212

STAGE TWO: CONDUCT HEARING 

- 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
- Adjudicators should not allow questions and should not consider any testimony or evidence regarding complainant’s sexual history unless exception is met

Lathrop GPM, > 213

STAGE TWO: CONDUCT HEARING 

- Instruct parties and witnesses to pause after each question to allow time for relevancy determination
- Potential reasons to exclude a question:
 - Redundant
 - Harassing
 - Prior sexual history without exception
 - Irrelevant
- Provide reasoning when excluding a question
- Exclude questions with caution
- Recommendation: allow advisors to briefly articulate why a question is relevant or not relevant

Lathrop GPM,  214

STAGE TWO: CONDUCT HEARING 

- You must provide an opportunity for the parties to cross-examine everyone whose statements you will rely on in your decision
- If a party requests to cross-examine a particular party or witness and that individual does not appear live or via video conference or if a witness or party refuses to answer a question asked by an advisor, do not rely on any of that person's statements

Lathrop GPM,  215

STAGE TWO: CONDUCT HEARING 

- Review script of closing remarks
 - Remind regarding policy prohibiting retaliation
 - Explain that questions related to the process or resources should be directed to the Title IX Coordinator

Lathrop GPM,  216

STAGE TWO: CONDUCT HEARING 

- Wait to make final decision on responsibility and sanctions (rather than making the decision immediately after hearing)
 - Notice must include explanation of how information and evidence was weighed and how it supports the result and sanctions

Lathrop GPM,  217



CASE STUDY
Conduct Hearing

Lathrop GPM,  218

CASE STUDY 

- You and the other members of the hearing panel determine that the following individuals should be available for the hearing: Ashley, Nick, Tyler, Jason, Drew, Amanda, and Lauren.
- You inform the Title IX Coordinator of your decision regarding witnesses.

Lathrop GPM,  219

CASE STUDY 

- Prior to the hearing, hearing Nick submits his list of witnesses for the hearing. He would like to call his current girlfriend because she will be able to “vouch that he would never sexually assault someone.” The investigator interviewed Nick’s girlfriend, but did not include any information from that interview in the investigation report.
- Do you allow the witness?

Lathrop GPM,  220

CASE STUDY 

- Ashley also submits an additional witness. She wants to call her friend from her hometown. She says that she had a text message conversation with this friend the day after the alleged conduct. She says that she told her friend all about what happened. Ashley did not suggest this witness during the investigation.
- Do you allow the witness?

Lathrop GPM,  221

CASE STUDY 

- Nick has an attorney advisor.
- Ashley has a school-appointed advisor. Three days before the hearing, Ashley finds out that her mom tested positive for COVID-19. Because Ashley was with her mom all weekend, she needs to self-quarantine for two weeks. She quarantines at her parents’ house, which is four hours away from campus. She told the Title IX Coordinator that she does not want to delay the hearing; she wants to get it over with. But she wants to know how it will work with her advisor.
- How will Ashley and her advisor communicate during the hearing?
- How can Ashley give her advisor questions to read?

Lathrop GPM,  222

CASE STUDY 

- The hearing panel heard from all of the witnesses in the investigation report, except Drew (Tyler, Jason, Amanda, Lauren). Their testimony was generally consistent with the accounts they provided to the investigator and no additional information was provided, except that Jason stated “Ashley really did seem pretty drunk when she was at their apartment that night. She was getting loud and weird and was, like, tripping over stuff.”

Lathrop GPM,  223

CASE STUDY 

- The hearing panel also heard from Nick’s current girlfriend, who testified that Nick is a great guy and she could never imagine him sexually assaulting anyone.

Lathrop GPM,  224

CASE STUDY 

- When you allow the parties to give a closing statement, Nick’s advisor starts giving the statement.
- How do you respond?

Lathrop GPM,  225

CASE STUDY 

- Drew did not respond to the Title IX Coordinator’s messages during the hearing.
- Do you attempt to schedule another hearing in order to provide an opportunity to cross-examine Drew?

Lathrop GPM,  226

CASE STUDY 

- Drew informs the Title IX Coordinator that he is not willing to participate in the hearing.
- How does that impact the decision-making process?

Lathrop GPM,  227

STAGE THREE: DELIBERATE AND MAKE DETERMINATION





Lathrop GPM,  228

STAGE THREE: DELIBERATE AND MAKE DETERMINATION 

- 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



Lathrop GPM,  229

STAGE THREE: DELIBERATE AND MAKE DETERMINATION 

- Evidentiary issues (cont.)
 - 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



Lathrop GPM,  230

STAGE THREE: DELIBERATE AND MAKE DETERMINATION 

- Evidentiary issues (cont.):
 - 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)



Lathrop GPM,  231

STAGE THREE: DELIBERATE AND MAKE DETERMINATION 

■ 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?



Lathrop GPM,  232

STAGE THREE: DELIBERATE AND MAKE DETERMINATION 

■ Consider all relevant evidence, including inculpatory and exculpatory evidence

- Inculpatory: evidence which tends to establish that respondent is responsible for a policy violation
- Exculpatory: evidence which tends to establish that respondent is not responsible for a policy violation

Lathrop GPM,  233

STAGE THREE: DELIBERATE AND MAKE DETERMINATION 

■ Dealing with inculpatory and 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?

Lathrop GPM,  234

STAGE THREE: DELIBERATE AND MAKE DETERMINATION 

- Judging credibility based on demeanor
 - Remember trauma-informed training
 - Parties and witnesses may be nervous or uncomfortable
 - Parties and witnesses may be defensive, especially when subjected to cross-examination
 - Focus on evidence presented
 - What evidence is consistent with complainant's and respondent's accounts?
 - What evidence is inconsistent with complainant's and respondent's accounts?

Lathrop GPM, > 235

STAGE THREE: DELIBERATE AND MAKE DETERMINATION 

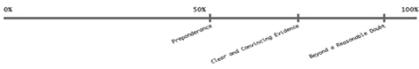


- Determination
 - Finding re: policy violation
 - Sexual contact/harassment
 - Consent/unwelcomed
 - Sanctions
 - Remedies (consult with Title IX Coordinator)
 - Written Notice

Lathrop GPM, > 236

STAGE THREE: DELIBERATE AND MAKE DETERMINATION 

- 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
 - Hearing panel 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 (clear and convincing)



Lathrop GPM, > 237

DETERMINATION—FINDING 

▪ Standard of proof (cont.):

- 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



Lathrop GPM,  238



CASE STUDY 

Determine Whether
a Policy Violation Occurred
and Rationale for your Decision

Lathrop GPM,  239



**STAGE FOUR: DETERMINE
SANCTIONS AND REMEDIES**



Lathrop GPM,  240

STAGE FOUR: DETERMINE SANCTIONS 

- 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 (VAWA) 
- Institution's policy must list *all* possible sanctions for sexual misconduct (VAWA; Title IX requires range or list of sanctions)
- The list of sanctions must be specific, including the type and length of suspensions and any requirements that must be met for reinstatement (VAWA)
- Sanctions must be included in notice of determination (Title IX and VAWA)

Lathrop GPM,  241

STAGE FOUR: DETERMINE SANCTIONS 

- Possible Sanctions
 - No contact order
 - Suspension or Expulsion
 - Transcript notations?
 - Disclosure to other institutions?
 - Separate disciplinary file?
 - Change in class schedule/living arrangements
 - Mandatory training/counseling
 - Limitations on access to campus facilities
 - Limitations on campus activities
 - Community service
 - Delay of degree conferral
 - Temporary or permanent revocation of degree

Lathrop GPM,  242



STAGE FOUR: DETERMINE SANCTIONS 

- Sanctions when student **not** suspended or expelled
 - Make inquiries to determine whether restrictions need to be made to:
 - living arrangements
 - class schedules
 - use of facilities
 - co-curricular activities
 - campus events
 - Allow for Title IX Coordinator or other designee to modify or clarify
 - General no contact directive → limit use of facilities to specific time
 - Consider restrictions when respondent graduates or withdraws, but complainant is still a student

Lathrop GPM,  243



STAGE FOUR: REMEDIES 

- Consider who will determine remedies
- 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

Lathrop GPM, ▶ 244

STAGE FOUR: REMEDIES 

- Remedies for complainant
 - Changing living arrangements
 - Escorts
 - Separation from respondent
 - Counseling services
 - Medical services
 - Academic support services/accommodations
 - Allowing course withdrawal without penalty
 - Reviewing disciplinary actions against complainant to determine if harassment contributed
 - Reviewing academic issues to determine if harassment contributed
 - Financial aid and/or immigration assistance



Lathrop GPM, ▶ 245

STAGE FOUR: REMEDIES 

- Remedies for broader student population in some cases:
 - Proactive measures to prevent sexual harassment and violence, such as trainings
 - Developing effective written materials to educate students on policy and resources
 - Encourage students to report
- Periodic "climate checks" and review of issues (e.g., better lighting?)
- Regulations only require a range of all protective measures for sexual misconduct in policy



Lathrop GPM, ▶ 246



CASE STUDY 

Determine Sanctions and Reasoning, Remedies for Complainant, Remedies for Community

 247



Q & A 



 248



**STAGE FIVE:
NOTICE OF DETERMINATION**



 249

SESSION OVERVIEW 

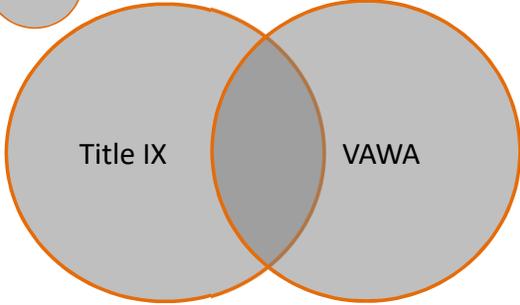
- Elements of Notice of Determination
- Addressing Inculpatory and Exculpatory Evidence
- Delivery
- Additional Required Post-Determination Notices
- Case Study



Lathrop GPM,  250

OVERVIEW 

Other Conduct



Title IX VAWA

Lathrop GPM,  251

STAGE FIVE: NOTICE OF DETERMINATION—ELEMENTS 

- Summary of complaint/allegations
- Summary of process/procedural steps
- Relevant policy provisions
- Findings of fact
- Result/decision
- Rationale for the result/decision
- Sanctions
- Rationale for the sanctions
- Whether remedies will be provided
- Appeal process



Lathrop GPM,  252

STAGE FIVE: NOTICE OF DETERMINATION—ELEMENTS 

- Summary of complaint(s)/allegations
 - Recap allegations in the complaint
 - Use neutral language
- Procedural steps since complaint 
 - Notices to the parties
 - Interviews with parties and witnesses
 - Site visits
 - Methods used to gather other evidence
 - Hearing(s) held
 - Reference policy provisions setting forth the process

Lathrop GPM, > 253

STAGE FIVE: NOTICE OF DETERMINATION—ELEMENTS 

- Relevant policy provisions
 - Definition of relevant prohibited conduct
 - Elements of the offense
 - Consider other relevant definitions (e.g., consent, incapacitation, coercion, welcomeness)
 - Burden of proof



Lathrop GPM, > 254

STAGE FIVE: NOTICE OF DETERMINATION—ELEMENTS 



- Findings of fact supporting the determination
- Result/decision
 - Conclusion regarding application of policy definition to the facts

Lathrop GPM, > 255

STAGE FIVE: NOTICE OF DETERMINATION—ELEMENTS 

- Rationale for the result as to each allegation
 - Must include explanation of how information and evidence was weighed and how it supports the result
 - Explain how standard of evidence was applied

Lathrop GPM,  256

STAGE FIVE: NOTICE OF DETERMINATION—ELEMENTS 

- Written notice should address all relevant evidence provided, including evidence that is contrary to your conclusion
 - What evidence supports your conclusion?
 - What evidence is contrary to your conclusion?
 - Why is the evidence that supports your conclusion stronger?
- Explain credibility determinations
 - Why do you find one party more credible than the other?
 - If a witness's statement is contrary to your conclusion, why do you not believe the witness?
- The reader should be able to tell that you considered all relevant evidence in making your decision

Lathrop GPM,  257

STAGE FIVE: NOTICE OF DETERMINATION—ELEMENTS 

- Sanctions (if any)
 - Provide the rationale for the sanctions
 - Build in ability for Title IX Coordinator to modify/clarify sanctions and address future right to appeal
- State whether any remedies will be provided



Lathrop GPM,  258

STAGE FIVE: NOTICE OF DETERMINATION—ELEMENTS 

- Appeal process
 - To whom appeals should be sent
 - Required format of request for appeal
 - Timing/deadline for appeal
 - Bases for appeal
 - Who will decide the appeal
 - General process



Lathrop GPM,  259

STAGE FIVE: NOTICE OF DETERMINATION—DELIVERY 

- Must be in writing
- Must be delivered simultaneously
 - Email
 - In-person meetings to deliver hard copies of written notice
- Best practice: Let parties know ahead of time when decision will be delivered



Lathrop GPM,  260

STAGE FIVE: NOTICE OF DETERMINATION—FERPA 

- FERPA Exception – compliance with requirements for disciplinary proceedings—including the inclusion of the rationale for the result and the sanctions—does not violate FERPA

Lathrop GPM,  261

STAGE FIVE: NOTICE OF DETERMINATION—IMPLEMENTATION 

- Title IX
 - Determination regarding responsibility becomes final either on the date that the recipient provides the parties the written determination of the result of the appeal (if an appeal is filed) or the date on which an appeal would no longer be considered timely (if an appeal is not filed)

Lathrop GPM,  262

STAGE FIVE: ADDITIONAL REQUIRED POST-DETERMINATION NOTICES 

- For sexual assault and VAWA crimes, your institution must provide simultaneous notice to both parties of—
 - Any change to the results that occurs prior to the time that such results become final
 - When such results become final



Lathrop GPM,  263

CASE STUDY 

Notice of Outcome



Lathrop GPM,  264

CASE STUDY – NOTICE OF OUTCOME 

Notice of Outcome Excerpt:
 Based on all the evidence in the adjudication file, the evidence presented at the hearing, and the Policy regarding Title IX Sexual Harassment, Non-Title IX Sexual Harassment, Sexual Assault, and consent, the Hearing Panel finds there is sufficient evidence to determine that it is more likely than not that the following policy violations occurred.

- Nick engaged in sexual assault as defined by the Policy by touching Ashley's breasts without consent.
- Ashley engaged in sexual assault as defined by the Policy by engaging in oral sex with Nick without his consent.

The Hearing Panel further finds insufficient evidence to determine that it is more likely than not that Nick engaged in Title IX Sexual Harassment or Non-Title IX Sexual Harassment as defined by the Policy. The Panel also finds insufficient evidence to determine that it is more likely than not that Nick engaged in Sexual Assault as defined by the Policy by engaging in sexual penetration of Ashley without her consent. Further explanation and rationale for these findings is included below.

Lathrop GPM,  265

CASE STUDY – NOTICE OF OUTCOME 

Analysis of Title IX and Non-Title IX Sexual Harassment Allegation

Ashley alleges that Nick engaged in sexual harassment in violation of the Policy by showing several of his friends topless pictures of Ashley without her consent. The Panel must determine what conduct occurred and whether that conduct constitutes either Title IX or Non-Title IX Sexual Harassment as defined by the Policy.

Title IX Sexual Harassment
 Under the Policy, Title IX Sexual Harassment includes "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" when such conduct occurs within an education program or activity and against a person in the United States. The Panel concludes that even taking Ashley's account of Nick's conduct in his apartment as true, there is insufficient evidence to determine it is more likely than not that Nick engaged in Title IX Sexual Harassment by allowing his friends to see topless pictures of Ashley. Specifically, even taking Ashley's account as true, because Ashley's account includes only one incident of Nick engaging in unwelcome conduct of a sexual nature (allowing his friends to see the photos), the panel concludes that the alleged unwelcome conduct based on sex was not pervasive. Accordingly, even taking Ashley's account of Nick's conduct in his apartment as true, the Panel finds insufficient evidence to determine that Nick's conduct was severe, pervasive, and objectively offensive as required by the definition of Title IX Sexual Harassment under the Policy and accordingly insufficient evidence to determine it is more likely than not that Nick engaged in conduct constituting Title IX Sexual Harassment as defined by the Policy.

Lathrop GPM,  266

CASE STUDY – NOTICE OF OUTCOME 

Non-Title IX Sexual Harassment
 The Panel next considers whether Nick engaged in Non-Title IX Sexual Harassment as defined by the Policy. Under the Policy, Non-Title IX Sexual Harassment includes unwelcome conduct of a sexual nature or based on sex 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. The parties agree that Ashley sent Nick topless photos of herself, that he had them on his phone, and that two of Nick's roommates and a third male student saw the pictures in Nick's apartment on the evening of July 24, 2020. The parties disagree as to how the roommates and the other male students ended up viewing the photos. Ashley's account, if true, indicates that Nick engaged in unwelcome conduct of a sexual nature by allowing those individuals to see the photos of her topless. In contrast, Nick's account, if true, indicates that Nick's roommate grabbed his phone and looked at the pictures of Ashley and that Nick attempted to get his phone back, but his friends prevented him from doing so by pushing him away and standing between him and the person holding his phone. Accordingly, Nick's account, if true, indicates that Nick himself did not engage in any unwelcome conduct of a sexual nature while in his apartment on July 24. Considering the totality of the evidence in the adjudication file and presented at the hearing, the Panel concludes there is no surrounding evidence that tips the balance of evidence sufficient to meet the preponderance of the evidence standard as to whether Nick showed his friends the photos.

Lathrop GPM,  267

CASE STUDY – NOTICE OF OUTCOME 

In coming to this conclusion, the Panel considered the accounts of witnesses who reported being present in Nick's apartment on July 24. The witness accounts of Nick's conduct vary. One of Ashley's friends stated that when she and Ashley entered the room, Nick and three other male students were huddled around Nick's phone, another friend of Ashley stated that when they entered, the three male students were looking at a phone and Nick was sitting in a chair a little ways away, one of Nick's roommates stated that the roommate took the phone from Nick and that they looked at the photos for "maybe a few seconds" before Ashley entered, and another of Nick's roommates stated that the other roommate took Nick's phone, but did not remember how long they looked at the pictures. Neither of the accounts from Nick's roommates indicate how Nick reacted when his roommate took his phone. Because the witness accounts regarding Nick's role in how his friends ended up seeing the photos of Ashley vary, the panel finds these accounts to be insufficient to alter the conclusion that there is insufficient evidence to determine it is more likely than not that Nick showed his friends the photos of Ashley.¹ Because the Panel finds insufficient evidence to determine what Nick's role was in his friends seeing the photos of Ashley, the Panel finds insufficient evidence to determine it is more likely than not that Nick engaged in unwelcome conduct of a sexual nature or based on sex. The Panel therefore finds insufficient evidence to determine that it is more likely than not that Nick engaged in conduct constituting Non-Title IX Sexual Harassment in his apartment on July 24.

¹ Another witness reported being at Nick's apartment during the alleged incident on July 24. Because that witness did not submit to cross-examination at the hearing, in this matter, the Panel did not consider that witness's statements in making this determination.

Lathrop GPM,  268

CASE STUDY – NOTICE OF OUTCOME 

Analysis of Ashley's and Nick's Sexual Assault Allegations

The Panel next analyzes whether Nick or Ashley engaged in Sexual Assault in violation of the Policy. Under the Policy, 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."² Under the Policy, it is the responsibility of the person initiating the specific sexual activity to obtain consent for that activity.

Therefore, in order to determine whether Nick engaged in sexual assault against Ashley, the panel must determine what sexual contact occurred; whether Nick initiated the sexual contact that occurred; if Nick initiated sexual contact, whether Ashley had capacity to consent to the sexual contact; if Ashley had capacity to consent to sexual contact initiated by Nick, whether Nick obtained Ashley's consent for the sexual contact; and finally, if Ashley did consent to sexual contact initiated by Nick, whether that consent was obtained through coercion. In order to determine whether Ashley engaged in sexual assault against Nick, the Panel must determine what sexual contact occurred; whether Ashley initiated the sexual contact that occurred; and if Ashley initiated the sexual contact, whether Ashley obtained Nick's consent for each sexual contact.

²Under the Policy, Sexual Assault is a form of Title IX Sexual Harassment when it occurs within the University's education program or activity. Because the alleged Sexual Assault took place in Ashley's University-owned apartment, this alleged conduct occurred within the University's education program or activity.

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Sexual Contact and Initiation

The panel first considers what sexual contact occurred. The parties agree that (1) Nick touched Ashley's breasts; (2) Ashley performed oral sex on Nick; and (3) the parties engaged in sexual intercourse. The Panel finds that each of those contacts constituted sexual contact as defined by the Policy.

The Panel next considers who initiated each of the sexual contacts that occurred. The parties agree that Nick touched Ashley's breasts, and accordingly the Panel finds sufficient evidence to determine it is more likely than not that Nick initiated that sexual contact by touching Ashley's breasts. The parties also agree that Ashley performed oral sex on Nick and accordingly the Panel finds sufficient evidence to determine it is more likely than not that Ashley initiated oral sex by beginning to perform it on Nick.

As to the sexual intercourse, Ashley reported that Nick initiated sexual penetration. In addition, when told of Ashley's account that Nick initiated sexual intercourse, Nick stated "That might be right, I don't really remember exactly how it started. It just progressed to that." Accordingly, considering both parties' accounts, the Panel finds sufficient evidence to conclude it is more likely than not that Nick initiated the sexual intercourse.

Lathrop GPM,  270

CASE STUDY – NOTICE OF OUTCOME 

Ashley's Allegations of Sexual Assault Against Nick

1. Incapacitation

The Panel next considers whether Ashley had capacity to consent to the sexual contact that Nick initiated. Ashley alleged that she did not have capacity to consent because she was too intoxicated. Under the Policy, "[a]n 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." Under the Policy, 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.

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The parties agree that Ashley drank alcohol on the night of July 24. Even taking Ashley's account as true, however, the Panel finds insufficient evidence to determine that it is more likely than not that Ashley was incapacitated as defined by the Policy. Ashley provided a detailed account of the encounter in her apartment, including what sexual contact took place, that she was mad at Nick, that Nick gave her an ultimatum and that she did not want to break up so she told him she forgave him, that she told Nick she was not in the mood when he started stroking her arm and back, that she told Nick she did not feel sexy, and that she told Nick "stop it" when he touched her breast. Although the Panel does not doubt Ashley's account that she felt "tired and woozy," Ashley's account indicates that she was able to understand the fact, nature, and extent of the sexual situation and was able to communicate decisions regarding consent, nonconsent, and the withdrawal of consent. Accordingly, based on Ashley's account, the Panel finds insufficient evidence to determine it is more likely than not that Ashley was incapacitated as defined by the Policy.

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In coming to this conclusion, the Panel considered Ashley's account of her intoxication level, including her statement that if she hadn't drank so much she could have thought more clearly and wouldn't have given in to Nick's pressuring, as well as Nick's and witness accounts related to Ashley intoxication level. Although these accounts indicate that Ashley was intoxicated on the night of July 24, Policy makes clear that "incapacitation requires more than being under the influence of drugs or alcohol." Accordingly, in light of the evidence discussed above indicating that Ashley was able to understand the fact, nature, and extent of the sexual situation and was able to communicate decisions regarding consent, nonconsent and the withdrawal of consent at the time the sexual contact with Nick occurred, the Panel finds insufficient evidence to determine that it is more likely than not that Ashley was incapacitated as defined by the Policy.

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2. Consent

The Panel next considers whether Ashley consented to the sexual contact initiated by Nick. Under the Policy, 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.”

The Panel first considers whether Ashley consented to Nick touching her breasts. Ashley’s account, if true, indicates that she did not engage in any words or overt actions indicating that she consented to Nick touching her breasts, and in fact, indicates that she verbally communicated that she did not consent to sexual contact when she told Nick she was not in the mood before he first touched her breast and told him to “stop it” before he touched her a second time. Similarly, Nick’s account, if true, does not include any words or overt actions from Ashley indicating she consented to him touching her breasts, and in fact, includes words from Ashley indicating that she did not consent when she told him “don’t” or “stop it,” before Nick continued to touch her breasts. Accordingly, based on the parties’ accounts, the Panel finds sufficient evidence to determine it is more likely than not that Ashley did not consent to Nick touching her breasts.

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In coming to this conclusion, the Panel considered Nick’s explanation that he did not think that she was saying “no” in that way,” but that she was feeling bad about herself and he tried to reassure her. Because neither party’s account includes any words or overt actions indicating that Ashley consented to Nick touching her breasts, Nick’s explanation for his interpretation of Ashley’s words does not alter the Panel’s conclusion that there is sufficient evidence to determine it is more likely than not that Ashley did not consent to Nick touching her breasts.

The Panel also considered the account of Nick’s girlfriend. At the hearing, Nick’s girlfriend stated that Nick is a great guy and she could not imagine him sexually assaulting anyone. In light of the fact that neither party’s account includes any words or overt actions from Ashley indicating that Ashley consented to Nick touching her breasts, the account from Nick’s girlfriend is insufficient to alter the Panel’s conclusion that there is sufficient evidence to conclude it is more likely than not that Ashley did not consent to Nick touching her breasts.

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The Panel next considers whether Ashley consented to sexual penetration. Ashley’s account, if true, is unclear as to whether Ashley engaged in any words or overt actions indicating she consented to Nick initiating sexual intercourse with her. In contrast, Nick’s account, if true, indicates that after Ashley performed oral sex on Nick, they started kissing again and Ashley then took off her underwear. Nick also reported that sexual intercourse between him and Ashley often happened like that and that they “didn’t have a conversation about it every time.” Accordingly, Nick’s account, if true, indicates that Ashley engaged in an overt action in removing her underwear after performing oral sex on Nick that, in light of the context of the parties’ relationship and typical sexual interactions, could be reasonably interpreted by Nick as indicating Ashley’s consent to sexual intercourse. There is no surrounding evidence that tips the balance of evidence sufficient to meet the preponderance of the evidence standard as to whether Ashley engaged in an overt action reasonably indicating she consented to engaging in sexual intercourse with Nick. Accordingly, the Panel finds insufficient evidence to determine it is more likely than not that Ashley did not consent to engaging in sexual intercourse with Nick.

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In coming to this conclusion, the Panel considered the parties' accounts of Ashley telling Nick that she was not in the mood and to stop it when he was touching her breasts. Nick reported that after he told Ashley that he loved her body and she shouldn't be insecure about it, Ashley "seemed to feel better" and "got more into it." When asked what he meant when he said Ashley "got more into it," Nick stated, "like she turned toward me and was kissing me back and stuff." When told of Nick's account that she turned toward him and was kissing him back and stuff, Ashley agreed that she was participating in some ways, saying, "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." Although as discussed above, the Panel finds sufficient evidence to determine it is more likely than not that Ashley did not consent to Nick touching her breasts, in light of Nick's account of Ashley's conduct during the rest of the encounter, including turning toward him, participating in the kissing, performing oral sex on Nick, and removing her underwear, the Panel finds that Nick's account, if true, indicates that Ashley engaged in words or overt actions reasonably indicating that she consented to the sexual intercourse. The Panel therefore finds insufficient evidence to determine it is more likely than not that Ashley did not consent to engaging in sexual intercourse with Nick.

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3. Coercion

Because Ashley alleged that Nick pressured her to engage in sexual contact, the Panel also considered whether Nick obtained Ashley's consent to the sexual intercourse through coercion. Under the Policy, "[c]onsent cannot be procured, expressly or implicitly, by use of force, intimidation, threats, or coercion, as that term is defined below." Under the Policy coercion is defined as "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." Because there is no allegation that Nick used any physical force, the Panel analyzes whether Nick threatened severely damaging consequences or pressured Ashley in such a way that would cause a reasonable person in her circumstances to fear severely damaging consequences.

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Ashley reported that Nick implied that he was going to break up with her if she would not "let the whole picture thing go." Because that "ultimatum" was related to the parties' argument about the photographs and not related to Ashley engaging in sexual contact, the Panel finds that Ashley's account of this statement, even if true, does not establish that it is more likely than not that Nick engaged in coercion. Ashley also stated that after she "made it clear that she wasn't interested, but [Nick] kept persisting, [she] sort of gave up resisting him." Ashley's account, however, does not identify any threat of severely damaging consequences or pressure rising to the level of causing a reasonable person to fear severely damaging consequences. The Policy states that "[c]oercion is more than an effort to persuade or attract another person to engage in sexual activity." Accordingly, even taking Ashley's account as true, the Panel finds insufficient evidence to determine that it is more likely than not that Nick coerced Ashley into engaging in sexual intercourse.

Lathrop GPM,  279

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In sum, the Panel finds sufficient evidence to determine it is more likely than not that Nick engaged in sexual assault of Ashley as defined by the Policy when he touched her breasts without her consent, but insufficient evidence to determine it is more likely than not that Nick engaged in sexual intercourse with Ashley without her consent.

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CASE STUDY – NOTICE OF OUTCOME 

Nick's Allegation of Sexual Assault Against Ashley

Nick alleges that Ashley performed oral sex on him without his consent. Because the Panel finds sufficient evidence to determine it is more likely than not that Ashley initiated performing oral sex on Nick, the Panel must determine whether Ashley obtained Nick's consent to engage in that sexual contact.

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When asked what words or overt actions indicated that Nick consented to her performing oral sex on him, Ashley reported, "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." Under the Policy, "[p]revious relationships or previous consent does not imply consent to future sexual acts." Accordingly, Ashley's account, if true, does not include any words or overt actions from Nick indicating that Nick consented to Ashley performing oral sex on him. Similarly, Nick reported that after kissing, 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 reported, "No, neither of us said anything; she just started doing it." Further, when asked if he engaged in any words or overt actions that may have indicated to Ashley that he consented to the oral sex, Nick stated "No, nothing; she just started doing it." Accordingly, Nick's account also does not include any words or overt actions from Nick indicating that he consented to Ashley performing oral sex on him.

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Therefore, based on the parties’ accounts, the Panel finds sufficient evidence to determine that it is more likely than not that Nick did not consent to oral sex and that Ashley engaged in conduct constituting Sexual Assault as defined by the Policy.³

³ Although as discussed above, the Panel does not doubt Ashley’s account that she was intoxicated during the sexual encounter on the night of July 24, under the Policy, the use of drugs or alcohol by the respondent is not a defense against allegations of sexual misconduct. Accordingly, because Ashley initiated the oral sex and had the responsibility to obtain Nick’s consent for that sexual contact, Ashley’s intoxication level does not impact the Panel’s determination that it is more likely than not that Ashley engaged in conduct constituting Sexual Assault as defined by the Policy.

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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

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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

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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

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Q & A 


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UPCOMING TRAININGS 

- Date TBD
 - Training for Appeal Officers
 - Informal Resolutions Training
 - Training for Adjudicators in Non-Title IX Cases
 - Trauma Informed Training for First Responders, Confidential Resources, and Campus Security

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ON DEMAND TRAININGS 

- Available on-demand:
 - Title IX/VAWA Investigator Training
 - Annual Training for NEW Title IX Coordinators and Deputy Coordinators
 - Annual Training for ADVANCED Title IX Coordinators and Deputy Coordinators
 - Title IX/VAWA Hearing Panel Training
 - Title IX Update: Final Regulations
 - Conducting a Grievance Process Under the New Title IX Regulations

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ON DEMAND TRAININGS 

- Available on-demand:
 - Trauma Informed Training for First Responders, Confidential Resources, and Campus Security
 - Making Your Sexual Misconduct Policy a 10
 - Title IX/VAWA Training for Chief Academic Officers
 - Title IX/VAWA Panel Discussion for Coaches and Athletic Directors
 - Compliance Update: New VAWA Guidance
 - Senior Leadership Training
 - Transgender Students and Employees Training
 - Minnesota Law Update: Title IX Coordinator Overview of Legal Requirements
 - Confidential Resources Training
 - Attorneys Serving as Advisors
 - Panel Discussion on Interviewing Survivors of Sexual Assault
 - Fundamentals of FERPA
 - Drafting Your Notice of Determination
 - Post-VAWA Annual Security Report Drafting
 - Additional Requirements Under Minnesota's Campus Sexual Assault Law
 - Drafting Effective and Compliant Investigation Reports
 - Title IX Coordinator Training: Duties Beyond Sexual Assault
 - Train the Trainer: Title IX/VAWA Training for Coaches and Athletic Directors
 - Complying with the NCAA Sexual Violence Policy – Part 1
 - Complying with the NCAA Sexual Violence Policy – Part 2
 - Unique Challenges in Responding to Allegations of Domestic Violence, Dating Violence, and Stalking
- Prevention programs for students & employees—customizable online modules

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2020 Title IX/VAWA Hearing Panel 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 Pine Tree 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 Hearing Panel 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 apartment in the University's Pine Tree apartment complex, 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 Hearing Panel 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 Hearing Panel 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, when such conduct occurs within an education program or activity and against a person in the United States.

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).

Non-Title IX Sexual Harassment does not include conduct covered under the definition of Title IX Sexual 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 Hearing Panel 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 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

¹ Nick stated that he, Tyler, Jason, and David Donaldson live in a two-bedroom apartment in the University’s Pine Tree apartment complex. 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.

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 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

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.

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?” When asked if he engaged in any words or overt actions that may have indicated to Ashley that he consented to the oral sex, Nick stated “No, nothing; she just started doing it.” 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

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.”

stated that Ashley took off her own underwear.⁴ When asked what position they were in while having sex, Nick stated that he was on top, which was “pretty typical.” When told of Ashley’s account that Nick initiated sexual intercourse, Nick stated “That might be right, I don’t really remember exactly how it started. It just progressed to that.” 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

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 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.”

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.

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 Hearing Panel 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.

2020 Title IX/VAWA Hearing Panel Training

Handout 7

Notice of Outcome Excerpt:

Based on all the evidence in the adjudication file, the evidence presented at the hearing, and the Policy regarding Title IX Sexual Harassment, Non-Title IX Sexual Harassment, Sexual Assault, and consent, the Hearing Panel finds there is sufficient evidence to determine that it is more likely than not that the following policy violations occurred.

- Nick engaged in sexual assault as defined by the Policy by touching Ashley's breasts without consent.
- Ashley engaged in sexual assault as defined by the Policy by engaging in oral sex with Nick without his consent.

The Hearing Panel further finds insufficient evidence to determine that it is more likely than not that Nick engaged in Title IX Sexual Harassment or Non-Title IX Sexual Harassment as defined by the Policy. The Panel also finds insufficient evidence to determine that it is more likely than not that Nick engaged in Sexual Assault as defined by the Policy by engaging in sexual penetration of Ashley without her consent. Further explanation and rationale for these findings is included below.

Analysis of Title IX and Non-Title IX Sexual Harassment Allegation

Ashley alleges that Nick engaged in sexual harassment in violation of the Policy by showing several of his friends topless pictures of Ashley without her consent. The Panel must determine what conduct occurred and whether that conduct constitutes either Title IX or Non-Title IX Sexual Harassment as defined by the Policy.

Title IX Sexual Harassment

Under the Policy, Title IX Sexual Harassment includes "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" when such conduct occurs within an education program or activity and against a person in the United States.

The Panel concludes that even taking Ashley's account of Nick's conduct in his apartment as true, there is insufficient evidence to determine it is more likely than not that Nick engaged in Title IX Sexual Harassment by allowing his friends to see topless pictures of Ashley. Specifically, even taking Ashley's account as true, because Ashley's account includes only one incident of Nick engaging in unwelcome conduct of a sexual nature (allowing his friends to see the photos), the panel concludes that the alleged unwelcome conduct based on sex was not pervasive. Accordingly, even taking Ashley's account of Nick's conduct in his apartment as true, the Panel finds insufficient evidence to determine that Nick's conduct was severe, pervasive, and objectively offensive as required by the definition of Title IX Sexual Harassment

under the Policy and accordingly insufficient evidence to determine it is more likely than not that Nick engaged in conduct constituting Title IX Sexual Harassment as defined by the Policy.

Non-Title IX Sexual Harassment

The Panel next considers whether Nick engaged in Non-Title IX Sexual Harassment as defined by the Policy. Under the Policy, Non-Title IX Sexual Harassment includes unwelcome conduct of a sexual nature or based on sex 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.

The parties agree that Ashley sent Nick topless photos of herself, that he had them on his phone, and that two of Nick's roommates and a third male student saw the pictures in Nick's apartment on the evening of July 24, 2020. The parties disagree as to how the roommates and the other male students ended up viewing the photos. Ashley's account, if true, indicates that Nick engaged in unwelcome conduct of a sexual nature by allowing those individuals to see the photos of her topless. In contrast, Nick's account, if true, indicates that Nick's roommate grabbed his phone and looked at the pictures of Ashley and that Nick attempted to get his phone back, but his friends prevented him from doing so by pushing him away and standing between him and the person holding his phone. Accordingly, Nick's account, if true, indicates that Nick himself did not engage in any unwelcome conduct of a sexual nature while in his apartment on July 24. Considering the totality of the evidence in the adjudication file and presented at the hearing, the Panel concludes there is no surrounding evidence that tips the balance of evidence sufficient to meet the preponderance of the evidence standard as to whether Nick showed his friends the photos.

In coming to this conclusion, the Panel considered the accounts of witnesses who reported being present in Nick's apartment on July 24. The witness accounts of Nick's conduct vary. One of Ashley's friends stated that when she and Ashley entered the room, Nick and three other male students were huddled around Nick's phone, another friend of Ashley stated that when they entered, the three male students were looking at a phone and Nick was sitting in a chair a little ways away, one of Nick's roommates stated that the roommate took the phone from Nick and that they looked at the photos for "maybe a few seconds" before Ashley entered, and another of Nick's roommates stated that the other roommate took Nick's phone, but did not remember how long they looked at the pictures. Neither of the accounts from Nick's roommates indicate how Nick reacted when his roommate took his phone. Because the witness accounts regarding Nick's role in how his friends ended up seeing the photos of Ashley vary, the panel finds these accounts to be insufficient to alter the conclusion that there is insufficient evidence to determine it is more likely than not that Nick showed his friends the photos of Ashley.¹

Because the Panel finds insufficient evidence to determine what Nick's role was in his friends seeing the photos of Ashley, the Panel finds insufficient evidence to determine it is more likely

¹ Another witness reported being at Nick's apartment during the alleged incident on July 24. Because that witness did not submit to cross-examination at the hearing in this matter, the Panel did not consider that witness's statements in making this determination.

than not that Nick engaged in unwelcome conduct of a sexual nature or based on sex. The Panel therefore finds insufficient evidence to determine that it is more likely than not that Nick engaged in conduct constituting Non-Title IX Sexual Harassment in his apartment on July 24.

Analysis of Ashley's and Nick's Sexual Assault Allegations

The Panel next analyzes whether Nick or Ashley engaged in Sexual Assault in violation of the Policy. Under the Policy, 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.”² Under the Policy, it is the responsibility of the person initiating the specific sexual activity to obtain consent for that activity.

Therefore, in order to determine whether Nick engaged in sexual assault against Ashley, the panel must determine what sexual contact occurred; whether Nick initiated the sexual contact that occurred; if Nick initiated sexual contact, whether Ashley had capacity to consent to the sexual contact; if Ashley had capacity to consent to sexual contact initiated by Nick, whether Nick obtained Ashley’s consent for the sexual contact; and finally, if Ashley did consent to sexual contact initiated by Nick, whether that consent was obtained through coercion. In order to determine whether Ashley engaged in sexual assault against Nick, the Panel must determine what sexual contact occurred; whether Ashley initiated the sexual contact that occurred; and if Ashley initiated the sexual contact, whether Ashley obtained Nick’s consent for each sexual contact.

Sexual Contact and Initiation

The panel first considers what sexual contact occurred. The parties agree that (1) Nick touched Ashley’s breasts; (2) Ashley performed oral sex on Nick; and (3) the parties engaged in sexual intercourse. The Panel finds that each of those contacts constituted sexual contact as defined by the Policy.

The Panel next considers who initiated each of the sexual contacts that occurred. The parties agree that Nick touched Ashley’s breasts, and accordingly the Panel finds sufficient evidence to determine it is more likely than not that Nick initiated that sexual contact by touching Ashley’s breasts. The parties also agree that Ashley performed oral sex on Nick and accordingly the Panel finds sufficient evidence to determine it is more likely than not that Ashley initiated oral sex by beginning to perform it on Nick.

² Under the Policy, Sexual Assault is a form of Title IX Sexual Harassment when it occurs within the University’s education program or activity. Because the alleged Sexual Assault took place in Ashley’s University-owned apartment, this alleged conduct occurred within the University’s education program or activity.

As to the sexual intercourse, Ashley reported that Nick initiated sexual penetration. In addition, when told of Ashley's account that Nick initiated sexual intercourse, Nick stated "That might be right, I don't really remember exactly how it started. It just progressed to that." Accordingly, considering both parties' accounts, the Panel finds sufficient evidence to conclude it is more likely than not that Nick initiated the sexual intercourse.

Ashley's Allegations of Sexual Assault Against Nick

1. Incapacitation

The Panel next considers whether Ashley had capacity to consent to the sexual contact that Nick initiated. Ashley alleged that she did not have capacity to consent because she was too intoxicated. Under the Policy, "[a]n 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." Under the Policy, 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.

The parties agree that Ashley drank alcohol on the night of July 24. Even taking Ashley's account as true, however, the Panel finds insufficient evidence to determine that it is more likely than not that Ashley was incapacitated as defined by the Policy. Ashley provided a detailed account of the encounter in her apartment, including what sexual contact took place, that she was mad at Nick, that Nick gave her an ultimatum and that she did not want to break up so she told him she forgave him, that she told Nick she was not in the mood when he started stroking her arm and back, that she told Nick she did not feel sexy, and that she told Nick "stop it" when he touched her breast. Although the Panel does not doubt Ashley's account that she felt "tired and woozy," Ashley's account indicates that she was able to understand the fact, nature, and extent of the sexual situation and was able to communicate decisions regarding consent, nonconsent, and the withdrawal of consent. Accordingly, based on Ashley's account, the Panel finds insufficient evidence to determine it is more likely than not that Ashley was incapacitated as defined by the Policy.

In coming to this conclusion, the Panel considered Ashley's account of her intoxication level, including her statement that if she hadn't drunk so much she could have thought more clearly and wouldn't have given in to Nick's pressuring, as well as Nick's and witness accounts related to Ashley intoxication level. Although these accounts indicate that Ashley was intoxicated on the night of July 24, Policy makes clear that "incapacitation requires more than being under the influence of drugs or alcohol." Accordingly, in light of the evidence discussed above indicating that Ashley was able to understand the fact, nature, and extent of the sexual situation and was able to communicate decisions regarding consent, nonconsent and the withdrawal of consent at the time the sexual contact with Nick occurred, the Panel finds insufficient evidence to determine that it is more likely than not that Ashley was incapacitated as defined by the Policy.

2. Consent

The Panel next considers whether Ashley consented to the sexual contact initiated by Nick. Under the Policy, 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.”

The Panel first considers whether Ashley consented to Nick touching her breasts. Ashley’s account, if true, indicates that she did not engage in any words or overt actions indicating that she consented to Nick touching her breasts, and in fact, indicates that she verbally communicated that she did not consent to sexual contact when she told Nick she was not in the mood before he first touched her breast and told him to “stop it” before he touched her a second time. Similarly, Nick’s account, if true, does not include any words or overt actions from Ashley indicating she consented to him touching her breasts, and in fact, includes words from Ashley indicating that she did not consent when she told him “don’t” or “stop it,” before Nick continued to touch her breasts. Accordingly, based on the parties’ accounts, the Panel finds sufficient evidence to determine it is more likely than not that Ashley did not consent to Nick touching her breasts.

In coming to this conclusion, the Panel considered Nick’s explanation that he did not think that she was saying “‘no’ in that way,” but that she was feeling bad about herself and he tried to reassure her. Because neither party’s account includes any words or overt actions indicating that Ashley consented to Nick touching her breasts, Nick’s explanation for his interpretation of Ashley’s words does not alter the Panel’s conclusion that there is sufficient evidence to determine it is more likely than not that Ashley did not consent to Nick touching her breasts.

The Panel also considered the account of Nick’s girlfriend. At the hearing, Nick’s girlfriend stated that Nick is a great guy and she could not imagine him sexually assaulting anyone. In light of the fact that neither party’s account includes any words or overt actions from Ashley indicating that Ashley consented to Nick touching her breasts, the account from Nick’s girlfriend is insufficient to alter the Panel’s conclusion that there is sufficient evidence to conclude it is more likely than not that Ashley did not consent to Nick touching her breasts.

The Panel next considers whether Ashley consented to sexual penetration. Ashley’s account, if true, is unclear as to whether Ashley engaged in any words or overt actions indicating she consented to Nick initiating sexual intercourse with her. In contrast, Nick’s account, if true, indicates that after Ashley performed oral sex on Nick, they started kissing again and Ashley then took off her underwear. Nick also reported that sexual intercourse between him and Ashley often happened like that and that they “didn’t have a conversation about it every time.” Accordingly, Nick’s account, if true, indicates that Ashley engaged in an overt action in removing her underwear after performing oral sex on Nick that, in light of the context of the parties’ relationship and typical sexual interactions, could be reasonably interpreted by Nick as indicating Ashley’s consent to sexual intercourse. There is no surrounding evidence that tips the balance of evidence sufficient to meet the preponderance of the evidence standard as to whether Ashley engaged in an overt action reasonably indicating she consented to engaging in sexual

intercourse with Nick. Accordingly, the Panel finds insufficient evidence to determine it is more likely than not that Ashley did not consent to engaging in sexual intercourse with Nick.

In coming to this conclusion, the Panel considered the parties' accounts of Ashley telling Nick that she was not in the mood and to stop it when he was touching her breasts. Nick reported that after he told Ashley that he loved her body and she shouldn't be insecure about it, Ashley "seemed to feel better" and "got more into it." When asked what he meant when he said Ashley "got more into it," Nick stated, "like she turned toward me and was kissing me back and stuff." When told of Nick's account that she turned toward him and was kissing him back and stuff, Ashley agreed that she was participating in some ways, saying, "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." Although as discussed above, the Panel finds sufficient evidence to determine it is more likely than not that Ashley did not consent to Nick touching her breasts, in light of Nick's account of Ashley's conduct during the rest of the encounter, including turning toward him, participating in the kissing, performing oral sex on Nick, and removing her underwear, the Panel finds that Nick's account, if true, indicates that Ashley engaged in words or overt actions reasonably indicating that she consented to the sexual intercourse. The Panel therefore finds insufficient evidence to determine it is more likely than not that Ashley did not consent to engaging in sexual intercourse with Nick.

3. Coercion

Because Ashley alleged that Nick pressured her to engage in sexual contact, the Panel also considered whether Nick obtained Ashley's consent to the sexual intercourse through coercion. Under the Policy, "[c]onsent cannot be procured, expressly or implicitly, by use of force, intimidation, threats, or **coercion**, as that term is defined below." Under the Policy coercion is defined as "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." Because there is no allegation that Nick used any physical force, the Panel analyzes whether Nick threatened severely damaging consequences or pressured Ashley in such a way that would cause a reasonable person in her circumstances to fear severely damaging consequences.

Ashley reported that Nick implied that he was going to break up with her if she would not "let the whole picture thing go." Because that "ultimatum" was related to the parties' argument about the photographs and not related to Ashley engaging in sexual contact, the Panel finds that Ashley's account of this statement, even if true, does not establish that it is more likely than not that Nick engaged in coercion. Ashley also stated that after she "made it clear that she wasn't interested, but [Nick] kept persisting, [she] sort of gave up resisting him." Ashley's account, however, does not identify any threat of severely damaging consequences or pressure rising to the level of causing a reasonable person to fear severely damaging consequences. The Policy states that "[c]oercion is more than an effort to persuade or attract another person to engage in sexual activity." Accordingly, even taking Ashley's account as true, the Panel finds insufficient evidence to determine that it is more likely than not that Nick coerced Ashley into engaging in sexual intercourse.

In sum, the Panel finds sufficient evidence to determine it is more likely than not that Nick engaged in sexual assault of Ashley as defined by the Policy when he touched her breasts

without her consent, but insufficient evidence to determine it is more likely than not that Nick engaged in sexual intercourse with Ashley without her consent.

Nick's Allegation of Sexual Assault Against Ashley

Nick alleges that Ashley performed oral sex on him without his consent. Because the Panel finds sufficient evidence to determine it is more likely than not that Ashley initiated performing oral sex on Nick, the Panel must determine whether Ashley obtained Nick's consent to engage in that sexual contact.

When asked what words or overt actions indicated that Nick consented to her performing oral sex on him, Ashley reported, "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." Under the Policy, "[p]revious relationships or previous consent does not imply consent to future sexual acts." Accordingly, Ashley's account, if true, does not include any words or overt actions from Nick indicating that Nick consent to Ashley performing oral sex on him. Similarly, Nick reported that after kissing, 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 reported, "No, neither of us said anything; she just started doing it." Further, when asked if he engaged in any words or overt actions that may have indicated to Ashley that he consented to the oral sex, Nick stated "No, nothing; she just started doing it." Accordingly, Nick's account also does not include any words or overt actions from Nick indicating that he consented to Ashley performing oral sex on him.

Therefore, based on the parties' accounts, the Panel finds sufficient evidence to determine that it is more likely than not that Nick did not consent to oral sex and that Ashley engaged in conduct constituting Sexual Assault as defined by the Policy.³

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³ Although as discussed above, the Panel does not doubt Ashley's account that she was intoxicated during the sexual encounter on the night of July 24, under the Policy, the use of drugs or alcohol by the respondent is not a defense against allegations of sexual misconduct. Accordingly, because Ashley initiated the oral sex and had the responsibility to obtain Nick's consent for that sexual contact, Ashley's intoxication level does not impact the Panel's determination that it is more likely than not that Ashley engaged in conduct constituting Sexual Assault as defined by the Policy.



Training for Title IX/VAWA Hearing Panel Training 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/>